Bundesnetzagentur

2009 Monitoring Report

by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway

pursuant to
section 63 (4) Energy Act (EnWG) in conjunction with
section 35 EnWG

Bonn, August 2009

Table of Contents

Foreword

The year 2008 was characterised by major structural changes in the German energy markets. The current monitoring report documents, analyses and evaluates these developments in the various stages of the value-added chain. In doing so it presents the progress achieved through regulation in the network area as well as in both the up- and downstream areas of competition. Furthermore the report points out a number of issues in competition and regulation for which the Federal Network Agency considers further action.

The transition to incentive regulation (effective since January 1st. 2009) in particular had significant impacts on the period under review. The second round of the cost regulation for electricity and gas networks formed the basis of the first regulatory period under the regime of incentive regulation. On average the revenue caps, on which incentive regulation is based, are slightly higher than the charges of the second round of cost regulation. However, they provide the basis for sustainable and efficient network operation with appropriate charges. In this context the decision of the Federal Network Agency to subject an additional ten supra-regional transmission system operators (gas) to cost regulation will have positive effects on the network charges.

Beyond preparations for incentive regulation the year 2008 was characterised by far-reaching changes. Particularly those in the German gas sector will have a positive influence on the market. These include the completed implementation of the two-contract model regarding the network access, the adaption of the business processes for customers switching gas suppliers to match the specifications specified by the Federal Network Agency (GeLiGas) and not least of all the introduction of the new balancing model (GABi Gas), which simplifies the balancing of differences between network operators and suppliers. Through the interaction of these measures and the continuing reduction of market areas the competition on the German gas market is effectively being strengthened and intensified.

But changes are also noticeable in the corporate structures themselves. Through the cooperation and concentration of the network business, the re-municipalisation of networks and the network sales planned by large TSOs, the market structure of the German energy markets will continue to change. The Federal Network Agency observes and accompanies this restructuring process, taking into account that unbundling regulations have been extended by the Third Energy Package of the European Union. In the year under review the four major energy suppliers have affirmed their position as market leaders for the supply of electricity. This also applies to the supply of electricity to household customers who have changed suppliers. In the gas sector the market is also dominated by just a few companies. With regard to the market shares of the five largest companies in the individual market categories, only marginal changes were noticeable compared to previous years.

The decrease in wholesale prices for electricity has led to a reduction of the price level for industrial customers, in contrast to household and commercial customers. However, nearly half of all household customers still do not use the opportunity to change their supplier, as is the intention of competitive markets. These customers usually purchase their electricity at significantly higher prices than those customers who placed a new contract already or changed their supplier. For this reason I want to encourage especially household customers to explore the opportunities competitive markets offer.

Security of supply in the German electricity sector can currently still be classed as high, taking into account the reliability of supply, the network structure and the power plant capacity available to satisfy demand. Nonetheless, it will not be possible to maintain this level, which is high compared to other European countries, if the delays in the construction of power plants and pipelines continue to exist. Warning signs, such as the increased number of reported congestions, clearly show that further investments by the network operators and generators are urgently required and that serious delays caused by long-winded planning

and approval procedures must be abolished. Furthermore, progress must be made in the congestion management at cross-border interconnection points in order to additionally strengthen security of supply by promoting cross-border trade.

In the gas sector long-term investments in the network are imperative to ensure a continuously high security of supply, with a largely uninterrupted supply of gas to the customers. In addition, the capacity management must be improved in order to optimise the physical utilisation of the networks. The Federal Network Agency has already begun to develop a solution in cooperation with the gas network operators. The performance of the German gas networks and the cooperation between network operators and suppliers turned out to be good even under difficult circumstances, so that even in the crisis situation between Russia and Ukraine the customers in Germany, as well as those in the affected neighbouring countries, could be supplied with gas.

