

**2007 Report by the
Federal Network Agency for Electricity, Gas,
Telecommunications, Post and Railway
to the European Commission
on the German electricity and gas market**

The complete text of the Report is available (in German) at www.bundesnetzagentur.de

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Foreword by Matthias Kurth, President of the Bundesnetzagentur

The Federal Network Agency's present report to the European Commission shows the progress made during the period under review (2006) in terms of the implementation of provisions stipulated in the Energy Industry Act as well as in corresponding ordinances. Aspects to be emphasized are the reduction of network charges in the electricity and gas sector that were achieved due to the review and approval of network costs by the Federal Network Agency or the state regulatory authorities. In addition the introduction of the new model for access to the gas network has created the central cornerstone for the development of a competitive market.

However, the report also shows deficits that still exist in the implementation of the energy regulatory framework. In the case of unbundling, which is one of the main prerequisites for the development of competition in the energy supply networks, there are still unresolved issues with regard to functional unbundling and informational unbundling. In the gas sector there are some details in the area of network access which still impede the development of an effective, competitive market. Deficits were found in the areas of availability of capacity, control and balancing energy and standard load profiles as well as the use of standardised data formats. For the electricity sector this report identifies necessary improvements, inter alia in the areas of "EEG enhancement", minimum connection power for network or substation levels, contributions to infrastructure extension cost, loss energy as well as reports on network conditions and network expansion. Furthermore some of the network operators in the electricity and gas sector do not meet their statutory transparency requirements and duties of disclosure satisfactorily.

In the electricity sector the reporting year 2006 shows a stagnation in the ratio of change of suppliers. In 2006 the gas sector final consumers have only made little use of the possibility to change suppliers. However, in 2007 a considerable increase in the number of changes of supplier is becoming apparent. In the electricity and gas sector the retail price level for household customers and commercial customers has increased on average, despite a reduction of the network charges. For industrial customers there has been a slight decrease. The report further clarifies that neither the construction of conventional power plants nor the expansion of the electricity network are progressing as required. Without concerted efforts in this area, the security of supply could be affected in the medium term. The creation of a reasonable "excess supply" - in the case of electricity through a net expansion of the

generating and network capacity - is an important prerequisite for the development of competition and efficient trade. Further efforts are required in this area.

The Federal Network Agency calls upon all market players - undertakings as well as final consumers - to use the opportunities presenting themselves in a liberalised electricity and gas market in order to contribute to a larger choice of providers and thus more intense competition.

The present report by the Federal Network Agency is based on the predefined structure of the national reports to the European Commission dated 17 April 2007. The report incorporates the results of the 2007 monitoring exercise by the Federal Network Agency under section 35 of the Energy Industry Act (EnWG). In the course of this exercise, comparison was made with figures from the 2006 monitoring. Overall, a total of 2,744 (previous year: 2,656) completed surveys from various market segments were analysed. The market coverage of the questionnaires received in the relevant market segments in proportion to selected overall market data will be presented in the individual chapters of this report. Where a comparison with known overall market data was possible, the market coverage of the monitoring exercise ranged between 84 and 100 percent. The market coverage ratio reflects the relationship between a figure particularly relevant to the market of a chapter (e.g. supply quantity) compared to market data from reliable external sources.

This report was drawn up in consultation with the Federal Cartel Office. The Federal Cartel Office has provided supplementary contributions covering "Important developments in the electricity and gas market", "Main areas of the Federal Cartel Office's work", "Situation and structure of the electricity and gas sectors", "Measures to prevent the abuse of dominant position", "Factors influencing gas prices" and "Description of the medium-term demand and supply situation in the gas sector".

The remarks in the area of unbundling are based on the results of the market survey conducted by the Federal Network Agency and an analysis of the annual compliance reports from the vertically integrated energy supply companies, which must be provided to the Federal Network Agency under section 8 (5) of the Energy Industry Act (EnWG).

For the presentation of the electricity sector the "regional indicators" were supplemented by analyses regarding the correlation of spot market prices. In addition the present report included information provided by trade associations and organisations in the electricity and gas sector.¹

¹ Information provided by trade associations or organisations shall not be legally binding on future decisions by the Federal Network Agency and the Federal Cartel Office, as it was not subject to detailed scrutiny.

1 Summary / Important Developments

1.1 Organisational structure of the Federal Network Agency

On 13 July 2005 the Second Energy Statutes Reorganisation Act took effect in Germany with a completely reworked Energy Industry Act (EnWG). The objective of this Act is to establish non-discriminatory third-party network access as well as fair and efficient network charges while at the same time offering a secure, cost-efficient, consumer-friendly, efficient and environmentally sustainable grid-based supply of electricity and gas to the general public. The EnWG deals in particular with the regulation and unbundling of network operations on the electricity and gas market. Both the electricity and the gas market in Germany are fully liberalised.

The Federal Network Agency, like the Federal Cartel Office, is a separate higher federal authority within the scope of business of the Federal Ministry of Economics and Technology and passes court-like judgments. In the energy sector the regulatory decisions of the Federal Network Agency are primarily made by four ruling chambers (section 59 (1) of the Energy Industry Act). They are staffed by one chairman and two assessors. The members of the ruling chambers must not own or lead undertakings in the energy sector, or be members of the management board or supervisory board of an undertaking in the energy sector.

The following illustration shows the organisational structure of the department of Energy Regulation as well as the corresponding ruling chambers in the Federal Network Agency.

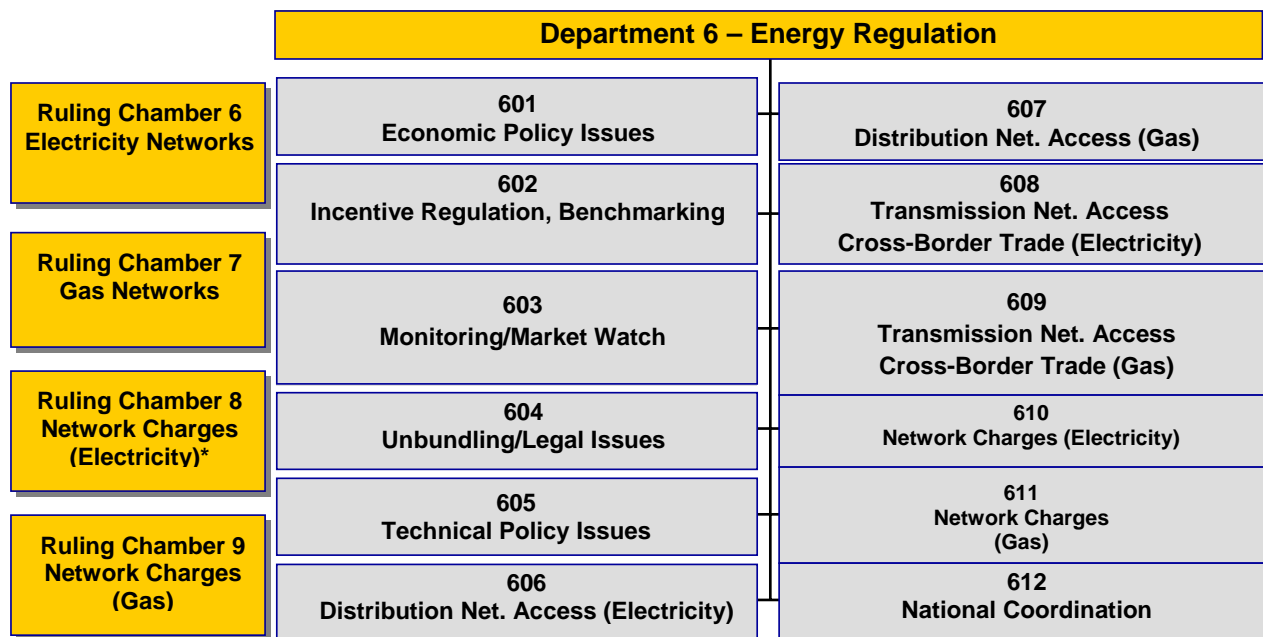


Figure 1: Organisational structure of the Department of Energy Regulation

According to section 54 (3) of the Energy Industry Act, the Federal Network Agency is the general enforcement agency for the Energy Industry Act and generally responsible for the electricity and gas transmission systems.

The tasks allocated to the federal states in their own right, as per article 83 of the German constitution, are listed in section 54 (2) of the Energy Industry Act. Responsibility of a federal state applies only if the distribution network of an undertaking does not cross the border of another federal state and has less than 100,000 customers connected to it, be it directly or indirectly. In addition the Federal Network Agency exercises any competencies whose standardised application across Germany is of particular importance in order to ensure efficient surveillance of the market. The Agency also assumes the tasks assigned to the member states in Regulation (EC) No. 1228/2003 on conditions for access to the network for cross-border exchanges in electricity (section 56 of the Energy Industry Act).

The Federal Network Agency and the state regulatory authorities support each other in performing their tasks. In order to ensure a standardised regulatory system across Germany, a committee of federal state representatives was set up pursuant to section 8 of the Law on the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway, consisting of one representative from each state's regulatory authority.

Section 5 (1) of the Federal Network Agency Act provides for an Advisory Council to be set up at the Federal Network Agency. It consists of 16 members of the German Bundestag and

16 representatives of the German Bundesrat; the representatives of the Bundesrat must be members or political representatives of the government or of a federal state. The members and deputy members of the Advisory Council are always appointed by the German government upon the proposal of the German Bundestag and the German Bundesrat.

Section 58 of the Energy Industry Act (EnWG) sets out the cooperation between the cartel offices and the regulatory authorities. Where the regulatory authority takes decisions concerning the regulation of network operations (part 3 of the EnWG), the Federal Network Agency will give the Federal Cartel Office and the authority responsible under state law, in whose federal state the affected network operator is located, due opportunity to comment before the end of proceedings (section 58 (1) sent. 2 of the Energy Industry Act). The cartel offices give the Federal Network Agency opportunity to comment under section 58 (2) of the EnWG. In a number of cases set out in section 58 (1) sent. 1 of the Energy Industry Act, the Federal Network Agency is required to seek agreement with the Federal Cartel Office. The Federal Network Agency and the Federal Cartel Office can exchange information, irrespective of the type of procedure chosen, including personal data and operational/business secrets, where this information is required to fulfil their respective tasks; they can also use such data in these proceedings. They strive for a standardised interpretation of the Energy Industry Act which upholds the spirit of the Law against Restraints of Competition (GWB).

