

Expert Report

The background of the cover is a solid red color. In the upper right, there are several concentric, semi-transparent circles. On the left side, there is a large, dark, angular structure that resembles a staircase or a series of steps, extending from the bottom left towards the top right. At the base of this structure, near the bottom left, there are small, dark silhouettes of people standing.

Socialisation for the energy transition? **Legally Feasible**

by attorney Dr. Johannes Franke
and attorney Dr. Roda Verheyen

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Expert Report

Socialization in the energy sector

**Conditions for constitutional and EU legal
framework with the example of the electricity sector**

Prepared on behalf of communia e.V.

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Foreword

The energy sector is at the heart of a climate-friendly transformation of the economy and society. Whether it is the phasing out nuclear power or coal, energy prices, or expanding renewables, the energy sector has been and continues to be the subject of intense political debate. It is now clear that all areas of the energy sector must be fully decarbonized as quickly as possible. Only then can global climate targets be even remotely met. However, the energy transition is already under pressure, even though—considering all sectors of energy supply together—it has only just begun.

The pressure is coming from several directions: attacks by authoritarian forces are increasing, and defenders of the fossil fuel status quo are once again gaining ground. German energy transition policy and the European energy market in particular are leading to rising energy prices for consumers and industries. The German energy transition continues to rely on market mechanisms and the mobilization of private investment. However, this outcome of forty years of neoliberal restructuring is already showing disastrous consequences. The immense challenges of this transformation remain unresolved and are generating enormous social conflicts.

However, an extensive reliance on private capital in the energy sector has not always been the case—and it does not have to remain so. An energy sector that provides renewable energy as a common good, in line with demand, that and promotes energy transition as a public task under democratic accountability—in other words, a public energy sector—is both necessary and possible. It's time to de-privatize the energy sector!

Although the question of ownership has experienced a stunning revival through socialization initiatives in the housing sector, the debate on the potential of socialization and public economy for a democratic, socially just energy transition and an ambitious energy policy has only just begun.

The following legal expert report, "Socialization in the energy sector – conditions for constitutional and EU legal framework with the example of the electricity sector," contributes to ending the niche status of socialization perspectives in the energy sector. Until now, it has been politically evident that the challenges of climate-friendly transformation can be effectively addressed through socialization within a public eco-

nomy. Now, this expert report demonstrates that the current legal framework also enables this approach.

It is the first report of its kind and thus represents pioneering legal and political work. It provides a comprehensive and application-oriented examination of the potential and limitations of socialization in the energy sector, reflecting current developments and regulations. It is a new foundation—a "basic case study for socialization" in the energy sector—on which various actors now have the opportunity of developing further ideas and political ambitions for a fundamentally different energy transition.

In the recent debates on the possible application of Article 15 of the German Basic Law (GG) in the energy sector, doubts have often been raised that the overriding law of the European Union excessively restricts ambitions for socialization in the energy sector. This expert report now demonstrates that more is possible than previously thought! There are no significant obstacles to the politically sound application of Article 15. This means that socialization for a more socially just and climate-friendly energy supply is possible.

With the prospect of socialization in the energy sector, Article 15 of the Basic Law returns to its roots. Even during the historical socialization movement, there was a strong demand for the socialization of the energy industry. And the founding fathers—and a few mothers—of the Basic Law also explicitly envisioned the socialization of mining and the energy industry when the socialization article was negotiated into the constitution. As with areas of public services (such as housing), the same applies to the means of production in the energy industry: democratic common ownership is needed—for an economy that serves us all because it belongs to us all.

This expert report deserves credit for breathing new life into another aspect of Article 15 of the Basic Law. Its aim is to advance the debate and concrete political ambitions for the socialization of the means of production, particularly in the energy sector. In these challenging political times, this glimmer of hope for a more equitable and climate-friendly energy supply is urgently needed.

Justus Henze
communia

I Background and Expert Report Commission

Article 15 of the Basic Law of the Federal Republic of Germany [*Grundgesetz*] (GG) provides for the possibility of socializing land, natural resources, and means of production. During the negotiations on adopting the Basic Law, this provision was a central point and an essential component of the compromise between the SPD and the CDU.¹ The possibility of socialization represents the “economic neutrality”² of the Basic Law, which—despite guarantees of freedom of occupation and property—does not prescribe a particular economic system and does not commit to the capitalist economic system. In legal practice, Article 15 has so far led a shadowy existence despite its potentially explosive power. This only changed with the Berlin initiative “Deutsche Wohnen & Co. Enteignen” (DWE), which successfully put to a vote a referendum on the socialization of large housing corporations in September 2021. Although there has been no concrete implementation to date, a report commissioned by the Berlin Senate from a commission of experts confirmed by a large majority that the project is constitutionally possible in principle.³

The housing market is not the only potential area of application for Article 15 of the Basic Law. The possibility of socialization is also being discussed, particularly for the energy sector. Following the example of DWE, the initiative “RWE & Co. Enteignen” has been formed, which advocates the socialization of large energy companies. This raises the question of the legal possibilities for socialization in the energy sector. According to the expert report commission, particular focus should be given to the aims of socially acceptable pricing and climate and environmentally friendly energy supply. Compared to the housing market, however, the structures of the energy sector are much more complex; from a legal perspective, differences arise particularly from extensive EU regulation of the energy sector.

Against this backdrop, this report examines the legal framework for possible socialization in the energy industry pursuant to Article 15 of the Basic Law, focusing on the electricity sector and taking into account constitutional and European law guidelines. Specifically, it addresses the question of which socialization projects are eligible, which purposes may be pursued, and to what extent the regulatory framework under EU law is compatible with socialization and a public economy within the meaning of Article 15. In this way, the report aims to outline the scope of possibilities for socialization with the purpose of a socially acceptable and climate-friendly energy supply, thus providing an overview and a basis for possible further, more concrete considerations, without going into detail on individual options. In particular, individual options for the design of public-sector ownership are not examined, as these raise difficult and detailed follow-up questions. Instead, the report assumes the “baseline case” of transfer to a public-sector body.

The report focuses primarily on the electricity sector, as a comprehensive presentation and analysis of the entire energy industry (gas, hydrogen, district heating, etc.) with its respective specific features would be too extensive. This applies in particular to the section on regulatory guidelines presented in the final part of the report. However, the legal considerations and findings can generally be applied to other areas of the energy industry, in particular the gas sector, which is regulated in a similar way, in least in terms of its basic principles (for example, with regard to access and fee regulation).

1 On the historical development of the provision, see for example, Durner, in: Dürig/Herzog/Scholz, GG, 106th edition, October 2024, Article 15 margin no. 8 ff.

2 For example, Federal Constitutional Court, judgment of July 20, 1954 – 1 BvR 459/52 et al. = NJW 1954 1235: “The ‘economic neutrality’ of the Basic Law consists [...] in the fact that the constitutional legislator has not expressly opted for a particular economic system.”

3 Expert Commission on the Referendum on the Socialization of Large Housing Companies, Final Report June 2023, available at: <https://www.berlin.de/kommission-vergesellschaftung/downloads/>.



Since 2020, the registered association communia has been developing strategies for a democratic economy, socialization, and public luxury as a movement-oriented think tank. To this end, we support social movements that advocate socialization and test alternative, public, and democratic models of ownership in order to overcome the climate crisis and inequality. We shape policy, conduct research, and develop new narratives for an economy that serves the many—because it belongs to the many.

The present expert report is part of our comprehensive project on socialization perspectives in the energy sector. Within this project, we are working closely and on equal footing with social movements for over three years to develop strategies and concepts for a democratic, public interest-oriented, and ecological energy supply. We are developing a long-term vision of an energy sector in the public economy, in which the social and ecological production and distribution of energy is organized within the framework of public and democratic forms of ownership. To this end, we are developing concrete points of departure in the here and now. Our aim is to make technically sound analysis applicable for practical political work.

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II Executive Summary

Socialization in the energy sector is possible to a large extent under Article 15 of the German Basic Law (GG). EU law does not fundamentally preclude socialization, even if certain (particularly European) requirements would also have to be met by a socialized electricity supplier:

- Under constitutional law, various **socialization projects** in the energy sector are eligible for socialization. Even if the term “means of production” in Article 15 of the Basic Law is interpreted narrowly, it still covers production facilities and network infrastructure. Land and mineral deposits can also, in principle, be subject to socialization (indirectly via concessions, if necessary, insofar as mineral deposits are not subject to ownership under mining law). Finally, the socialization of entire companies operating in energy production (for example, as producers and/or grid operators) is also covered by Article 15. In particular, socialization via the shares of these companies is also permissible, as this offers practical advantages over the socialization of operating assets in the sense of individual assets. With the socialization of shares, the public utility company takes over the company as such. This includes any shareholdings and other assets abroad.
- The constitutional requirement for transfer to a **public economy** stipulates that the object of socialization must be removed from private-interest economic activity, which is characterized by a primary focus on individual profit-making. Instead, a form of economic activity must be established in which the immediate goal is the satisfaction of needs and the realization of common interests. The basic case for this is transfer to a public-sector body and thus one bound to the common good. The objectives set by the client—socially acceptable pricing and climate-friendly supply—are permissible objectives of public service provision and thus of socialization in the energy and electricity sectors.
- The **European Treaties**, that is, the Treaty on the Functioning of the European Union (*TFEU*, *TEU*), do not fundamentally preclude socialization or the performance of public service tasks. According to Article 345 of the *TFEU*, the rules in Member States governing the system of property ownership remain unaffected. The case law of the ECJ on nationalization and prohibitions on privatization makes it clear that, in principle, Member States have discretion regarding the allocation and structure of ownership. While market economy principles such as fundamental freedoms are not overridden, interventions may be justified by (non-financial) reasons of public interest. This means that socialization in accordance with Article 15 is fundamentally compatible. The other competition provisions of the *TFEU* (state aid and antitrust law) also apply in principle to energy producers operating in a public economy. However, in the case of entrustment with services of public economic interest (SGEI), Article 106(2) *TFEU* allows for exceptions and qualifications if this is necessary for the provision of SGEI. The necessary act of entrustment requires a clear mandate with a specific public service objective. This is, in any case, required in the course of the act of socialization under Article 15. The Treaty on the Functioning of the European Union does not therefore fundamentally oppose socialization in the energy sector, but rather demonstrates considerable flexibility in this regard.
- The **regulatory legal framework** also applies in principle to a socialized energy supplier, unless the interpretation of individual provisions indicates otherwise. Energy industry law is regulated at the federal level in the Energy Industry Act (EnWG) and is largely determined by EU law; the legislative powers for energy law remain unaffected by socialization.

- The **grid level**, in particular, is subject to comprehensive regulation, which is largely determined by EU law. Legal requirements for the separation of grid and operations (“unbundling”), for ensuring non-discriminatory network access, and for fee regulation would also have to be observed by a socialized energy supplier. These guidelines are intended to prevent the exploitation of monopolies at the grid level and ensure fair competition “on the grid.” State ownership does not generally lead to company exemption from these obligations, and no special provisions are made for socialized companies. In individual cases, a different interpretation of individual provisions may be considered in light of Article 15(1) of the Basic Law, provided that it does not conflict with EU law. EU law itself also gives Member States the option of introducing special public service regulations at the secondary legislation level (Article 9 of the Internal Market for Electricity Directive), but these are currently lacking.
- If the socialized energy supply company does not operate at the grid level, it is affected as a grid user by access and fee regulation and the conditions specified therein.
- § 46 of the EnWG contains a special provision for **local distribution networks**, which requires regular tendering (at least every 20 years) for the rights of way necessary for network operation. This potential periodic change of ownership is not without its problems in view of long-term socialization. In particular, the question arises as to whether the periodic obligation to compete in tenders would be compatible with public service orientation (Article 15(1)) of a socialized grid operator. The provisions in § 46 of the EnWG are not required by EU law and could therefore be amended by ordinary federal law.
- At the **level of power generation**, certain restrictions on the freedom of action of electricity generators exist in order to ensure grid stability. Transmission system operators are permitted, in particular, to curtail renewable generation capacities and temporarily prohibit the shutdown of conventional generation capacities. These requirements serve to ensure system stability and would also have to be observed by a socialized energy supplier. However, this does not mean that insurmountable obstacles would stand in the way of a targeted transition towards renewable energies. Curtailment of renewable generation capacities must be compensated, and bans on decommissioning conventional plants do not lead to a permanent operating requirement.
- As far as consumer **supply** is concerned, there should generally be no conflict between regulatory requirements (especially basic supply) and the (social) aim of socialization. There are generally no restrictions on socially acceptable tariff arrangements.

III Expert Report

The first part of this report examines possible socialization projects in the energy and electricity sectors. It begins by outlining the basic structure of the German and European electricity sectors, which is of central importance both for socialization projects and for understanding the regulatory framework of energy law, which is largely shaped by EU law. When examining socialization projects, the constitutional concept of “means of production” is at the forefront, as is the question of the extent to which entire companies can fall under it. In addition, the variants “natural resources” and “land” are also briefly considered, as well as—in view of the often international activities of energy companies—the geographical scope of Article 15.

In the second part, the constitutional requirements for a “public economy” within the meaning of Article 15 of the Basic Law are elaborated, particularly with regard to the specific goals of social pricing and climate-neutral energy supply by a socialized energy supplier. The expert report does not aim to “examine” individual conceivable forms of public service activity from a legal perspective, as this would necessarily raise complex and specific follow-up questions in numerous legal areas. Instead, this part also addresses the constitutional foundations and requirements of Article 15.