In order to contribute to a more varied market structure and increased competition, I ask the companies to get even more involved in the various stages of the value added chain. And I appeal to the end users to avail themselves more proactively of the existing opportunities to change their supplier and the related financial savings potential for the supply of electricity and gas. By cooperation of all market players only can we succeed in strengthening further competition. Similarly, all market players will have to cooperate in order to tackle the upcoming challenges. In addition to incentive regulation, these are the implementation of the Third Energy Package, the liberalisation of metering introduced at the end of 2008 and also the increased use of regenerative energy sources as well as the feed-in of biogas.

Matthias Kurth
President of the Federal Network Agency
for Electricity, Gas, Telecommunications,
Post and Railway

1 Important developments

1.1 Important developments on the electricity market

1.1.1 Regulatory issues

Introduction of incentive regulation

In terms of regulation the year 2008 was characterised by the preparation and introduction of the incentive regulation, which replaced the old system of cost regulation of network charges on January 1st 2009. Incentive regulation defines revenue caps for the network operators, which are reduced further according to an efficiency-path in the regulatory period. In the first ever efficiency comparison across Germany, the results revealed an efficiency range of 75.5 to 100 percent for distribution system operators (DSOs) in the electricity sector, with an average efficiency of 92.2 percent. The average efficiency values for transmission system operators (TSOs) stood at 97,4 percent.

For the DSOs, there was an average increase of two percent in the revenue caps, compared to the network costs approved in the second round of cost reviews. On behalf of the four TSOs the considerably increased energy procurement costs for system services must be highlighted .These cost increases led to a partial allowance for hardship cases concerning balancing energy, the process of turning main intermittent generation from renewable sources into a constant monthly profile, and redispatch. It must be emphasized that the cost increases resulting from the fact that the process of turning main intermittent generation from renewable sources into a constant monthly profile is expected to grow across Germany in 2009. Compared to the last round of cost reviews these effects resulted in a significant increase of the revenue caps from 7.6 percent up to 30.2 percent.

The increase of the TSOs' revenue caps in 2009 will be balanced by means of the DSO's regulation account, with interest being paid. The network charges will not be affected by this until 2014. However, the significant cost increases of the system services lead to a noticeable increase in the DSOs' upstream network charges for 2010, compared to 2009. In 2010 the increased costs from the use of upstream network levels can be ascribed to the revenue cap adjustment based on changes in the permanently not-influenceable cost elements of DSOs.

Development of network charges

Due to the fact that not all revenue caps had been issued at the time of reporting (April 1st 2009) the average network charges in all customer categories investigated (household, commercial and industrial customers) decreased again by 1.8 - 2.1 percent since the reference date of the last report. Due to the reviews of the regulatory authorities a reduction of the network charges, ranging between 0.22 and 1.50 ct/kWh for all customer categories, was achieved since 2006. In the reporting period the share of network charges in the overall price of electricity has decreased again to 25 and 23.7 percent respectively for household and commercial customers. Due to the greater decrease of the overall prices compared to the network charges, the share of network charges in the overall price of electricity has slightly increased to twelve percent for industrial customers.

1.1.2 Competition related issues

Development of electricity prices in the wholesale sector

In terms of competition related issues the extremely high level of stock exchange prices and their drastic decline at the end of 2008 were dominant. A look at the annual mean averages for the Phelix Day Base and the Phelix Day Peak in 2008 reveals significant price increases of 73.1 and 62.9 percent respectively on the EEX spot market. Nevertheless, after an increase which lasted until the second half of 2008, the mean averages of the Phelix Day Base and the Phelix Day Peak for the first half of 2009 returned to a price level comparable to the annual mean averages of these indices for 2007.

In 2008 the annual mean averages on the EEX futures market have also increased significantly by 26 percent (Phelix Base Year Future) and 25.3 percent (Phelix Peak Year Future) for the baseload forward prices. However, a short-term analysis of the price development of the Phelix Year Futures reveals a peak price at the beginning of July 2008, followed once again by significant price decreases until the end of February 2009. The average price level of the Phelix Year Futures for 2010 stands at 50.71 €/MWh (Base) and 73.51 €/MWh (Peak) for the first half of 2009. These figures are therefore below the annual mean averages of the Phelix Year Futures in 2007 for the subsequent year 2008, which stood at 55.84 €/MWh (Base) and 79.35 €/MWh (Peak).