1.2 Important developments in the areas of unbundling and consumer aspects

Effective unbundling between the network area and those areas within a vertically integrated energy supply company which are accessible to competition, is one of the key objectives of the Energy Industry Act. The **unbundling process** has been continuing steadily in the report period 2006. The unbundling requirements have been structurally implemented at transmission system level. DSOs with more than 100,000 customers must divest their distribution network to a legally independent company by 1 July 2007. At present the Federal Network Agency sees no signs that legal unbundling will not be implemented on time by all DSOs concerned.

The trend that can be observed in the divestment of electricity and gas distribution systems goes toward small network companies which operate the holding company's leased network with few own staff members. Alternatively, either network cooperations are set up which lease and operate the networks of various owners or, in other cases, networks are leased out to existing network operators of large supply companies. A transfer of the network ownership to the divested network companies only occurs in very few cases. While the transport network operators in the electricity sector have quickly and consistently driven this divestment ahead, i.e. with a transfer of network ownership and the major part of staff to the network company, this process has been sluggish in the case of gas transmission network operators. With a few exceptions the natural gas transmission systems are operated on a temporary lease base by companies with only few staff members of their own. The strategic functions of the network companies at the TSO level, both for electricity and gas, are always found at the level of the holding corporation. For that reason there are still issues to be resolved in the area of functional unbundling and informational unbundling at all network levels, despite a large-scale implementation of measures for legal unbundling and unbundling of accounts.

In 2006 nearly all universal suppliers have met the transparency requirements in terms of their general prices and general terms and conditions for their **universal supply**. The calculation and publication of separate, general prices for the low voltage or low pressure **replacement supply** of final consumers who are not household customers still has not caught on amongst the majority of universal suppliers. The transparency requirements for the contents of energy supply contracts with household customers beyond universal supply are starting to catch on, though.

The **demand for information by energy consumers** continued to be high in 2006. The focus of consumer complaints received by the Federal Network Agency was once again the increase of final consumer prices, both for electricity and for gas.

1.3 Important developments on the electricity market

There is presently no need to declare **congestion** at domestic lines within Germany. The German transmission system operators (TSOs) currently prevent the development of congestion in their networks by employing network and market related measures (so-called topology measures and redispatching, i.e. switching in the network and short-term changes in the regional distribution of the power plant feed-in). However, the predicted development of the German power generating market over the next few years, which is likely to see both the additional construction of new conventional power plants as well as the construction of onshore and offshore windfarms, will require an expansion of the transmission system and related planning.

There is congestion at all German borders, with the exception of the Austrian border. At the beginning of 2006, for all German borders on which congestion had been declared to exist procedures for congestion management as set out in EG regulation 1228/2003 were applied. On the Kontek cable, an AC-connection between Germany and Denmark, implicit auctions were introduced in 2006. At the other **cross-border interconnections** capacity was allocated by means of explicit auctions, with allocation to market players being made on the basis of the prices bid for the capacity.

The **degree of interconnection** of the entire German transmission system is calculated by dividing the import capacity by the total power plant capacity installed in Germany. In addition to an import capacity of an average 17 GW in 2006, the VDN² reports an installed power plant capacity of 124.3 GW. In 2006 the degree of interconnection in Germany was therefore around 14 percent. Compared to 15 percent in 2005 the degree of interconnection between Germany and the neighbouring states may have declined slightly, but it is still above the 10 percent interconnection aimed for at the European Council of Barcelona in 2002. The slight decline of the degree of interconnection can be explained by the fact that the generating capacity has increased while the import capacity has remained the same.

In the case of **cross-border load flow**, import and export (without Luxemburg and Sweden, which were not taken into consideration for the monitoring) have increased in 2006 when compared to 2005. While the export rate has increased only slightly from 57 TWh to 58 TWh, the import rate has increased from 32 TWh in 2005 to 42 TWh in 2006.

² Cf. VDN (German association of electricity network operators): Daten und Fakten - Stromnetze in Deutschland 2007, 2007.

The **revenues from congestion management** amounted to a total of 636 mio. Euro in 2006. Compared to 2005 the revenue from congestion management has therefore almost doubled. In terms of export capacity the TSOs generated revenues of approx. 298 mio. Euro (2005: approx. 119 mio. Euro), while in terms of import capacity they generated approx. 338 mio. Euro in 2006 (2005: approx. 215 mio. Euro). The auction revenues remaining with the German TSOs has also nearly doubled in 2006 to approx. 314 mio. Euro (2005: approx. 157 mio. Euro). In the 2006 reporting period Germany once again exported electricity primarily to the Netherlands, Switzerland and Austria. The most important import countries for Germany were Poland, the Czech Republic and France, just as in 2005.

According to the 2007 monitoring exercise, congestion in the domestic German distribution system occurs primarily at the high voltage level. In one case congestion was also reported at a low voltage level. At extra high voltage and medium voltage level no congestion occurred during the period under review. However, congestion did also occur at substation levels, in this case affecting primarily the substation level for extra high and high voltage level.

The network charges for household customers with an annual consumption of 3,500 kWh p.a. have declined from an average of 7.30 ct/kWh (1 April 2006) to 6.34 ct/kWh (1 April 2007). This equals a reduction of approx. 13 percent. This reduction is a result of the cuts in network charges made in the regulatory authorities' first round of approvals. These approvals were the first decisions ever made by the regulatory authorities on the applications of grid operators in Germany. In the **electricity sector** the Federal Network Agency alone regulates the **network charges** of 256 network operators, of which 101 come under general federal responsibility. In the case of 155 further network operators, network charges are also regulated by the Federal Network Agency through an official delegation of powers, based on administrative agreements between the federal government and some federal states. By June 2007 a total of 246 proceedings had been closed. The reduction of costs applied for led to a considerable decrease of the share of the network charges in the retail price of electricity. However, due to the increased costs of procuring electricity plus the supply margin, levies and taxes, the reduction in network charges caused by regulation has, with the exception of industrial customers, only resulted in a more moderate price increase rather than an actual price reduction. By regulating the network charges, the prerequisites for the development of an electricity market characterised by competition were improved.

The role of the TSOs to convert the fluctuating feed-in from renewable energies into a profile supply will subsequently be referred to as "EEG enhancement" (EEG = Renewable Energy

Sources Act). In order to balance the difference between the profile supply (currently a monthly band) of the TSO to electricity supply companies supplying final consumers, and the actual feed-in of electricity from renewable energy, the TSO must either buy additional electricity or, in the case of excessive feed-in, sell it (balancing energy). Since sales and purchase prices are not equivalent in value, costs are incurred which are included in the network charges. The transmission system operators claim costs of several hundred mio. Euros per year for this, with a strong upward trend. Since the network costs resulting from these obligations are part of the network charges, a separate determination of prices in the sense of a separately shown surcharge does currently not take place in Germany. The Federal Network Agency is currently developing a fundamentals report for the details of opening up the market segment "EEG enhancement", based on available proposals.

The expenditure for the sum of all **auxiliary services** in the reporting period 2006 amounted to approx. 1,192 mio. Euro. Based on the total consumption, the calculated share of positive secondary control energy in the overall demand for secondary control energy was approx. 53 percent in 2006. While the average demand for positive secondary control energy has therefore almost doubled in two years, a considerable reduction was noted in negative secondary control energy. The frequency of use for the minute reserve in 2006 has also decreased with a total of 3,940 requests (2005: 6,456). In the control area of RWE TSO the demand for minute reserves was the greatest with almost 3,000 requests.

In 2006 the **prices for balancing energy** have increased to an average of 4.4 ct/kWh (2005: 3.1 ct/kWh). For positive control area balances the average balancing energy prices in the reporting period 2006 were between 7.81 ct/kWh (E.ON Netz GmbH) and 10.39 ct/kWh (Vattenfall Europe Transmission GmbH). For negative control area balances the average balancing energy prices were between 0.16 ct/kWh (E.ON Netz GmbH) and 0.71 ct/kWh (EnWB Transportnetz AG). The total expenditure of the transmission system operators for balancing energy in 2006 increased to approx. 360 mio. Euro (2005: approx. 213 mio. Euro).

Until the end of 2006 an interim solution applied to **schedule changes** extending beyond a control area, with different lead times for changes to intraday trading schedules; at the beginning of 2007 the TSOs changed this to the statutory notice periods - i.e. at least three quarters of an hour for every quarter hour of a day.

The **transparency requirements** under the Energy Industry Act and the relevant ordinances are still not being fully met by all distribution system operators. The same applies to the area of network connection terms.

The large majority of network operators has not yet established objective connection terms for the allocation of customers to a particular network or substation level. Where this allocation has been made, a relatively large range of **minimum connection power** for the allocation of customers to a network or substation level was found.

In terms of the development and publication of **minimum requirements for metering devices** as well as the volume of data and their quality, hardly any progress has been made since the year before. In the same way, there has been little progress in the partially liberated market for the installation, operation and maintenance of metering devices.

For the **network connection of new generating plants** the majority of network operators has developed "General Connection Terms", but not yet fully published them. This makes it more difficult not only for potential users to check whether the terms and conditions presented to them individually also agree with the "General Connection Terms". In the area of connected generating power ≥ 100 MW the dominant energy sources for the extra high voltage network are nuclear power, hard coal and lignite. According to the information provided by the transmission system operators, lignite and wind energy were the only energy sources at the extra high voltage network level that saw an increase in generating capacity in 2006. There has been a considerable trend towards connection requests to the extra high voltage network for generating capacity based on hard coal. In addition the reporting period 2006 saw an important increase in connection requests for wind energy, of which approx. 30% are based on an increase due to capacity enhancements of wind power plants.

On 30 June 2007 the Ordinance on Network Connection of Power Plants (KraftNAV) entered into force. This ordinance ensures greater planning safety for all parties involved in power plant and network investment. The objective of the ordinance is to relieve power plant investors from procedural obstacles and costs as well as to create greater transparency for all market players, which will also facilitate the discovery of abusive practices. For power plant investors who have decided on a concrete request for network connection by the end of 2007 and have been connected to the network by the end of 2012, a limited transport guarantee for a period of 10 years is stipulated, should the German network experience congestion in the future.