The third part then deals with the relationship between the “public economy” required by Article 15 and the European Treaties, which pursue undistorted

competition in the Single Market as an essential goal and which must be strictly observed due to their primacy over national (constitutional) law. The key question here is the compatibility between the EU’s (internal) market model and the public economy model of Article 15 of the Basic Law. This is one of the focal points of the study. Even though EU law, and in particular EU energy law, is shaped by the principles of the market and competition, there are exemption clauses for the property structures of Member States (Article 345 TFEU) and services of general interest (for example, Article 106(2) and Article 14 TFEU) that need to be examined.

The concluding fourth section presents the basic principles of the energy law requirements for a socialized energy supplier. Such a supplier would still be bound by the legal requirements. Therefore, the regulatory guidelines under energy law for the grid level (for example, unbundling, grid access, and fee regulation), as well as the power generation level (redispatch, decommissioning), and the distribution level (supply to consumers) are presented in overview and evaluated in terms of their relevance to the activities of a public-service energy or electricity supplier.

Based on the results, conclusions are then drawn regarding the general possibilities and limitations of socialization in the energy sector, which can serve as a basis for further, more concrete considerations.

1

Possible socialization projects in the energy and electricity sector

According to Article 15(1) of the German Basic Law, land, natural resources, and means of production can be transferred to public ownership or other forms of public economy for the purpose of socialization. In order to determine the legally possible socialization projects in the German energy sector, that sector's basis structure is first presented. The scope of the socialization project referred to in Article 15(1), namely "means of production," will then be elaborated and applied to the energy sector.

1.1. Basic structure of the German energy sector

The German energy market for electricity and gas is regulated by the Energy Industry Act (hereafter referred to as EnWG). The purpose of the Act is to ensure that the general public is supplied with energy in the most secure, affordable, consumer-friendly, efficient, environmentally friendly, and greenhouse gas-neutral manner possible, with an increasing reliance on renewable energies (§ 1(1) EnWG). The EnWG creates the legal framework for market structures, pricing, and access to energy networks. The market structure comprises three central areas: energy producers, transmission grids, and distribution networks. It should be noted that this legal structure is relatively new and was only implemented as a result of the wave of privatization and liberalization in the 1990s. Previously, energy supply took place within legally protected regional monopolies.⁴

1.1.1. Energy producers

Energy producers supply energy (for example, for electricity and heat) that they obtain from various sources such as fossil fuels, renewable energies, or nuclear power. Some of the energy generated is supplied directly to large-scale consumers, but most of it is passed on to distributors and end consumers via

trading markets. Physically, electricity and gas producers feed into a unified grid—a uniform electricity mix emerges from the socket. Virtually, however, a market for electricity and gas is established in which end customers can choose between different energy suppliers and, indirectly, energy producers or at least production methods (for example, electricity from renewable energies).

1.1.2. Transmission grids

Transmission grids (so-called electricity highways) are high-voltage power lines and high-pressure gas pipelines, which are responsible for transporting energy over long distances and connecting large power plants to the distribution networks. The four German transmission system operators—TenneT, 50Hertz, Amprion, and TransnetBW—are responsible for ensuring the stability and reliability of the grids. Since these power grids are considered natural monopolies,⁵ they are regulated by the Bundesnetzagentur to ensure fair conditions for grid access (that is, equal treatment, no excessive fees). This is because energy producers and consumer alike depend on the reliable transport of electricity and gas, sometimes over long distances.

⁴ For more details, see, for example, Britz, in: Fehling/Ruffert, *Regulierungsrecht*, 2010, § 9 Rn. 10 f.

⁵ A natural monopoly exists when an infrastructure cannot be economically duplicated, meaning that the construction of a parallel infrastructure makes no economic sense. This is often the case with grids because of economies of scale (that is, the grid becomes more lucrative as the number of users increases) and high initial investments are necessary, making short-term market entry impossible in the event of insufficiencies ("sunk costs"); see, for example, ...

1.1.3. Distribution networks

Distribution networks distribute electricity and gas at the local level to end consumers such as households and commercial enterprises, for example, in a city. They are often operated by regional and municipal operators, such as municipal utilities, but also to a considerable extent by large energy companies. The respective network operators are responsible for maintenance and security of supply. As natural monopolies, distribution networks are also subject to supervision by the Bundesnetzagentur, which is tasked with ensuring reasonable prices and non-discriminatory access. As with transmission grids, their use is indispensable for energy producers and consumers alike, ensuring that electricity and gas reach “from the source into the homes” of consumers. At a technical level, the distribution networks are divided into high, medium, and low-voltage networks.

1.1.4. Energy supply companies

§3, No. 18 of the EnWG defines energy supply companies as natural or legal persons who supply energy to others, operate an energy supply network, or have the right of disposal over an energy supply network as owners. Customer installations are excluded from the definition according to § 3, No. 18 of the EnWG. Thus, the definition of energy supply companies covers companies at all levels of the German energy sector, both in terms of electricity and gas.

1.2. Means of production

Article 15(1) of the German Basic Law names means of production as a possible socialization project.

1.2.1. Concept of means of production in Article 15(1) of the Basic Law

The term “means of production”—from the Latin verb *producere* (to bring forth, to create)—initially raises the question of whether certain sectors could be excluded from the scope of application. This question is controversial in legal scholarship. Some scholars base their interpretation on a narrow understanding of the term, according to which only physical or legal means for the production of tangible goods are covered by the term.⁶ Examples cited in the literature include operating facilities (buildings or machinery), resources (raw materials), and patents or trademarks used in production.⁷ Ultimately, the decisive factor for the distinction is whether a means of production serves to manufacture a “tangible” or “material product” or whether a pure service product is to be created.⁸ This narrow interpretation is justified by the exhaustive list of other projects that can be socialized and the exceptional nature of Article 15 of the Basic Law.

In contrast, proponents of a broad interpretation also include the service and financial sectors under the concept of means of production in Article 15(1), so that the socialization of banks and insurance companies would also be possible. Since Article 15 aims at the (possibility of) restructuring the capitalist economic system, the term must be interpreted in accordance with this purpose, since the socialization of industry would not be possible without the possibility of socializing banks and insurance companies.⁹

The legislative history of the norm does not allow for a clear conclusion in this regard and is used to justify both a narrow and broad interpretation.¹⁰ A com-

parison with the Weimar Constitution (WRV) argues in favor of a narrow interpretation. Article 156 of the WRV, which dealt with the possibility of socialization, referred to “private economic enterprises,”¹¹ which could indicate a deliberately narrower formulation by the Parliamentary Council. A broad interpretation is supported by the fact that the Social Democrats in the Parliamentary Council wanted to keep open the possibility of extensive socialization of the economy and would probably never have agreed to a Basic Law that ruled it out.¹²

1.2.2. “Traditional” means of production in the energy sector

However, the question of which economic sectors are eligible for socialization is only relevant to this report insofar as it concerns, for example, pure electricity traders. With regard to the energy industry, there is broad consensus within the legal literature that the means of production in the energy industry can be socialized, as they belong to the production of goods and not to the production of services.¹³

This primarily concerns the level of power generation. Energy suppliers regularly operate energy generation facilities such as power plants, wind farms, solar plants, or refineries. These physical facilities serve to produce and supply a good—namely, electrical energy or gas—and thus represent traditional means of production. Even under a narrow interpretation of the term—limited to material resources for the production of goods—these facilities would fall within the energy industry. This is also confirmed by the historical interpretation of Article 15 of the Basic Law.

6 Brückner, *Sozialisierung in Deutschland*, 2013, p. 185 f.; Axer, in: *BeckOK GG*, 61st ed. 15.03.2025, Art. 15, Rn. 17; Durner, in: *Dürig/Herzog/Scholz, GG*, 105th ed. August 2024, Art. 15, Rn. 36; Sachs/Wendt, *GG*, 10th ed. 2024, Art. 15, Rn. 11.

7 Axer, in: *BeckOK GG*, 61st ed. 15.03.2025, Art. 15, Rn. 17.

8 Durner, in: *Dürig/Herzog/Scholz, GG*, 105th ed. August 2024, Art. 15, Rn. 36.

9 Jarass, in: *Jarass/Pieroth, GG*, Art. 15, Para. 2; Wieland, in: *Dreier, GG*, 3rd ed. 2013, Art. 15, Rn. 25; Kempny, in: *Dreier, GG*, 4th ed. 2023, Art. 15, Rn. 33.

10 Durner, in: *Dürig/Herzog/Scholz, GG*, 105th ed. August 2024, Art. 15, Rn. 38.

11 Art. 156(1), Sentence 1 WRV: “The Reich may, by law, without prejudice to compensation, transfer private economic enterprises suitable for socialization into public ownership, applying *mutatis mutandis* the provisions applicable to expropriation.”

12 Kempny, in: *Dreier, GG*, 4th ed. 2023, Art. 15, Rn. 32.

13 Durner, in: *Dürig/Herzog/Scholz, GG* Art. 15, Rn. 38.

In the past, energy companies were also considered suitable for socialization: Hermann von Mangoldt, then chairman of the Committee on Fundamental Issues and Fundamental Rights, explicitly cited power plants as an example of means of production in the Parliamentary Council,¹⁴ and they were also considered goods suitable for socialization in the Federal States. For example, Article 41(1) of the Constitution of the State of Hesse (HV) explicitly includes energy companies.¹⁵

The narrow concept of means of production, limited to the production of material goods, also includes electricity and gas networks. As essential operational bases of energy supply, these also represent means of production for supply, even though they distribute energy rather than produce it. They are an absolutely essential part of the overall production chain, since without them, the energy generated could not be delivered to consumers, and the energy industry as such would be unable to function. The current regulatory division of the energy industry into generation and grid levels serves to create competition in the supply of energy to end customers, but does not change the actual structure of the energy industry and the necessary joint consideration of production and grid infrastructure.

The legislature also considers energy supply infrastructure facilities to be inextricably linked to production. §1(1), No. 3 of the Energy Supply Security Act (Energiesicherungsgesetz – ENSiG) refers to “means of production in the commercial sector, insofar as these serve to supply electrical energy and natural gas.” This wording makes it clear that infrastructure for transport and distribution, such as transmission grids, distribution networks, pipelines, and storage facilities used for energy distribution, are regarded by legislators as means of production for supply.

As a result, the generation capacities (that is, power plants, etc.) and grid infrastructure of energy supply companies fall under the definition of means of production in Article 15(1) of the Basic Law. Consequently, these means of production in the energy industry could be transferred into public ownership on the basis of Article 15. Raw material deposits, such as coal fields, could also be considered projects for

socialization. Whether these are regarded as part of the means of production for generating energy or as natural resources within the meaning of Article 15 is ultimately irrelevant.

1.2.3. Socialization of entire companies

Furthermore, the question arises as to whether and how entire companies can be socialized, since Article 15 of the Basic Law specifies categories of material goods as objects of socialization, but does not explicitly include companies.

1.2.3.1. Fundamental possibility of socializing entire companies

The fact that companies are not expressly covered by Article 15 of the Basic Law appears to be a departure from Article 156 of the WRV, which referred to the transfer of “suitable private economic enterprises into public ownership.” The fact that, in contrast, companies are no longer explicitly listed as objects of socialization in Article 15(1) could be interpreted, in the context of an historical interpretation, as a deliberate departure from the legal situation under the WRV. However, the available documents on the genesis of the provision tell a different story: both in the descriptive part of the Herrenchiemsee draft and in the deliberations of the Committee on Fundamental Issues of the Parliamentary Council, there was repeated reference to companies or groups of similar companies in relation to projects of socialization included in the Basic Law, and specifically in relation to the “means of production.”¹⁶ As a result, the historical interpretation clearly supports the inclusion of entire companies in the concept of means of production. Against this background, even authors who wish to limit the scope of application to the production of material goods argue in favor of the permissibility of socializing entire companies, provided that they serve the production of material goods.¹⁷

The ability to socialize entire companies is also implicitly affirmed by proponents of an unwritten criterion of “ripeness for socialization,” which considers a certain size or position of power of a company to

14 Durner, in: Dürig/Herzog/Scholz, GG Art. 15, Rn. 10.

15 Art. 41 of the HV has not been applicable since the Basic Law came into force.

16 Durner, in: Dürig/Herzog/Scholz, GG, Art. 15, Rn. 10 f.

17 Durner, in: Dürig/Herzog/Scholz, GG, Art. 15, Rn. 41.

be a prerequisite for socialization in accordance with the WRV.¹⁸ It is highly controversial whether and to what extent a criterion of “ripeness for socialization” is legally required at all,¹⁹ or at least to be taken into account within the framework of proportionality.²⁰ For the energy sector, which in the historical discussion is considered a “traditional case” of Article 15 of the Basic Law (see above), the question is likely to play only a minor role, if any. Regardless, discussion about the exemption of small businesses leads to the opposite conclusion that companies as such can in principle be subject to socialization.

Even from a teleological perspective, that is, in terms of its purpose, Article 15 aims precisely at transferring not only individual goods, but also larger economic bodies from private to public economy. The socialization of entire companies is further supported by the fact that it is undisputed that at least all essential means of production and assets of a company could be transferred into public ownership. Ancillary and auxiliary operations that do not belong to the economic sector are also covered, insofar as they serve the main business.²¹

1.2.3.2. Ways to socialize entire companies

If one affirms the potential for socialization of entire companies, the question arises as to how this could be achieved. On the one hand, it is conceivable to transfer all assets, such as tangible goods, trademarks, rights, real estate, investments, contracts, etc. to a public body. The company would be stripped of its assets and thus effectively dissolved.

The other option would be the socialization of legal entities, such as corporations and partnerships,

or the shares or holdings therein. It is questionable whether shares in a corporation could also be socialized directly. In practice, it would probably be more efficient and legally secure to socialize a large company via its shares rather than its assets.²² This is because the socialization of all assets requires, among other things, their sufficiently specific designation,²³ at the latest during the administrative implementation of the law. In the case of socialization of shares, on the other hand, the company is taken over “as such,” including all assets, employees, contracts, licenses, etc.