Due to the multitude of influencing factors in the context of the present report, the Federal Network Agency is unable to perform an analysis of the causes of the EEX price developments. With regard to the effects of EEX price developments we refer, inter alia, to the surveys of the Federal Network Agency on the price level of the retail sector. One example is the price element “energy procurement and distribution”, which has decreased by nine percent, or 0.6 ct/kWh, in case of the analysed commercial customers on 1 April 2009. However, in the case of household customers and small commercial customers this price element has increased once again since 1 April 2008. For the customer categories investigated here, an increase of up to 18 percent (plus 1.3 ct/kWh) was recorded for “energy procurement and distribution” for household customers covered by universal supply, and an increase of eleven percent (plus 0.8 ct/kWh) for small commercial customers.

Developments in the industrial and commercial customers sector

In 2008 the industrial customer segment accounted for a quantitative share of approximately 50 percent, and the commercial customer segment a share of approximately 23 percent of the overall electricity market. Accordingly, the industrial and commercial customers (including retail and services) represent almost three quarters of the entire German electricity market, in relation to the overall amount of electricity supplied. Based on the number of customers they account for a good six percent of the German electricity market. Local universal suppliers supply around half of all industrial and commercial customers.

In the case of small commercial customers the quantitative change of supplier rate has increased by 0.8 percentage points to 6.3 percent in 2008. In the case of commercial customers the quantitative change rate stood at 12.6 percent in 2008 and remained almost constant compared to 2007. For industrial customers a decrease of 2.6 percentage points from 13.2 to 10.6 percent was recorded in 2008.

The increase in electricity prices between 2006 and 2009 was only seven percent and around nine percent respectively for industrial and commercial customers. By comparison the electricity price for household customers covered by universal supply rose by nearly 23 percent. A comparison of the price levels on April 1st 2009 with the previous year’s value (April 1st 2008) reveals an overall price reduction of five percent for industrial customers, while the prices increased by seven percent for commercial and household customers.

Another significant difference to household customers is that industrial and commercial customers pay the same prices to a supplier within the area of the universal supply network as to a supplier located outside the area of the universal supply network. Further findings show that the positive effects of the decreased wholesale prices are reflected much more

quickly in the retail prices of industrial customers than those of small commercial and household customers. Overall the aspects mentioned above indicate that there is a nationwide market for industrial and large commercial customers, thus around two thirds of the German electricity market. However, the fact that this market is dominated by just a few large companies requires critical reflection.

Developments in the household customers segment

In terms of quantity, the household customers segment represents only about a quarter of the entire electricity market. However, based on the number of customers around 94 percent of all final consumers of electricity are household customers under section 3 no. 22 of the Energy Act (EnWG). Almost 90 percent of all household customers are supplied by the relevant universal supplier and at about five percent the annual supplier change rate is significantly lower for household customers than for industrial and large commercial customers. On a positive note, however, it must be pointed out that the electricity supply to household customers from other suppliers than the universal supplier has almost doubled in 2008. The overall quantitative supplier change rate for household customers increased by one percentage point, from 4.34 percent in 2007 to 5.34 percent in 2008.

Around half of all household customers are still supplied by universal supply, which is the most expensive type of electricity supply with greatest increase in the prices. Due to the regional dominance of the universal supplier and the resulting low competitive pressure, household customers pay significantly higher prices for electricity supplied by the universal supplier than by a supplier who is located outside the area of the universal supply network. For this reason the price increase for household customers in the last three years at 23 percent has been much greater than that for industrial and commercial customers. Therefore the household customer market does not represent a nationwide market, but a strongly regional market.