Competition in the upstream and downstream electricity markets has not improved much in 2006. There is a continuing trend towards greater market concentration, which is in particular caused by the intended consolidation of the vertical integration of the largest electricity

supply companies and by the integration of the electricity and gas business. At regional and local level, electricity supply companies and municipal utilities, both of whom distribute the electricity onwards, tend to join forces in particular with regard to procuring electricity.

Electricity generation and distribution structures and supply volumes requested by final customers have largely stayed the same. However, what has changed are the ways in which this electricity gets from the producer to the end-user. Electricity trade has therefore continued to be of increasing significance in this reporting period. The role of vendors at the energy exchange EEX in Leipzig is assumed primarily by the four largest energy supply companies but also larger municipal utilities. On the demand side there are a few large buyers, some procurement-optimising distributors and the large energy supply companies themselves. Between them the four largest energy supply companies attract the vast majority of trade offers in this context. Electricity wholesale trade is also important for trading outside the exchange, i.e. the over-the-counter (OTC) business, since the trend of the exchange prices is used as a reference in that area.

The increased importance of electricity trading, the changed demand structure (e.g. through different supply contracts for a variety of load ranges) and a structurally different arrangement of the buyers (e.g. in the form of purchasing cooperatives or municipal utilities with a trading function) has also affected the delimitation of the markets on which distributors, wholesalers and traders purchase their electricity. The important criteria for judging competition - regardless of the way the markets are delineated from each other (for further details on market delimitation cf. chapter 3.2.2.1, 3.2.3.1) - are the conditions at import and export level (for an in-depth explanation see chapter 3.2.1.1).

Since Germany is a net exporter of electricity and import plays only a minor role anyway, domestic generation of electricity is of great importance for the supply of electricity. Of this generation a share of approximately 60 percent falls to the two large energy supply companies E.ON and RWE. Including Vattenfall and EnBW, this share increases to approximately 90 percent. The share is similar when it comes to the transport of electricity at high voltage level. The remaining competitors, that together amount to approx. 10 percent of the electricity generated in Germany, are not important competitors since this market volume is spread across a multitude of often regional and local electricity suppliers (cf. chapters 3.2.1.1 and 3.2.2.1)³.

³ For further details see Federal Cartel Office activity report 2005/2006, Deutscher Bundestag Drucksache 16/5710, p. 12 ff., available at: <http://www.bundeskartellamt.de/wDeutsch/publikationen/Taetigkeitsbericht.php>.

While the trading volume of the **EEX spot market** increased only slightly in 2006, the **futures market** and in particular the **OTC clearing at EEX** recorded considerable increases in their trading volumes. As of 1 April 2007 the number of traders at EEX participating in exchange transactions and clearing as well as OTC clearing stood at 161, of which 95 were non-national traders with headquarters outside Germany. At the EEX spot market the number of traders as of 1 April 2007 stood at 137, while the futures market recorded a total of 78 traders. According to surveys by the EEX the average number of active traders per trading day, i.e. of those traders that actually submitted a bid, was 106 for the spot market in the calendar year of 2006 and 33 traders per trading day for the futures market. The electricity prices in the wholesale segment have risen once more in 2006. The annual mean average of the Phelix-Day-Base and the Phelix-Day-Peak increased by 10.46 and 13.95 percent respectively compared to 2005. The annual mean averages of the Phelix-Base-Year-Futures and Phelix-Peak-Year-Futures for the following year have increased by 33.68 and 44.16 percent respectively, compared to 2005 (for further information see chapters 3.2.2.1 and 3.2.2.2).

A functioning change of suppliers provides the basis of effective competition. With its decision on business processes and data formats the Federal Network Agency has laid the foundations for process security in case of a change of supplier. On 8 November 2006 the Ordinances on Low Voltage and Low Pressure Connection and the Ordinances on Universal Electricity and Gas Supply entered into force. Together they have superseded the Ordinance concerning the General Terms & Conditions of Electricity Supply to Tariff Customers (AVBEltV) and the Ordinance concerning the General Terms & Conditions of Gas Supply to Tariff Customers (AVBGasV) from 1979 and have adapted their contents to the new energy regulatory framework. It was in particular the legal framework for a quick and simple change of supplier that was further improved.

With regard to the delimitation of network related markets for the supply of household customers and small customers without load curve metering, the market shares of the individual market players have remained largely unchanged. Apart from the four main energy supply companies, a large part of these markets falls to the municipal utilities. Change of supplier or customer movements only occurred to a very limited extent (cf. chapter 3.2.3.1).

According to information from the electricity distribution system operators, the total volume of **change of supplier** by final consumers in 2006 amounted to 35.09 TWh. In terms of the overall amount taken off by final consumers (444.32 TWh), the total volume of change of supplier leads to an average change ratio of 7.90 percent in the reporting period 2006. The overall change of supplier ratio in 2006 has therefore slightly increased by 0.11 percent

compared to 2005. This data is based on a total of 797,563 individual changes of supplier, which the recorded electricity DSOs have performed in the reporting period 2006. Of those, the electricity DSOs performed 678,423 changes of supplier (i.e. approximately 85 percent) for household customers under section 3 no. 22 of the Energy Industry Act. The number of changes of supplier recorded overall for the reporting period 2006 decreased by 3.5 percent compared to the reporting period 2005.

In the course of the 2007 monitoring exercise, the TSOs were, for the first time, asked for data on the amounts withdrawn by final customers and on changes of suppliers. The overall change of supplier ratio of 9.41 percent for electricity TSOs and DSOs is the result of comparing the overall amount of changes of supplier (45.41 TWh) with the total amount withdrawn by final consumers at the electricity TSOs (39.26 TWh) and DSOs (444.32 TWh), which amount to a sum total of 483.58 TWh. Data are based on a total of 22 changes of supplier, which the four TSOs have performed in the reporting period 2006.

According to information provided by the electricity wholesalers and suppliers, the three **largest companies** supplied a total of 239.06 TWh to final consumers in 2006. According to information from the VDEW, this is equivalent to a share of 45.06 percent of the total net electricity consumption of at 530.5 TWh in the year 2006, withdrawn from the “public supply” grid. The total amount supplied by the three largest companies to final consumers has decreased from 239.89 TWh (2005) to 239.06 TWh (2006). This denotes a slight decline in the market share of the three largest companies from 45.55 percent to 45.06 percent. In the reporting period 2006 the three largest companies recorded the highest share in the category “> 2 GWh/year” with 48.49 percent, while the lowest share was found in the category “> 100 MWh/year ≤ 2 GWh/year” with 34.52 percent.

The data collection for the monitoring report compared the current average **retail price level** (prices as at 1 April 2007) for the customer categories “industrial customers”⁴, “commercial customers”⁵, and “households”⁶, incl. all taxes and levies and contrasted them with the figures from 1 April 2006.

The mean averages weighted by volume for prices valid at 1 April 2007, and taking into account the sales volume 2006 of each company to the final consumers in the related customer category, were:

⁴ Eurostat (Statistical Office for the European Communities) - Customer category “Ig” (annual consumption 24 GWh/year, maximum demand 4,000 kW, medium voltage)

⁵ Eurostat - Customer category “Ib” (annual consumption 50 MWh/year, maximum demand 50 kW, low voltage).

⁶ Eurostat - Customer category “Dc” (annual consumption 3,500 kWh/year, low voltage).

- 11.95 ct/kWh (electricity tax - standard tariff) and 10.95 ct/kWh (producing sector) for industrial customers.
- 19.75 ct/kWh (electricity tax - standard tariff) and 18.87 ct/kWh (producing sector) respectively for commercial customers; and
- at 20.12 ct/kWh (general prices, general tariff) and 19.94 ct/kWh (beyond universal supply) for households.

For further information see chapter 3.2.3.2.

While for industrial customers the overall prices weighted by volume have come down slightly, commercial customers and households recorded an increase in the overall prices. Due to the increased costs of procuring electricity plus the supply margin, levies and taxes, the reduction in network charges caused by regulation has only resulted in a more moderate price increase for commercial customers and households, rather than an actual price reduction.

For the reporting period 2007 to 2016, the share of the overall planned **investments in electricity generating capacity** for power plants offering "public supply" with a net maximum capacity of at least 20 MW (incl. partial plant expansion) stands at 26.6 percent (27.3 GW) of the overall net maximum capacity for "public supply", which according to preliminary information by the VDEW amounts to 102.6 GW in 2006. However, no distinction was made here between replacement investments and additional net capacity. Also, there are at present company-internal approvals for 7.7 GW only and company-external approvals (by authorities) for 5.8 GW. Compared to the monitoring exercise 2006, the total number of planned investment projects has increased by 4.1 GW to 27.3 GW (23.2 GW in 2006). In the same way the sum total of actual projects under construction has grown by 1.2 GW to 5.1 GW (3.9 GW in 2006). Another 2.0 GW must be added to the listed investments for those investments in generating capacity that were commissioned by the companies in 2006 but had not been completed by 31 December 2006 (cf. next paragraph, further information in chapter 5.1.2). The investment projects for 2.0 GW (of a total of 8.6 GW) were not listed again separately when the participating companies answered questions about pending investments.

In addition to planned investments the power generators were asked whether a decommissioning of generating capacity for power plants ensuring "Public Supply" with a net maximum capacity of at least 20 MW (incl. partial decommissioning of plants) was pending or whether power plants were to be disconnected from the network. For the total period from 2007 to 2020 the overall amount of decommissioning or the disconnection of electricity generating capacity (without nuclear power) stands at a net generating capacity of 2.4 GW.

Furthermore the power generators were asked about details of investments in power generating capacity for power plants ensuring “public supply”, with a net generating capacity of at least 20 MW (incl. partial extension), that were actually commissioned in 2006. Questions were also asked as to whether power plants were finished and connected to the network in 2006 or decommissioned and therefore disconnected from the network. Compared to the reporting period 2005 the sum of commissioned investments increased from 4.5 GW (2005) to 8.6 GW. The increase in installed net generating capacity slowed down from 1.7 GW in 2005 to 0.56 GW in 2006. According to preliminary information by the VDEW, the net generating capacity for “public supply” in Germany has increased by 0.8 GW from 101.8 GW (2005) to 102.6 GW in the reporting period 2006.