According to the wording, shares themselves do not directly fall under the term “means of production.” However, it seems unconvincing that the legislator of a socialization law should be constitutionally required to prescribe a more complex and legally uncertain procedure for socialization solely on the basis of the term “means of production” if the norm is also intended to allow for the socialization of the entire company.²⁴ If one accepts the prevailing view that the object of socialization can be the company itself as a “means of production,” then the concept cannot be used to argue against a particular path for socialization. The decisive factor is that the company is actually the object of socialization, that is, it is transferred in its entirety to a public economy (see below, section 2). This would normally require a *complete* transfer of shares to a public body.²⁵

This result is ultimately confirmed by a comparison with expropriation under Article 14 of the Basic Law. Although the aim is somewhat different from that of socialization under Article 15, it is comparable in terms of the withdrawal of the power of disposal. The expropriation of company shares for the purpose

18 For discussion on the question of ripeness for socialization, see “Wissenschaftliche Dienste des Deutschen Bundestags, Verfassungsrechtliche Vorgaben der Vergesellschaftung von Wohneigentum eines privaten Wohnungsunternehmens,” WD 3 – 3000 – 105/19, report dated April 12, 2019, p. 8 f, with further references; Brückner, *Sozialisierung in Deutschland*, 2013, p. 189.

19 In contrast, see Durner, in: Dürig/Herzog/Scholz, GG, Art. 15, Rn. 93 ff.

20 See Axer, in: *BeckOK GG*, 61st ed. 15.03.2025, Art. 15, Rn. 19.

21 Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 15, Rn. 41.

22 In this context, a company takeover is referred to as a “share deal” (purchase of shares) and an “asset deal” (purchase of assets).

23 See, for example, in the context of company purchase agreements, Hübner, in: *Scherer, Unternehmensnachfolge*, 6th ed. 2020, § 3, Rn. 225 ff.

24 Kempny comes to the same conclusion in: Dreier, GG, 4th ed. 2023, Art. 15, Rn. 33.

25 It would likely be impermissible, at the very least, to “socialize” only a small share of a company—in such a case, the object of socialization would not actually be the company itself, but only (minority) shares in it, which as such no longer fall under the concept of means of production. Conversely, it could possibly be argued that small shares could remain with private sector actors, provided that they have no influence on the business and the company as a whole is removed from the capitalist economic system. However, this would in any case result in unnecessary legal uncertainty. It also seems to be more of a theoretical question, as there is unlikely to be any private sector interest in participating in a purely public sector company.

of nationalizing a company is provided for by the legislature in other contexts, for example under § 18(2) No. 1-3 EnSiG to secure the energy supply in the area of critical infrastructure.²⁶ According to § 1(2) of the Financial Market Stabilization Act (Rettungsübernahmegesetz – RettungsG), shares in companies in the financial sector and their subsidiaries are also permissible objects of expropriation. Against this background, it would be systematically unconvincing to permit socialization, unlike expropriation (Article 14), only through the method of socializing all assets.

As a result, Article 15 of the Basic Law thus permits the socialization of entire companies in the energy sector, including, for example, the socialization of (all) shares in corporations.

Conversely, Article 15 allows not only for the socialization of entire groups of companies, but also of individual companies. With regard to the question of whether such socialization would constitute a case-by-case law, the prevailing opinion sees Article 19(1) not as an absolute prohibition of case-by-case measures, but as a concretization of the principle of equality. Therefore, individual companies can also be socialized, as long as the legislature complies with the requirements of Article 3(1) of the Basic Law. This provides considerable scope for differentiation, so that the socialization of a single energy supply company would, in principle, be constitutionally possible.²⁷

1.2.4. Regional scope of Article 15

Since socialization pursuant to Article 15(1) is effected by law, the authority to socialize is determined by the scope of sovereign power of the respective legislature. The Basic Law does not contain any explicit provision for the Federal States in this respect. However, their sovereign authority is not unlimited, but follows the so-called principle of territoriality. This requires that the direct effects of an act of sovereignty be limited to the respective Federal State;²⁸ or, in the case of socialization by the Federal government, to the territory of the Federal Republic.²⁹

A German socialization law can therefore only directly cover assets that are subject to German sovereignty. As such, means of production located abroad (for example, power plants) cannot be directly transferred into public ownership by a German law.

Despite this limitation, socialization can have indirect effects abroad by restructuring domestic legal relationships with foreign connections. For example, a German law could transfer all shares in a corporation into public ownership. If the corporation had foreign subsidiaries, the body operating the public sector enterprise would indirectly become the owner of those foreign subsidiaries. This report thus assumes the “baseline case” of state ownership, in which case the shares would be transferred to the state. However, other forms of organization for a public economy³⁰ are also possible and should be considered in any specific socialization project. An abstract examination of the various design options and their implications goes beyond the scope of this report, which is intended to provide a basic orientation regarding the possibility of socialization in the energy sector.

As a result of socialization, control over foreign means of production would indirectly pass to the public sector or public utility bodies. If an internationally operating energy supplier based in Germany is subject to German law as a legal body, the transfer of its shares or domestic assets could thus result in its foreign operations also falling under public control. Socialization could therefore effectively transfer a globally operating company, including its foreign holdings, into public ownership, insofar as it is subject to German law. The legal guidelines applicable to the subsidiaries abroad would, of course, continue to apply even if the German parent company were subject to public service control. Socialization concerns only the allocation of assets; it would in no way entail the power to exercise sovereign authority abroad.

Note: The question of the amount or modes of compensation is not addressed in depth in this report. However, it should be noted at this point that, in addi-

26 On the relationship between Article 15 and measures under § 17 et seq. EnSiG: Winkler/Zeccola/Michailidou, “Die Renaissance des Energiesicherungsgesetzes. Verfassungsrechtliche Implikationen der Maßnahmen nach §§ 17 ff. EnSiG und das Potenzial des Art. 15 GG,” NVwZ 2023, 545.

27 Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, GG Art. 15, Rn. 84.

28 Kommission zum Volksentscheid zum Volksentscheid (2023) “Vergesellschaftung großer Wohnungsunternehmen, Abschlussbericht,” June, 2nd ed., p. 28, Rn. 74.

29 Herdegen, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 25, Rn. 54.

30 See section 2 below for the requirements for a “public economy” within the meaning of Article 15 of the Basic Law.

tion to Article 15(2) of the Basic Law, which provides for compensation arrangements in the event of socialization, foreign investors could claim the protection of international investment protection agreements.³¹ The Energy Charter Treaty (ECT) could be particularly relevant. Germany³² and, most recently, the EU³³ have withdrawn from this treaty, but the so-called “sunset clause” in Article 47(3) of the ECT stipulates that protection under the agreement continues for 20 years after withdrawal. Other investment protection agreements may also be relevant.

As a result, Article 15 of Basic Law also allows internationally integrated companies based in Germany to socialize their domestic means of production and, indirectly, to control their foreign assets.

31 In this context, in connection with the socialization of housing corporations, see the final report of the expert commission on the referendum on the socialization of large housing companies (fn. 3), para. 397 ff. In the housing sector, the issue was probably of less practical significance than in the energy sector.

32 See, for example, <https://umweltinstitut.org/welt-und-handel/meldungen/grosser-erfolg-fuer-klima-und-demokratie-deutschland-verkuendet-ausstieg-aus-dem-energiecharta-vertrag/>.

33 See EU Commission, press release dated June 28, 2024, https://ec.europa.eu/commission/presscorner/detail/de/ip_24_3513.

1.3. Natural resources and land

By way of the other elements set out in Article 15(1) of the Basic Law, natural resources used in the energy sector—such as mineral deposits—as well as land, including any buildings on it, can also be socialized.³⁴ This could include, for example, (power plant) sites owned by energy producers, although the transitions and differences to the socialization of “means of production” can be left aside in the present context (see above). However, as far as coal, oil, and gas mineral resources are concerned, it should be noted that, under current mining law, these are not actually owned by private companies, but are “free for mining” and thus ownerless (§ 3(3) of the Federal Mining Act – BbergG). Instead, the object of socialization here would likely be the rights granted for the extraction of raw materials (§§ 7 ff. BbergG).

In the context of a conceivable socialization of these rights to coal, oil, or gas fields, the further question arises as to whether such socialization can also serve the purpose of the non-operation or phasing out of extraction. This cannot be explored in great detail here, but would likely be the case if the socialized company’s phase-out plan were linked to a positive concept (“transformation”).

1.4. Results

The concept of means of production offers a broad scope within which various parts of the German energy sector can be categorized. Transmission grids, distribution networks, and power generation facilities represent potential projects of socialization as means of production.

The companies behind them can also be socialized—even those that operate parts of their businesses abroad. Socialization can also take place by transferring (all) shares in the company, such as stocks, to a public service body.

Other socialization projects, “natural resources” as well as “land,” also offer the possibility of socializing individual coal, gas, and, where applicable, oil deposits or properties located in Germany owned by energy producers.

³⁴ Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 15, Rn. 35.

2

Public economy

Once the potential projects of socialization in the energy sector have been identified, it is necessary to clarify what the concept of public economy in Article 15(1) of the Basic Law encompasses and to what extent the objectives pursued by socialization are compatible with the objective of a public economy.

2.1. Concept of a public economy

The concept of a public economy in Article 15(1) of the Basic Law requires a form of economic activity that is not geared towards individual profit-making, but directly towards meeting social needs and pursuing other public welfare goals. A public economy stands in contrast to a "private economy" as a form of economic system geared towards profit.³⁵ This is closely related to the distinction between private property (Article 14) and common property, which is mentioned in Article 15 as a sub-form of the public economy: individual property (Article 14) is for private use, that is, the respective owners may, in principle, dispose of it freely within the framework of the law.³⁶ A private economy based on this principle is therefore directly oriented toward the generation or maximization of profit (which does not preclude indirect effects for public benefit). In contrast, common ownership and a public economy are directly aimed at satisfying common needs and realizing the common good or general interests (which in turn does not preclude the possibility of making a profit per se; see below).³⁷

This report does not assume a specific form of public economy, nor does it examine a specific legal form for socialized energy producers. Depending on

the individual case, various structures may be possible, raising further legal questions that would extend beyond the scope of this report. Instead, the prerequisites and limitations of public economy management are examined without specifying a particular management model or legal form.

According to the wording of Article 15(1) of the Basic Law, the standard case of public economy is transfer to public ownership. Transfer to public ownership means the transfer of previously privately owned property to a suitable public service body.³⁸ This can occur primarily (though not necessarily)³⁹ through transfer to an appropriate lawful public institution. Although transfer to a lawful public organization is not mandatory, the following report is based on this "standard case."⁴⁰ This includes all legal entities under public law, in particular state or local authorities, foundations under public law, and institutions under public law. These institutions differ from private owners from the outset (that is, by virtue of their obligations under public law, for example, to fundamental rights) in that they do not operate for private gain but within the framework of public goals.⁴¹

35 Axer, in: BeckOK GG, 59th ed. 15.6.2024, Art. 15, Rn. 11; Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 15, Rn. 50, each with further references.

36 Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 15, Rn. 46.

37 Hummel, Grundfälle zu Art. 15 GG, JuS 2008, 1065 (1067); Axer, in: BeckOK GG, 59th ed. 15.6.2024, Art. 15, Rn. 10.

38 Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 15, Rn. 44.

39 For conceivable organizational structures, see Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 15, Rn. 54 ff.

40 In connection with the possible structures of different forms of common property and public economy, extensive legal questions arise that extend beyond the subject-matter and aim of this expert report.

41 Abschlussbericht der Kommission zum Volksentscheid (Fn. 3), p. 33, Rn. 93 f.

The requirements of Article 15(1) of the Basic Law are not limited to the transfer of ownership to a public service body. Because common ownership is only conceived as one possible form of public economy, it must also be managed as a public utility.⁴² There is a public welfare obligation attached to the management. Socialization pursuant to Article 15(1) may not, for example, simply be used to generate additional revenue for the public sector. Therefore, the aims pursued by socialization must be goals of the common good. In addition, generating a certain profit should remain a legitimate secondary objective.⁴³ However, this must take a back seat to the public welfare objective and must not be played off against it under any circumstances. It is not possible to determine the boundary between these two objectives in abstract terms. In general, it should be noted that the public welfare aim of the management must in any case be at the forefront, and furthermore, any profits incurred must, in the view of the authors, be spent in accordance with the public welfare objective.

2.2. Goal of a public economy

In the case of socialization, Article 15(1) of the Basic Law identifies public economy management as an independent objective of constitutional rank, which also comes into play “as such” in a case-by-case proportionality assessment.⁴⁴ According to the conclusive view of the expert commission of the State of Berlin, in the case of socialization, a modified proportionality assessment is required in each individual case.⁴⁵ In concrete terms, this means that constitutional considerations must not focus solely on the purposes “behind” socialization, but that socialization itself (that is, withdrawal from the capitalist economic system) must be considered as a legitimate goal in its own right.

As is often the case, the socialization of the energy sector examined here is intended to pursue concrete objectives beyond mere socialization: in this instance, according to the expert report outlined at the outset, socialization is intended to contribute to a social and environmentally friendly energy supply. It is therefore necessary to clarify the extent to which these goals are compatible with the constitutional objective of a public economy.

Even though socialization can pursue various goals,⁴⁶ these must always serve the common good. Although various laws refer to the concept of the common good or general welfare, the term remains vague. Neither case law nor legal scholarship has yet succeeded in giving the concept of the common good a clear definition.⁴⁷ The reason for this is that in a democracy, the concept of the common good must remain open, as it is an essentially contested concept.⁴⁸ Debate surrounding the meaning of the common good stands at the core of democratic discourse. What the common good actually is can thus only be decided politically within the democratic process and cannot be determined through legal interpretation. For this reason, the definition of the common good must be left to the legislature and not the judiciary, which enjoys considerable leeway in this regard.⁴⁹

42 Abschlussbericht der Kommission zum Volksentscheid (Fn. 3), p. 33, Rn. 95 f.

43 Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 15, Rn. 51 with further references.