For household customers who do make use of their opportunity to change suppliers, the acquisition of new customers reveals the clear dominance of just a few companies. In 2008 for example the four largest suppliers in Germany held a share of approximately 52 percent in the supply of household customers outside the areas of universal supply networks and thus achieved a market share in this market segment comparable to that in the overall retail sector. Overall positive developments are an increased number of suppliers that operate in several network areas, high customer acquisition rates by new suppliers and increasing supplier change rates. However, the existing price structures in particular indicate a lack of workable competition for household customers, i.e. for about a quarter of the German electricity market.

Intervention against agreements restricting competition and abusive practices, sector investigations

In the period under review the Federal Cartel Office discontinued pending abusive practice proceedings against E.ON, which had been instituted on suspicion of abusing the trade in CO_2 certificates, established in 2005, to include emissions certificates allocated free of charge in their pricing for electricity for industrial customers.[1]

[1] Cf. 2008 Report by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway to the European Commission on the German electricity and gas market, pursuant to section 63 (5) of the Energy Act, p. 35 (chapter 1.6).

In the proceedings by the Federal Cartel Office E.ON had initially, in February 2008, offered commitments to run an electricity auction comparable to that of RWE[2], or to sell a power plant with a capacity of about 350 MW to industrial customers or independent power plant operators. The dismissal of the proceedings was mainly necessary because, after the Commission's decision regarding the German wholesale electricity market (COMP/39.388), there was a risk of double treatment of E.ON's pricing in the relevant time period. Furthermore E.ON had - in agreement with the Federal Cartel Office - included the relevant power plant in its commitment to the European Commission in the context of the abusive practice proceedings initiated by the Commission against E.ON under article 82 EC.

At the end user level the Federal Cartel Office refrained from investigating electricity prices for universal supply under cartel law. Due to the existing and efficient opportunities for changing supplier even at this market level, the Federal Cartel Office considers intervention by means of the control of anti-competitive practices unnecessary. However, in view of the control of anti-competitive practices several consumer complaints gave rise to the initiation of preliminary proceedings regarding the pricing for the supply of end users with heat flow.[3] Some state cartel offices have already initiated anti-competitive practice proceedings against providers of heat flow.

Furthermore the period under review saw the initiation of a sector investigation under section 32e of the Competition Act (GWB), in which the level of electricity generation and procurement markets is analysed. This investigation aims to review the pricing mechanisms of the electricity wholesale markets for stock exchange trading and OTC trading. In Germany the amount of electricity generated, offered and consumed per hour is recorded. In addition the exchange of electricity via the interconnectors is investigated as well as any indication of the potentially abusive retention of capacity.[4]

1.1.3 Assessment of security of supply

In Germany the security of electricity supply can currently be classed as high. The reliability of supply is at an extremely high level, which is reflected in the short downtimes compared to other European countries. There is no structural congestion at network level. Furthermore Germany has a diverse power plant mix with capacities that suffice even at times of maximum utilisation.

In the future increased investments in new and/or additional capacity are required in all areas. In the area of transmission systems there is a particular risk of long-term delays to expansion projects. This could result in structural congestion in electricity transmission, which would likely lead to negative effects on the economy due to rising electricity prices or a setback in the security of supply. The German government's climate protection objectives are also detrimentally affected by delayed implementation. Progressive internal market integration alone will probably not be able to compensate all these negative effects.

In the area of the short-term development of power plant capacity by 2012, an increase in the remaining power plant capacity at the time of the peak load of the year can be assumed. In the area of medium to long-term development of power plant capacity until 2018 it is not possible to assess whether the currently high base of freely available capacity

[2] 2008 Report by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway to the European Commission on the German electricity and gas market, pursuant to section 63 (5) of the Energy Act, p. 35 (chapter 1.6).
[3] Federal Cartel Office, Activity Report 2007/2008, Official Records of Parliament 16/13500, p. 27f.
[4] Cf. chapter 2.3.4.

will last and be sufficient to satisfy the maximum network load. Such an assessment would depend on a number of assumptions which the Federal Network Agency cannot make.