On 4 November 2006 a planned interruption of an extra high voltage line resulted in an unexpected power failure extending across Europe. The Federal Network Agency has initiated investigations in this matter and identified the cause to be the missing so-called (n-1) security as well as a lack of coordination between the transmission system operators. A detailed report about this incident was made available to the general public on the internet via <http://www.bundesnetzagentur.de/media/archive/9007.pdf>.

According to a survey by the German Association of Network Operators (VDN), Germany in 2005 had an excellent security of supply (99.996 percent) in international comparison, with an average **interrupt rate** (System Average Interruption Duration Index, SAIDI) of 19.3 minutes per final consumer and year for unplanned interruptions (and a corresponding 13.4 minutes for planned interruptions). The same applies to the System Average Interruption Frequency Index (SAIFI) with 0.336 unplanned and 0.106 planned supply interruptions per low voltage final consumer and year.

In 2006 the German **TSOs** spent a total of approximately 922 mio. Euro on expansion/development and renewal of the network infrastructure as well as its maintenance (2005: approx. 643 mio. Euro). That affirms the trend already recognisable in the monitoring report 2006 towards growing **investments in the network infrastructure**. The TSO's budget figures of approx. 1,056 mio. Euro stated for the year 2007 also reflect this increase in the area of investments for expansion/development and renewal of the network infrastructure. At the same time this is not enough to close the foreseeable gap in the infrastructure.

In the area of **security of supply** it must further be stated that approximately a quarter of the distribution system operators with more than 10,000 connected customers have not yet met their statutory obligations in terms of drawing up a report on the condition of their network

and a planning report for the expansion of their network. Insufficient analyses of the network condition and an expansion of the network according to the needs can lead to misjudgements with regard to risks for the security and reliability of the electricity supply systems.

The total amount supplied in 2006 by the surveyed wholesalers and suppliers to final consumers was 466.97 TWh (432.84 TWh in 2005). The subset that was supplied under the terms and conditions for **general prices (general tariff)** decreased in 2006 by 0.65 TWh to 84.51 TWh (85.16 TWh in 2005). By far the largest part of the electricity supplied under the terms and conditions for general prices was supplied to households under section 3 no. 22 of the Energy Industry Act - 73.21 TWh and 86.63 percent of 84.51 TWh. With regard to the total amount of electricity (131.97 TWh) supplied by wholesalers and suppliers to households under section 3 no. 22 of the Energy Industry Act (information which was also requested during the 2007 monitoring exercise), the share that was supplied to households under the terms and conditions for general prices (general tariffs) was found to be 55.47 percent.

1.4 Important developments on the gas market

As part of the cooperation agreement (KoV) under section 20 (1b) of the Energy Industry Act and concluded between the operators of the gas supply networks located in Germany on 19 July 2006, the network operators have formed market areas. If a network is located in two or more market areas, a clear **market area allocation** is required for each exit point. Of those network operators allocated to more than one market area, 89 percent have performed an initial allocation of customers in agreement with their transport customers.

In terms of the **formation of network subareas** the monitoring survey showed that the majority of network operators with market areas spanning networks had subdivided their networks in 2006. When asked about the definition of **allocation requirements and restrictions**, 30 percent of local gas network operators claimed to have defined such requirements and restrictions.

The information provided by network operators in terms of **capacity** shows that there are contractual bottlenecks, as had already been apparent in last year's survey. This applies in particular to feed-in capacity at the borders. Another fact that becomes obvious is that congestion management is currently only applied to a very small degree. This applies to the secondary market as much as to auctions in case of contractual bottlenecks and the withdrawal of capacity ("use it or lose it"). By integrating the networks within the market areas, the situation regarding take-off capacity should be eased in the future. The availability of import capacities and market area coupling capacities, which are critical to the liquidity of the trade markets within the market areas (virtual points), still requires improvement. The Federal Network Agency has intensified its efforts to further develop the capacity allocation and congestion management procedures at national level and within the context of an ERGEG working group. As part of the Regional Initiative North West the Federal Network Agency heads a pilot project to improve capacity at selected central cross-border coupling points (between Germany/Netherlands and France/Germany). Studies on the progress of network expansion are being planned.

In the gas sector the **network costs** were cut by up to 28.7 percent compared to the network costs applied for. The average network charges weighted by volume were found to be lower than in the previous year. The cut of the costs applied for led to a decrease of the share of network charges in the retail price of gas. However, due to the increased costs of procuring gas plus the supply margin, levies and taxes, the reduction in network charges caused by regulation has, with the exception of industrial customers, only resulted in a more moderate

price increase rather than an actual price reduction (see chapter 4.2.3.2). The Federal Network Agency alone regulates the network charges of over 220 network operators in the gas sector, of which around 60 come under general federal responsibility. In case of approximately 160 further network operators, network charges are also regulated by the Federal Network Agency on behalf of the federal states (official delegation of powers). With the regulation of network charges, the prerequisites for the development of a competitive gas market were improved.

The use of a standardised format in the context of **electronic data exchange** must be considered a prerequisite for a change of supplier process that is suitable for bulk business and thus for the endeavoured maximum automation in the processing of customer data among the market players. For the reporting period 2006 it has to be pointed out that a standardised data format for the transmission of master and business data of the market players in the gas market did not exist and that even an electronic transmission is not standard for all network operators. The resulting need for greater coordination and manual processing in the data exchange between the companies is therefore in contravention of the statutory requirements. The Federal Network Agency, in its draft decision regarding the business process for changing gas suppliers, therefore introduces a standardised format for consistent data transmission. Following the requirements set by the Federal Network Agency in the electricity sector, it intends to use the EDIFACT standard here as well⁷.

An analysis of the current monitoring shows that considerable progress was made in the area of **balancing**, when compared to the 2006 monitoring exercise. Particularly noteworthy are the areas of nomination and basic balancing. However, the information provided as regards extended balancing and flexible services, the sizable and greatly varying price spread when pricing differences in quantity, and the area of control energy, is incomplete. It must be pointed out that the cooperation agreement concluded between gas network operators contains supplementary rules for balancing, which substantiate the provisions of the Gas Network Access Ordinance (GasNZV). The area of control and balancing energy will be one of the key points in the Federal Network Agency's future work on the topic of gas network access.

Due to the low number of responses for the period surveyed in 2006 it was once again not possible to obtain a comprehensive overview of the market in terms of the supply situation for customers with standard load profiles. The use of **standard load profiles** for handling gas supplies has not yet been implemented by approx. 73 percent of the local distribution

⁷ The Federal Network Agency took a corresponding decision on 20 August 2007, after the copy deadline for this report. For further details see www.bundesnetzagentur.de.

system operators. Given the fact that the use of a standardised load profile is one of the main prerequisites for ensuring a change of supplier in a way suitable for bulk business, the Federal Network Agency calls on network operators to implement their statutory obligation for the use of standard load profiles without delay.

The operators of gas supply networks that do not serve local distribution (TSOs) meet their **transparency requirements** far better than in the 2006 monitoring exercise. The published information is however still not complete, in particular with regard to capacity and the technical and contractual minimum and maximum pressure.

Whether or not restrictions in the publication of capacity will be justified for reasons of confidentiality is a matter the Federal Network Agency will have to investigate. Furthermore the structure of companies' websites does at times prevent the required transparency and makes it difficult to check whether or not information is complete. Considerable progress has been made in setting up a joint interactive gas network map. With regard to the publication of appropriate information by local gas network operators, the monitoring exercise shows that it is incomplete in some parts. A considerable number of local distribution system operators do not fulfil their transparency requirements at all or only in part.

In 2006 the first **biogas** generation plants were connected to the natural gas network. Due to the information provided by the companies it can be assumed that further plants will be connected to the network in 2007 and in years to come. In order to ensure efficient network access for companies, it is necessary to provide the technical minimum requirements for connection to the network in a non-discriminatory and comprehensive manner.

Compared to 2005 the year 2006 saw a slight increase in the share of network operators which defined the technical and data-specific **minimum requirements for operators of metering points** under section 21b (2) of the Energy Industry Act (59.9 percent of local distribution system operators and 73.9 percent of TSOs). As in 2005, only a few individual applications by third parties at local DSO level were registered for taking over the operation of metering points. In case of TSOs no applications were recorded in the reporting period 2006.

The **liquidity** of the German gas market is still low. One of the contributing factors in the period under review was the high concentration at import level. E.ON Ruhrgas alone as the most important German wholesaler attracted a share of approx. 60 percent (cf. chapter 1.6), as the Federal Cartel Office established during its cartel administrative proceedings against E.ON Ruhrgas for concluding long-term gas supply contracts. Another cause for the lack of

liquidity was the foreclosure of the market for supplying regional and local traders and suppliers (for more information on the market delimitation for gas refer to chapters 4.2.2.1 and 4.2.3.1). As a rule, the gas import companies had signed agreements with regional and local dealers and suppliers (especially municipal utilities), in which long-term contracts with high fulfilment of demand were signed. The Federal Cartel Office has taken action against these long-term contracts in the reporting period by instituting proceedings against the wholesalers on the grounds of anti-competitive conduct. In these proceedings the Federal Cartel Office has also stipulated those combinations of contract duration and supply amounts that it would consider permissible under cartel law for any future supply contracts (for further details see chapter 1.6 "Control of anti-competitive practices in the gas sector").

From 2 July 2007 both the **gas trade** on the spot market (day ahead) and the futures market trade will be included in the **EEX**. Trading will take place in the market areas BEB and EGT (E.ON gas transport). In the latter, trading will concentrate on the futures market to start with, while the spot market trade in these market areas (which will be merged by then) will not start until 1 October 2007.

Competition in the gas markets has not much improved in 2006. Comprehensive competition covering all levels of supply was found to be inadequate. Households and small customers were effectively still not able to freely choose their gas supplier during the period under review. The Federal Cartel Office and some other cartel offices of the federal states have therefore used proceedings against abusive price levels in order to facilitate the market entry of new competitors via resale ("Beistellung") as part of a temporary supply solution, until the Federal Network Agency is able to provide a final gas network access model, which is suitable for bulk business (see chapter 1.6). To date competition was observed only occasionally among larger customers. In its market delimitation the Federal Cartel Office has taken into account the statement affirmed repeatedly by case law that the further development of legal framework conditions alone does not constitute a change of market conditions. Instead any assessment of the conditions of competition must be based on the actual circumstances in each concrete case.⁸

On 8 November 2006 the Ordinances on Low Voltage and Low Pressure Connection and the Ordinances on Universal Electricity and Gas Supply were established. Together they have superseded the Ordinance concerning the General Terms & Conditions of Electricity Supply to Tariff Customers (AVBEltV) and the Ordinance concerning the General Terms &

⁸ Cf. BGHZ 136, 379, 385 „Strom und Telefon I“; and OLG Düsseldorf, ruling dated 23/11/2005, WuW/E DE-R 273-277, "Mainova AG / Stadtwerke Aschaffenburg GmbH", where the appeal against the Federal Cartel Office's prohibition of this intended merger was rejected non-appealably.

