

Ownership unbundling and constitutional conflict: a typical German debate?

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1. Introduction

The progress of creating an internal market for energy has not gone far enough for the European Commission. According to the Communication “Prospects for the internal electricity and gas market”,¹ the final report on the so-called sector inquiry² and the Communication „An Energy Policy for Europe”,³ all published on 10 January 2007, in particular non-discriminatory access to the electricity and gas networks (as pre-requisite for competition in the energy networks) is still not sufficiently safeguarded. Perceived as one of the main obstacles is the “systemic conflict of interest inherent in the vertical integration of supply and network activities”,⁴ namely the preference of group companies on the one hand and the lack of willingness to invest for fear of increased competition on the other. In order to ensure that the incentives for the owner and/or operator of the energy networks are not distorted by the interests of connected supply undertakings, the Commission deems it „necessary to decisively reinforce the current inadequate level of unbundling (of the energy networks).”⁵ Ideally, it strives for full ownership unbundling of the networks, which replaces the legal, operational and accounts unbundling already in place⁶ by introducing complete ownership separation of the networks operation from the vertically integrated supply undertakings. Allegedly geared to the situation in some Member States where ownership unbundling is already in place for some while⁷ „economic evidence shows that full ownership unbundling is the most effective means to ensure choice for energy users and encourage investment.”⁸

However, since the Commission’s plans have been published, economists in particular have formulated considerable reservations against ownership

¹ KOM(2006) 841 final, 10.1.2007.

² See Communication “Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)”, 10.1.2007 (KOM[2006] 851 final), in particular nos 51 et seq. See also the remarks of Director General Competition, *Philip Lowe*, and co-authors of the European Commission (*Pukinskaite/Webster/Lindberg*), Competition Policy Newsletter, Spring 2007, Issue 1, pp. 23 et seq.

³ KOM(2007) 1 final.

⁴ See final report on sector inquiry, n. 2, nos 52 and 53.

⁵ *Ibid.*, no. 54 (brackets added).

⁶ See Art. 10, 12, 15 et seq., 18 et seq. Electricity Directive 2003/54/EG, Art. 9 et seq., 13 et seq., 15, 16 et seq. Gas Directive 2003/55/EG, and ss 6 et seq. German Energy Industry Act (EnWG).

⁷ Above all England and Wales. *Lowe et al.*, n. 2 *supra*, also name the Netherlands, Portugal, Slovenia, Spain, Czech Republic, Denmark, Finland, Lithuania, Romania, Slovakia and Sweden.

⁸ See final report on sector inquiry, n. 2 *supra*, no. 55.

unbundling.⁹ A major concern are sufficient safeguards for much needed investments into maintenance and extension of networks, or in other words, into energy supply security in general and network security in particular. Another question in this context is whether for reasons of regulatory obligations to reduce costs, there will ever be a chance to find independent operators resp. voluntary buyers for gas and electricity networks.¹⁰ Further, there has also been extensive criticism from legal scholarship,¹¹ on which we will focus in turn.

The Commission does not seem too impressed. Neither criticism nor political resistance of the Council of Ministers¹² has prevented it from tabling a draft package of new, third generation legislation for the

⁹ See, for instance, G. Brunekreeft, and E. Ehlers, 'Does Ownership Unbundling of the Distribution Networks Distort the Development of Distributed Generation?', TILEC Report, Tilburg University, December 2005, Brunekreeft /Ehlers, 'Ownership Unbundling of Electricity Networks and Distributed Generation', 1 (2006) *CRNI* 63. For an ambiguous qualitative social cost and benefit analysis, see Mulder, M., Shestalova, V., and Lijesen, M., 'Vertical separation of the energy-distribution industry – An assessment of several options for unbundling', CPB Document No. 84, The Hague, May 2005, available at www.cpb.nl, and, in response, B. Baarsma, M. de Nooij, 'An ex ante welfare analysis of the unbundling of the distribution and supply companies in the Dutch electricity sector', Discussion Paper no. 52', see economisch onderzoek, Amsterdam, April 2007, for a negative quantitative social cost and benefit analysis. See also G. Brunekreeft, E. van Damme, 'De Splitsing van de Energiebedrijven', TILEC Report, Tilburg University, May 2005, available at www.tilburguniversity.nl/tilec. For further guidance on the interference of ownership unbundling with the current technical structure of the sector, see M. Finger, R. Künneke, 'The need for coherence between institutions and technology in liberalized infrastructures: the case of network unbundling in electricity and railways', MIR-Report-2006-009, CDM Working Paper Series, College of Management of Technology, EPFL, Lausanne, October 2006. Very critical as regards the situation in the English Gas market, from an economic point of view P. Wright, 'The advantages of full ownership unbundling in gas transportation and supply: how the European Commission got it wrong about the UK', SERIS, June 2006, available at www.seris.co.uk. See also the invalidation by NERA Economic Consultants of a report by London Economics commissioned by the European Commission ('Structure and Performance of Six European Wholesale Electricity Markets in 2003, 2004 and 2005', February 2007). This report by London Economics alleges that the European electricity market works insufficiently. See NERA, 'Structure and Performance in Europe: A Review of the Report for DG COMP', Energy Regulation Insights, Issue 33, April 2007.

¹⁰ In this regard especially C. Kempfert, *Frankfurter Allgemeine Zeitung* (F.A.Z.), 'Die Entflechtung ist kein Allheilmittel', 19.9.2007.

¹¹ Most recently, T. Mayen, 'Eigentumsrechtliche Entflechtung der Energieversorgungsnetze', (2008) *RdE* 33 et seq.; U. Büdenbender, P. Rosin, 'Pro und Contra Ownership Unbundling in der Energiewirtschaft', (2007) *ET* 20 et seq.; ownership unbundling, however, is also receiving some support, see S. Haslinger, 'Grundrechtsverletzung durch ownership unbundling', (2007) *WuW* 343 et seq., and W. Möschel, *Frankfurter Allgemeine Zeitung*, 'Entflechtungen in der Stromwirtschaft', 7.7.2007, p. 15; toning, however, his support down in *Frankfurter Allgemeine Zeitung* (F.A.Z.), 'Die Entflechtung ist kein Allheilmittel', 19.9.07. See also C. Kahle, 'Die Eigentumsrechtliche Entflechtung (Ownership Unbundling) der Energieversorgungsnetze aus europarechtlicher und verfassungsrechtlicher Sicht', (2007) *Recht der Energiewirtschaft* (RdE), 293 et seq.; S. Storr, 'Die Vorschläge der EU-Kommission zur Verschärfung der Unbundling-Vorschriften im Energiesektor', (2007) *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW), 232 et seq.

¹² The Council of Energy Ministers led by France and some smaller Member States has rejected the imposition of ownership unbundling for the time being, see *Financial Times*, 'Power unbundling plan dropped', 15.2.2007, and 'Brussels power proposals opposed', 6.6.2007.

promotion of further liberalization of the European energy markets on 19 September 2007. These proposals are supposed to adjust current legislation,¹³ in particular the internal energy market Directives 2003/54/EC (electricity) und 2003/55/EC (gas), which explicitly exclude an obligation of ownership unbundling.¹⁴ Under the groundbreaking heading „Energising Europe: A *real* market with secure supply“¹⁵ ownership unbundling of the electricity and gas networks is favoured so that „no supply or production company active anywhere in the EU can own or operate a transmission system in any Member State of the EU.“¹⁶ As second best solution, the Commission announces the Independent System Operator model, according to which „vertically integrated companies [...] retain the ownership of their network assets, but [which] requires that the transmission network itself is managed by an independent system operator – an undertaking or entity entirely separate from the vertically integrated company – that performs all the functions of a network operator.“¹⁷

2. Unbundling options

Prior to discussing the legal questions of ownership unbundling, we will describe the options contained in the proposals in greater detail.

2.1. Favoured: (full) ownership unbundling

As already mentioned, the European Commission favours complete ownership unbundling of electricity and gas transmission system operators. Consequently, ownership of transmission assets would have to be transferred to completely independent third parties, which would also exclusively operate these networks. In other words, this is about the separation of all network functions from the other activities of the energy supply undertaking (ESU); any influence whatsoever of the previously

¹³ Additional changes are proposed for EC Regulation 1228/2003 on cross-border network access and EC Regulation 1775/2005 on access to gas transmission networks as well as the proposal of a new Regulation establishing a European Agency supervising the cooperation of the national energy regulatory agencies, which will not be dealt with here.

¹⁴ See Art. 15(1) 2nd sentence Electricity Directive 2003/54/EC and Art. 13(2) 1st sentence Gas Directive 2003/55/EC.

¹⁵ See press release of 19.9.2007 (IP/07/1361); emphasis added.

¹⁶ Explanatory Memorandum of the new proposals, p. 7.

¹⁷ *Ibid.*, p. 5.

integrated ESU on the operation of the networks is prohibited. Supply and generation companies would no longer be allowed to exercise any direct or indirect control over the independent network operators.¹⁸ It appears that the new proposals push it even further by demanding energy supply or production undertakings not to own transmission networks *anywhere* in the European Union¹⁹ (and vice versa).

With respect to *public* ESUs, Member States should not be obliged to privatize these undertakings. This is obviously aimed at lulling especially French (EdF and GdF/Suez) and German (with its approx. 900 municipal undertakings or so-called “Stadtwerke”) concerns. Whenever supply and network activities are in public hands, this is permitted as long as “any public entity or the State could transfer the [control] rights to another publicly or privately owned legal person. [T]he Member State in question must demonstrate that in practice, the results are truly effective and that the companies operate entirely separate from one another [...]”.²⁰ This aims at sufficient *structural* – and not necessarily ownership – separation where networks and supply are, for instance, transferred to different ministries or one of the two activities is passed from municipal undertakings into other “public” hands, for instance to regional authorities.²¹

2.2. Second best solution: “Deep” Independent System Operator (ISO)

Alternatively, the Commission aims at introducing so-called independent system operators, should ownership unbundling not go through. In such a case, the current network owners would remain network owners. Here as well, however, energy supply and production companies would not be allowed to own shareholdings, which enable them to exercise control over

¹⁸ The new proposals refer to ‘control’ as used in Art. 3(2) Merger Control Regulation (Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24/1). See also, for an interpretation of ‘control’, Bechtold/Bosch/Brinker/Hirsbrunner, EG-Kartellrecht, 2005, Art. 3 FKVO, nos 12 et seq., and the recent ‘Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings’ of 10 July 2007 (available at http://ec.europa.eu/comm/competition/mergers/legislation/jn_de.pdf). The proposals prohibit any holding of interest in one activity when the other is controlled, see Art. 1(4) No. 1 of the proposals.