1.2 Important developments in the gas market

As in previous years, 2008 was characterised by far-reaching changes in the gas market, which have changed not only the structure of the gas market itself but also the processes and developments. The following sections summarise the more detailed chapter 3 (regulation and developments on the gas market) and present the key findings of the 2009 monitoring. In doing so they will first deal with the structural changes in the gas market, followed by the major developments in the area of gas networks, wholesale and retail, as well as innovations in the area of metering. The use of gas storage facilities and the security of supply in Germany conclude this summary.

1.2.1 Structural changes in the gas sector

In 2008 several changes to the German network access regime were introduced and implemented. Although the Federal Network Agency's requirement to implement the two-contract model had already been binding from October 2007, it could not be implemented on a nationwide scale until 2008. As a consequence of this implementation gas traders now only need two contracts (one entry point contract and one exit point contract), which simplifies the gas trade in Germany significantly and can lead to a noticeable stimulation of the competition

However, the development of competition is still hindered by the still too high number of market areas. Since the two-contract model is restricted to one market area, the gas trade between market areas or across several market areas continues to be exacerbated. In addition there are incidences of contractual congestion, for example, that continue to impede the transport of gas beyond the market borders. For this reason the Federal Network Agency continues to work on a further reduction of the number of market areas. In the period under review it was possible to reduce the number of market areas from 14 to 12. Further reductions are due.

Another new issue in 2008 was the regulation regarding the feed-in of biogas which has been incorporated in the Gas Network Access Ordinance. In 2008 twelve active biogas plants already fed an amount of 42m m³ into the gas networks; for 2009 another 24 new feed-in projects are planned and the long term aim is a feed-in volume of 10 bn m³ by the year 2030.

In October 2008 the legislator restructured and liberalised the metering sector, thus opening it to competition. However, in the period under review no far-reaching activities of third parties were observed.

In 2008 another important milestone on the way to improving the structures of the German gas market was the introduction of a new balancing model, the so-called “GABi Gas model”. It aims to improve the procedures required to balance differences between the contractual and the actual take-off for customers. The simplification of the processes between gas traders and network operators facilitates the market entry of new gas traders and strengthens competition between established gas traders. Furthermore the use of balancing energy

is made more cost-effective and efficient. Overall the introduction of the GABi Gas has had positive effects on competition and transparency in the German gas market.

1.2.2 Network and regulatory issues

In 2008 the number of network operators in Germany continued to decline, as in previous years. Reasons are mergers and/or the sale of networks in particular. Yet the average number of transport customers using the networks has grown. This could indicate increasing competition in the gas sector, even though especially end users only had limited opportunities to change their gas supplier.

With regard to the costs for the use of networks, the period under review was characterised by the Federal Network Agency's second round of cost regulation, its results forming the basis of incentive regulation, which entered into force on January 1st 2009. In this context the Agency's decision was noteworthy that ten supra-regional TSOs (gas) are not subjected to pipeline competition in their networks. As a consequence of this decision these networks are also to undergo cost regulation by the Federal Network Agency. The approved network charges therefore affect the remaining network charges via the incorporation of upstream network costs. While an increase in network charges was observed across all customer categories, this was mainly due to the advanced redistribution of costs.

In addition to the costs for the use of networks, the capacity situation, in particular in the transmission systems and at coupling points between countries and market areas, has become a focus of the Federal Network Agency. In 2008 the networks were almost fully booked, just as they were in previous years. As demand rose the share of booked interruptible capacity, as well as the actual interruptions, rose as well. It is primarily contractual capacity that is fully utilised. In contrast with that, the physical utilisation of networks, primarily at the cross-border coupling points, is often lower. For this reason an improvement of the capacity management is urgently required and should be given preference over an expansion of physical capacity.

Nevertheless investments in the preservation and expansion of gas networks are urgently required and an important issue, in particular with a view to the launch of incentive regulation. Although investments of TSOs (gas) have declined in 2008 compared with 2007, an average annual increase of investments by 100% is expected for the period till 2011. In regard to the DSOs a trend towards increasing investments has also been observed.