Conditions of Gas Supply to Tariff Customers (AVBGasV) from 1979 and have adapted their contents to the new energy regulatory framework. It was in particular the legal framework for a quick and simple **change of supplier** that was further improved.

In 2006 over 90 percent of network operators (local distribution system operators and TSOs) were in principle able to offer a procedure for changing suppliers. Overall the change ratio in the gas sector in relation to the quantities involved is on a low level. In relation to the overall gas supply, 2006 saw a supplier change ratio of 1.25 percent according to information provided by system operators "gas". Despite an increase in the number of actual changes for the category 'household customers', compared to 2005, it is still large and very large industrial customers, i.e. final consumers with a take-off capacity in excess of 10,000 MWh/year, that clearly dominate in terms of the change ratios quoted. According to information from the gas network operators, the total volume of change of supplier by final consumers in 2006 amounted to 11.74 TWh. Compared to the previous year (3.31 TWh) this figure increased more than threefold. According to information from the surveyed network operators, a comparison with the year 2005 showed an increase of the number of processed supplier changes for final consumers, from 302 (2005) to 8.871 (2006). Despite this the share of the overall volume of supplier changes as a percentage of the overall take-off capacity is only 1.25%. Nearly two thirds of the supplier changes among final consumers were found among households.

According to information provided by gas wholesalers and suppliers, the three **largest companies** supplied a total of 317.36 TWh to final consumers in 2006, which equals a market share of 30.87 percent (2005: 29.91) of the total gas consumption of 1028.08 TWh in the year 2006 (source: BMWi/BAFA). The total amount supplied by the three largest companies to final consumers has increased slightly from 312.56 TWh (2005) to 317.36 TWh (2006). In the reporting period 2006 the concentration of the three largest companies was highest in the supply category ">100,000 MWh/year", with approximately 50 percent. The lowest concentration was found in the category "> 300 MWh/year ≤ 10,000 MWh/year". For this category the three largest companies together reached a market share of 23.61 percent.

The data collection for the monitoring report compared the current average **retail price level** (prices as at 1 April 2007) for industrial customers⁹, commercial customers¹⁰, and

⁹ Eurostat customer category I4-1 (annual consumption of 116,370,800 kWh/year and a maximum demand of 250 days (4,000 hours)).

¹⁰ Eurostat customer category I1 (annual consumption of 116.371 kWh/year, no prescribed maximum demand, if necessary 115-120 days).

households¹¹, incl. all taxes and levies and contrasted them with the figures from 1 April 2006. The mean averages weighted by volume (for further information see chapter 4.2.3.2) for the price level on 1 April 2007, taking into account the sales volume of each company in the related customer category in 2006, were found to be 4.23 ct/kWh for industrial customers. For commercial customer these figures were 5.74 ct/kWh and for households 6.57 ct/kWh (general prices /general tariff) and 6.25 ct/kWh respectively (beyond universal supply). While the overall price weighted by volume has slightly decreased for industrial customers, a slight increase of the overall price was recorded for commercial customers and households. Due to the increased cost of procuring gas plus the supply margins and taxes, the reduction in network charges across all customer categories, caused by regulation, has only resulted in a more moderate price increase for commercial customers and households rather than an actual price reduction.

With regard to **security of gas supply** an expected growing demand for gas in the medium term is faced with a forecast for an almost stagnant domestic supply of currently just under 18 percent (181.7 TWh in 2006) of demand (1,028.1 TWh in 2006). This output level can only be maintained by growing domestic investments. In doing so both new drill holes and new procedures for increasing or extending the output from existing sources must be employed. At the same time it must be assumed that growing demand means a decreasing relative share of domestic output, which in turn necessitates an increase in the amount imported (2006: 978.3 TWh). As large projects for a diversification of transport routes and supply sources, the Nord Stream Gas pipeline and the LNG terminal in Wilhelmshaven are currently being discussed.

The report section System Responsibility found that on-call service or network monitoring are the most frequently designated network-related measures under section 16 (1) no. 1 of the Energy Industry Act, while contractual regulations about a deactivation are the most frequently designated market-related measures as set out in section 16 (1) no. 2 of the Act. Four gas transmission system operators have not drawn up a **vulnerability analysis** under section 16 (5) of the Energy Industry Act.

In case of those gas transmission system operators who have provided information on the issue of **network expansion**, a considerable increase in investments for expansion and development is not apparent until 2008. According to the budget figures, a comparison with previous years shows the year 2007 to be the start of a trend towards greater investments. Statements on the actual increase of capacity and the question of whether the newly created

¹¹ Eurostat customer category D3 (annual consumption of 23,269 kWh/year (appliances: cooking, water heating, and central heating)).

capacity can cover (future) demand for capacity, cannot be made. The planned expenditure for renewal and maintenance will not change significantly.

1.5 Main areas of the Federal Network Agency's work

Access to electricity supply grids

Cross-border congestion management

The Federal Network Agency is dedicated to further developing methods of congestion management for the transmission networks at Germany's external borders. This is done in cooperation with the neighbouring regulatory authorities and the affected transmission system operators. 2006 saw the adoption of a revised version of the annex on congestion management of the relevant regulation (EC) 1228/2003, also known as the "electricity regulation". In a comitology procedure based on a draft prepared by ERGEG¹², the so-called congestion management guidelines in the annex to the electricity regulation were replaced and entered into force on 1 December 2006. As part of an EU regulation they are now universally and directly binding in all member states. These congestion management guidelines expand further on the provisions in the electricity regulation, in particular with regard to the coordination of TSOs for congestion management, improvement of transparency, calculation of available transmission capacity and capacity allocation procedures.

In order to achieve a transposition of the quoted guidelines as quickly as possible, the Federal Network Agency and other national regulatory authorities have begun to introduce the necessary steps already before the guidelines entered into force. Optimisation of congestion management in different European regions was one aspect that was discussed in particular. Several regions decided to introduce implicit auctions for the allocation of day-ahead capacities via market coupling, in order to improve efficiency. Central Western Europe and Northern Europe for example introduced projects for the launch of market coupling (in Central Western Europe based on the load flow). In Central Eastern Europe load flow-based explicit auctions are to be introduced.

Congestion management within Germany

Due to the changing generating pattern in Germany, i.e. the increasing feed-in of regenerative energies foreseeable in the future, an additional feed-in of conventional power plants as well as maintaining the conventional current feed-in capacity while at the same time reducing nuclear feed-in, German transmission system operators had considered the medium-term appearance of congestion within Germany to be possible. In order to clarify

¹² The comitology procedure is a simplified EU legislative procedure, in which the European Commission (chair), the member states and the European Parliament (consultation) are involved.

how this potential future congestion within Germany might be managed, the Federal Network Agency has commissioned an expert opinion which will be completed in the next few months.

Network expansion

Since the issue of avoiding congestion within Germany is closely related to the issue of expanding the network according to needs, the Federal Network Agency considered one of the main areas of its work in 2006 to be the control of the TSOs' network expansion projects. On the one hand it requested the network expansion and network condition reports from the transmission system operators in February 2006 and made them available to third parties, upon request and provided the criteria were met. On the other hand the status quo of network expansion project implementation mentioned in these reports is reviewed by the Federal Network Agency by means of the quarterly reports submitted by the TSOs (cf. chapter 5.1.4).

Transparency

The creation of more market transparency, in particular the reduction of an information asymmetry, is considered an important factor in the development of an internal energy market, both by the European Commission and the national regulatory authorities. For this reason ERGEG had already begun in 2005 to draw up the so-called "Guidelines of Good Practice of Information Management and Transparency" (GGP-IMT). These guidelines were adopted by the regulatory authorities on 2 August 2006. In addition to general considerations on transparency and the management of information, they also contain a list of the information required for the market as seen from the regulators' perspective, which is not legally binding but rather a recommendation for the market players. As presented above, the congestion management guidelines were established on 1 December 2006 and now contain a list of transparency requirements for transmission system operators similar to those in the GGP-IMT list.

Based on the GGP-IMT and the congestion management guidelines the Federal Network Agency then created a draft transparency report in 2006 as part of its work in the region Northern Europe. This report contains concrete definitions of the individual transparency requirements and is thus intended to contribute to a harmonisation of transparency in the entire northern region. On that basis the Federal Network Agency then dedicated itself to further harmonising the degree of transparency, even beyond the borders of the northern region.

EEG enhancement

Section 14 (1) of the Renewable Energy Sources Act (EEG) requires transmission system operators to record the different extent and the chronological sequence of the remunerated energy amounts and remunerations under section 5 (2) EEG and to immediately balance the energy amounts against each other. Under section 14 (3) EEG, electricity supply companies supplying electricity to end users must accept and pay for the electricity that the TSO responsible for their control area has taken off on their behalf in accordance with a duly announced profile which is close to the actual electricity take-off. For TSOs these obligations result in a task to convert the fluctuating feed-in from renewable energy sources into a profile supply, currently a monthly band. This process is referred to as "EEG enhancement". To date this responsibility was largely fulfilled by the generating and trading sister companies of each transmission system operator. This procedure was criticised as discriminatory by many market players. Some market players have therefore approached the Federal Network Agency and have submitted suggestions as to how the "EEG enhancement" could be performed within the context of a transparent, non-discriminatory and market-oriented procedure. These proposals were then discussed in preliminary talks with transmission system operators and those market players who had approached the Federal Network agency with their proposals. The Federal Network Agency is currently developing a fundamentals report with details for opening up the market segment "EEG enhancement", which will be based on the available proposals.

Connection and access to electricity supply networks

The Federal Network Agency had to become active in this field and took action regarding the network connection for generators (large power plants connected to the transmission system) and consumers (selection of network level, contributions to infrastructure extension cost) as well as in the area of network usage in the narrow sense, regarding many varied technical questions, in particular the procurement and handling of balancing services.