44 Abschlussbericht der Kommission zum Volksentscheid (Fn. 3), p. 39, Rn. 123 ff.

45 Abschlussbericht der Kommission zum Volksentscheid (Fn. 3), p. 39, Rn. 123 ff.

46 Abschlussbericht der Kommission zum Volksentscheid (Fn. 3), p. 44, Rn. 146 ff.

47 Wieland, in: Dreier (ed.), *Grundgesetzkommentar*, 3rd ed. 2013, Vol. 1, Art. 14, Rn. 116.

48 So-called “essentially contested concepts,” cf. Gallie, *Proceedings of the Aristotelian Society* 56 (1956), 167 f. On their significance in a democratic constitutional state: Möllers, *Demokratie – Zumutung und Versprechen*, 2008, p. 11.

49 Wieland, in: Dreier (ed.), *Grundgesetzkommentar*, 3rd ed. 2013, Vol. 1, Art. 14, Rn. 118.

In order to examine whether the pursued objectives—in addition to the independent goal of socialization—of an environmentally friendly and affordable energy supply are purposes of the common good, relevant parliamentary laws and, in particular, the Basic Law must therefore be consulted.

2.2.1. Social pricing

Affordable energy supply is one of the stated purposes of the Energy Industry Act (EnWG) pursuant to § 1(1). It has thus been explicitly defined by the legislature as an objective of the common good. Furthermore, the affordable supply of energy to the population as part of public services has a direct constitutional link to the social welfare principle of Article 20(1) of the Basic Law.⁵⁰ The goal of social pricing in the field of energy supply is thus a goal of the common good. Incidentally, the independent purpose of Article 15—namely, to withdraw parts of the economy from a profit-maximizing system—is closely linked to the goal of affordable and socially responsible supply. Ultimately, there is no doubt about the legitimacy of social supply objectives as an object of socialization.⁵¹ The much-discussed and already repeatedly mentioned socialization of large housing corporations also serves this goal.

2.2.2. Climate and environmentally-friendly energy supply

The situation may be somewhat less clear with regard to climate and environmentally-friendly supply, as this is not as closely related to the purpose of socialization.⁵² Nevertheless, provided that the constitutional purpose of socialization is upheld, that is, that operations are not conducted for private gain, it cannot be denied that climate and environmental protection are legitimate common good objectives that may be pursued (in part) within the framework of socialization. An environmentally friendly energy supply serves climate protection, which has constitutional status under Article 20a of the Basic Law. The climate protection requirement stipulates, among other things, that climate neutrality must be pursued and that a natio-

nal reduction pathway be followed that is compatible with the Paris temperature targets.⁵³ This requires the promotion of renewable energies and the reduction of climate-damaging emissions in order to minimize environmental and climate damage. A sustainable energy policy thus contributes to the constitutionally required protection of the environment and climate.

This is also reflected in the legal framework. In addition to the goal of affordable energy supply, § 1(1) of the EnWG cites environmentally friendly and greenhouse gas-neutral energy supply, increasingly based on renewable energies, as a legislative aim and thus as an energy supply goal of the common good. The second half of the sentence takes into account the objectives of § 1(2) of the German Renewable Energy Sources Act (EEG), according to which the share of renewable energies in the electricity supply is to gradually increase to 80% by 2050.⁵⁴

In light of all this, climate and environmental protection are clearly recognized objectives of the common good that may be pursued through socialization.

50 Energy supply as a service that citizens need in order to secure a dignified existence: BVerfGE 66, 248 (258); 38, 258 (270).

51 See also Durner, in: Dürig/Herzog/Scholz, GG, 105th ed. August 2024, Art. 15, Rn. 51, with further references.

52 Durner, loc. cit., for example, is somewhat doubtful here.

53 See BVerfG, decision from March 24, 2021, 1 BvR 2656/18 et al., Ls. 2. and 2.d.

54 Theobald, in: Theobald/Kühling, *EnWG*, 126th ed. July 2024, § 1, Rn. 16.

2.3. Results

Article 15(1) of the Basic Law designates the management of a public economy as an independent purpose of constitutional rank. The additional objectives pursued in the present context of an environmentally friendly and affordable energy supply are important matters of the common good. Insofar as these are pursued within the framework of a non-profit economic system, they do not conflict with the requirement of a "public economy," but rather represent (further) legitimate purposes of socialization, which would have to be considered in a modified proportionality assessment in the event of concrete socialization. This has also been recognized by the expert commission appointed to examine the socialization of large housing corporations, with regard to the (partial) goal of management that is also geared towards climate protection.⁵⁵

⁵⁵ Abschlussbericht der Kommission zum Volksentscheid (Fn. 3), Rn. 184

3

Relationship between a public economy and the European Treaties

Energy law is largely shaped by EU law, which takes precedence over national (constitutional) law and must therefore be strictly observed in connection with socialization in the energy sector. In this respect, the first question arises as to whether the European Treaties fundamentally preclude the socialization of an energy supplier (see section 1). Secondly, it must be clarified to what extent a publicly oriented energy supplier is subject to the compensation rules of the European Treaties and may be restricted in its operations by these rules (2).

3.1. Member State autonomy with regard to property ownership

According to Article 345 of the TFEU, the property structures of the Member States of the Treaties remain unaffected. At the same time, the establishment of a Single Market to prevent distortions of competition requires Member States to largely refrain from intervening in the economy.⁵⁶ However, EU law is not limited to the establishment and optimization of the Single Market. Article 3(3) of the TEU emphasizes the importance of the Single Market and its fundamental freedoms, but at the same time places it at the service of the general interest. In this sense, various provisions of EU law, for example, provide a special legal status for so-called services of general economic interest (SGEI), which essentially correspond to the concept of services of general interest. Here, Member States are granted greater leeway, and the private sector "principle of competition" of the EU Treaties is partially relativized due to the relevance of the common good of these economic sectors (Article

14, 106(2) TFEU, Article 36 CFR). Similarly, Article 345 of the TFEU can also be classified among those provisions that strikes a balance between a competitive Single Market and the provision of public services.⁵⁷

The autonomy of Member States with regard to property ownership also means that public undertaking does not violate the Treaties, but is recognized as a legitimate part of the concept of the Common Market.⁵⁸ Article 345 of the TFEU originally also served to keep open the possibility of socialization of the means of production by Member States.⁵⁹

In its landmark decision *Costa v. E.N.E.L.*, which also established the primacy of EU law, the European Court of Justice (ECJ) explicitly ruled that nationalization in the energy sector can be compatible with EU law as long as it does not discriminate on the basis of nationality.⁶⁰ In this context, nationalization is to be understood as an umbrella term that also includes socialization pursuant to Article 15 of the Basic Law.

56 Kingreen, in: Calliess/Ruffert, *TFEU*, 6th ed. 2022, Art. 345, Rn. 3.

57 Kingreen, in: Calliess/Ruffert, *TFEU*, 6th ed. 2022, Art. 345, Rn. 3.

58 Kingreen, in: Calliess/Ruffert, *TFEU*, 6th ed. 2022, Art. 345, Rn. 12.

59 Durner, in: Dürig/Herzog/Scholz/, *GG*, 105th ed. August 2024, Art. 15, Rn. 24.

60 ECJ, Ruling from July 15, 1964, Case C-6/64, *Costa/E.N.E.L.*

This follows from the fact that, in the “baseline case” examined here of a transfer to public ownership by a lawful public body, private ownership is withdrawn and public or state ownership is established. However, this should also apply to a transfer to lawful private bodies which is not examined in detail here⁶¹—because in such cases, private ownership would have to be restructured under public law to such an extent so as to preserve the public economy that it would be comparable to nationalization.⁶² As a result, the socialization of the means of production in the energy sector, including companies, by the Member States is therefore permissible in principle.⁶³

However, in the event of socialization and subsequent public economic activities, Member States remain bound by the fundamental freedoms, the prohibition of discrimination, and public economic competition law (see section 2).⁶⁴ This means, in particular, that “activities that restrict competition” require justification, although these are more extensive in the area of services that are particularly relevant to the common good. Public undertakings are thus bound by European competition rules (Article 106(1) TFEU); however, in the area of services of public economic interest, Article 106(2) of the TFEU provides special possibilities for justification insofar as the common good objective pursued would otherwise be jeopardized (see below, section 2). The situation is similar with regard to discriminatory measures in the context of property allocation.⁶⁵

The balancing of public interests and the principle of competition in the design of property structures can be illustrated by a case that is fundamentally comparable to socialization and also concerns the energy industry: in 2013, the ECJ had to rule on

the admissibility of a privatization ban in the Netherlands in the so-called *Essent* decision.⁶⁶ Specifically, the case concerned a regulation prohibiting the sale of shares in electricity and gas distribution network operators to private investors. The entire Dutch supply network was owned by the state-owned operator *Essent*, so the case was essentially about permanently preventing the “intrusion” of private sector interests into network operations. This is interesting in the present context not least because the long-term safeguarding of the objectives of the public economy is a key issue in the actual implementation of a specific socialization process.

In its ruling, the ECJ first confirmed that the European Treaties do not, in principle, preclude either the nationalization or privatization of companies.⁶⁷ At the same time, it found that Article 345 of the TFEU does not mean that Member States are completely free to structure their property systems and are not subject to the fundamental principles of competition under the TFEU (for example, non-discrimination, freedom of establishment, and the free movement of capital).⁶⁸ Rather, the outcome depends on a balancing of interests: a ban on privatization (like nationalization) falls under Article 345 of the TFEU and may ultimately be compatible with EU law. Member States are not prohibited from introducing or maintaining the public ownership of energy supply networks. However, a ban on privatization restricts the free movement of capital and must therefore be justified. Such justification is possible if it is not solely driven by economic motives (in particular, profit maximization) and if it pursues an objective that is in the public interest.⁶⁹ The restrictions must then be proportionate to the objectives pursued and not exceed what is necessary. In this

61 See above, footnote 39.

62 Even if the transfer to and public economic obligation of private bodies were no longer semantically covered by the term “nationalization,” it would still be covered by the freedom to shape the “property system.” Ultimately, the decisive factor is whether the legal order of the Union is otherwise preserved, as will be discussed shortly.

63 See also Kempny, in: Dreier (ed.), *GG*, 4th ed. 2023, Art. 15, Rn. 6 ff.; Axer, in: *BeckOK GG*, 59th ed. 15.06.2024, Art. 15, Rn. 9; Kingreen, in: Calliess/Ruffert, *TFEU*, 6th ed. 2022, Art. 345, Rn. 12.

64 Durner, in: Dürig/Herzog/Scholz, *GG*, 105th ed. August 2024, Art. 15, Rn. 24; Kingreen, in: Calliess/Ruffert, *TFEU*, 6th ed. 2022, Art. 345, Rn. 12.

65 Kingreen, in: Calliess/Ruffert, *TFEU*, 6th ed. 2022, Art. 345, Rn. 12.

66 ECJ, Ruling from October 22, 2013, joined Cases C-105/12 to C-107/12, *Essent*.

67 ECJ, loc. cit., Rn. 30.

68 ECJ, Ruling from October 22, 2013, joined Cases C-105/12 to C-107/12, *Essent*, Rn. 36.

69 ECJ, Ruling from October 22, 2013, joined Cases C-105/12 to C-107/12, *Essent*, Rn. 51 f.

specific case, consumer protection and the safeguarding of investments were recognized as overriding reasons of public interest.⁷⁰ Environmental protection and social objectives have also been recognized by the ECJ as overriding reasons of public interest in other decisions.⁷¹

These standards are structurally similar to those that apply at the constitutional level when reviewing Article 15: there, too, public interest objectives that exceed profit generation and a proportionality assessment are required. With regard to the specific case, however, it should be noted that this “only” concerned the level of the grid, where competition is impossible anyway due to the inherent monopoly structure. This does not mean that the standards developed there cannot also be applied to the socialization of an energy producer or supplier—in fact, this should generally be the case. However, under EU law, it would probably not be permissible to use this means of socialization to completely eliminate competition at the level of the producer or supplier, that is, to socialize all companies operating there and convert them into a single provider. In this respect, the concept of the European Treaties (and, incidentally, the secondary legislation on competition in the energy sector, see below 4.2) sets a limit. Widespread nationalization of entire economic sectors is likely to regularly violate the prohibition of discrimination, fundamental freedoms, and other provisions of the Treaties due to its monopolizing effect.⁷² This would have to be examined in detail in each individual case.

As a result, the European Treaties do not pose a fundamental obstacle to the socialization of parts of the energy industry. However, socialization projects must comply with fundamental freedoms and the prohibition of discrimination.

70 ECJ, Ruling from October 22, 2013, joined Cases C-105/12 to C-107/12, *Essent*, Rn. 58 f.

71 Kingreen, in: Calliess/Ruffert, *EUV/TFEU*, 6th ed. 2022, Art. 36 *TFEU*, Rn. 82.

72 Durner, in: Dürig/Herzog/Scholz, *GG*, 105th ed. August 2024, Art. 15, Rn. 24.

3.2. Relationship between a public economy and the competition rules of the Treaty on the Functioning of the European Union (TFEU)

The competition rules of the TFEU serve to ensure undistorted competition in the Single Market. They are intended to prevent market distortions and thus guarantee fair competition, economic efficiency, and consumer protection. Competition law also restricts state intervention in market activities, in particular through state aid control provisions pursuant to Article 106-109 of the TFEU.