¹⁹ See also p. 7 of the proposals’ memoranda.

²⁰ P. 6 of the proposals’ memoranda.

²¹ See p. 6 of the proposals’ memoranda. Were, for instance, the German energy supplier EnBW classified as municipal undertaking, one of the two activities would consequently have to be transferred to, say, the State of Baden-Württemberg.

the Independent System Operator (ISO).²² The network operator would be the primary interface to network users who are solely responsible for the network operation and dispatch. What is more, it would also decide over maintenance, extension and investment of the network in general.²³

Model for this ISO concept seems to be the Scottish electricity sector and the British Transmission and Trading Arrangements (BETTA).²⁴ In short, the national transmission system operator National Grid and the two Scottish transmission network owners, which are vertically integrated, are regulated by OFGEM. Both network owners have *voluntarily* transferred all assets necessary for operating the Scottish electricity transmission grid to National Grid.²⁵ The transmission system operator can order the network owners whatever it needs to operate the grid, in principle also to extend the network. The owners invoice the operator the costs incurred and based on a charging methodology approved by the sector regulator OFGEM. A so-called Transmission Owner/System Operator Code regulates the relationship between the three undertakings.

The exact terms of such a compulsory European ISO model would have to clarify whether and to what extent it is to be implemented, i.e. by way of service or lease contract or trust, depending on the Member States' laws, which might make it necessary to adjust the company laws of individual Member States.²⁶

From a comparative point of view, it is also interesting in this context to look at the developments in the Netherlands: there, separate electricity and gas *distribution* network operators have to be in place from 2011,²⁷ unhinged

²² The proposals prohibit persons controlling energy supply activities (incl. network property), to be at the same time invested in a transmission system operators, Art. 1(8) No. 2(a) of the proposal for a revised Electricity Directive. On the other hand, it seems that minority shareholdings in both activities are admissible as long as they are not controlling and not capable of blocking decisions, see p. 6 of the proposals' memoranda.

²³ So-called „deep“ ISO as set out in Art. 1(8) No. 5 of both proposals for Gas and Electricity Directives. This term was used, for instance, by H. Schmitt von Sydow, Director at DG TREN, in his speech at the 36th Annual Energy Law Conference of the Institute for Energy Law at the University of Cologne, 16 November 2007.

²⁴ See also Financial Times v. 20.11.06, ‚Barroso warns on EU energy dominance‘.

²⁵ Expropriation of such assets is explicitly provided for in the law.

²⁶ These issues are exhaustively dealt with by F.J. Säcker in his article in this issue.

²⁷ The transmission networks of 110 kV and above are already or will, by the latest from beginning of 2008, be operated by the state-owned transmission system operator TenneT. See Wet van 23 november 2006 tot wijziging van de Electriciteitswet 1998 en van de Gaswet in verband met nadere regels omtrent een onafhankelijk netbeheer, no. 614, Staatsblad van het Koninkrijk der Nederlanden, 2006, as amended (‘splittingswet’). See also, as regards the coming-into-force of the splittingswet (without the parts containing the actual separation provisions), Staatsblad 2007, no. 13, and as regards the coming-into-force

from the vertical integrated energy supply undertakings, which are exclusively in municipal ownership (apart from one minority shareholding of Australian investor Macquarie). These new distribution system operators are to be directly hinged at the municipal owners of the remaining energy supply holdings.²⁸ The operators would at least hold so-called economic “ownership” (*economisch eigendom*) of the networks. According to the Dutch reading, this means that the operators would not only operate the distribution networks without interference from the legal owners but would also receive all profits and would be solely responsible even for the potential total loss of the networks. As a result, the legal title to the networks could stay with the vertical integrated energy supplier.²⁹

Coming back to the Commission’s proposal, even the “second best” solution of introducing ISOs would require that vertically integrated transmission network owners in the Member State where the ISO model has been introduced are not only *not* allowed to operate transmission networks *anywhere else* in the EU. As they pursue production or supply activities, they would equally not be allowed to own and pursue such activities in Member States where ownership unbundling has been enforced instead of ISOs.³⁰ Similar to the favoured option of ownership unbundling, this means that existing network activities would have to be sold or vice versa.³¹

2.3. Special option: share split

Finally, the proposals explicitly provide for an alternative option to implement full ownership unbundling, i.e. by way of a so called share split,³² which the Commission has adopted with the aim to accommodate several Member States and in particular Germany.³³ This option stipulates that the

of the controversial separation provisions, Staatsblad 2007, no. 273.

²⁸ After the separation only left with production, retail and other competitive energy supply activities.

²⁹ See also the explanatory memorandum *Memorie van Toelichting*, ‘Wijziging van de Electriciteitswet 1998 en van de Gaswet in verband met nadere regels omtrent een onafhankelijk netbeheer’, Kamerstuk 2004-2005, 30212, nr. 3, Tweede Kamer, S. 44-5, 65-67, available at www.overheid.nl.

³⁰ Although recitals 10 and 11 of the proposals refer to system operators only, Art. 1(4) nos 1 and 2 (replaced Art. 8(1) and (2)) and Art. 1(8) no. 2(a) (inserting Art. 10(2)(a) and Art. 10a) of the proposal for a revised Electricity Directive in conjunction with p. 7 (1st para.) of the proposals’ explanatory memoranda, for instance, might be read in this way; at least the wording of the draft Directives is ambiguous in this respect. This conclusion seems also to be supported by the proposals’ referral to the EU wide applied term of control, see n. 18 above.

³¹ This would, for example, be the case for companies such as E.ON of Germany for its activities in the UK.

³² See e.g. proposal for the amendment of the electricity directive 2003/54/EC, p. 5 and recital no. 11.

³³ See already W. Möschel, F.A.Z., 10.01.07, ‘Widerstand gegen EU-Vorschläge’, but toned down in

current shareholders will receive for their share in the vertical integrated energy undertaking as it stands now (i.e. including the networks) two separate shares in a newly incorporated and completely independent network company, which also owns the networks, and in the remaining supply and/or production company. It is, however more than doubtful whether, as the Commission claims, the shares will gain value after such a share split.³⁴ Insofar, one has to consider, that the credit rating of the separated network company does not necessarily increase. This is because regulation is uncertain, in particular with regard to the expected rate of return of new investment, and that the credit rating of the remaining vertically integrated energy suppliers is likely to decrease.³⁵

3. Competence of the European legislator?

The legal questions arising from the reform plans of the Commission will subsequently be discussed from a competence point of view first, followed by elaborations from a fundamental rights perspective (see 4 below). To give straightforward solutions to those problems is almost impossible as yet, predominantly because things are still in flow and concrete results of the European legislative process will naturally take time to come to the fore. As there are already rather diverging views available on several of the before mentioned unbundling options, it can safely be assumed that final clarifications will only be obtained in the course of legal actions carried out before the courts. To put it positively, the current unbundling debate is likely to contribute to the accomplishment of urgent theoretical questions in the context of both European and national constitutional law.

3.1. Lack of specific competences

So far, the EC Treaty does not contain specific competences of the European Union to take measures in the area of energy policy, which is quite different from other policy areas such as agriculture and transport.³⁶

F.A.Z., 19.09.07, 'Die Entflechtung ist kein Allheilmittel'.

³⁴ In this respect at least Energy Commissioner Piebalgs in Handelsblatt, 29.05.07, 'EU will Netz-Regulierung per Aktiensplitt'. See section 4.4 below as regards the legal problems this option involves.

³⁵ See Baarsma/de Nooij, n. 9 above, p. 27.

³⁶ Art. 3(1) (u) EC refers only generally and programmatically to „measures in the sphere of energy“ and cannot be considered as a competence.

Accordingly, in particular under the principle of conferred powers in Art. 5(1) EC,³⁷ ever since the first steps towards liberalization of the energy markets in the EU, it has been controversial whether and in how far European institutions can rely on general competences of the EC Treaty.³⁸ It may mainly be attributed to the persistence of the Commission and the consenting majorities in the European Council and the European Parliament that today the basing of EU energy policy measures (also) on Article 95 EC (“harmonization” competence) is politically recognized. The failed Constitutional Treaty for the very first time contained its own title on energy,³⁹ with far reaching competences for the European legislator.⁴⁰ According to the conclusions of the European Council on 21 and 22 June 2007, these special powers will be extended in the so called “Reform Treaty”, which is due to be signed as Treaty of Lisbon during the Portuguese Presidency.⁴¹

3.2. Harmonization of national laws according to Art. 95 EC?

For the time being, however, until ratification of the new treaty, legislative measures in energy will mainly have to be based on the competence of Art. 95 EC – if one does not want to take recourse to the rather colourful „fall back“ competence of Art. 308 EC, which is supposed to serve as rescue competence should no other competences be available.⁴² The limits of Art. 95 have, however, been emphasized in the more recent jurisprudence of the European Court of Justice (ECJ): harmonization measures first require

³⁷ See also ECJ, C-376/98, ECR 2000, p. I-8419, nos 83 et seq. – *Tobacco Advertising Directive*.

³⁸ See early *Hüffer/Ipsen/Tettinger, Die Transitrichtlinien für Gas und Elektrizität*, Bochumer Beiträge zum Berg- und Energierecht, vol. 14, 1991.

³⁹ Accounting for repeated demands of the Commission, cf. *Hancher* in: Roggenkamp et al. (eds), *European Energy Law*, 2001, pp. 220 et seq., see also *Rashbrooke*, (2004) 22 *Journal of Energy & Natural Resources Law* 373 (377).

⁴⁰ Cf. Art. III-256 of the Treaty establishing a Constitution for Europe, signed on 29 October 2004 (OJ C 310/1).

⁴¹ See Conclusions of the German Presidency, Council Document 11177/1/07 REV 1, 20 July 2007, pp. 21, 22, nos 19 (m) and (q) (Annex 1 - IGC Mandate), revising Article 100(1) EC (by emphasizing the area of energy in the context of difficulties arising in the supply of certain products), and by adding to the aims set out in the new Article 176a(1) EC (already proposed by the Constitutional Treaty) of Union policy on energy, in the context of the establishment and functioning of the internal market, the promotion of the interconnection of energy networks.