Against the background of an increasing demand over the next few years to renew existing power plants as well as the currently existing market-oriented incentives through electricity prices and the agreed plans for abandoning nuclear energy, a large number of thermal power plants with a total capacity of approximately 29 GW is currently either being projected or already being built. A large part of the power plants are to be constructed in the Rhine-Ruhr area and in north Germany. The affected transmission system operators were initially against these requests for network connection. However, the Federal Network Agency was able to bring about a consensual solution. In this context the Ordinance on Grid Connection of New Power Plants (KraftNAV) should be mentioned, which entered into force on 30 June 2007.

In the area of network connection there was also some dispute regarding network connection for users consuming electricity, in particular with regard to the selection of network level and the charging of contributions to infrastructure extension cost. With regard to the selection of network levels the Federal Network Agency received numerous complaints according to which the parties requesting network connection were refused connection to the requested network or substation level by the network operator. The background is - in addition to the question of whether or not section 17 of the Energy Industry Act gives the party requesting connection a right to choose - ultimately a financial one, both for the party requesting connection and for the network operator. Furthermore the choice of network level has direct implications for the network charges to be paid or collected. The Federal Network Agency has developed a policy paper on this issue and published it for public discussion. Another issue that the Federal Network Agency dealt with due to manifold complaints and enquiries is the collection of contributions to infrastructure extension cost. It became apparent that it is not only the specific prices that vary greatly between individual network operators. The system of collecting those contributions is also heterogeneous and in most cases not transparent. The contribution to infrastructure extension cost does not present a component of the network charge in terms of the Network Charges Ordinance. For that reason the regulatory authorities do not issue a formal ex-ante approval for such contributions. They, as well as the network connection costs, are however part of the network connection terms, which under sections 17 and 18 of the Energy Industry Act must, above all, be transparent and non-discriminatory vis-à-vis the user. A completely non-uniform and inconsistent way of collecting charges that had evolved over decades must now be measured against the parameters of the new Energy Industry Act and aligned with new regulations contained in the Ordinance on Low Voltage Connection (NAV). Due to the lack of transparency and uniformity of the system for collecting charges used by the different network operators, efforts are being made to draw up a standardised system for the collection of contribution to infrastructure extension cost.

In the area of network usage, matters of administration and procurement were dealt with. Section 10 (1) of the Electricity Network Access Ordinance (StromNZV) states that network operators must procure loss energy according to a market-oriented, transparent and non-discriminatory procedure. In talks between the Federal Network Agency and companies it became apparent that the legal stipulations for the procurement of loss energy are being implemented in many different ways. Both the procurement practices and the method for determining the network losses varied, depending on the network operators reviewed. Due to that finding the Federal Network Agency developed its own concept of tendering for loss

energy. This concept is to be presented to the market players as part of a consultation from the beginning of August to mid-September 2007 and to be developed further.

Another focal point under review was the procurement and handling of energy supplies to customers operating thermal storage heaters or reverse cycle heating systems. Although this is an area requiring large amounts of electricity, there are hardly any procurement alternatives for customers, apart from suppliers already established in the network area. That leads to a situation where customers, even in cases of price increases, factually have no alternative options in practice. The cause is presumed to be the complex temperature-dependant load profiles used here, which involve a lot of effort for supplying those customers. The Federal Network Agency has commissioned an expert opinion on this issue, with the aim of simplifying the currently used standard load profile procedure in a suitable manner, thus creating effective competition for the market segment "heat storage customers" as well.

The method of recording electricity consumption also plays an important role for users with a medium voltage connection, if their annual consumption is less than 100,000 kWh. According to the provisions of the Electricity Network Access Ordinance (NZV), these users are entitled to be supplied via a standard load profile, since section 12 of the Ordinance does not restrict this to a certain voltage level. However, if the user is connected to medium voltage, some network operators requested from the user the installation of load curve metering.

Due to the results of the monitoring report 2006 the Federal Network Agency has expanded its activities in the area of metering and measuring. Developments in the area of installation, operation and maintenance depend in particular on the profitability of the metering point operators, which would increase if metering was liberalised. However, some obstacles in the market could be overcome by measures of the Federal Network Agency. Some network operators for example did not initially provide a contract for a metering point operator because no recommendation by the relevant trade association was available. In addition the technical minimum requirements and terms and conditions with regard to the extent and quality of data vary between network operators. Based on a complaint, the Federal Network Agency took a decision about the connection configuration, i.e. the number and arrangement of metering points as well as the method for measuring. Furthermore it was established that in case of remote load curve metering via the telephone network, the telephone connection required as necessary infrastructure for ensuring the transmission of data must be provided by metering point operator.

Due to the results of the monitoring report 2006 the network operators' compliance with their duty of disclosure and transparency requirements was comprehensively reviewed. In the area of transmission system operators the statutory information was largely published. The distribution system operators fulfilled their transparency requirements only partially or had published their information on their website in a way that made it difficult to find. These findings prompted the Federal Network Agency to work out a more concrete and specific definition of the terms of the statutory duty of disclosure and transparency requirements on the one hand and on the other hand to supplement information regarding the level of detail and publication deadlines as well as data formats.

Network charges for electricity

The Federal Network Agency's primary focus in the area of network charges for electricity in 2006 was the approval of these charges under section 23a of the Energy Industry Act. For the first time network operators had submitted applications for approval of their network charges. While reviewing the applications the regulatory authorities made considerable cuts to the network costs applied for (for further information see chapter 3.1.3.1).

With the 2006 benchmarking exercise for electricity, an efficiency comparison of the German network operators was conducted as required under section 22 of the Electricity Network Charges Ordinance. The objective of the benchmarking exercise was to increase transparency and to provide an overview of the status quo at the beginning of energy regulation. Within the classes of comparison that had to be formed as part of this benchmarking exercise, considerable cost differences became apparent.¹³

Based on section 19 of the Electricity Network Charges Ordinance (StromNEV) applications for individual network charges were processed. Furthermore the network operators' duty of disclosure under the Electricity Network Charges Ordinance was reviewed. A number of abusive practice proceedings are pending.

Access to gas supply networks

Decision about the prohibition of the single capacity booking model

Upon application by the Federal Association of New Energy Suppliers e.V. (BNE) and the gas trader NUON Deutschland GmbH, proceedings on the grounds of anti-competitive conduct were initiated against the network operators RWE Transportnetz Gas GmbH, E.ON Hanse GmbH and Stadtwerke Hannover AG. The matter under investigation was the

¹³ For the results see Communication 300/2006 (Official Gazette no. 17/2006 of the Federal Network Agency, dated 30 August 2006).

admissibility of access to the gas network under the single capacity booking model and the subdivision of the German gas network into 19 market areas¹⁴.

The cooperation agreement of the gas industry had so far provided for two different options for organising gas transport: The basic model is a form of access provided by law and based on two contracts from the injection of gas (entry point) to its withdrawal at the end customer's premises (exit point); this is the so-called "two-contract model" (entry-exit model). In addition the agreement also contains the so-called "single-capacity booking model" requested by the Federal Association of the German Gas and Water Industries (BGW) and the Association of Local Utilities e.V. (VKU). In case of the single capacity booking model, the transmission of gas is processed on the basis of a series of individual agreements for each of the networks used. On 17 November 2006 the following decision was made about this matter: the two-contract model is the only admissible model. Network access agreements concluded on the basis of the single capacity booking model must be changed over in two steps by 1 April 2007 or 1 October 2007 at the latest. The prohibition of this model was necessary because the single capacity booking model was not provided for either in law or in the ordinances. The decision initially only affected the network operators directly involved in the proceedings; however, as a model case this was of importance to the entire German gas industry. The associations BGW, VKU and GEODE have therefore completely reviewed the cooperation agreement. At the beginning of the energy industry year 2007/2008 on 1 October 2007, the present co-existence of the two access models will finally be terminated and the two-contract model will be put on a reliable contractual footing.

An application for a prohibition of - at the time of decision - 19 designated market areas¹⁵ was rejected on the grounds of non-admissibility. At the same time the subdivision into market areas presents a considerable obstacle to the creation of a sufficiently liquid, open and flexible gas market and can therefore not be tolerated in the long term. The Federal Network Agency therefore pursued the issue further with the objective of achieving an important reduction of the number of market areas. To achieve this, the undertakings should first be given an opportunity to submit their own proposals. If voluntary solutions cannot be established, formal regulation proceedings could be considered. In the meantime undertakings have merged market areas or made binding announcements for such a step.

¹⁴ By 1 October 2007 the number of market areas will be reduced to 14. The Federal Network Agency is working towards a further reduction of the number of market areas across the board.

¹⁵ Ditto.

Decision about refusal to grant network access and allocation of firm capacity

Under the terms of the ministerial approval by the Federal Ministry of Economics and Technology, E.ON AG, as part of its merger with Ruhrgas AG, had been obliged to offer to the market gas volumes amounting to a total of 200 billion kWh in several auctions starting 1 October 2003. One of the requirements stipulated had been the obligation to transport the gas auctioned off. After the 2005 auction EnBW Trading GmbH had unsuccessfully applied to EGT (formerly: Ruhrgas Transport AG & Co. KG) for firm transport capacities for its gas purchased at auction, but was only assigned interruptible capacity. EGT claimed that at the time in question all firm fixed capacities had already been booked by third parties.

Considerable capacity from companies of the E.ON group was also considered as having priority. In the winter of 2005 EGT had repeatedly interrupted the gas transports of EnBW, because firm capacity rights had almost without exception been used by other transport customers. Due to an application by EnBW Trading claiming anti-competitive conduct, the Federal Network Agency formally established on 5 May 2006 that EGT had acted in a discriminating and thereby anti-competitive way when allocating capacity. A particularly critical factor in this decision had been the interpretation of their obligations under the ministerial approval. In line with the legal interpretation of the ruling made, EGT must offer all buyers of release quantities firm transport capacities where this is requested. Without these accompanying measures the ministerial approval would have been deprived of its intrinsic value in a critical area. The affected undertaking has appealed against this decision at the higher regional court Düsseldorf. The proceedings were concluded with a settlement in court.