For the purposes of this study, it must be clarified to what extent the EU competition rules of the TFEU apply to public economy undertakings, since Article 15 of the Basic Law requires companies to be oriented toward public service (see above, section 2). The extent to which the European Treaties prescribe market-oriented participation in competition is therefore decisive for the actual scope of public service activities.

Socialization does not mean that the energy supplier is exempt from control by the European competition law. Rather, a socialized company remains subject to the competition rules of the TFEU if it continues to engage in economic activity.⁷³ This follows from Article 106(1) of the TFEU, which stipulates that Member States shall not adopt any measures contrary to the Treaties, in particular their competition rules, with regard to public services. As a result, a socialized energy supplier would generally be classified as a “public undertaking”; the decisive factor is whether the state can exert controlling influence on planning and business operations.⁷⁴

However, as already mentioned, EU law provides for specific exemptions or special justifications if an undertaking has been entrusted with a so-called service of general economic interest (SGEI). SGEIs are market-based services that are provided in the public interest, associated with special public service obligations, and would not be provided without state in-

tervention (or would be provided under different conditions).⁷⁵ This would in principle apply to a socialized enterprise in the energy sector which, as described above, would already be subject to special public service obligations under the constitution.

3.2.1. Exemption from competition rules under to Article 106(2) of the TFEU

A public service energy supplier could be partially exempt from the competition rules of the TFEU under the conditions set out in Article 106(2) of the TFEU.

According to Article 106(2), undertakings entrusted with SGEIs are subject to EU competition law only insofar as the application of these rules does not either legally or factually obstruct the performance of their tasks. The provision is intended to ensure that entrusted undertaking can effectively fulfil their public interest tasks—for example, the provision of basic services such as energy, water, or public transport—even if this leads to a restriction of competition in certain areas. The exception applies only if the competition rules would significantly impede the performance of tasks and only to the extent that such restriction is necessary.⁷⁶

Article 106(2) thus forms the interface between economic interventions by the guarantor state, on the one hand, and the Member States’ constitutional obligation to ensure a system of undistorted competition, on the other.⁷⁷ This role is reinforced by Article 14 of the TFEU, which obliges the EU and the Member States to guarantee the economic and financial conditions for SGEIs and provides a basis for further sector-specific regulations. It is the legal basis for the special role of public services in European economic law. It has value similar to that of fundamental rights and is part of the fundamental principles of the Trea-

⁷³ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, July 19, 2016, Rn. 6.

⁷⁴ Jung, in: Calliess/Ruffert *TFEU*, 6th ed. 2022, Art. 106, Rn. 12.

⁷⁵ See <https://eur-lex.europa.eu/DE/legal-content/summary/state-aid-application-of-rules-for-services-of-general-economic-interest-sgei.html>.

⁷⁶ Jung, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, Art. 106, Rn. 47.

⁷⁷ Wernicke, in: Grabitz/Hilf/Nettesheim, *TFEU*, 83rd ed., July 2024, Art. 106, Rn. 3.

ties, which must be observed when interpreting the more specific provisions that follow.⁷⁸ Unlike Article 106(2), Article 14 of the TFEU does not dogmatically treat public services as a breach of the competitive market order, but recognizes their independent significance. This is based on the view that economic systems oriented towards the common good are at the core of the European social model and constitute an essential part of common European values.⁷⁹

Prior to the liberalization of the energy markets, energy supply companies fell within the scope of Article 106(2) of the TFEU, according to traditional ECJ case law and the Commission's understanding. Since the liberalization of the energy supply industry, the role of energy supply companies must be considered in a differentiated manner.⁸⁰ As a rule, energy suppliers today lack an individuated act of entrustment,⁸¹ which would be necessary for the application of Article 106(2). Such an act of entrustment requires that the energy supplier has been assigned a task in the above sense by virtue of an act of public authority (for example, by law or administrative decision).⁸² However, the fact that such an act of entrustment is often lacking in today's privately structured energy industry is merely a statement of fact and not a normative requirement: if an individual act of entrustment exists for an energy supplier, the scope of application for Article 106(2) is reopened.

The classification of an activity as an SGEI is determined by the Member States, who have a wide margin of discretion in this regard.⁸³ As mentioned above, the entrustment must be carried out by means of a legally binding measure, such as a law, an administrative decision, or a concession contract. This must clearly specify the particular obligations of the

undertaking, including the nature of the service, the duration of the entrustment, and any financial compensation mechanisms.⁸⁴

For a socialized energy supplier, such an act of entrustment is contained in the socialization law itself. This essentially follows from the constitutional guidelines, which only allow socialization for public service purposes, which would also have to be laid down in the socialization law (see above, 2.2). Entrustment within the meaning of Article 106(2) could also be emphasized once again by the legislator, but this is not necessary. Member States have a wide margin of discretion when classifying services as SGEIs.⁸⁵ Article 9 of Directive 2019/944 on common rules for the Internal Market for Electricity⁸⁶ defines SGEIs in the energy sector as public service obligations "which may relate to security, including the security of supply, regularity, quality, and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection." In this respect, too, there is clear congruence with the goals of socialization examined here. On the other hand, it would be doubtful whether the "pure" socialization goal (in the sense of a withdrawal from the capitalist economic system) would be sufficient for the application of Article 106(2); however, this is irrelevant in view of the (further) specific objectives pursued.

78 Jung, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, *TFEU* Art. 14, Rn. 19. The "value similar to that of fundamental rights" is confirmed by Article 36 of the Charter of Fundamental Rights of the European Union (CFR), according to which the Union recognizes access to services of general economic interest.

79 Jung, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, Art. 14, Rn. 21.

80 Jung, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, Art. 106, Rn. 43.

81 Jung, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, Art. 106, Rn. 43.

82 Jung, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, Art. 106, Rn. 42.

83 Wernicke, in: Grabitz/Hilf/Nettesheim, *TFEU*, 83rd ed., July 2024, Art. 106, Rn. 44.

84 Wernicke, in: Grabitz/Hilf/Nettesheim, *TFEU*, 83rd ed., July 2024, Art. 106, Rn. 49; Theobald/Kühling, *Energierecht*, *TFEU* Art. 101–102, Rn. 95.

85 "Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest," January 11, 2012, OJ EU C 8/11, Rn. 45 ff.

86 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

3.2.2. Exemptions in the area of state aid

The entrustment of SGEIs may also justify exemptions to the prohibition of state aid under Article 107(1) of the TFEU. This may be particularly relevant in the present context if a socialized company is to receive subsidies or other benefits at a later date (see below).

Whether financial support from the state is classified as aid within the meaning of Article 107(1) depends on five cumulative conditions:

- First, the beneficiary must qualify as an “undertaking” within the meaning of EU law. The concept of an undertaking within the meaning of Article 107(1) of the TFEU covers any entity engaged in economic activity, regardless of its legal form and the means of its financing. It is not necessary for it to be profit-oriented. In principle, both private and public undertakings are included.⁸⁷ Thus, even a public service energy supplier without the intention of making a profit would be an undertaking within the meaning of Article 107(1).
- Second, the grant must come from state resources and be attributable to the state. For attributability, it is generally sufficient that the public authority decides on or influences the grant in some form.⁸⁸ Examples include subsidies, subsidized loans, tax breaks, payment deferrals, etc.⁸⁹ However, the mere arrangement of private law relationships is not sufficient unless the funds are “permanently under state control and thus at the disposal of the competent national authorities,” which is why the ECJ does not classify the EEG surcharge as state aid.⁹⁰
- Third, the undertaking must be granted an eco-

nomic advantage that comparable undertakings would not receive under market conditions.⁹¹

- Fourth, the measure must specifically favor certain undertakings or branches of production.⁹²
- Fifth, a measure must distort or threaten to distort competition and affect trade between Member States.⁹³ The energy sector is highly integrated into the Single Market, so financial support measures in this area are in principle likely to affect trade between Member States.

On this basis, it should first be noted that the act of nationalization or socialization itself does not constitute aid within the meaning of Article 107(1), provided that the compensation does not overcompensate those affected (that is, in this case, the socialized undertakings).⁹⁴ The so-called nationalization of Uniper SE in 2022, as reported in the media, was, however, a form of state aid requiring approval, as it was structured as a measure of recapitalization to avert insolvency. In this case, the Federal Government acquired shares in Uniper SE from the previous owner.⁹⁵ However, such a situation is not applicable to socialization. This also applies to socialization through the acquisition of shares, which is not comparable to the scenario described above because it does not involve the state rescue of distressed enterprises, but rather the socialization of profitable companies. Overcompensation is fundamentally unlikely under Article 15 of the Basic Law and, in any case, is not required, since compensation—which is not discussed further here—does not, according to the prevailing view, have to reflect market value. State aid law is therefore generally not relevant to the act of socialization itself, but only in the event of

⁸⁷ Commission Notice (Fn. 70), Rn. 6 ff.

⁸⁸ Commission Notice (Fn. 70), Rn. 38 ff.

⁸⁹ Examples in *v. Wallenberg/Schütte*, in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, Werkstand: 83. EL July 2024, Art. 107, TFEU Rn. 93 ff.

⁹⁰ ECJ, Ruling from March 28, 2019 – C-405/16 P = EuZW 2019, 418, Rn. 57; see also, subsequently, the current ruling on the KWKG ECJ, Ruling from January 24, 2024 – T-409/21.

⁹¹ Commission Notice (Fn. 70), Rn. 66 ff.

⁹² Commission Notice (Fn. 70), Rn. 117 ff.

⁹³ Commission Notice (Fn. 70), Rn. 185 ff.

⁹⁴ *Handbuch über staatliche Beihilfen Handreichung für die Praxis von BMWi-EA6*, January 2016, p. 29 f.

⁹⁵ Press release of the Federal Ministry for Economic Affairs and Climate Action, dated September 21, 2022, available at: <https://www.bundeswirtschaftsministerium.de/Redaktion/EN/Pressemitteilungen/2022/09/20220921-federal-government-agrees-on-adaptation-of-the-stabilisation-package-for-uniper-federation-takes-over-99-of-uniper.html>.

subsequent state support for the socialized undertaking. This could be the case, for example, if the state were to provide subsidies to the undertaking so that it could pass on electricity to consumers at reduced, non-cost covering prices. It would also be conceivable to offset any additional costs of a climate-neutral energy supplier. Similarly, aid may be involved in the case of an equity injection, provided that this is not carried out under market conditions, that is, a private investor would not have made it, in which case the state has a certain degree of discretion.⁹⁶

If aid is granted to the socialized undertaking, it may be justified by the special characteristics of the SGEIs. The requirements for this are outlined briefly below; ultimately, it depends on the individual case.

According to the *Altmark-Trans*⁹⁷ ruling of the ECJ, compensation payments for the provision of public services do not constitute state aid if four cumulative conditions are met.⁹⁸

- First, the SGEI must be clearly defined and the company must have been legally entrusted with providing this service. This requirement would be met if a socialization law explicitly stipulates that the undertaking is responsible, for example, for providing a sustainable basic energy supply.
- Second, financial compensation for SGEIs must be calculated objectively, transparently, and predictably so that no unjustified advantages arise.
- Third, financial compensation must not exceed what is necessary to fulfil the SGEI.
- Fourth, the undertaking must either have been selected through a competitive tendering process or its cost structure must be comparable to that of an efficiently managed company (which is difficult to prove on a hypothetical basis).

Although the EU Commission has issued a communication on its application,⁹⁹ the application of the *Altmark-Trans* criteria ultimately depends on the individual case, resulting in considerable legal uncertainty.¹⁰⁰

Should (only) one of the *Altmark-Trans* criteria not be met, the classification as aid remains in place, so that justification under Article 106(2) of the TFEU is possible.

Article 106(2) of the TFEU allows aid to be granted to undertakings if four conditions are met:

- First, the undertaking must actually be entrusted with an SGEI, which would be the case for a public energy supplier under the socialization law (see above, 2).
- Second, state support must be necessary in order to fulfil the SGEI. It is not necessary for the undertaking's economic survival would be threatened without the support; it is sufficient if the fulfilment of the service would be jeopardized.¹⁰¹
- Third, aid must be necessary for the performance of the services, it must not, for example, lead to overcompensation. According to the EU Commission's guidelines, the compensation "must not exceed what is necessary to cover all or part of the costs incurred by the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit."¹⁰² In this respect, the definition of public service obligations, in which Member States have considerable discretion, is also of great importance.
- Fourth, the measure must not disproportionately affect the Single Market. This could be ensured by limiting the aid to a specific duration and adjusting its amount to the actual investment needs.

96 Schweitzer/Mestmäcker, in: Immenga/Mestmäcker, *Wettbewerbsrecht*, 6th ed., 2022, Art. 107(1) TFEU, Rn. 85 ff.

97 ECJ, Ruling from July 24, 2003, Rs. C-280/00, *Altmark Trans*.

98 ECJ, Ruling from July 24, 2003, Rs. C-280/00, *Altmark Trans*, Rn. 87 ff.

99 European Union framework for State aid in the form of public service compensation, OJ. 2012 C 8, 15.

100 Cremer, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, Art. 107, Rn. 20.

101 Wernicke, in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, Werkstand: 83rd ed., July 2024, Art. 106 TFEU, Rn. 64 with reference to ECJ case law.

102 Article 5(1) of the Commission Decision of December 20, 2011, on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest. Ref. K (2011) 9380, 2012/21/EU, OJ EU L 7/3.