⁴² In this respect, it is doubtful whether national governments do not have to obtain a mandate of their national Parliaments first in order to proceed according to Art. 308 EC. It seems, after all, that the Constitutional Convention when drafting the Chapter on Energy (wrongly) assumed that most of the measures in the area of energy policy had been based on Art. 308 EC. At least, this is what *Rashbrooke*, n. 39 above, 380, claims by referring to official documentation. This also sheds a meaningful light on the widespread insecurity that exists with respect to the powers of the EU in the area of energy policy.

national provisions, which are or are likely to become an obstacle to the functioning of the common market. In this context, the occurrence of such an obstacle must be sufficiently probable. Further limitations are the principles of subsidiarity and proportionality.⁴³

In this context, it should be remembered that only three years after the implementation deadline for the Energy Directives and after the deadline of 1 July 2007 for introducing legal unbundling also for distribution network operators, the intended pro-competitive effects have hardly had the chance to unfold. In Germany, for instance, after having admittedly implemented the Directives one year late in July 2005, the regulatory agencies of the federal state (BNetzA) and the German *Länder*, which are responsible for the ex-ante regulation of network access (as the core of the reform), have only then become operational. Further, given the vast amount of German electricity and gas networks to be regulated, drawing reliable conclusions as to the efficiency of the German implementation naturally takes more time, also with respect to the incentive regulation according to section 21a of the Energy Industry Act (EnWG).⁴⁴ Nevertheless, during the short time since the coming-into-force of this latest revision of German energy industry law and based on sections 21 and 23a EnWG together with regulations concerning network access and network charges both for electricity and gas, considerable progress and noticeable reductions in passing-through network tariffs have been achieved.⁴⁵ Additionally, experiences such as in the Netherlands show that with adequate regulation, it is possible within the current European regulatory framework to effectively stop the much denounced cross-subsidization of vertically integrated energy supply undertakings and in particular between the network operations and the supply business.⁴⁶ It should be remembered in this context that the prevention of cross-subsidies, which are believed to put competitors not owning energy networks at a disadvantage, has been one of the main

⁴³ See ECJ, n. 37 above.

⁴⁴ Which exceeds the requirements of the Energy Directives. The regulation concerning incentive regulation (ARegVO, BR-Drs. 417/07), which is based on section 21a subs. 6 German Energy Industry Act (EnWG), has only just, i.e. on 21 September 2007, passed the *Bundesrat*, the second parliamentary chamber; according to its section 1, network charges will not be determined by way of incentive regulation before 1 January 2009.

⁴⁵ See only the *Bundesnetzagentur's* Monitoring Report (Monitoringbericht) of August 2006 (www.bundesnetzagentur.de/media/archive/7263.pdf); further: *Evaluiierungsbericht der Bundesregierung an den Deutschen Bundestag und den Bundesrat nach § 112 EnWG über die Erfahrungen und Ergebnisse mit der Regulierung durch das Energiewirtschaftsgesetz v. 26.9.2007* (evaluation report about the experiences with energy network regulation), BT-Drs. 16/6532.

⁴⁶ See the corresponding report, in particular p. 15, of the Dutch energy regulator DTe, available at www.ez.nl/dsc?c=getobject&s=obj&objectid=152033&!dsname=EZInternet&isapidir=/gvisapi/.

reasons for the introduction of the tightened (operational and legal) network unbundling.⁴⁷ Thus, not only the conclusions of the Commission's sector inquiry,⁴⁸ which is in any event only concerned with the market situation up to 2005, have to be put into perspective. It is particularly questionable whether at present one can already speak about continuing obstacles for an efficient functioning of the internal market for electricity and gas, which requires further harmonization of national laws according to Art. 95 EC. Not least for reasons of proportionality, it is indeed arguable whether one should not wait and see how the several measures taken by the Member States in the course of implementing the latest Energy Directives „settle“ first before their competitive effectiveness can safely be evaluated.⁴⁹

Against this background, it is first of all questionable whether there already is a sufficiently appreciable threat to undistorted competition resp. (impairing) effect on the internal market as a result of the current (process of) national implementation of the 2003 Energy Directives. According to the jurisprudence of the ECJ, the compulsory requirement „appreciable“, i.e. not only minor distortions of competition, is necessary in order not to degrade the competence of Art. 95 EC to a comprehensive community competence, which runs contrary to the principle of powers limited to those specifically conferred on the Community (Art. 5(1) EC).⁵⁰

What is more, it appears rather doubtful whether the prescription of compulsory ownership unbundling or Independent System Operators at present or in the near future is necessary and proportionate. For this to be the case, it always and above all requires, apart from a verifiable impairment of the internal market, evidence that the community measure does not go beyond what is necessary to obtain that aim.⁵¹ Furthermore, a harmonization measure is not supposed to exceed what is necessary to obtain the aims of Art. 14 EC; in other words, the (legitimate) aim has to be in adequate proportion to the intensity of the interference with individual legal positions.⁵² Following the assumption that the internal market for

⁴⁷ See also Art. 19(3), (4) and Art. 23(1)(e) Electricity Directive 2003; Art. 17(3), (4) and Art. 25(1)(e) Gas Directive 2003.

⁴⁸ N. 2 above, in particular nos 51 et seq.

⁴⁹ Cf. *Büdenbender/Rosin*, et 2007, 21, with a more detailed reasoning; see also *Storr*, n. 11 above, p. 237.

⁵⁰ See ECJ, C-300/89, [1991] ECR, p. I-2867, no 23 – *Titanium Dioxide*, and again ECJ, C-376/98, ECR 2000, p. I-8419, nos 106 et seq. – *Tobacco Advertising Directive*.

⁵¹ Cf. ECJ, C-491/01, [2002] ECR, p. I-11453, no 122 – *British American Tobacco*; ECJ, C-103/01, [2003] ECR, p. I-5369, no 48 – *Commission/Germany*.

⁵² See e.g. S. Leible in Streinz (ed.), EUV/EGV (commentary), 2003, Art. 95 EGV, no. 37; C. Calliess in Calliess/Ruffert (eds), EUV/EGV (commentary), 3rd ed. 2007, Art. 5 EGV, no. 52; both with further references.

energy supply can already be achieved by applying and developing the current regulatory framework for the European energy sector,⁵³ the measures proposed could also lead to a conflict with the general principle of subsidiarity as set out in Art. 5(2) EC, which confines the harmonization competence of Art. 95 EC.⁵⁴

If, consequently, the application of Art. 95 EC must *expressis verbis* serve the achievement of the goals set out in Art. 14 EC, and thus the fundamental freedoms of the internal market,⁵⁵ it also has to be questioned whether compulsory ownership unbundling or ISO should, at the same time, be allowed to override exactly these freedoms. As already discussed, should the proposals come into force unaltered, would this mean that vertically integrated energy suppliers were forced to either give up all of their (shareholdings in) networks⁵⁶ or supply/production activities *all throughout* the EU (if ownership unbundling was enforced EU-wide) or, for instance, if the ISO model was introduced in Germany and ownership unbundling according to the current proposals in the UK, to give up either their supply and generation activities in England and Wales or their networks in Germany. In other words, all vertically integrated energy supply undertakings to be unbundled in the EU would have to unbundle their activities in all Member States.⁵⁷ This would without any doubt mean an infringement of the free movement of capital according to Art. 56(1) EC. It should be noted in this context that the fundamental freedoms do not only bind the Member States but also, as can be inferred from, inter alia, Art. 3(1), 7(1) and 249(1) EC, the community legislator.⁵⁸ This can only be justified if the community legislative measure serves the general interest and, again, is necessary and proportionate for its safeguard,⁵⁹ which after all seems doubtful.

⁵³ Apart, obviously, from “fine-tuning”, such as ensuring more stringent regulatory supervision of the energy sector on national and European level, and by way of greater regulatory cooperation, both between the Member States and on European level.

⁵⁴ See insofar S. Leible in Streinz, n. 52 above, Art. 95, no. 12 with further references.

⁵⁵ See again ECJ, C-376/98, ECR 2000, p. I-8419, nos 83 et seq. – *Tobacco Advertising Directive*.

⁵⁶ And, obviously, any network operations.

⁵⁷ Apart from the States where the ISO model was introduced and where they could thus remain vertically integrated (with transmission network ownership being legally unbundled, see Art. 1(8) inserting a new Art. 10a) with the exception of network operation. Consequently, not only straightforward ownership unbundling but also the introduction of ISO’s as suggested by the proposals (and understood by the authors) would be expropriation.

⁵⁸ See W. Schroeder in Streinz, n. 52 above, Art. 28, no. 29.

⁵⁹ See ECJ, C-51/93, [1994] ECR, p. I-3879, nos 20 et seq. – *Meyhui*; ECJ, C-114/96, [1997] ECR, p. I-3629 nos 31 et seq. – *Kieffer and Thill*. The ECJ after all grants the legislature a wide margin of appreciation thereby confining its own role to merely controlling evident misjudgements.

3.3. Bar for exercising competences (*Kompetenzausübungssperre*)

3.3.1. Art. 295 EC

If the competence for the introduction of ownership unbundling resp. independent system operators is seen in Art. 95 EC, legislative measures might be blocked by Art. 295 EG, which is a bar for the exercise of competences.⁶⁰ According to this provision, the „Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.“ It was introduced to meet the wide-spread fear (especially of Germany) that the exercise of Treaty competences could deeply interfere with the economic order by way of adopting socialization measures whose practical relevance has always been highly controversial, in particular because of the different organization of national property orders.⁶¹ The ECJ’s rare jurisprudence on Art. 295 above all prohibits the EU to take isolated decisions about the allocation of property and thus any formal deprivation of property rights.⁶² This acknowledges the importance of the property order as a significant part of the Member States’ economic constitution and social structure and the exclusive organizational power the Member States have, at least with respect to any substantial shifting of frontiers in this area. On the other hand, the ECJ has made it clear that this provision does *not* result in the Member States’ property orders not being subject to the fundamental principles of the Treaty and that national regulation of ownership can not be used to justify interferences with the Treaty’s freedoms.⁶³ The competence to legislate thus also extends to measures, which have a bearing on property rights, at least as long as they serve the Treaty’s goals, in particular the completion of the internal market,

⁶⁰ See, e.g., C. Calliess, ‘Ownership Unbundling für alle? – Kritische Überlegungen zu den aktuellen Entflechtungsvorschriften der Europäischen Kommission’, (2007) 57 *Energiewirtschaftliche Tagesfragen* (ET) 108, 109; T. Kingreen in Calliess/Ruffert (eds), n. 52 above, Art. 295, no. 5 with further references.