Business process for change of supplier

In addition to creating non-discriminatory network access for traders and suppliers, standardised processes and data formats for changing suppliers in the gas sector are of vital importance for the entry of new players into the German gas market. Without the resulting suitability for bulk business it is not possible to create the conditions required for strong competition and a corresponding choice of suppliers for the consumers. In order to meet their obligations under section 37 (1) sent. 1 Gas Network Access Ordinance, trade associations BGW and VKU published the “BGW/VKU-Leitfaden Geschäftsprozesse zum Lieferantenwechsel bei Erdgas“ (BGW/VK Guidelines for business processes regarding change of supplier for natural gas) in June 2006. This was further supplemented by drafts for appropriate communications for the handling of an electronic exchange of data. Starting with these preliminary thoughts of the gas industry, the Federal Network Agency then found it necessary, in order to ensure sufficient legal certainty and obligation, to use its competence to make determinations under section 42 (7) no. 4 of the Gas Network Access Ordinance. After publication of a draft determination of nine business processes and the automation of

the related data exchange as well as the standardised definition of data formats, a stakeholder hearing was conducted. The presiding Ruling Chamber is currently investigating to what extent the draft determination is to be modified after evaluating the comments received¹⁶.

International aspects

The Federal Network Agency is represented in several working groups of ERGEG and CEER. These, inter alia, deal with issues such as gas storage, interoperability, balancing, transparency, European grid, access to LNG terminals, methods for calculating capacity and the trade of capacity rights on the secondary market. Furthermore the Federal Network Agency, in cooperation with the French regulatory authority CRE, has taken over chair of the working group "Treatment of New Infrastructure Investment". The work conducted by this group entails an analysis of data collected regarding procedures used to date under article 22 of Directive 2003/55/EC as well as a concrete recommendation for the application of article 22 in the form of guidelines.

The objective of the Gas Regional Initiative, which was launched by ERGEG in April 2006, is to break down trade and transport barriers between the EU states, initially at regional level, in order to allow the development of a Community-wide single market. Germany belongs to the regional energy market "North West", whose activities in 2006 were initially characterised by the launch of the initiative, the setting up and staffing of the required panels and the drawing up of a work programme.

Network charges for gas

Approval procedure pursuant to section 23a of the Energy Industry Act

Reviewing the first applications for approval of the network access charges under section 23a of the Energy Industry Act presented one of the Federal Network Agency's primary tasks in the area of energy regulation. Since the current approval of charges expires on 31 March 2008, the electronic data collection form and the requirements for the report to be attached were decided upon and can be downloaded by undertakings on the Federal Network Agency's website. Any decisions of fundamental importance were made in agreement with the state regulatory authorities. Furthermore the Agency investigated whether the network operators, who had declared to be subject to network competition, did indeed meet the criteria for a calculation of tariffs under section 19 of the Gas Network Charges Ordinance. To date one notification has been rejected. For a comparison of transmission system operators who calculate their tariffs according to section 19, a benchmarking exercise under

¹⁶ The Federal Network Agency made a corresponding determination on 20 August 2007, after the copy deadline for this report. For further information see www.bundesnetzagentur.de.

section 26 of the Gas Network Charges Ordinance is being prepared. A benchmarking exercise under section 21 (1) of the Gas Network Charges Ordinance was conducted, with 1 November 2005 serving as the reference date. The data submitted was checked for plausibility and completed so that the results could be published. Furthermore, the Federal Network Agency checked whether the network operators had met their duties of disclosure under section 27 (2) of the Gas Network Charges Ordinance. Of 747 network operators 505 have completely fulfilled their duties of disclosure and transparency under section 27 (2) of the Gas Network Charges Ordinance, 65 only fulfilled their obligations in part, while 177 have not fulfilled their duties at all. Two abusive practice proceedings under section 31 of the Energy Industry Act were initiated and concluded by a withdrawal of the relevant application.

Unbundling

The work of the Federal Network Agency in the area of unbundling can be summarised as follows for the period 2006 until June 2007:

- Active support of the unbundling process through consultation with companies and associations as well as talks at trade events.
- Definition of requirements by publishing guidelines for the informational unbundling.
- Review of compliance reports of the energy supply companies for the reporting period 2006.
- Collection of market data on the implementation of unbundling.
- Participation in the implementation of the legal framework at European level (ERGEG/CEER).

Supply quality

All operators of energy supply networks are obliged to submit to the Federal Network Agency a report about interruptions of supply that occurred in their network. Section 52 of the Energy Industry Act empowers the Federal Network Agency to set requirements regarding the formal layout of the report. These stipulations were published for network operators on 22 February 2006 as "Allgemeinverfügung zu Vorgaben zur formellen Gestaltung des Berichtes nach § 52 EnWG" (General ordinance on provisions for the formal layout of the report under section 52 EnWG)." The role of the Federal Network Agency in this case is to monitor data transfer as well as to check the plausibility of data and to analyse any data received.

Network operators within the Federal Network Agency's competence are obliged to immediately notify the Federal Network Agency of major interruptions of supply (under section 13 of the Energy Industry Act interruptions of supply for essential requirements). In 2006 this affected a system failure in the interconnected German and European network on 4

November 2006. In connection with this power failure the Federal Network Agency has launched extensive investigations and compiled a detailed presentation of the events as well as an analysis and assessment of the incident in a report (for further information see chapter 5.1.3).

Following the power failure in North-Rhine-Westfalia (area around Münster) in 2005, the Federal Network Agency was involved in a close dialogue with the transmission system operators as well as the standardisation body of the DKE (German Commission for Electrical, Electronic & Information Technologies of DIN and VDE). In such cases it is important to ensure that the network operators carry out the required remedial action. The DKE is to specify standards for construction and remedial action and/or describe them for the first time.

Incentive regulation

As required by section 112a of the Energy Industry Act, the Federal Network Agency on 30 June 2007 submitted to the German government its report on incentive regulation pursuant to section 21a of the Energy Industry Act.

The proposal was to introduce a revenue cap during two regulatory periods, of which the first was to last three and the second five years. From the third regulatory period the Federal Network Agency's concept suggested a yardstick competition with regulatory periods of two years each. For the first regulatory period the Federal Network Agency presented a formula for incentive regulation, which distinguished between controllable cost elements on the one hand and permanently or temporarily non-controllable cost elements on the other hand. Using this formula the undertakings were to be given a revenue path to be aimed for as a revenue cap, while taking into account a number of components. These necessary components were the consumer price index, the sectoral productivity gains, a company-specific efficiency target as well as the expansion factor and consideration of quality aspects. The Federal Network Agency accompanied and supported the Federal Ministry of Economics and Technology in detailed, subject-specific issues regarding the ordinance.

On 16 November 2006 the Federal Ministry of Economics and Technology published a draft on the incentive regulation ordinance, which was based on the concept presented in the Federal Network Agency's report. On 4 April 2007 a draft bill of the incentive regulation ordinance was presented. The Federal Cabinet passed the draft ordinance on 13 June 2007.

The incentive regulation, which the Federal Cabinet got under way, will provide the network operators with incentives for an efficient operation of their electricity and gas supply networks.

1.6 Main areas of the Federal Cartel Office's work

The Federal Cartel Office's main areas of work during the period under review covered merger control in the energy sector, the fight against agreements restricting competition and the control of anti-competitive practices in cases of companies with dominant position.

Merger control

In the period under review the tendency towards vertical integration in the electricity and gas sectors continued. Accordingly, the Federal Cartel Office dealt in particular with planned mergers in which large energy supply companies were intending to partner with municipal utilities. These planned mergers are an expression of the large energy supply companies' strategy of so-called "forward integration". They endeavour to round off their portfolio by buying shares in municipal utilities. With this strategy the large energy supply companies intend to secure their position as a dominant upstream supplier of electricity and/or natural gas. This way the existing foreclosure of the market threatens to become even worse for competitors, given its already high market concentration. On the one hand a dominant upstream supplier can obtain rights to information through integration with its buyer, rights which are not available to the competitors and therefore strengthen the dominant supplier's position. On the other hand there is a risk that such mergers could discourage potential competitors from entering the market.

In the past the Federal Cartel Office had granted individual applications for share purchases of dominant upstream suppliers in municipal utilities. Such plans had only ever affected a small amount of energy supplied. At the same time only a slight increase in the market share, restricted to less than one percent on the relevant market, was to be expected. Due to the high market concentration, however, even such a small increase is already cause for concern in terms of competition. Against the background described above the Federal Cartel Office has, in the period under review, adopted a change of approach and has begun to prohibit even share holdings of this type.

From now on approval of planned mergers between dominant upstream suppliers and municipal utilities will only be granted under strict collateral clauses. Commitment offers submitted by the undertakings must be suitable to counterbalance the expected deterioration of competition. In the planned merger of RWE Energy AG / Saar Ferngas AG, which had been registered in the reporting period at the Federal Cartel Office, this had not been the case. The Federal Cartel Office therefore prohibited this planned merger (cf. chapter

4.2.2.1)¹⁷.

The work of the Federal Cartel Office in the period under review was still greatly influenced by the insights gained in the merger control proceedings for the planned merger of E.ON / Stadtwerke Eschwege. In these merger control proceedings the Federal Cartel Office had already conducted a comprehensive collection of new market data for the electricity markets during the previous reporting period, with data relating to the years 2003 and 2004. The survey found that E.ON and RWE constituted a duopoly with a dominant position across the German electricity markets, so that the criteria for prohibiting this planned merger continue to apply¹⁸. The appeal lodged by the affected undertakings against the Federal Cartel Office's prohibition order was rejected in its entirety by the higher regional court Düsseldorf in its ruling of 06 June 2007, thereby confirming the Federal Cartel Office's assessment of competition on the German electricity markets¹⁹.

In the period under review the new energy regulatory framework has also led to an increasing number of registrations for planned mergers affecting the area of supply networks. Municipal utilities set up joint electricity and gas network companies with either regional suppliers or large supply companies as partners. The Federal Cartel Office expects such a merger of networks in joint companies not to result in a deterioration of the conditions of competition in the affected network service markets. Within the confines of its distribution system each of the network operators involved is a natural monopolist anyway.

Neither does the Federal Cartel Office currently see any risk that the undertakings involved in such network companies might be considerate of each other, thus leading to a factual apportionment of supply areas. The crucial factor in this assessment is the new energy regulatory framework, which ensures the monitoring of operative unbundling between network and distribution. The prognosis of the Federal Cartel Office is fundamentally optimistic in this regard.