By being entrusted with a SGEI, a public service energy supplier can therefore claim exemptions from the prohibition of state aid, both by fulfilling the *Altmark-Trans* criteria and by justification under Article 106(2) of the TFEU. In individual cases, justification under Article 107(2) or (3) may also be considered. To this end, the European Commission has published guidelines on state aid for climate, environmental protection, and energy purposes.¹⁰³

3.2.3. Impact on antitrust law (Articles 101 and 102, TFEU)

SGEI undertakings are also not in principle exempt from the prohibitions on agreements restricting competition (Article 101 of the TFEU) or the abuse of a dominant market position (Article 102 of the TFEU), as can be seen from Article 106(1) of the TFEU.¹⁰⁴

As with state aid, however, the existence of an SGEI may justify conduct that would otherwise be prohibited under competition law if the restriction of competition is essential to the performance of the SGEI and there is no alternative which lessens the distortion of competition.¹⁰⁵ In practice, this means, for example, that a SGEI undertaking that holds a monopoly position will not automatically be prosecuted for abuse of a dominant market position, provided that this position is necessary for the performance of the SGEI.

In this context, it should be emphasized once again that socialization itself is not subject to antitrust law.

3.2.4. Interim conclusion

The competition rules of the TFEU also generally apply to energy producers in the public sector, but are qualified by the opening clauses of the primary legislation (Article 345, 106(2), and 14 of the TFEU). EU competition law does not preclude socialization itself; the relevant provisions only concern the subsequent activities of the undertaking. In this case, entrusting a public energy supplier with a SGEI leads to significant exemptions to European competition law, particularly with regard to state aid and market behavior. However, distortions of competition must be proportionate and must not exceed what is necessary. Socialization itself will regularly (if not necessarily) constitute the entrustment of a SGEI, since a socialized energy supplier would be commissioned to perform a public service obligation on the basis on a specific act (socialization law, possibly a specific administrative act).

103 Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, OJ C 80/1.

104 Bruhn, in: Theobald/Kühling, *Energierecht*, 127th ed., October 2024, TFEU Art. 101–102, Rn. 94.

105 Bruhn, in: Theobald/Kühling, *Energierecht*, 127th ed., October 2024, TFEU Art. 101–102, Rn. 95.

3.3. Results

As a result, European primary legislation does not pose a fundamental obstacle to the socialization of parts of the energy supply or its operation as a public service. In the event of socialization, fundamental freedoms must be observed. According to the *Essent* case law, an infringement on fundamental freedoms through socialization may be justified by overriding reasons of public interest. There is some leeway here; although purely economic reasons are excluded from the outset, they would in any case be inadmissible under Article 15 of the German Basic Law.

The competition rules of the TFEU also apply in principle to energy producers operating in the public sector. Article 106(2) and the *Altmark-Trans* criteria provide exemptions to the rules for undertakings entrusted with SGEIs, which include energy suppliers organized as public utilities. European primary legislation offers sufficient flexibility to ensure the economic and financial conditions for SGEIs and objectives of the common good.

4

Overview:

Legal framework for a public electricity supplier

The preceding sections of this expert report have demonstrated that, and under what conditions, an energy supplier may be socialized under the German Basic Law and the European Treaties. Such socialization is fundamentally permissible under constitutional and EU law. The public service orientation required by constitutional law is also fundamentally compatible with European primary legislation (that is, the Treaties).

However, a public service energy supplier would still have to comply with the applicable legal regulations after socialization. In energy industry law, this legal framework is largely shaped by European secondary legislation (that is, directives and regulations), some of which is implemented and supplemented by federal laws. This legal framework is outlined below for the electricity sector, first with an explanation of legislative responsibilities, followed by a discussion of fundamental substantive requirements, particularly those of energy industry law.

4.1. Foundations of legal jurisdiction for a public energy producer

In order to understand the legal requirements for a public energy supplier, it is first important to distinguish between the jurisdiction for socialization and the legislative jurisdiction for energy policy and energy industry.

4.1.1. Jurisdiction for socialization laws pursuant to Article 72(1), Article 74(1) No. 15, German Basic Law

The distribution of legislative jurisdiction between the Federal Government and the States is determined by Articles 30 and 70 of the German Basic Law. According to these articles, the states have the right to legislate insofar as the Basic Law does not assign this jurisdiction to the Federal Government. The transfer of land, natural resources, and means of production into public ownership or other forms of public enterprise is part of concurrent legislation pursuant to Article 74(1) No. 15 of the Basic Law.

In the case of competing legislation, the jurisdiction pursuant to Article 72(1) of the Basic Law lies within the Federal States, as long as and to the extent that the Federal Government has not exhaustively

and conclusively exercised its legislative authority by enacting a law.¹⁰⁶ The Federal Government has not yet made use of its jurisdiction under Article 74(1) No. 15 of the Basic Law,¹⁰⁷ thus the question of the scope of any preclusive effect with regard to socialization laws of the Federal States does not arise.

According to Articles 70 and 72(1) of the Basic Law, Federal States therefore have the jurisdiction to legislate in the area of transferring land, natural resources, and means of production into public ownership or other forms of public enterprise, that is, for socialization pursuant to Article 15 of the Basic Law.

However, Article 74(1) No. 15 of the Basic Law only establishes the jurisdiction for socialization laws to transfer ownership, not for the regulation of the means of production transferred to public ownership. In the energy sector, this jurisdiction is based on Article

¹⁰⁶ BVerfGE 138, 261 (280) Rn. 44.

¹⁰⁷ Uhle, in: Dürig/Herzog/Scholz, GG, 105th ed., August 2024, Art. 74, Rn. 353.

74(1) No. 11 of the Basic Law (law relating to economic matters), and the Federal Government has made conclusive and exhaustive use of it.¹⁰⁸ Therefore, a state legislature that becomes the owner of an energy producer through a socialization law (or structures its public sector orientation by law) cannot nevertheless enact its own rules that encroach upon the Federal legislature's jurisdiction over the energy industry.

4.1.2. Legislative jurisdiction for the energy industry

In the energy industry, the EU initially holds far-reaching regulatory powers, of which it has made extensive use. The legislative powers of the EU under Article 194 of the TFEU and of the Federal Government under Article 74(1) No. 11 of the Basic Law (law relating to economic matters) in the energy sector are therefore determined by the interaction of European guidelines and national implementation.

4.1.2.1. Legislative jurisdiction of the EU pursuant to Article 194, TFEU

Article 194 of the TFEU gives the EU the jurisdiction to shape an energy policy that secures the internal energy market, guarantees security of supply, promotes energy efficiency and renewable energies, and strengthens the (cross-border) interconnection of grids. In addition, the environmental jurisdiction under Article 194 may also play a role insofar as it concerns cross-sectoral guidelines that do not exclusively affect the energy sector.¹⁰⁹

According to Article 4(2)(l) of the TFEU, energy policy is fundamentally a shared authority. For shared authorities, Article 2(2)(2) stipulates that Member States may only exercise their authority to the extent that the Union has not exercised its authority.¹¹⁰ On this basis, the EU can adopt all binding and non-binding measures, including directives and regulations (cf. Article 288)(2) and (3) of the TFEU).¹¹¹

However, the EU cannot, through its legislative jurisdiction for the energy industry under Article

914 of the TFEU, prevent the socialization of ownership of parts of the energy sector, since, according to Article 345, the Treaties shall not affect the rules of Member States governing systems of property ownership, and Article 15 of the Basic Law has been part of this property system since 1949. Conversely, socialization pursuant to Article 15 cannot override the legislative jurisdiction for energy policy as standardized in the European Treaties. Legal acts based on these treaties remain applicable even after socialization. Even if primary legislation is fundamentally open to socialization (Articles 345 and 106(2) of the TFEU, see section 3 above), this does not lead to a general exception from secondary legislative provisions. Exemptions from certain regulations may arise in individual cases through interpretation of the specific provisions, taking into account the aforementioned "opening clauses" of the primary legislation for public service policies.¹¹² The possibility for Member States to impose public service obligations on energy supply companies is also found in secondary legislation in Article 9 of the Internal Market for Electricity Directive; in this respect, Member States may also allow certain exemptions from the regulatory requirements (Article 9(5) of the Internal Market for Electricity Directive).

4.1.2.2. Legislative jurisdiction of the Federal Government pursuant to Article 74(1) No. 11, German Basic Law

The Federal Government has concurrent legislative jurisdiction for "law relating to economic matters," including energy policy, pursuant to Article 74(1) No. 11 of the Basic Law. It may enact national regulations, provided that the EU has not fully harmonized the area, and supplements EU guidelines with, for example, the Energy Industry Act (EnWG) and the Renewable Energy Sources Act (EEG).

With regard to the energy industry, the Federal Government has made extensive use of concurrent legislation, leaving no room for state-level regulations

¹⁰⁸ Wissenschaftliche Dienste des Deutschen Bundestags, Gesetzgebungskompetenzen für die Regulierung von Stromnetzentgelten, WD 3 – 3000 – 160/18, Draft of May 28, 2018, with further references.

¹⁰⁹ Cf. Gundel, in: Dausen/Ludwigs, *Handbuch des EU-Wirtschaftsrechts*, 61st ed., September 2024, M. Energierecht, Rn. 29.

¹¹⁰ Calliess, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, Art. 194, Rn. 24.

¹¹¹ Calliess, in: Calliess/Ruffert, *TFEU*, 6th ed., 2022, Art. 194, Rn. 22.

¹¹² See, for example, ECJ, Ruling from April 20, 2010 – C-265/08, Rn. 17 ff. on public service price regulations for natural gas supply. See also ECJ, Ruling from April 11, 2019 – C-473/17 et al., Rn. 39 ff.

(see above).¹¹³ Socialization under Article 15 of the Basic Law is a procedure of constitutional rank and cannot therefore be excluded by simple federal laws. However, as explained above, it does not permit any change in legislative jurisdiction for socialized means of production. In the energy sector, means of production under public ownership therefore continue to be subject to the laws enacted on the basis of Article 74(1) No. 11 of the Basic Law. The applicable national energy industry law currently stipulates that the regulatory framework of the EnWG is in principle fully applicable to public undertakings as well (§109(1) of the EnWG);¹¹⁴ unsurprisingly, there are no special regulations for the case of socialization.

4.1.2.3. Results

The change of ownership and type of management does not therefore result in a different legal framework for an energy producer in the public economy. Differences in individual cases may arise from an interpretation of the relevant requirements, possibly in conjunction with the “opening clauses” of EU primary legislation (for example, Article 106(2) of the Basic Law). In this context, EU law generally grants Member States the option of introducing special regulations for public service (Article 9 of the Internal Market for Electricity Directive). Beyond that, however, socialization under Article 15 of the Basic Law has no effect on the applicable European and national regulations governing the energy industry. Current federal law, specifically §109(1) of the EnWG, stipulates a fundamental alignment of regulation for private and public enterprises and does not provide for any exemptions in the event of socialization. The following analysis is therefore based on the generally applicable regulations.

¹¹³ Wissenschaftliche Dienste des Deutschen Bundestags, Gesetzgebungskompetenzen für die Regulierung von Stromnetzentgelten, WD 3 – 3000 – 160/18, prepared on May 28, 2018.

¹¹⁴ For exemptions in individual regulations, see Pielow, in: BeckOK EnWG, as of March 1, 2025, § 109, Rn. 23.

4.2. Basic features of the legal framework for an energy supplier in the electricity sector of a public economy

The legal requirements for a publicly owned energy supplier are outlined in more detail below for the electricity sector. They largely depend on the specific project of socialization, that is, at which level of supply an enterprise (transmission grids, distribution networks, power generation) is to be socialized. The following section outlines the basic legal requirements for publicly owned energy suppliers in order to provide a starting point for examining individual cases. Due to the extensive scope of the regulations, it is not possible to provide a comprehensive overview without a specific socialization project.¹¹⁵ Requirements outside the scope of the EnWG are thus not examined in detail.

4.2.1. Energy industry requirements for a utility company pursuant to the Energy Industry Act (EnWG)

The Energy Industry Act (EnWG) is the central legal basis for the law governing grid-bound energy supply in Germany and implements the relevant European guidelines. As explained above, an energy supply company that has been socialized pursuant to Article 15 of the Basic Law is generally subject to the same energy law requirements as private or municipal suppliers, unless the socialization process involves changes to (federal) energy law not determined by EU law, or EU law opening clauses are used in secondary legislation (cf. Article 9 of the Internal Market for Electricity Directive). The specific requirements of the EnWG that apply to a socialized enterprise depend on the enterprise's activities.

The EnWG forms the central basis for market regulation and, in particular, sets out regulatory requirements for network operators. Especially relevant are the "unbundling" provisions for separating grids from other business areas, as well as the requirements for network connection and access (see sections 4.2.1.1. to 4.2.1.3.). The Bundesnetzagentur (BNetzA), as an independent regulatory authority, is responsible for network regulation. In addition, there are obligations relating to the system responsibility of transmission system operators, which relate to the level of power generation and concern, among other things, the

decommissioning of power generation plants (see 4.2.1.5.). Finally, there are also certain guidelines with regard to the supply to consumers (see 4.2.1.6.).

4.2.1.1. Unbundling obligations (§§6–10, EnWG)

A key principle of the EnWG is unbundling, that is, the separation of grid operation from other business areas such as power generation and distribution. The regulations serve to prevent distortions of competition. As explained above, energy supply grids are largely natural monopolies (see 1.1.2.). "Vertically integrated" energy suppliers that operate grids but are also active in power generation and/or distribution could therefore exploit their special position of power at the network level to give their other business divisions a competitive advantage over their rivals.

To prevent this and enable fair "competition on the grid," the EnWG prescribes various so-called unbundling measures. Account unbundling (§6b EnWG) requires vertically integrated energy supply companies to keep separate accounts for network operation, power generation, and distribution. This is intended to prevent cross-subsidization of competitive activities through monopolistic network profits.¹¹⁶ Informational unbundling (§6a EnWG) obliges network operators not to disclose confidential market information to affiliated power generation or distribution companies in order to ensure that all market participants have access to the same information.¹¹⁷

¹¹⁵ An impression of the scope of energy industry regulation is provided by the "law map" of the Federal Ministry for Economic Affairs and Climate Action, Gesetzeskarte für das Energieversorgungssystem, Karte zentraler Strategien, Gesetze und Verordnungen (pdf), available at: <https://www.energiewechsel.de/KAENEF/Redaktion/DE/Publikation/2021/plakat-gesetzeskarte.html>.