⁶¹ For a concise account of the range of opinions on this issue, see Storr, n. 11 above, 234 et seq. with further references; in greater detail, M. Ruffert, in: Henneke (ed.), ‘Kommunale Perspektiven im zusammenwachsenden Europa’, 2002, pp. 10 et seq.; early, for instance, H.P. Ipsen, ‘Europäisches Gemeinschaftsrecht’, 1972, ch. 41, nos 11, 18, also with reference to the extensive debates conducted in the area of the Treaties on the European Coal and Steel Community and EURATOM. Ipsen at the time already emphasized that Art. 295 (ex 222) EC is a barrier for exercising competences rather than the basis for individual rights. See also the official explanation of the German government to Art. 295 in *Bundestags-Drucksache 2/3440*, Appendix C, p. 154.

⁶² Cf. ECJ, C-309/96, ECR 1997, I-7505, no. 22 – *Annibaldi*; see also BVerfGE 50, 290 (339) – *Mitbestimmung*.

⁶³ See last ECJ, C-503/04, 18.7.07 – *Commission/Germany*, (2007) EuZW 514, no. 37; earlier already ECJ, C-463/00, ECR 2003, I-4581, no. 67 – *Commission/Spain*; C-367/98, ECR 2002, I-4731, no. 48 – *Golden Shares*.

and are not specifically targeted at reconstructing the national property orders.

This case law, however, does not at all draw a clear line⁶⁴ and is therefore also challenged by some Advocate Generals.⁶⁵ In particular, it leaves open the central question what exactly is meant by the Member States' „rules governing the system of property ownership“. It does therefore not come as a surprise that, for instance in Germany, there exists a variety of legal opinions on this subject.⁶⁶ Following the predominant legal opinion,⁶⁷ this provision is to be construed in a *narrow* sense. This is because at least the German version only in a general way refers to the order of property ownership (“Eigentumsordnung”) and not to specific property rights (rules). Amongst other reasons, it is believed that only such a narrow interpretation lives up to the ECJ's emphasis on the internal market objective and its demand to give way to the *effet utile* of Treaty provisions.⁶⁸ Accordingly, the community legislator is not allowed to prescribe privatisation or nationalisations (socialisations), an interpretation, which is in accordance with the original motives of introducing Art. 295 EC.

If one follows this restrictive approach, then further unbundling of energy networks must fulfil the following requirements: if networks, which are at present in public (state and/or municipal) ownership have by way of ownership unbundling to be transferred to – private – third parties, would this not be allowed under Art. 295 EC as a bar for exercising competences because it would mean the compulsory privatization of public networks. Wisely, the Commission therefore proposes, as has been explained above, that network property can in fact remain in public hands if it can be shown that complete independence is guaranteed by all means, such as by way of transfer to a different ministry or regional authority. For state or communal networks, the only viable option therefore is the introduction of ISOs.⁶⁹ This discussion, however, raises another, closely related question, which also needs to be considered: private vertical integrated energy supply

⁶⁴ See only Ruffert, n. 61 above, p. 22.

⁶⁵ See especially the recent opinion of Advocate General Ruiz-Jarabo Colomer in C-112/05, 13.2.2007 – *Commission/Germany*, no. 47 et seq., with respect to the participation of public shareholders in the private limited company *Volkswagen GmbH*; for further references, see also Ruffert, n. 61 above, p. 20.

⁶⁶ For an overview, see Storr, n. 11 above; Calliess, n. 60 above.

⁶⁷ See again the references made by Calliess, n. 60 above, pp. 108 et seq.

⁶⁸ Similar the French („régime de la propriété“) and Spanish („régimen de la propiedad“) version. By contrast, the English version refers in a more general way to “rules [...] governing [...] property ownership”, which could thus also comprise property „rights“.

⁶⁹ Rightly so Calliess, n. 60 above, p. 110.

undertakings could be put at a disadvantage and thus be violated in their fundamental right to equal treatment because only public authorities (considered as one entity because of their state affiliation)⁷⁰ are allowed, as a result of Art. 295 EC, to own both, the energy networks and production/supply. The private undertakings, on the other hand, would lose the entitlement to own both, network and other (competitive) energy supply activities, and would thus not be able to also earn both network charges and profits from the other activities, which public authorities would.

On the other hand, the narrow interpretation of Art. 295 EC is not necessarily imperative: given the ever growing fundamental rights protection on EU level, in particular with a view to the European Charter of Fundamental Rights and its incorporation into the Reform Treaty, it can also be rightly claimed that Art. 295 EC also bars such prescriptions of the community legislator, which encroach upon the core or *Wesensgehalt* of constitutional right to property.⁷¹ Hence, what is searched for is the untouchable core or essential content of the right to property within the European „union of national constitutions“ (*Verfassungsverbund*) in order to specify the exact meaning of Art. 295 EC⁷² or to develop an independent fundamental rights related bar for the exercise of competences. The detailed evaluation of EU legislation prescribing ownership unbundling or introducing independent system operators thus depends predominantly on the safeguards of fundamental rights established in European and national constitutional law. In any event, given the problems of interpretation just discussed the ongoing and highly necessary debate about the scope of Art. 295 EG should not only help to determine the exact limiting effects of this provision but more importantly also shed light on the interplay of Art. 295 EC with the minimum requirements of the protection of the fundamental right to property on EU as well as on Member States' level.

⁷⁰ Calliess, n. 1 above, with further references in n. 39. This view appears, however, doubtful at least if different levels of legally independent shareholders are involved as is often the case in federal structures such as Germany, which have states and municipalities. In Germany, the latter enjoy institutional protection under Art. 28 of the German Constitution *Grundgesetz*.

⁷¹ Storr, n. 11 above; M. Schmidt-Preuß et al. in: W. Löwer (ed.), ‚Bonner Gespräch zum Energierecht‘, 2006, pp. 51 et seq.

⁷² See, e.g., U. Di Fabio, ‚Grundfragen der europäischen Eigentumsordnung‘, in W. Löwer, *ibid.*, pp. 9 et seq.; further, Storr, n. 11 above, 235; M. Schmidt-Preuß, (2006) *EuR* 463 (475); Schmidt-Preuß in: Baur/Pritzsche/Simon (eds), ‚Unbundling in der Energiewirtschaft‘, 2006, ch. 1, no. 68.

3.3.2. Art. 175(2)(c) EC

Another bar for exercising competences or, better, a restriction could possibly be seen in Art. 175(2)(c) EC, according to which measures in the area of environmental policy, which “significantly” affect the „general structure“ of national energy supply, and which in variance to the rule of qualified majority requires the unanimous decision of the Council.⁷³ This provision, which dates back to the Amsterdam Treaty, also owes its existence to the already mentioned reservation (in particular of France and Germany) with respect to a general competence of the EU legislature in the area of energy policy.⁷⁴ Although this stipulation is a special provision within Title XIX („Environment“) of the Treaty whose application in the context of harmonization measures according to Art. 95 EC can rightly be questioned, it can nevertheless and given the reasons for its incorporation into the Treaty be inferred that measures relating to energy policy, which touch upon the respective national (essential) structures, have generally to be met with reservations. This, however, raises the question whether the “general structures” of national energy supply include the existing vertical structure of the energy supply sector. Looking into what has been said in the case law and legal literature with respect to Art. 175 EC, this can not necessarily be assumed because so far this issue has only become relevant in the area of environmental policy, in particular with regard to the composition of primary energy resources to be used for electricity generation in the Member States.

3.4. Interim conclusions & competition law related measures of the Commission

Our elaborations so far have shown that in principle, the implementation of the Commission’s plans do not raise any concerns as regards its competencies. It is, however, doubtful, at least on the basis of the statements made by the Commission so far, whether the current legislative proposals fulfil all the conditions set by Art. 95 EC. It is particularly

⁷³ New Article 176a(2), 2nd para. EC now contained in the draft Treaty of Lisbon requires that any measures taken in the context of Article 176a(1) EC (see n. 41 supra) “shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, [...]”

⁷⁴ In this respect, see also the Protocol on Art. 130r EC (old) to the Maastricht Treaty according to which Art. 6 EC is not supposed to interfere with the Member States’ policies on the use of energy resources. As regards background and content of Art. 175(2)(c) EC, see W. Kahl, in Streinz, n. 52 above, Art. 175, nos 28 et seq. with further references.

questionable, also with respect to the reservations made by economists,⁷⁵ whether mandatory ownership unbundling or the obligation to introduce an Independent System Operator is suitable/appropriate and necessary to achieve noticeable improvements of competition on the internal energy markets. To this extent, the Commission may be reminded of its specific duty of substantiation of new legislation (Article 253 EC).⁷⁶ Thus, it has to be asked whether ownership unbundling or independent system operators indeed

- facilitate urgently needed investments into the extension of the European electricity and gas networks,
- support the desirable construction of interconnectors at the internal borders, and moreover,
- whether this results overall in more favourable conditions for network access and stronger competition (also on downstream markets) and thus contributes to decreasing prices for consumers of electricity and gas.

These concerns are even more urgent if ownership separations or comparable measures are to be enforced via the route of competition law instead of Article 95 EC, more specifically by drawing on Article 7 of Regulation No 1/2003 on the implementation of the Treaty's competition rules.⁷⁷ According to this provision, "the Commission, when finding that there is an infringement of Article 81 or of Article 82 EC, may impose on the relevant undertakings any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end." First of all, the exercise of this competence is, if a specific infringement of Article 81 or 82 EC has been detected, explicitly subject to the proportionality test; in so far, the existing concerns with respect to legislative ownership unbundling are equally valid for "executive" actions of the Commission resp. DG Competition to the same effect. Furthermore, it is highly questionable whether Article 7 of Regulation No. 1/2003 does authorize the Commission, apart from extreme individual cases, to take measures as drastic as ownership unbundling on its own account against several or even a majority of energy undertakings. If

⁷⁵ See already the references made in note 9. See also the German Monopoly Commission (*Monopolkommission*) in its last Special Report playing down the competition deficits in the German gas and electricity markets ('Sondergutachten Strom und Gas 2007: Wettbewerbsdefizite und zögerliche Regulierung') of 6 November 2007, p. 231 et seq. (www.monopolkommission.de).