The Federal Cartel Office has also investigated the cooperation between energy suppliers in a network company as to whether this might have repercussions that could damage competition in the distribution business. Such standalone solutions restricting competition, where distribution is ultimately limited to a company's own network, were not found to exist in

¹⁷ Federal Cartel Office, decision of 23 March 2007, file ref. B 8 -62/06.

¹⁸ Cf. National Contribution to the EU Benchmark Report, Report of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway as required by section 63 (5) of the Energy Industry Act, Bonn, August 2006, p. 28; Cf. also Federal Ministry for Labour and Economics: Benchmark-Bericht zu den Strom- und Gasmärkten gemäß Anforderungen der GD TREN vom 2. Juni 2005 (2005), see p. 9.

¹⁹ Cf. Higher Regional Court (OLG) Düsseldorf, Ruling of 06 June 2007, File ref. VI-2 Kart 7/04 (V).

the period under review. However, should there be any indication in future that such effects are developing, the Federal Cartel Office would have to review its optimistic prognosis .

Intervention against abusive practices and agreements restricting competition

Electricity

During the period under review the Federal Cartel Office investigated in the abusive practice proceedings against RWE AG²⁰, whether the energy supply company had abused the trade in CO₂ certificates, established in 2005, to include the emissions certificates allocated free of charge in their pricing for electricity in order to obtain unjustified revenues. The subject matter of the proceedings is the pricing for electricity with regard to the supply of industrial customers, based on bilateral agreements in the year 2005. The Federal Cartel Office served RWE AG with a formal warning in December 2006 and explained the results of its investigations at that point in time as well as its preliminary legal viewpoint (for more information see chapter 3.2.4). At present the Federal Cartel Office is analysing the comments received by the parties involved in the proceedings. A decision is expected during late summer 2007.

With regard to electricity prices for household and small customers without load curve metering, the Federal Cartel Office and the cartel offices of the federal states saw no reason to intervene during the reporting period. As in the previous reporting period hardly any cases of obstructing a change to a different supplier were observed. However, in terms of purchasing electricity for heat storage systems a change of supplier is usually not possible due to a lack of alternative suppliers operating on the market. Despite a lack of competition in this segment, no proceedings on the grounds of abusive price levels have been initiated since the prices for heating electricity are significantly lower than the tariff or product prices of the relevant companies and the profit margins are generally lower here. In the current period under review the responsible state supervisory authorities for electricity prices have often only approved reduced electricity price increases for general tariffs, which had been applied for under the approval procedures for charges and processed on the basis of the German Electricity Rate Schedule²¹.

²⁰ Cf. already National Contribution to the EU Benchmark Report, Report of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway as required by section 63 (5) of the Energy Industry Act, August 2006, p. 29.

²¹ This tariff approval based on section 12 of the German Electricity Rate Schedule expires on 30 June 2007, as this regulation ceases to have effect at this point, cf. article 5 (3) of the Second Energy Statutes Reorganisation Act, dated 7 July 2005, German Law Gazette (BGBl. I), p. 1970, 2018.

Gas

In the gas sector the Federal Cartel Office continued the cartel and abusive practice proceedings against wholesalers, which had already been instituted in the previous reporting period²².

In the proceedings for long-term gas supply contracts between importing wholesalers as well as regional and local dealers and suppliers, the Federal Cartel Office had initially in January 2006 issued a prohibition order, based on articles 81 and 82 EC and section 1 of the Law against Restraints of Competition (GWB), to be executed immediately, against E.ON Ruhrgas AG as the most important German wholesaler. According to investigations of the Federal Cartel Office during cartel administrative proceedings against E.ON Ruhrgas AG for concluding long-term gas supply contracts, the company was found to import approximately 60 percent of the entire German natural gas. In its order the Federal Cartel Office found that the agreements contained in the relevant contracts contravene articles 81 and 82 EC as well as section 1 GWB due to the combination of long-term purchasing obligations and the degree of fulfilment of the actual distribution needs. E.ON Ruhrgas was further instructed to remedy this contravention no later than the end of the current gas industry business year on 30 September 2006. A prohibition was issued for concluding new contracts with regional and local dealers and suppliers for a duration of more than four years and an actual distribution need which covers between 50 and 80 percent of the demand of these companies, as well as contracts with a duration of over two years for a fulfilment of needs of over 80 percent. For practical reasons regional and local dealers and suppliers, whose actual overall demand is less than 200 GWh, are exempted. In order to spread the economic risk evenly across all wholesalers, the prohibition order also stipulates that the coverage against risks in cases of fluctuating demand for supplies by several wholesalers must be equivalent to at least the level of the supply ratio. To prevent a circumvention of these principles, several supply contracts between supplier and customer (so-called “stacking of contracts”) are to be considered one contract. Implicit contract renewal clauses are prohibited. The Federal Cartel Office’s prohibition order is restricted until the end of the gas industry business year 2009/2010, i.e. 30 September 2010.

In a ruling dated 20 June 2006 the higher regional court Düsseldorf, to which E.ON Ruhrgas AG had appealed to obtain temporary relief, confirmed the immediate execution of the prohibition order and stated in the reasons for its decisions that there are no serious doubts about the lawfulness of the order or the objective criteria for the provisions stipulated in the

²² Cf. National Contribution to the EU Benchmark Report, Report of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway as required by section 63 (5) of the Energy Industry Act, August 2006, p. 29.

prohibition order²³. A final decision about the appeal of E.ON Ruhrgas AG against the prohibition order is expected in September 2007.

These proceedings against E.ON Ruhrgas AG will be a landmark decision for the entire gas industry. After confirmation of the immediate enforcement of the prohibition order against E.ON Ruhrgas AG, the Federal Cartel Office has therefore continued its anti-trust proceedings against the other German wholesalers with the objective of implementing the basic principles of the Ruhrgas decision against them, too. In the period under review four companies have committed to adopting the principles of the Ruhrgas decision in their area. These proceedings were concluded in accordance with section 32 of the Law against Restraints of Competition. However, cartel administrative proceedings against further wholesalers are continuing.

The trend towards increasing end customer prices has partially continued in the period under review. While the prices have been increasing, in particular in the gas business year 2005/2006 (1 October 2005 to 30 September 2006), the current gas business year 2006/2007 has instead been recording price decreases.

In the gas business year 2005/2006 the Federal Cartel Office instituted anti-trust proceedings against seven of the 29 gas supply companies under its remit for suspicions of abusing their dominant position after some considerable price increases by these companies since October 2005. The Federal Cartel Office had, beforehand, surveyed the gas prices of over 700 gas supply companies across Germany in cooperation with the cartel offices of the federal states and compiled a database of gas prices, which was available to all cartel authorities. The cartel offices of the federal states have instituted a further 80 proceedings.

The proceedings of the Federal Cartel Office against the seven gas supply companies were concluded in February 2006, after the companies had agreed in writing to admit competitors in their network area from 1 April 2006 as part of a temporary supply solution. This interim solution is intended to facilitate initial customer changes by way of an administrative solution, before an enforcement of non-discriminatory network access via the Federal Network Agency and the state regulatory authorities also allows for a physical transmission. The majority of proceedings instituted by the state cartel offices have by now been concluded, after the companies have backed down on their price increases or reduced them or committed to offering alternative tariffs or to opening the markets to competition by way of this temporary supply solution. Some companies were also able to clear up the suspicion of

²³ Cf. ruling by the higher regional court (OLG) Düsseldorf dated 20 June 2006, file ref.: VI-2 Kart 1/06 (V).

abusive practices and to prove furthermore that the extent of their price increases for the sales prices was below the price increase in the purchase price. A few cases resulted in formal orders and appeal proceedings.

Due to the overall high level of gas prices for household customers, the Federal Cartel Office and the state cartel offices have once again conducted a comprehensive survey of gas prices and basic structural data for typical consumption patterns among approximately 700 German gas supply companies in the gas business year 2006/2007. It was then possible to use the data collected as a basis for further reviews of anti-trust matters. Individual state cartel offices have instituted preliminary investigations based on the results of the data collected. In some cases the preliminary investigations were dropped after the company had reduced its prices, in other cases a decision as to whether or not formal abusive practice proceedings were to be instituted had not been made by the time this report was finished.

The prices collected by the federal and state cartel offices were also compiled in a list and, based on a decision by the conference of state ministers for economic affairs on 7/8 June 2006, published on the Federal Cartel Office's website for the first time. Publication of these gas prices served to give household customers for the first time a nationwide overview of tariffs for household customers, in order to create more transparency and promote competition.

In the period under review the Federal Cartel Office has also turned its attention to the spreading practice of energy supply companies, in the household customer segment, to threaten tariff customers with the cessation of energy supply, if these customers, citing section 315 of the German Civil Code (BGB), had disputed the fairness of past standard price increases for the supply of natural gas and had therefore not completely ceased payment but had reduced the amount invoiced by the supply company in line with their dispute; this practice was looked at under the aspect of control of abusive practices as set out in cartel law.

A customer objection under section 315 BGB means that the relevant claims do not become due until the fairness of the price increase has, upon application by the supply company and by way of a judicial determination of contractual obligations to perform, been confirmed through a court ruling. As long as the fairness of unilaterally set standard price increases has not been proven or determined by a court, the supply company's interest in threatening a cut-off from the supply does not warrant legal protection.

Against this background the Federal Cartel Office advised the 29 cross-regional gas supply companies under its remit in writing in September 2006, that in cases in which a tariff customer does not indiscriminately fail to meet his payment obligations due to a pricing objection under section 315 BGB, but rather withholds the disputed amount, any threat of cutting the customer off and even more so any subsequent cut-off of the gas/electricity supply vis-à-vis a tariff customer constitutes a violation of the prohibition of abusing the company's dominant position under section 19 (1) of the Law against Restraints of Competition. During the period under review the Federal Cartel Office has instituted abusive practice proceedings against one regional gas supply company with a formal warning; however the proceedings were dropped after the company could demonstrate which organisational measures had been taken to prevent any comparable violations in future. In numerous other cases preliminary investigations were initiated, which were then also dropped after the companies had given up their objectionable behaviour and had taken organisational measures to prevent any further unjustified cut-off threats against tariff customers.