¹¹⁶ Theobald, in: Theobald/Kühling, EnWG, 127th ed., October 2024, before §1, Rn. 43 ff.

¹¹⁷ Theobald, in: Theobald/Kühling, EnWG, 127th ed., October 2024, before §1, Rn. 43 ff.

In addition to these measures, there are also organizational and structural unbundling obligations. Operational unbundling (§§7a, 7b EnWG) stipulates that network operators must be separated from power generation or distribution companies in terms of personnel and organization.¹¹⁸ Managers and employees of the network operator may not work for other divisions of the company simultaneously. Furthermore, legal unbundling (§§7, 7b EnWG) stipulates that network operation and distribution must be spun off into independent companies if they are part of a vertically integrated company.¹¹⁹

The strictest form of separation of network and operations is ownership unbundling (§§8-10e EnWG). It requires network operators to be independent of energy production or distribution companies. In Germany, this form is not mandatory, so alternative models such as the Independent System Operator (ISO) or the Independent Transmission Operator (ITO) are possible.¹²⁰ Companies that do not implement complete ownership unbundling must have their model approved by the BnetzA.

Not every network operator is required to implement all four stages of unbundling. As a general rule, accounting and informational unbundling must always be applied. However, this does not apply to operational and legal unbundling. Such unbundling is only mandatory if the network operator has more than 100,000 customers connected to its electricity or gas division ("De-Minimis-Rule," §7(2), §7a(6) EnWG).¹²¹

Accordingly, a public service energy supplier must comply with the unbundling obligations outlined above. However, the act of socialization would not necessitate a legal separation of ownership between the network and other areas of business activity.

4.2.1.2. Grid connection, network access, and energy supply

The EnWG regulates the separation of grid connection, usage, and energy supply in order to ensure non-discriminatory access to the electricity or gas network. While network access (§20 EnWG) ensures that market participants are allowed to feed energy into a grid (producers) or withdraw from it (consumers),¹²² grid connection (§§17, 18 EnWG) refers to the physical connection to the grid.¹²³ These two aspects must be distinguished: network connection enables the technical connection to the grid, while grid access regulates the use of this grid for feeding and withdrawing electricity and gas into and from it.

§17 of the EnWG contains the general obligation of network operators to connect everyone to the grid. This obligation applies to all network connections that do not fall within the more specific scope of §18 of the EnWG, which establishes a special connection obligation for low-voltage and low-pressure networks that serve the general supply. Refusal of connection is only possible under strict conditions, for example if the connection is technically impossible or economically unreasonable for the network operator.¹²⁴

The principle of non-discriminatory network access (§20 EnWG) generally prohibits network operators from differentiating between different network users. Similar to the unbundling obligations, this serves to enable competition and is intended in particular to prevent companies affiliated with the network operator from receiving preferential treatment.¹²⁵ However, the regulation contains an extensive requirement of equal treatment; differentiation based on conditions (more on fees below) may only be made according to "objectively justified criteria." Conditions are objectively justified if they are necessary to ensure technically and organizationally secure network access.¹²⁶ According to §20 of the EnWG, access may

118 Theobald, in: Theobald/Kühling, EnWG, 127th ed., October 2024, before §1, Rn. 48 (table).

119 Theobald, in: Theobald/Kühling, EnWG, 127th ed., October 2024, before §1, Rn. 48 (table).

120 Theobald, in: Theobald/Kühling, EnWG, 127th ed., October 2024, before §1, Rn. 46.

121 Theobald, in: Theobald/Kühling, EnWG, 127th ed., October 2024, before §1, Rn. 45.

122 Hartmann/Wagner, in: Theobald/Kühling, EnWG, 127th ed., October 2024, § 17, Rn. 20.

123 Hartmann/Wagner, in: Theobald/Kühling, EnWG, 127th ed., October 2024, § 17, Rn. 18.

124 Hartmann/Wagner, in: Theobald/Kühling, EnWG, 127th ed., October 2024, § 17, Rn. 145.

125 For example, Assmann/Purucker, in: BeckOK EnWG, 14th ed., March 1, 2025, § 20 Rn. 1.

126 Hahn, in: Bourwieg/Hellermann/Hermes, Energiewirtschaftsgesetz, 4th ed., 2023, § 20 Rn. 19.

only be denied if the network operator demonstrates that granting network access is not possible or reasonable for operational or other reasons. Overall, therefore, differentiation in network access is only possible under strict conditions and is essentially limited to ensuring proper network operation.

Note: Certain legal privileges regarding network connection and grid access apply to renewable energies. These must be connected to the grid with priority (§8 EEG) and the electricity they generate must be purchased with priority by network operators (§11 EEG).

A socialized energy supply company that (also) acts as a network operator is subject to the same legal obligations with regard to grid access as other network operators. Due to the obligations under §§17, 18 and 20 of the EnWG to ensure connection and access without discrimination, access or connection cannot be denied to specific producers or users, for example for political reasons. Excluding the transmission of electricity generated from fossil fuels would hardly be compatible with the principle of non-discriminatory grid access, nor would any differentiation in the terms of purchase that goes beyond the applicable regulations of the EEG.

This applies in any case under current national energy law, which does not provide for any exceptions for public or public sector service operators (§109(1) EnWG). It should be noted, however, that European regulatory law generally permits public service exceptions to the rules on network access at the level of Member States “insofar as their application would de jure or de facto prevent the performance of the public service obligations assigned to the electricity undertakings and insofar as the development of trade is not affected to an extent contrary to the interests of the Union.” (Article 9(5) in conjunction with Article 6 of the Internal Market for Electricity Directive). Under Article 9(2) of the Internal Market for Electricity Directive, public service obligations can relate, among other things, to pricing and environmental and climate

protection, that is, the socialization objectives discussed here; such obligations must be transparent and non-discriminatory and serve to ensure equal access for EU electricity companies to national consumers. The specific options this opens up for the (federal) legislature are open and also depend on the specific socialization project.

4.2.1.3. Network fees

The right to network access pursuant to §20(1) of the EnWG generally requires that all network access be granted. In return, those entitled to network access must pay network fees, the collection of which is regulated by the state.¹²⁷ The reason for this is once again that energy supply networks constitute natural monopolies and, without appropriate regulation, there would be a risk that network operators would exploit their monopoly position to generate excessive profits. The general principle can be found in §21 of the EnWG, further specified by the provisions of the Incentive Regulation Ordinance (ARegV).¹²⁸

As the regulatory authority, the BNetzA sets revenue caps as part of incentive-based regulation and ensures that network operators act in an economically efficient manner. This is done within the framework of incentive regulation, which compares the efficiency of network operators and is designed to create financial incentives for cost-effective network use.¹²⁹ Efficiency incentives are essentially created not simply by reimbursing network operators for the actual costs of network operation, but instead, a revenue cap is set at the beginning of a regulatory period, which includes not only the (efficient) costs of network operation but also a return on equity set by the authorities (§7 StromNEV). Since the revenue cap is set for the entire regulatory period, cost savings exceeding the regulatory requirements due to efficiency gains can be recorded as profits and do not have to be passed on directly to consumers.¹³⁰ However, this regulatory approach carries the risk that investments will be neglected in order to generate additional profits. To counteract this, incentive regulation includes various

¹²⁷ Theobald, in: Theobald/Kühling, EnWG, 127th ed., October 2024, Vor § 1, Rn. 15.

¹²⁸ From 2028, the regulatory provisions (ARegV, StromNEV) will be repealed due to a ruling by the European Court of Justice and replaced by independent determinations by the BNetzA. See, for example, Stelter/Wiedmeyer, Die neuen Festlegungskompetenzen der BNetzA, EnWZ 2025, 51.

¹²⁹ Theobald, in: Theobald/Kühling, EnWG, 127th ed., October 2024, Vor § 1, Rn. 16.

¹³⁰ Overview, for example, in Franke, Die Finanzierung des Netzausbaus zwischen Markt und Staat, 2020, p. 263 ff.

instruments designed to make investments more attractive, which further complicates the system.¹³¹

Regulated network fees have a significant impact on the economic leeway of a socialized energy supplier. This applies, on the one hand, insofar as the energy or electricity supplier itself is subject to the network fees. For the supplier, the network fees are an extraneous cost component that it passes on, in whole or in part, to end customers. If a socialized energy or electricity supplier is (also) active at the network level, the guidelines of incentive regulation apply directly and it may not charge any fees that exceed these requirements. Its investments and the passing on of investment costs are also subject to regulatory requirements. This limits its options. However, it should be noted that the regulation of fees only sets upper limits, which also include a return on invested equity capital, based on the profit expectations of private network operators. On the other hand, it is not prohibited to charge less than the approved network fees, which means that a socialized company could, in principle, charge lower fees and thus reduce the burden on consumers.

4.2.1.4. Excursus: Awarding concessions in accordance with §46(2), EnWG

In connection with distribution network regulation, it is necessary to briefly address the concession award procedures under §46 of the EnWG. This regulates the granting of rights of way, which allows energy companies to use public roads for power lines or gas pipelines (a necessary requirement for their activities as network operators). The procedure for awarding concessions pursuant to §46(2) of the EnWG is strictly regulated by law and by the case law of the Federal Court of Justice (BGH) to ensure transparency, equal treatment, and fair competition.

The legal guidelines under §46 of the EnWG stipulate:

- Public, transparent procedure (§46(1),(3) EnWG): Municipalities must conduct the awarding of concessions in a competitive and transparent manner, that is, they must publicly announce the award and disclose the evaluation criteria.

- Appropriate selection (§46(4) EnWG): The selection of the concessionaire must be objective and non-discriminatory, taking into account in particular the objectives of energy supply, such as security of supply, environmental compatibility, and consumer protection.

The Federal Court of Justice (BGH) has further developed and specified these standards in a differentiated body of case law.

In the following context, it is important to note that no exemptions or blanket privileges for municipal utilities are permitted; rather, the guidelines apply to them accordingly (§46(6) EnWG). Direct award to municipal operators is excluded.¹³² However, consideration of local interests in the award procedure is expressly permitted (§46(4)(2),(3) EnWG). It should be noted that the current law does not recognize any exceptions to the concession procedure under §46 of the EnWG.

As a result, the procedures of the socialization of distribution networks at the state level provided for in §46 of the EnWG and developed by case law do not constitute an absolute obstacle. The socialization of energy networks (on the concept of means of production, see above 1.2.b), enabled by Article 15(1) of the Basic Law, cannot be excluded by simple federal law such as §46 of the EnWG. Under European law, the procedure under §46(2) of the EnBW is not mandatory.¹³³

It is more difficult to assess whether the tendering procedure under §46 of the EnWG would continue to apply without restriction after socialization. On the one hand, federal legislature has, through the EnWG, fully exercised its jurisdiction for concurrent legislation in the energy sector under the heading "law relating to economic matters" pursuant to Article 74(1) (11) of the Basic Law (see above, 1.b)bb), without the federal states being able to deviate. If the distribution networks were to be socialized, the federal state (or its municipalities) would remain subject to the requirements of §46(2) of the EnWG, and the federal state (or the municipalities) would have to conduct an open concession procedure in accordance with §46(2) of the EnWG upon expiry of the concession of the socialized operator. Thereafter, the socialized operator would also be obliged, pursuant to §46(2) of the

¹³¹ On investment incentives, see also Franke, loc. cit., p. 266 f. for transmission grids and p. 293 ff. for distribution networks.

¹³² See also Federal Court of Justice, Ruling of December 17, 2013 – KZR 65/12 = EnWZ 2014, 268 (270).

¹³³ Hellermann, in: Bourwieg/Hellermann/Hermes, Energiewirtschaftsgesetz 4th ed., 2023, § 46, Rn. 25.

EnWG, to transfer ownership of the network or grant possession of it should another applicant be awarded the concession. On the other hand, the question arises as to whether the constitutionally provided possibility of transferring means of production to public ownership (Article 15 of the Basic Law) could preclude the application of §46 of the EnWG. This is because the obligation to periodically enforce such a provision within the framework of a competitive tendering process would subject the socialized company, at least in part, to the logic of private sector competition. Since there is no EU law requirement for §46 of the EnWG, it seems highly questionable whether the provision would be compatible with Article 15 of the Basic Law in such a case, or whether it could be interpreted in a manner consistent with the constitution. The issue can at this point only be flagged.

4.2.1.5. Obligations of electricity producers in relation to ensuring security of supply and grid stability

Related to ensuring grid stability and security of supply, §§13 ff. of the EnWG also contain guidelines that directly or indirectly affect the level of generating power. For a public sector energy supplier, these may be particularly relevant with regard to the production structure and thus the socialization objective of an environmentally and climate-friendly supply. If, for example, a partially conventional energy supplier is “taken over” through socialization, the question arises as to what limits may be set on a climate-friendly restructuring (expansion of renewable capacities, discontinuation of conventional power generation).

The starting point is the responsibility of transmission system operators (TSOs), which is regulated in §13(1) of the EnWG. This entitles TSOs to take certain measures related to grids and markets in the event of a threat or disruption of the security or reliability of the electricity supply system in their control area, as regulated in §13(1)(1-3) of the EnWG. In order for TSOs to perform this task, they must have a certain degree of access to the power generation level. The relevant (and, in detail, very complex) regulations can be found in §13a ff. of the EnWG. They can only be outlined here in broad terms, focusing on the extent to which they restrict the options available to a socialized electricity generator.