⁷⁶ Zu den Anforderungen im Rahmen des Art. 95 EG: Leible, note 52 above, Art. 95, no 23.

⁷⁷ In this respect, see, for instance, the Communication of the Commission "Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors", note 2 supra, in particular no. 44.

one does not only take into account the still existing uncertainties outlined above with respect to the competences of the EU in the area of energy policy but also the fundamental rights relevance of the measures proposed, which are discussed in turn, much seems to militate for the existence of a reservation in law to restrict fundamental rights by *formal* legislation only (reservation of legislative/statutory powers – *Gesetzesvorbehalt*) instead of mere executive measures. This becomes particularly evident when looking at Article 176a(2) EC of the new energy chapter of the Treaty of Lisbon, which generally subjects “big style” modifications of the EU energy scene to the joint approval of the European Council and the European Parliament “in accordance with the ordinary *legislative* procedure”.

4. Human rights related barriers to certain actions, especially property protection

The evaluation of ownership unbundling, also by way of share split, and of the Independent System Operator model on the basis of human rights as applied on European and national level touches upon several guarantees such as the freedom of profession and freedom to conduct a business, the freedom of association as well as the right to equal treatment, all of which will not be looked further into here. The guarantee discussed here is the fundamental right to property, more specifically the right to own energy networks.

4.1. Relationship between European and national protection of right to property

As an act of the European Union legislature, the binding prescription of ownership unbundling measures would primarily have to be measured against the European law protection of property as developed by the European jurisprudence on the basis of the European Convention of Human Rights as well as the common constitutional traditions of the Member States (see Art. 6(2) EUV), which in the meantime has also found its way into Art. 17 of the European Charter of Fundamental Rights.⁷⁸

⁷⁸ Charta of Fundamental Rights of the European Union, 7.12.2000, OJ C 364/1. This Charta, which the European Institutions have declared binding for themselves, will become legally binding with its recognition by the Treaty of Lisbon and the amended Article 6 of the EC Treaty. See also H.D. Jarass, (2006) NVwZ 1089 et seq.

Measuring these proposals additionally at national fundamental rights is, however, not excluded. Such examination is of particular importance if and in as far as the final Directives give Member States a choice, such as different options with respect to the implementation of ownership unbundling.⁷⁹ In this context, it should also be noted that constitutional courts of several Member States such as France, Spain and Italy have in the past articulated clear reservations against an all-inclusive primacy of European law.⁸⁰ In particular the German *Bundesverfassungsgericht* has excelled with regard to the European protection of fundamental rights. In its famous *Maastricht* judgement concerning the EU Treaty, it has reserved to itself the „cooperation“ with the European Courts at least with regard to the protection of fundamental rights⁸¹ should secondary community law interfere with the substance of German fundamental rights. It, however, appears unlikely that the *Bundesverfassungsgericht* will remember this hortative pointer and assess a possible imposition of ownership unbundling via secondary legislation (with or without scope for manoeuvre for national legislatures) against the fundamental right guarantees of the German Constitution *Grundgesetz* (and possibly against deviating decisions of the Luxembourg Court). It should be remembered in this context that there have already been repeated attempts – so far in vain – to provoke the application of this „cooperation reservation“.⁸²

4.2. The subject of human rights (*Grundrechtsträger*)

It is without doubt true that energy network operators and the vertical integrated energy supply undertakings behind them principally enjoy protection of their right to property both under European and under German law.⁸³ Under German law, for network operators situated in Germany this follows from Art. 19 subs. 3 GG. Under European law, Art. 6(2) EUV explicitly refers to the European Convention of Human Rights

⁷⁹ Cf. M. Schmidt-Preuß in: Baur/Pritzsche/Simon, n. 72 above, ch. 2, no. 5, with further references.

⁸⁰ See Kumm/Comella, [2005] International Journal of Constitutional Law 473 (475).

⁸¹ BVerfGE 89, 155, heading 7.

⁸² See BVerfG, 31.3.1998 (2 BvR 1877/97 and 2 BvR 50/98) – *Euro-Verfassungsbeschwerden*, BVerfG, 7.6.2000 (2 BvL 1/97) – *Bananenmarktverordnung*.

⁸³ See, however, Hermes, *Staatliche Infrastrukturverantwortung*, 1998, who puts infrastructure networks in telecommunications, energy and railway on the same footing with road infrastructure and thus generally categorizes them as public institutions, which do not enjoy fundamental rights protection because of the privilege of infrastructure owners to expropriate land owners in the course of infrastructure construction (see section 45 subs. 1 EnWG). But see J.-C. Pielow, *Grundstrukturen öffentlicher Versorgung*, 2001, S. 625 ff, representing the vast majority of legal opinion.

resp. its First Protocol.⁸⁴ In this regard, it is only doubtful, whether energy supply undertakings, which are owned by public institutions (such as the French EDF), enjoy property rights protection. For public-private undertakings with only minority or dispersed public shareholdings (such as the municipal shareholdings in German energy suppliers) the entitlement to fundamental rights protection, however, is to be accepted in as far as these undertakings only participate in mere commercial activities and not (also) in an official function.⁸⁵ In Germany, only exclusively public or publicly controlled public-private energy supply undertakings are assumed not to be entitled to fundamental rights protection.⁸⁶

With respect in particular to the possible unbundling option share split, it has to be noted that according to what has been said before, the energy supply undertakings resp. parent companies of the so far only legally unbundled transmission system operators (despite municipal minority or dispersed public shareholdings in individual cases) would enjoy both European and German property rights protection: the Commission, as far as it propagates the mandatory splitting of share rights in the network company to be newly incorporated, indeed focuses on the interests of the shareholders (which in Germany are also protected by fundamental rights).⁸⁷

⁸⁴ See Art. 1(1) 1st sentence: „Every natural or legal person is entitled to the peaceful enjoyment of his possessions“. According to the case law of the ECJ, the European law protection of the right to property also covers associations of persons, which have no legal capability, see only H.D. Jarass, *EU-Grundrechte*, 2005, § 22 no. 16 with further references.

⁸⁵ See, for instance, Jarass, *ibid.*, § 4 nos 32 et seq.; W. Cremer in: Marauhn/Grote, *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, 2000, ch. 22 no. 61; O. Müller-Michaels, *Grundrechtlicher Eigentumsschutz in der EU*, 1997, p. 43; even more comprehensively, M. Burgi, (1997) EuR 261 (287 et seq.).

⁸⁶ For public-private energy supply undertakings, see the seminal decision of the BVerfG, (1990) NJW 1783 - HEW; see generally V. Epping, *Grundrechte*, 3rd ed., 2007, no. 154. As regards critical comments and more recent tendencies in literature and case law, see only M. Schmidt-Preuß in: *Handbuch des Staatsrechts*, vol. IV, 3rd ed., 2006, § 93 no. 37; in favour of an entitlement of *Deutsche Telekom AG* (which is *de facto* controlled by the Federal Republic of Germany with its 43% shareholding) to fundamental rights protection, see BVerfG, decision of 14 March 2006 (1 BvR 2087/03), nos 71 et seq. (www.bundesverfassungsgericht.de); BVerwGE 114, 160 (189); BVerwG, NVwZ 2004, 742, 871 (878 et seq.).

⁸⁷ Apart from the fundamental right to property of the vertically integrated energy supply undertaking (ESU) according to Art. 14, 19 subs. 3 GG, German constitutional law also protects the right to property of (at least) private shareholders of such undertakings, see BVerfG (1 BvR 390/04), (2007) NJW 3268, also available at www.bundesverfassungsgericht.de, with comments by L. Leuschner, ‘Gibt es das Anteilseigentum wirklich?’, (2007) NJW 3248, BVerfGE 14, 263 (276). See H.D. Jarass / B. Pieroth, *Grundgesetz-Kommentar*, 5th ed., 2000, Art. 14 no. 9. By contrast and just mentioned in passing, the protection in this regard of shareholders under the European Convention of Human Rights (ECHR) seems not to be as far reaching as victim status according to Art. 34 ECHR for shareholders is doubtful. So far, only in exceptional circumstances has the European Court for Human rights recognized the right to property of shareholders by “piercing the corporate veil”, see only *Agrotexim v. Greece* (1996) 21 EHRR 250 (in particular no. 66).

But in this respect, it seems that the Commission completely ignores the fact that the current energy supply companies have their own very existence, which is relevant in a fundamental rights context, and thus their restructuring by way of share split requires a particular constitutional justification.

4.3. Ownership unbundling in the light of EU property right protection

The ECJ's gradual contouring of the European occurrence of the fundamental right to property⁸⁸ has predominantly been guided by Art. 1 of the First Protocol of the European Convention of Human Rights and the common constitutional traditions of the Member States,⁸⁹ and comprises of the protection of any proprietary position, which the legal order assigns to an individual in such a way that this person can exercise the powers (of possession, use and disposal) related to it on its own responsibility and in its self-interest. On the level of interference, it has to be distinguished between the deprivation of property, which must be compensated, and the mere regulation of use. The first variant covers both *formal* expropriation, which means the compulsory transfer of property to the State or a third person,⁹⁰ and so called *de facto* expropriation, under which the formal ownership position is left untouched but where the owner completely loses every right connected to its property resulting in a *de facto* disappearance of the ownership position.⁹¹ Such interference must be justified (in particular) according to the principle of proportionality with respect to a legitimate public resp. general community interest; deprivation of property additionally requires a basis in law and adequate compensation. In this respect, the density of control exercised by the ECJ is not too intensive (especially with regard to the necessity and adequacy/suitability of the particular measure), which is widely criticized; often, the ECJ limits itself to a mere control of an evident violation of rights thereby recognizing a wide margin of appreciation in favour of the community legislator.⁹²

⁸⁸ See the seminal case *Hauer*, ECJ, ECR 1979, I-3727.