1.2.3 Competition related issues

<u>Intervention against agreements restricting competition and abusive practices, sector investigations</u>
In the wholesale sector the Federal Court of Justice (BGH) has ultimately confirmed the model prohibition order issued by the Federal Cartel Office in January 2006 against E.ON Ruhrgas AG on the grounds of market foreclosure by long-term gas supply contracts between importing wholesalers and regional and local traders and suppliers (in particular municipal utilities).[5]

With regard to the supply of end users the anti-competitive practice proceedings initiated under section 19, subsections 1 and 4 no. 2, and section 29 of the Competition Act (GWB) in

[5] BHG, decision dated 10 February 2009, file ref.: KVR 67/07; 2008 Report by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway to the European Commission on the German electricity and gas market, pursuant to section 63 (5) of the Energy Act, p. 35f.

March 2008 against 35 regional and/or local gas suppliers on suspicion of excessively inflated end user prices in 2007 and 2008 were concluded by the end of the year. The Federal Cartel Office had competition concerns about the charges demanded by 30 of the affected suppliers, which these companies were able to dispel by agreeing to cost-reduction measures amounting to a total of €129 million (credits, price cuts, postponement of price increases).[6]

During the period under review some state cartel offices also initiated formal abusive practice proceedings and preliminary investigations against regional or local gas suppliers with a dominant position. Some of these proceedings were concluded during the period under review by formal orders, in particular commitment decisions under section 32b of the Competition Act (GWB). In other cases preliminary investigations could be dropped after price cuts or price moratoria.

The Federal Cartel Office launched a sector investigation under section 32e GWB in order to investigate the market conditions in the gas transport networks. The sector investigation aims to analyse the capacity situation in the German gas transmission systems. Complaints by individual transport customers led to the assumption that long-term bookings by distribution companies affiliated to the network operators for transport capacity in gas transmission systems could be one of the main causes of contractual congestion and could thus potentially impede or even prevent the market entry of newcomers.[7]

Using the dominance method, the market shares of the largest companies in the gas market sectors “natural gas import/export/extraction”, “gas supply to end users of different consumer categories” and the “storage system working gas volume” were determined and compared with the results of previous years. In the preparations for these calculations the majority shareholdings of approx. 800 companies active on the German gas market were analysed. The results show that two groups of companies, as representatives of the five largest companies, dominate the market in ten of the eleven investigated gas market categories, due to their majority shareholdings. In 2008 the market shares of the five largest companies have hardly changed across the market categories, compared to previous years.

Developments in the wholesale sector
Compared to previous years the wholesale market was far more active and liquid in 2008. Through the merger of market areas and an increasing number of trade participants trading has increased significantly, especially at two virtual trading points. However, the trade at the European Energy Exchange still has little significance. The low number of trade participants and the low volume traded indicate that the majority of gas trade in Germany takes place at the virtual trading points or in bilateral deals and contracts between the companies.
It remains difficult to determine the wholesale price in Germany. The diversity of trading places and the lack of transparency in pricing for the majority of these trading places make an estimate quite impossible.

Developments in the retail sector
The volume supplied to final consumers in the network areas of the DSOs (gas) amounts to 686.64 TWh in 2008 and at 292.76 TWh for TSOs (gas). The period under review took into account all DSOs (gas) and TSOs (gas) with their supply volume, thus providing for the first time a complete record of the supply volume of 979.4 TWh.

On 31 December 2008 a total of 13.5m end users consumed gas from the supply networks

[6] Cf. chapter 3.2.3.4; Federal Cartel Office, Activity Report 2007/2008, Official Records of Parliament 16/13500, p. 30, p. 114ff.
[7] Cf. chapter 3.1.4.2.

of those DSOs (gas) and TSOs (gas) who had responded. Thereof, 11.84m end users belonged to the group of household customers in the sense of section 3 no. 22 of the Energy Act (EnWG).