4.2.1.5.1. “Redispatch” (§13a EnWG)

According to §13a of the EnWG, operators of facilities for the generation or storage of electrical energy with a rated output of 100 kilowatts or more, as well as facilities for the generation or storage of electrical energy that can be remotely controlled by a grid operator at any time, are obliged to adjust the output of their facilities or to tolerate this (“redispatch”) upon request of the TSO. The provision serves to ensure system stability and has become increasingly important in connection with the growing feed-in from renewable energies and the associated volatility.¹³⁴ The measures must be financially compensated to the plant operator (§13a(2-4) EnWG). The compensation is appropriate if, as a result, it does not leave the plant operator in a better or worse economic position than they would be without the measure (§13(2)(2) EnWG). The compensation provisions distinguish between conventional (§13(2)(3) No. 1-4 EnWG) and renewable (§13(2)(3) No. 5 EnWG) power generation plants in their calculations.

A socialized electricity provider would also be subject to the redispatch regulations. This would have no direct impact on public service objectives; in particular, it would not restrict the electricity producer in expanding renewable energies. Compensation must be paid for curtailing renewable energy plants.

4.2.1.5.2. Decommissioning of facilities (§13b EnWG)

The restriction on the authority to shut down plants, which is regulated in §13b of the EnWG, may constitute a more significant encroachment on the freedom of decision of electricity producers.

Operators of facilities for the generation or storage of electrical energy with a rated output of ten megawatts or more are required to notify the TSO and the BnetzA at least twelve months in advance of any temporary or permanent shutdowns of their facilities or parts thereof (§13(1) EnWG). If the plant operator fails to comply with this notification requirement, shutdown is prohibited, provided that continued operation is still technically and legally possible (§13b(1)(2) EnWG). In the case of socialization, this effectively means that fossil fuel generation capacities could only be decommissioned after at least one year (minimum notification period), unless the TSO gives prior notice that it does not expect the decommissioning to jeopardize or disrupt the security or reliability of the electricity supply system (§13(1)(3) EnBW).

¹³⁴ Assmann, in: BeckOK EnWG, 14th ed., status: March 3, 2025, § 13a, Rn. 1.

However, if the TSO classifies the plant as systematically relevant,¹³⁵ provisional or permanent decommissions are prohibited even after the notification period has expired (§13b(4)(5) EnWG); in the case of permanent closures, further conditions apply,¹³⁶ including confirmation of systemic relevance by the BnetzA. The legal consequence is that the plant operator must maintain or restore the plant's operational readiness for feed-in adjustments in accordance with §13a(1) of the EnWG (see above) (§13b(4)(3), (5)(11) EnWG). It is therefore not necessary to continue operating the plant; it must only be ready to return to the grid in a timely manner in the event of bottlenecks.

According to §13c of the EnWG, decommissioning prohibitions pursuant to §13b(4) and (5) of the EnWG (that is, decommissioning bans after the notification period has expired) must be financially compensated. Operators must not in any case be placed in a worse economic position than if they had decommissioned the plant as planned.¹³⁷

For lignite-fired power plants, §13g of the EnWG must be given priority, as special decommissioning obligations apply here due to the phase-out of coal.

Overall, §13b of the EnWG restricts the authority of a socialized electricity producer to decommission fossil fuel power plants. This is certainly an impediment in terms of the goal of environmentally and climate-friendly energy supply. On the other hand, the facilities in question do not have to be operated continuously, but only kept operational, which enables emission reductions even if decommissioning is prohibited. In any case, decommissioning must be compensated in accordance with §13c of the EnWG. However, this is less relevant or less "mitigating in its impact" in the case of a socialized electricity producer, as decommissioning would not (primarily) be carried out for economic reasons, but rather for reasons of the common good—climate protection.

4.2.1.6. Guidelines for supplying consumers

Finally, §§36 ff of the EnWG also contain guidelines regarding consumer supply and protection. One example is the basic supply obligation in §36 of the EnWG,

which applies to the energy supply company that supplies the most household customers in a general supply network area (§36(2) EnWG). This company must, in principle, supply all household customers in the network area under general terms and conditions (§36(1)(1) EnWG). This is intended to ensure that everyone has access to electricity and gas. The design of electricity and gas bills is also regulated (§§40 ff. EnWG). In addition, electricity suppliers must, as far as technically feasible and economically reasonable, offer end consumers a tariff that incentivizes energy conservation or control energy consumption (§41a EnWG).

These social and consumer protection requirements would have to be met by a socialized energy supplier; however, they are essentially congruent with the socialization objective of a socially and climate-friendly supply.

4.2.2. Procurement law

Outside of energy law, a significant change in the legal framework may result from a socialization in procurement law. A socialized energy supply company would likely be classified as a public body within the meaning of §99(2) of the Competition Act (GWB). Three criteria must here be met: its own legal personality, the performance of a task in the public interest of a non-commercial nature, and a close proximity to the state through control or financing by the public sector.¹³⁸ Since an energy supplier socialized in accordance with Article 15 of the Basic Law serves the public interest and—in the "baseline case" examined here—is controlled by the public sector, it most likely fulfills these requirements and would be bound by procurement law as a public contracting authority.

The company must then carry out procurement above the EU thresholds in accordance with public procurement law. It is subject to Part IV of the GWB, the Procurement Ordinance (VgV), and the Ordinance on the Award of Public Contracts by Entities operating in the Transport, Water and Energy Sectors (SektVO), as energy supply is one of the regulated sectors. Even if it were not classified as a public contracting authority,

¹³⁵ Definition of §13b(2)(2): "A plant is systematically relevant if its decommissioning would, with sufficient probability, lead to a significant threat or disruption to the security or reliability of the electricity supply system and this threat or disruption cannot be eliminated by other appropriate measures."

¹³⁶ For more details, see, for example, Assmann, in: BeckOK EnWG, 14th ed. status: March 1, 2025, § 13b, Rn. 31 ff.

¹³⁷ Ruttloff, in: BeckOK EnWG, 14th ed. status: March 1, 2025, § 13c, Rn. 1.

¹³⁸ Bungenberg/Schelhaas, in: BeckOK VergabeR, GWB, 35th ed., August 1, 2024, § 99, Rn. 22 ff.

ty, it would still be subject to procurement law guidelines as a sectoral contracting authority, depending on its activities.¹³⁹

In practice, this means that construction, supply, and service contracts may not be awarded without a formal tendering process, but should be awarded through competitive bidding procedures.

4.2.3. Other legal obligations outside of energy law

A large number of other obligations are not affected by socialization. For example, environmental, labor, and data protection requirements remain in place.

Depending on the legal form chosen during socialization, tax law or commercial and corporate law requirements may change, such as those of the Act on Limited Liability Companies (GmbH-Gesetzes) or the Stock Corporation Act (Aktiengesetzes).

4.2.4. Conclusion and design possibilities for a socialized energy supplier

Even a socialized energy supply company is not exempt from compliance with current law. In particular, it remains fully subject to the regulatory framework of the EnWG, which primarily subjects the monopolistic level of network to comprehensive regulation.

Network regulation would generally continue to apply in the event of socialization. State ownership (see §109 EnWG) or socialization does not lead to a fundamental exemption from these obligations, which limit the scope for a public sector company, particularly with regard to the separation of network and other business areas, network access conditions, and network fees. However, there are still design possibilities: with regard to fee regulation, a socialized company is not obliged to exploit the regulatory maximum. When interpreting existing law, the public service orientation of the company (constitutionally mandated, Article 15(1) of the Basic Law) may also be taken into account in individual cases, provided that this does not conflict with EU law. EU law itself also generally gives Member States the option of introducing special public service regulations (Article 9 of the Internal Market for Electricity Directive), which could be created by the (federal) legislature in the event of socialization. However, such regulations are currently lacking.

Outside the network level, there is already greater

scope for action and design flexibility. As far as consumer supply is concerned, there should generally be no conflict between regulatory requirements (especially basic supply) and the (social) purpose of socialization. There are generally no restrictions on suppliers setting socially acceptable tariff structures. At the level of power generation, various restrictions on the freedom of action of electricity producers are possible in order to ensure grid stability, particularly with regard to ramping up and down capacities as well as decommissioning. However, this does not mean that insurmountable obstacles would be placed in the way of a targeted transformation towards renewable energies, as these are only intermittent interventions.

The broader legal framework for the non-energy sector basically remains in place. In the case of the public law organization of the public service operator examined here, it would probably be bound by procurement law.

139 Marx, in: Theobald/Kühling, EnWG, 127th ed., October 2024, § 162, Rn. 48.

IV. Overall Result

01. The electricity sector can basically be divided into the level of power generation, the network level (transmission grids and distribution networks), and the level of sales. This division is also reflected in sector-specific regulatory law.
02. The concept of means of production encompasses the entire energy sector, at least insofar as the actual production and distribution of energy is concerned. In the electricity sector, both power generation plants and transmission and distribution networks constitute potential objects of socialization since electricity production is indisputably a form of material production covered by the concept of means of production in Article 15(1) of the German Basic Law. This may be questionable only with regard to pure service providers such as electricity traders; however, many authors consider the service sector to be also covered by the concept of means of production.
03. Entire companies can be socialized—even those that conduct part of their business abroad. The socialization of entire companies is in line with the prevailing view, provided that companies are involved in the production of goods, which is the case with energy supply companies (see above). Socialization is also possible by transferring the shares of a company to the public service operator. In this case, the company is taken over “as such” and only the owner is replaced. This means that any foreign subsidiaries and shareholdings are also transferred.
04. With regard to natural resources and energy sources (for example, coal or gas), the socialization of land and mineral deposits is also possible in principle, although it should be noted that, under mining law, these mineral deposits are not usually owned by the extracting companies. The object of socialization would therefore be the granted mining rights. In principle, the aim of socialization in this case could also be to phase out extraction.
05. Public economy within the meaning of Article 15(1) of the Basic Law means management not for private gain but geared towards meeting needs and promoting the common good. The purposes of a socially responsible and climate-friendly energy supply, examined within the framework of this commissioned report, are permissible public service aims. The basic case of a public economy is the transfer to an institution of public law bound to the common good. Other structures are in principle possible, but their detailed examination goes beyond the scope of this expert report.
06. The European Treaties (TFEU, TEU) do not pose a fundamental obstacle to socialization in the energy sector. Despite the far-reaching Single Market and competitive orientation of European primary legislation, the Treaties contain opening clauses for public service provisions, particularly in the area of services of public economic interest (SGEI, see, for example, Article 106(2) TFEU, Article 14 TFEU). Member States also have considerable discretion in the structuring of property ownership (Article 345 TFEU). According to the case law of the ECJ, nationalization and prohibitions on privatization may be permissible if justified by public interests (for example, social concerns and environmental protection). These principles are applicable to socialization.

07. The mandate for a socialized energy supplier examined here (providing socially responsible and climate-friendly energy) constitutes a SGEI according to European standards. This means that exceptions to the rules of competition under Article 106(2) of the TFEU are possible. Under primary legislation, state aid (subsidies, non-market equity grants) to a socialized utility provider may be justified on this basis. Socialization itself does not constitute state aid.
08. Socialization does not establish legislative or regulatory jurisdiction. Legislative jurisdiction for the energy industry resides partly with the EU and, at the national level, with the Federal Government. The responsibility of the Federal States for socialization (due to the Federal Government's failure to exercise its jurisdiction) does not lead to the power of regulating the area affected by socialization, in this case the energy sector.
09. An energy supply company in a public economy is, in principle, subject to the general legal framework of the energy industry. The EnWG is fully applicable to public companies (§109(1) EnWG); the special case of socialization is not explicitly addressed. Since socialization differs from mere state ownership, a different interpretation of individual requirements may be possible or even necessary in specific cases. EU law also gives Member States the option of introducing special public service regulations (Article 9 of the Internal Market for Electricity Directive), but these are currently lacking.
10. The legal framework governing the energy industry is particularly comprehensive and detailed for (electricity) network operators. The primary purpose of network regulation is to prevent exploitation of the network level by monopolies. In this respect, there are obligations to unbundle and to guarantee non-discriminatory network access; permissible network fees are also regulated. With regard to grid access, Article 9(5) of the Internal Market for Electricity Directive allows for exceptions to the network access regime, which could be used in the event of socialization; the details of this exception remain open.
11. §46 of the EnWG represents a special case, requiring the periodic tendering of rights of way necessary for the operation of distribution networks. This purely national provision has no basis in EU law and prohibits, among other things, the awarding of contracts to municipal enterprises without a tendering process. However, it does not fundamentally preclude socialization under the mandate of constitutional law. The main question is whether the periodic tendering obligation would still apply after socialization. One counterargument is that it would force the public service company into private sector competitive bidding.
12. At the level of generating electricity, there are regulations that enable transmission system operators (TSOs) to ensure grid stability, for example, by curtailing (renewable) generation facilities in return for compensation or by temporarily prohibiting the decommissioning of (conventional) power generation capacities. These requirements would also affect a socialized power generator. However, they do not fundamentally prevent a transformation of power generation capacities, but only allow targeted interventions to ensure system stability.

13. Providing public services to end customers is basically possible without any problems under the current regulatory framework; in particular, there is nothing to prevent socially responsible pricing.
14. The broader legal framework for the non-energy sector basically remains in place. In the case of the public law organization of the public service operator examined here, it would probably be bound by procurement law.
15. Overall, there is considerable scope for a socialized energy supply company, which has been examined specifically for the electricity sector. While it should be acknowledged that current network regulation limits the options available for a socialized network operator, there is still room for manoeuvre, for example, in the area of fee regulation (refraining from exploiting the permissible fees). Furthermore, EU law allows for exceptions for public service operators in this area, even if such exceptions have not yet been integrated into German law. At the level of electricity generation and supply to end customers, there is already extensive flexibility; here the current regulatory framework only sets out selective guidelines.