⁸⁹ See O. Depenheuer in: Tettinger/Stern (eds), *Kölner Gemeinschaftskommentar. EU-Grundrechtecharta*, 2006, Art. 17 no. 19 with further references.

⁹⁰ Not, however, mere confiscation, which seems to be admissible as mere regulation of use even without compensation, see Jarass, n. 78 above, 1092.

⁹¹ See ECJ, n. 88 above, no. 19, and case C-363/01, 16.10.2003 (not reported) – *Flughafen Hannover-Langenhagen*, available at Eur-Lex. European-style expropriation is thus much narrower than German-style expropriation in a substantial (as opposed to formal) sense, see Jarass, n. 78 above, 1092.

⁹² See for the critical views, for instance, Schmidt-Preuß, n. 72 above, 470. Encouraging in this respect is

Following what has been said before, the proposed ownership unbundling is a deprivation of property.⁹³ The alternative solution of ISOs, at least if introduced as „deep“ ISOs, might also be considered as a deprivation of property in the form of a *de facto* expropriation because the current network owners would lose every opportunity to dispose of the networks and in particular to decide (at least together with others) about network investment.⁹⁴ Whether and in how far this is justified under European law again requires principal considerations.⁹⁵ In so far it has to be noted that notwithstanding the jurisprudence of the ECJ consistent legal theory with respect to the right to property has not crystallised yet.⁹⁶ Even more, an untouchable substance in whatever respect of the EU protection of the right to property, which would also specify the bar contained in Art. 295 EC to exercise a competence has still not been determined. To put it more positively, further human rights orientated debates with regard to ownership unbundling of energy networks could, in combination with future decisions of the ECJ, make an indeed important contribution to the consolidation of the protection of the right to property in the EU.

4.4. Ownership unbundling measured at Art. 14 German *Grundgesetz* (GG)

According to the current state of the legislative process, the Member States shall have the choice between ownership unbundling and the introduction of ISO's. Consequently, at least from the point of view of the German *Grundgesetz*, the fundamental rights induced barriers of national constitutional law apply.⁹⁷ And in the present context German law also puts property right protection at the centre.⁹⁸ The guarantee of the right to

more recent case law which appears to show a tendency for a more comprehensive and tighter control, see lately only Court of First Instance (CFI), T-170/06, 25.8.2007, OJ C 199/37, 70 – *Alrosa/Commission*.

⁹³ This is also true for the Commission's proposed share split option, which demands the forced sale of one of the share packages if via the other share package control can be exercised over either network operation or the remaining (competitive) energy supply activities (with a later deadline though, see Art. 1(4) No. 4 proposal for a revised Electricity Directive).

⁹⁴ This seems to be followed by Callies, n. 60, p. 110.

⁹⁵ For a possible justification of Independent System Operators, see Storr, n. 11 above, 237, who does, however, not differentiate, as we would think appropriate, according to the extent of decision powers network operators should have, such as with regard to investment decisions.

⁹⁶ See Depenheuer, n. 89 above, Art. 17 no. 18; T. von Danwitz in: von Danwitz/Depenheuer/Engel, *Bericht zur Lage des Eigentums*, 2002, pp. 260 et seq., 280.

⁹⁷ It seems not completely illusionary that the German *Bundesverfassungsgericht* would take recourse to the above mentioned „Kooperationsvorbehalt“, should the unbundling measures of the EC legislature raise serious concerns as to its intrusion into the substantial core (*Wesensgehalt*) of German fundamental rights protection in its entirety.

⁹⁸ See only Schmidt-Preuß in: Baur/Pritzsche/Simon, n. 72 above, ch. 2, no. 8.

property of Art. 14 GG is to “safeguard proprietary freedom, which enables a self-dependent way of life.”⁹⁹ This guarantee thus is to be seen in close context to *personal* freedom¹⁰⁰ and is furthermore of essential importance for business activity.¹⁰¹ Apart from the function as safeguard of freedom this guarantee also has a law keeping function in that it protects the confidence of the subject of human rights (*Grundrechtsträger*) in the enduring existence of its rights.¹⁰² Protected are all proprietary rights granted by the legal order, which includes apart from asset ownership also share ownership.¹⁰³ Further, the protection of Art. 14 GG comprises besides the holding of property also its free use and ability to dispose of it,¹⁰⁴ including the free decision to let third parties use the property, in particular for a consideration.¹⁰⁵

Any interference with the right to property, i.e. the *taking* of protected positions (expropriation) as well as the *restriction* of its free use, disposal or exploitation (“determination of substance of ownership and its limitations” – *Inhalts- und Schrankenbestimmung*) are justified only in exceptional circumstances; state measures have to especially observe the principle of equal treatment as well as the principle of proportionality with its (strict) requirements of appropriateness, necessity and adequacy/suitability. The outer boundary is the substance of the guarantee of the right to property, which comprises of the principal power to dispose and the private utility (*Privatnützigkeit*) of property as the basis of private initiative.¹⁰⁶ Eventually, the public interest and the individual interests are to be put in a balanced relationship. In this context, the constitutional recognition of private property through Art. 14 subs. 1 1st sentence GG as well as the social imperative (*Sozialgebot* or *Sozialbindung*) contained on Art. 14 subs. 2 GG are to be observed.”¹⁰⁷ To the extent, however, that property is of importance for the safeguarding of the personal freedom of its owner, it enjoys special protection; the powers of the legislature are therefore much smaller in case

⁹⁹ See BVerfGE 79, 292 (303); 83, 201 (208); 97, 350 (371); 102, 1 (15).

¹⁰⁰ BVerfGE 24, 367 (389); 53, 257 (290); 100, 226 (241); 102, 1 (15, 17).

¹⁰¹ BVerfGE 51, 193 (218); 78, 58 (73); 101, 54 (75); 102, 1 (18); BVerwGE 81, 329 (341).

¹⁰² Wendt in: Sachs (ed.), GG (commentary), Art. 14 no. 1.

¹⁰³ BVerfGE 5, 290 (351); see BVerfG (1 BvR 390/04), (2007) NJW 3268; see also Baur/Pritzsche/Klauer, Ownership Unbundling, 2006, p. 79, and n. 87 above.

¹⁰⁴ BVerfGE 42, 263 (294); 50, 290 (339); 52, 1 (30 f.); 88, 366 (377); 101, 54 (75); BVerwGE 92, 322 (327).

¹⁰⁵ BVerfGE 98, 17 (35). As regards the entrepreneurial freedom to use tangible and financial means in the process of production and to organize the structure of the undertaking, see Schmidt-Preuß in: Baur/Pritzsche/Simon, n. 72 above, ch. 2, no. 8.

¹⁰⁶ BVerfGE 50, 290 (339) – *Mitbestimmung*.

¹⁰⁷ BVerfGE 52, 1 (29); 71, 230 (246); 81, 208 (220). Brackets added. Art. 14(2) GG sets out that “property commits its owner. Its use shall at the same time serve the welfare of the general public.”

of personal property than, for instance, with regard to the property of companies.¹⁰⁸ The *deprivation* of property positions constitutes, as expropriation, the most intrusive encroachment and can thus only be constitutionally justified as *ultima ratio* and only under the additional requirements of Art. 14 subs. 3 GG.

4.4.1. Repercussions of strict ownership unbundling

Ownership Unbundling as the most intrusive form of property right related separation would according to the German understanding only be possible by way of expropriation or, indirectly, through an order by law of compulsory sale.¹⁰⁹ Although one can argue whether the latter is to be seen as expropriation in terms of Art. 14 subs. 3 GG or „only“ as a determination of substance of ownership and its limitations.¹¹⁰ If, however, powers to use or dispose are restricted in such a massive way as by forced sale so that only an „empty coat“ of the right to property remains, then this would mean complete devaluation,¹¹¹ which would be equal to a depreciation of property and entail similar strict justification requirements as an expropriation.¹¹² For the national implementation of true ownership unbundling, it is particularly questionable, whether ordering a forced sale would at all be admissible or whether the only way open to the legislator is to formally legislate for (direct) expropriation. In any event, a forced sale would have to satisfy the material legal requirements mentioned in Art. 14 subs. 3 GG.¹¹³ More specifically, the legislature implementing European secondary law would have to explain why the common welfare, i.e. the creation of a „true“ internal energy market with secure supply, which the encroaching measure is striving for cannot be achieved as effectively as by way of introducing an Independent System Operator model¹¹⁴ whose conformity with fundamental rights can also be questionable depending on how extensive such an operators powers would be, i.e. whether such an operator would, for instance, have the power to decide upon network

¹⁰⁸ BVerfGE 50, 290 (348); see also BVerfGE 58, 81 (112); 79, 283 (289); 100, 126 (241); 102, 1 (17).

¹⁰⁹ Storr, n. 11 above, 236.

¹¹⁰ In the latter sense, Baur/Pritzsche/Klauer, n. 103 above, p. 80, and Storr, n. 11 above, 236; in the sense of expropriation recently Mayen, n. 11 above, and apparently Schmidt-Preuß in: Baur/Pritzsche/Simon, n. 72 above, ch. 2, no. 32, but see also no. 35 there.

¹¹¹ With regard to ownership unbundling in the form of forced sale, see Baur/Pritzsche/Klauer, n. 103 above, p. 85.

¹¹² See the seminal case *Rheinland-Pfälzisches Denkmalschutzgesetz*, BVerfGE 100, 226 (240 et seq.).

¹¹³ See also Storr, n. 11 above, 236.