According to information by the DSOs (gas) and TSOs (gas) the volume of supplier changes sums up to 42.57 TWh. In terms of the DSO's and TSO's overall supply volume, which stands at 979 TWh, an average supplier change rate of 4.35 percent was determined for 2008. This change rate is based on 384,138 changes of supplier.

Looking at the level of retail prices a trend towards increased gas prices can also be observed. For household customers covered by universal supply the average volume-weighted overall gas price stood at 7.11 ct/KWh on 01 April 2009. For household customers supplied via special contracts outside of universal supply, the price stood at 6.6 ct/KWh on 1 April 2009. For commercial customers the volume-weighted overall gas price stood at 6.24 ct/KWh on 1 April 2009 and 4.67 ct/KWh for industrial customers.

One finding across all categories was that the costs of energy procurement and distribution are no longer the main cost drivers. The increased retail prices, surveyed on 1 April 2009, are primarily due to the network charges that have increased in connection with the redistribution of costs.

1.2.4 Access to storage systems

Although Germany has the fourth largest capacity of underground gas storage systems in the world, the free capacity in 2008 was very limited. Furthermore, access by companies not affiliated to the operator of the storage systems was minimal. Although the offer of services and the implementation of transparency requirements still leave some room for improvement, an increase in free capacity for contracts starting in the near future indicate a slight improvement in the situation.

1.2.5 Security of supply for gas

The security and reliability of the networks in Germany continue to be very good. In 2008 hardly any interruptions of the gas supply for end users were recorded. Although investments into the infrastructure remain important and necessary in the medium to long term and are already planned, the issues of capacity allocation and congestion management are of great importance in order to improve the use of existing networks. However, the overall analysis of the gas crisis at the beginning of 2009 shows that the German network operators, in cooperation with the gas supply companies, can ensure the gas supply in Germany, even if import volumes are interrupted or lowered for a relatively long period of time. Furthermore the announced construction of new storage systems in Germany will improve the security of supply in Germany and Europe.

1.3 Important developments in the electricity and gas sectors

1.3.1 Merger control

2008 was characterised by a consolidation of the Federal Cartel Office’s restrictive line, already described in the last report, on the control of mergers between local and/or regional traders and suppliers (in particular municipal utilities and/or regional suppliers) and their

upstream suppliers with a dominant position.[8] In a decision dated 11 November 2008 the Federal Court of Justice (BGH) rejected complaints against the refusal to grant the merger between E.ON Mitte AG and Stadtwerke Eschwege and has thus confirmed the RWE/E.ON duopoly on the nationwide electricity markets, on which not just energy traders and suppliers but also large industrial companies source their electricity.[9] With this decision by the BGH the Federal Cartel Office's prohibition of the purchase of shares in distributors in the electricity sector by E.ON and RWE was acknowledge by the high court. Acquisitions of shareholdings in distributors by dominant upstream suppliers can only be approved on the basis of the appraisal clause of section 36 (1) of the Competition Act (GWB), if the divestiture of shares in other places results in improvements in competition which outweigh the disadvantages in the sense of section 36 (1) GWB.[10]

The Federal Cartel Office has granted conditional approval for the planned purchase of 26 percent of the shares in EWE AG by Energie Baden-Württemberg AG (EnBW). This approval was subject to the condition that the parties involved in the merger give up large holdings. The decision stipulates an alternative divestiture of the gas shares held by the parties involved in the merger where these shares present problems under cartel law. Following the Federal Cartel Office's official warning about the plans in December 2008, EWE and EnBW had pledged to the Federal Cartel Office to sell either the EWE holding company "Verbundnetz Gas AG (VNG)" or the EnBW holding company "GESO Beteiligungs- und Beratungs AG (GESO)" to a third party. GESO holds shares, inter alia, in ENSO Energie Sachsen Ost AG (ENSO) and DREWAG Stadtwerke Dresden GmbH (DREWAG). There were no competition concerns regarding the electricity supply, since the Federal Cartel Office was unable to prove an affiliation of EnBW to the dominant oligopoly on the nationwide electricity markets - measured according the criteria confirmed by the Federal Court of Justice in the proceedings "E.ON Mitte AG/Stadtwerke Eschwege".[11]