¹¹⁴ See also Baur/Pritzsche/Klauer, n. 103 above, p. 82.

investment. It remains to be seen whether such substantiation could ever be rendered successfully.¹¹⁵ With respect to proportionality aspects, an expropriation does after all constitute an extraordinarily massive interference, which, as long as supply security is not seriously in danger, would „look utterly out of place in a market economy,“¹¹⁶ which thus seems to be inappropriate. In any event, the legislator would, even in case of a mere ordering to sell, possibly not get around compensation payments. Such compensation is normally the reimbursement of the full value measured at the market price of the ownership position taken.¹¹⁷

From the point of view of energy supply undertakings, the above analysis also applies to the unbundling option share split. From the point of view of shareholders, a share split would, on the face of it, be a mere redefinition of their property (in the guise of a determination of substance and limitations), at least as long as their overall shareholdings and their value remain unchanged. Should, however, one of the then two share packages have to be sold (because the other share package controls one of the then two (network and remaining energy supply activities), then this is likely to at least be a determination of substance and limitation, which would have to be compensated.¹¹⁸

4.4.2. Repercussions of ISO models

The legal obligation to create an independent system operator, on the other hand, would likely be a determination of substance and limitations according to Art. 14 subs. 1, 1st sentence GG. The legal position of the

¹¹⁵ See also Schmidt-Preuß in: Baur/Pritzsche/Simon, n. 72 above, ch. 2, no. 33; Jacob in: Schmidt-Schläger/Zinow (eds), *Grundlagen des Energierechts*, 2004, p. 87 (103 et seq.); Baur/Pritzsche/Klauer, n. 103 above, pp. 82 et seq.; Holzngel/Schumacher, (2007) N&R 96 et seq. (from a European law perspective).

¹¹⁶ Schmidt-Preuß in: Baur/Pritzsche/Simon, n. 72 above, ch. 2, no. 33.

¹¹⁷ Vgl. BVerfGE 58, 137 (149); 100, 226 (245).

¹¹⁸ If not even an expropriation, see also Schmidt-Preuß, ‚Europarechtliche Grundlagen des Unbundling‘ and ‚Verfassungsrechtliche Rahmenbedingungen des Unbundling‘, chapters 1 and 2, in: Baur/Pritzsche/Simon, n. 72 above, (as regards European law), and pp. 33 et seq., 47 (as regards German constitutional law); more balanced from a German constitutional point of view, as regards determinations of substance and limitation (*Inhalts- und Schrankenbestimmungen*), which require compensation, H.-J. Papier in: Maunz/Dürig, Grundgesetz (commentary), Art. 14 nos 343 et seq. The forced sale of shares resp. company capital up to a certain shareholding threshold cave into share ownership to such an extent that the core of the right to property, its private utility (*Privatnützigkeit*), is *de facto* no longer existent. It is interesting to note in this context that the Commission’s proposals of 19 September 2007 do not contain any provision for compensation. At present, it can thus be established that the Commission’s proposals propagate unlawful expropriation, at least, however, an unlawful determination of substance and limitations of share ownership of the vertically integrated energy supply undertakings.

vertically integrated undertaking as owner of the networks would formally continue to last. On the other hand, the unlimited use of its network property would be removed, which would also have to be proportionate. Further, the social bond of the property is not allowed to lead to an excessive burden or hurt its owner in its proprietary sphere unreasonably.¹¹⁹ In this context, the range of powers the ISO can exercise becomes relevant: can the ISO take investment decisions for which the network owner bears the risk, would this probably be a restriction of use liable to compensation. It would only be acceptable if risk adequate remuneration was ensured.

Besides, again considering the aspect of proportionality, the ISO model is another significant restriction of the property rights of the network owner after regulated network access has just been introduced (with incentive regulation looming); the private utility (*Privatnützigkeit*) of network property would ultimately be reduced to a mere monetary consideration for putting its property at the disposal of the independent network operator.¹²⁰ At the time when the right to transport energy on the networks was introduced it was already claimed that the restrictions such a regulatory measure imposed on the right to property would be very close to the borderline of what was constitutionally allowed.¹²¹ On the other hand, it is suggested that network property is affected by its particular social context in which it is placed and its special social function it fulfils because the networks serve the general interest in secure and low-priced energy supply.¹²² Further, as network owners are normally corporate entities, the particularly protected concern for “personal” freedom is to some lesser extent relevant here. Property in this context does not serve personal circumstances but profit maximization.¹²³ Thus, if the restriction of use was compensated by adequate remuneration for transferring the use of the network property, such an encroachment into fundamental rights would, according to most legal commentators, still be reasonable and hence constitutional justified.¹²⁴

¹¹⁹ See BVerfGE 21, 150 (155); 50, 290 (340); 52, 1 (29, 32); 53, 257 (292); 58, 137 (148).

¹²⁰ See also Storr, n. 11 above, 236.

¹²¹ See, for instance, Schmidt-Preuß, (1996) RdE 1 et seq.; U. Bienenbender, (2000) WuW 119 et seq.; P. Badura, (2004) DVBl. 1189 et seq.; H.-J. Papier, *Die Regelung von Durchleitungsrechten*, 1997, pp. 13 et seq., and in: Maunz/Dürig, n. 118 above, no. 521 with further references.

¹²² See only Papier in: Maunz/Dürig, *ibid*.

¹²³ See Storr, n. 11 above.

¹²⁴ Cf. Storr, n. 11 above. But see also the text accompanying nn. 55-59 and 94 above as regards aspects of expropriation and interference with the free movement of capital in the context of introducing independent system operators.

5. Constitutional debate in other Member States

So far, we have focussed on European and German constitutional law and mainly form the prevailing legal point of view. However, the implementation of ownership unbundling or independent system operation is also likely to test its legal limits in other Member States.

5.1. Ownership unbundling from a comparative point of view

To start with, we should add some further remarks regarding the reasons the Commission has put forward in the context of its new proposals in order to justify its demand for ownership unbundling of the energy networks. In its Report on the sector inquiry, the Commission names several Member States where presumably ownership unbundling has been implemented.¹²⁵ However, this sort of reasoning is rather undifferentiated and the underlying facts are to some extent inconsistent or even erroneous.¹²⁶ It conceals that in most of these countries the unbundled transmission system operators are either state controlled or were separated before privatization.

Not sufficiently reflected are also the motives of the Member States, which have pursued ownership unbundling of their energy networks. Digging deeper, it becomes clear that such measures have often been based on voluntary agreements or unilateral (commercial) decisions of the undertakings concerned.¹²⁷ Further, it can not be assumed that the creation or even intensification of “true” competition has been the main motive for reforms towards ownership unbundling. In fact national interests prevail in this respect. In the Netherlands, for instance, ownership unbundling is currently implemented for the distribution grids, which are sought to remain in the hands of the state, more precisely in the hands of municipalities and provinces, which are the shareholders of the Dutch energy supply undertakings, which own the distribution grids. This has openly not been pursued for competition reasons, at least not predominantly, but for public order reasons in that these grids should not be able to pass into private

¹²⁵ See notes 2 and 7 above.

¹²⁶ When the Commission, for instance, claims in the context of the current third legislative package (http://ec.europa.eu/energy/electricity/package_2007/index_en.htm) in section “Question and answers” that “in electricity, about half of the Member States have ownership unbundled network operators” and “in gas there are seven Member States.”

¹²⁷ See, for instance, Spain and the UK. In the UK, British Gas was privatized vertically integrated and unbundled later, based on commercial considerations.

(foreign) hands should the energy supply undertakings be taken over by big European players.¹²⁸ The debate about this issue has thus predominantly taken place in the context of the discussion of the privatization of energy supply undertakings.¹²⁹

Finally and most importantly, one has to bear in mind, that ownership unbundling seems not to be *the* guarantee for more or “real” competition within the respective national energy markets. This point has, for instance, been made for the restructuring of the British gas market which is eyed extremely sceptical.¹³⁰ In Spain, ownership unbundling of the electricity transmission networks had already been implemented in 1985, i.e. long before the Energy Directives. More importantly, this was done before the privatization of the energy undertakings.¹³¹ However, sufficiently efficient competition in the Spanish energy market is non-existent, in particular because of parallel regimes for (captive) tariff customers and the actual competition for eligible customers. A further obstacle to competition is the rather isolated situation of the *Mercado Ibérico de la Electricidad, MIBEL* (without any noteworthy interconnectors along the Pyrenees).¹³² Last but not least, the German *Bundesnetzagentur* made it clear in April 2007 that until then, it had not received any figures, even after asking the respective Member States and ERGEG, which underline the argument that ownership unbundling enhances competition.¹³³

¹²⁸ See notes 27-29 above.

¹²⁹ Very critical from an economic point of view as regards the Dutch developments, Baarsma/de Nooij, n. 9 above. In New Zealand, the first and only country so far, which has forced unbundling of the distribution networks onto its energy sector, the development of competition has failed. As a result, it is “rowing back” for a number of years now. On the New Zealand experience, see only Nillesen, P., Pollitt, M., Sitompoel, R., ‘Eigendomssplitsing in Nieuw Zeeland’, ESB of 20 October 2006, pp. 533-5.

¹³⁰ See P. Wright, n. 9 above.

¹³¹ These energy undertakings originally were Instituto Nacional de Industria (electricity) and Instituto Nacional de Hidrocarburos (gas).

¹³² The two-pronged structure of captive customers and competition for eligible customers will not be abolished before 2009 according to the recent reform of the Spanish Electricity Act of 4 July 2007 (Ley 17/2007, B.O.E. no 160 of 5/7/2007, p. 29047). As regards the already mentioned and further notable competition obstacles on the Spanish energy market, see J.I. Pérez Arriaga et al., ‘Libro Blanco sobre la reforma del marco regulatorio de la generación eléctrica en España’ (upon request of the Spanish Ministry for Industry, Tourism and Commerce) of 30 June 2005. Amongst the market failures identified, Pérez Arriaga et al. name poor regulatory mechanisms to deal with the countless applications for access to the transport system and an unacceptable regulatory instability and uncertainty.

¹³³ See Bourwieg, K., ‘Bestandsaufnahme und Ausblick zur Entflechtung in Deutschland’, presentation at a workshop of a research consortium in law and economics in Brussels on 17 September 2007.

5.2. Possible constitutional constraints in France and the Netherlands

In any event, in Member States such as France and the Netherlands where a vertically integrated energy industry is in place, it can be observed that similar to the situation in Germany, considerable constitutional constraints exist as regards the introduction of ownership unbundling.