Whether or not Vattenfall forms part of the dominant oligopoly on the nationwide electricity markets is an issue that could not be resolved in the period under review. While the European Commission had, in its preliminary assessment of this matter in the anti-competitive practice proceedings against E.ON regarding the German electricity wholesale market (COM/39.388), initially acted on the assumption of an oligopoly consisting of RWE, E.ON and Vattenfall on the German electricity wholesale market,[12] its final decision, in which it declared the commitments offered by E.ON as binding, left open whether RWE, E.ON and Vattenfall or just RWE and E.ON together have a dominant market position.[13]

1.3.2 Unbundling

In 2008 the structures of energy suppliers in Germany continued to change. Cooperation and concentration of the network business and deconcentration through re-municipalisation are

[8] 2008 Report by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway to the European Commission on the German electricity and gas market, pursuant to section 63 (5) of the Energy Act, p. 35 (chapter 1.6). Federal Cartel Office, Activity Report 2007/2008, Official Records of Parliament 16/13500 dated 22 June 2009, p. 28f, 105f., 108.

[9] File ref.: KVR 60/07, Lower instance: Higher Regional Court Düsseldorf, decision dated 06/06/2007, file reference: VI-2 Kart 7/04 (V).

[10] 2008 Report by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway to the European Commission on the German electricity and gas market, pursuant to section 63 (5) of the Energy Act, p. 35 (chapter 1.6). Federal Cartel Office, Activity Report 2007/2008, Official Records of Parliament 16/13500 dated 22 June 2009, p. 105ff., 108f., 111f.

[11] 2008 Report by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway to the European Commission on the German electricity and gas market, pursuant to section 63 (5) of the Energy Act, p. 35 (chapter 1.6). Federal Cartel Office, Activity Report 2007/2008, Official Records of Parliament 16/13500, dated 22 June 2009, p. 106, 109f.

[12] Communication by the European Commission under article 27 (4) VO (EC) No. 1/2003 in the matters COMP/39.388 and COMP/39.389, Official Gazette EC No. C 146 dated 12 June 2008, p. 34f.

[13] Decision by the European Commission dated 26 November 2008, marg. note 24.

two opposed trends that have direct effects on the number of companies and the structure of the German energy market. In addition, restructuring was observed in many network companies. The transmission systems of E.ON and Vattenfall for example (two of the four German TSOs for electricity) and the transmission system (gas) of RWE are due to be sold by the integrated energy supply companies.

The next few years will be characterised in particular by the implementation of the Third Energy Package, in which the unbundling regulations have been drastically tightened even more.

1.3.3 Consumer protection

In 2008 consumer enquiries and complaints amounted to a number of 5,800. Nevertheless, this increase of 45 percent is not necessarily a sign of inefficient energy markets. Rather, it indicates that consumers make increasing use of the opportunities that liberalised end user markets offer them, which can - undoubtedly - lead to the problems listed. The figures also indicate that the Federal Network Agency is accepted as a mediating partner in the relationship between energy supply companies, network operators and consumers. Many disputes can be settled quickly by the Federal Network Agency. This shows that the Federal Network Agency was generally accepted as a mediator by all parties involved and able to motivate either one party or the other to give in by appropriate advice. However, not all issues consumers are confronted with in liberalised energy markets can be covered by the Federal Network Agency.

The main focus of work in this area were, inter alia, complaints about delayed supplier changes (gas, electricity) and enquiries regarding contractual issues.

Furthermore the period under review saw some legal changes relevant to consumers come into effect. Network charges, for example, now have to be disclosed not just on electricity bills but also on gas bills. In addition consumers can request more frequent bills from their energy supplier (monthly, quarterly, half-yearly). However, in terms of practical implementation, the charges for this service are currently far too high. From a consumer’s point of view additional billing charges ranging from 10 to 20 euros per bill are not acceptable.