5.2.1. France

France is the country of origin of the “service public” resp. the “(Grands) Services Publics Nationaux” with companies such as EDF and GdF, SNCF and La Poste. Such companies deliver services, which are understood to fall within the sole remit of the state, i.e. monopolistic services, which are comprehensively state-controlled.¹³⁴ Consequently, France is one of the major opponents to ownership unbundling of energy networks. In the course of progressing privatization and liberalization of the traditional „services publics“ led by the European legislator, there have been many attempts to raise the hurdles for these developments by invoking national constitutional constraints resp. by pointing to the existence of the “services publics constitutionnels”.¹³⁵ In this context, paragraph 9 of the preamble to the Constitution of 1946 occupies a special position; according to the preamble of the current Constitution of 1958, this provision is still in force. It ascertains that “all property and all enterprises that have or may acquire the character of a national public service or de facto monopoly shall become the property of society”. In view of the first ‘privatization wave’ during the mid-80ies, the Constitutional Council has interpreted paragraph 9 of the Preamble of 1946 as an obstacle to the privatisation especially of those activities or enterprises, which concern public services whose existence and operation is required by the Constitution.¹³⁶ The problem, however, is that the French Constitution (of 1958) does not contain any explicit or implicit answers to the question, which supply activities have to be considered as a “constitutional” or mandatory “state owned” public service. Nevertheless, the *Conseil Constitutionnel* ruled, that the partial privatization of *France Telecom*

¹³⁴ For a comprehensive comparison of the French and the German systems of “service public” and “öffentliche Daseinsvorsorge” against the background of the European concept of “services of general economic interest” see Pielow, n. 83 above, pp. 111 et seq.

¹³⁵ See for instance P. Esplugas, ‘La constitutionnalisation du service public: Un tigre de papier?’, (1996) *Revue administrative*, vol. 290, pp. 162 et seq., and ‘Conseil constitutionnel et service public’, 1994.

¹³⁶ Decision n. 86-207 DC of 25/26 June 1986, recitals 59 et seq.

(from a former *établissement public* to a *Société Anonyme* with private shareholders) in 1996 has only been constitutional because the majority of the undertaking's capital remained in public hands.¹³⁷ Similar reasons led to a decision on 5 August 2004, which dealt with the implementation of the 2003 Energy Directives by the Bill on the public service of electricity and gas:¹³⁸ Here again, the Court emphasized the legislative design of GdF and EdF as “services publics nationaux in the sense of paragraph 9 of the preamble of the Constitution of 1946” and established a compulsory public share of at least 70 per cent of the capital of the respective undertaking; it also underlined the fact, that the gas and electricity transmission networks remained *exclusively* in public hands after their legal unbundling.¹³⁹

However, in its recent decision concerning the partial privatization of EdF and GdF respectively by the Bill amending the Energy Act of 9 August 2004,¹⁴⁰ the Court pursued a more liberal approach: with respect to Article 39 of the Reform Act, which sets the public shareholding in GdF at only one third of the capital (not altering the 70 per cent public shareholding in EdF) in preparation of the envisaged merger of GdF and Suez, the existence of a national “service public” with respect to national gas supply and hence the applicability of paragraph 9 of the Preamble of 1946 as a barrier to the privatization of GdF was rejected. This ruling is based on the consideration that GdF is not regarded as a true “national public service” or “de facto monopoly” because after its nationalisation in 1946, other independent gas suppliers continued to exist. Further, it was reasoned, gas supply would constitute a more *local* rather than a *national service public* due to the *municipal* concessions (granting the right to use public ways, which is a *domaine public* of the municipalities). As a consequence, the Court decided that the legislature was considered to be free to exempt (any time) a *service public* from the scope of paragraph 9 of the Preamble of the 1946 Constitution.¹⁴¹ On this basis, the Energy Act 2006 was enacted. In contrast to the decision on the Energy Act 2004, the 2006 decision was not specifically concerned with the State's ownership of the networks. Furthermore, Article 12 of the French Energy Act as amended in 2006

¹³⁷ See decision 96-380 DC of 23 July 1996; for more details, see Pielow, n. 83 above, pp. 212 et seq.

¹³⁸ Later « Loi 2004-803 relative au service public de l'électricité et du gaz et aux entreprises électriques et gazières » of 9 August 2004, J.O. n° 185 of 11 August 2004.

¹³⁹ See decision n° 2004-501 DC of 5 August 2004, recitals 11 et seq.

¹⁴⁰ See now Loi n° 2006-1537 (“Loi relative au secteur de l'énergie”) of 7 December 2006, J.O. n° 284 of 8 December 2006, p. 18531.

¹⁴¹ See decision n° 2006-543 DC of 30 November 2006, recitals 10 et seq.; as to the numerous and controversial comments on this ruling, see the references at www.conseil-constitutionnel.fr/doctrine/2006543dc.htm.

prescribes that the capital of the gas transmission network “may only be held by Gaz de France, the State or (other) public enterprises or organizations.”¹⁴²

Consequently, it cannot be excluded that the Constitutional Council will come back to the findings of its 2004 decision when facing a possible obligation of the French State to privatize the gas and electricity networks. Moreover, given that EdF and GdF/Suez could only come into existence because of the nationalization of the communal use of way concessions in 1946, further reservations might be made with respect to the guarantee of communal self-government according to Article 72 of the French Constitution (*libre administration des collectivités territoriales*).¹⁴³

On the other hand, should, instead of ownership unbundling, a more stringent separation of “public” network operators be prescribed, which allows for the transfer of the network operation to another public institution, such as a different ministry, it should be remembered that this might constitute a discrimination of private network operators, which is against European law (see 3.3.1.) above).

Possible fundamental rights reservations might, however, not be as strong as they are in Germany: on the one hand, according to the French idea of fundamental rights, even exclusively public undertakings resp. network operators enjoy the protection of entrepreneurial freedom (*liberté de entreprendre*) and the right to property (*droit de propriété*). On the other hand, in the course of nationalizations and privatizations in the 1980s, a jurisprudence of the *Conseil Constitutionnel* and the *Conseil d'Etat* has evolved, which leaves the legislator a rather wide discretion in the design of such guarantees, and which reduces judicial review to a mere control of evident errors.¹⁴⁴

¹⁴² Thus, the envisaged shareholding of just 40% of the French State in the combined entity GdF-Suez once the merger has been accomplished might be *contra legem*.

¹⁴³ See already the respective advices in the decision 2006-543, recitals 28 et seq.

¹⁴⁴ See Pielow, n. 83 above, pp. 222 et seq.

5.2.2. The Netherlands

The (private/public) limited companies Delta and Eneco, two of the four largest energy suppliers and both wholly owned by public/municipal shareholders (as all other energy undertakings owning distribution networks), have commenced law suits against the so-called *splitsing wet*.¹⁴⁵ The law suits have been brought before courts in the Netherlands, which has a written constitution (*Grondwet*), which also protects the right to property. Interestingly though, for constitutional reasons these law suits have had to be based on the European Convention of Human Right (and on EC law), in particular on Art. 1 of its First Protocol. Highly controversial issues are at stake, which sound familiar: the scope of Art. 295 EC as interpreted by the Dutch government and a possible infringement of Art. 56 EC.

6. Conclusions and outlook

It is the purpose of this contribution to shed light on central questions of competence and fundamental rights, which the latest Commission proposals for revised energy legislation brought up.

The result of this analysis is that important details of the proposed legislative measures of the EU give rise to considerable concerns as regards the enforceability of a European-wide introduction of ownership unbundling resp. the imposition of an obligation to implement ISOs. This is because there still exist uncertainties with respect to competences and the observance of fundamental rights in the context of legislative measures of the EU in the property sphere (for instance what Article 295 EC concerns). In this respect, obstacles on the level of national jurisdictions seem not only to exist in Germany but can also be observed in other Member States such as France and the Netherlands. The Commission's demand for energy network ownership unbundling thus offers an excellent opportunity to develop solutions for urgent and fundamental questions concerning competences and fundamental rights protection on national and European level.

¹⁴⁵ N. 27 above. See *Energie Nederland*, jaargang 10, nr. 10, 14 augustus 2007. It should be noted in this context that Dutch municipalities and provinces are not protected as German municipalities, which enjoy a certain institutional guarantee according to Art. 28 subs. 2 of the German Constitution *Grundgesetz*.

On the other hand, it is highly doubtful whether and in how far, based on the explanatory statements and substantiations delivered by the European Commission, the tightening revision of the current Energy Directives is actually appropriate and necessary, contributes to a noticeable improvement of the competitive situation resp. a noticeable decline of consumer prices and an increase in investments into the network infrastructure, in particular interconnectors. Experiences with ownership unbundling in some Member States leave a rather pessimistic impression in this respect.

Moreover, the substantial economic concerns against such measures have already been outlined above.¹⁴⁶ In this context, the clear trend towards decentralized or distributed generation should be noted: the more electricity generation is not only pursued “top down” but also “bottom up” (network interdependence), the more intensive cooperation and coordination between (central as well as decentral) generators and the (distribution as well as transmission) network operators is needed. An even stricter separation of the networks from generation assets would compromise valuable synergies and expertise derived from the current vertical integration.¹⁴⁷

All in all, instead of pursuing an inflexible and irreversible restructuring of the ownership in and the operation of electricity and gas transmission grids, we consider it more appropriate to think intensively about more flexible adaptations of the existing legal framework supporting a “competition of systems” amongst the Member States. In particular, further adjustments resp. „fine-tuning“ of the existing regulatory mechanisms seems to be the way forward, such as ensuring more stringent regulatory supervision of the energy sector on national and European level, and by way of greater regulatory cooperation, both between the Member States and on European level. Also, current European legislation needs to be coherently implemented, and, as has already been mentioned, the measures already taken by the Member States naturally need time to prove their effectiveness.¹⁴⁸ One might also consider the introduction of binding “competition benchmarks” whose attainment by the Member States would be controlled by way of regular monitoring or impact assessments. Such an

¹⁴⁶ N. 9 above and accompanying text.

¹⁴⁷ See already Brunekreeft/Ehlers, n. 9 above, emphasizing the conflict between ownership unbundling and distributed generation.

¹⁴⁸ As regards regulatory cooperation, in particular within the Forum process and the ever growing role of ERGEG, see only L. Hancher and I. Del Guayo, *The European Electricity and Gas Regulatory Forums*, in B. Barton, L. Barrera-Hernández et al. (eds), *Regulating Energy and Natural Resources*, Oxford, 2006, and E. Ehlers, ‘The Amsterdam and Berlin Fora and the Forum Process in European Energy Policy’, ch. 6 in M. Roggenkamp and U. Hammer (eds), *European Energy Law Reports IV*, Antwerpen, Oxford, 2007.

approach might promote the creativity of both the Member States as well as the energy industry.