Electricity Regulation

In 27 jurisdictions worldwide

Contributing editors
Earle H O'Donnell and Daniel Hagan

2015

GETTING THE DEAL THROUGH

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Germany

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1 Policy and law

What is the government policy and legislative framework for the electricity sector?

Energy policy in Germany focuses on the reliable, affordable, consumer-friendly, efficient and environmentally compatible supply of electricity and natural gas. To this end, the German Energy Industry Act aims at ensuring effective and undistorted competition, as well as reliable and efficient supply networks.

As a member state of the European Union, Germany has implemented the relevant EU directives. Accordingly, the legal framework provides for a regulated third-party access system for transmission and distribution networks. Furthermore, power generation from renewable energy sources and environmental protection have been among the key objectives of German energy policy. The German government aims to achieve a major increase in the percentage of electricity generated from renewable sources by continuously introducing relevant goals in the new German Renewable Energies Act 2014. On the other hand, it has most recently turned away from the fixed feed-in tariffs system for renewable electricity generation in new power plants. As of 1 August 2014 fixed feed-in tariffs have been substituted by a system of promoted direct sales to third parties as primary marketing form for renewable electricity generation, leaving only small power plants with fixed feed-in tariff options. It also adopted liability and compensation provisions for network access of offshore wind farms as part of the Energy Industry Act amendments in late 2012; and, with a view to power blackout risk scenarios during winter 2012/2013, the Federal Decree on Backup Power Plants (the so called 'winter regulation', ResKV). Furthermore, in July 2013 and August 2014 various amendments to the network regulations listed below have been implemented, including provisions regarding network investments and fees (eg, exemptions on the surcharge for electricity-intensive consumers, which, after lengthy negotiations during the course of a state aid assessment of the European Commission, have been found to be in line with EU state aid rules after various amendments to the German Renewable Energies Act 2014), as well as pooling provisions for grid connection points.

Historically, a limited number of utility companies enjoyed regional monopolies in their respective areas. These companies supplied energy and also operated the networks. By implementing Directive 2003/54/EC, Germany required market operators to comply with legal, functional and account unbundling requirements. Germany has so far objected to the introduction of mandatory ownership unbundling of transmission network operators in connection with the EU's third liberalisation package, as long as either the independent system operator (ISO) or independent transmission operator (ITO) requirements are met.

The main sector regulator is the Federal Network Agency, based in Bonn. Furthermore, competition is safeguarded by the Federal Cartel Office, where a specialised unit deals with the energy sector. Also located in Bonn, it applies antitrust law primarily to electricity supply, electricity generation and mergers.

Among the key statutes applying to the German electricity sector are:

- the Energy Industry Act (EnWG): containing the key norms for transmission, unbundling, distribution and supply of electricity and natural gas. On the basis of the Energy Industry Act, the federal government has issued a number of regulations, including:
- the Federal Decree on Power Plant Network Access (KraftNAV);
- the Federal Decree on Network Access (StromNZV);
- the Federal Decree on Network Access Fees;
- the Federal Decree on Incentive Regulation;
- the Federal Decree on Terms and Conditions of the Supply of Regular Consumers;
- the Federal Decree on Metering Access;
- the Federal Decree on Concession Fees;
- just recently the Federal Decree on Backup Power Plants (ResKV);
- the Energy Line Expansion Act (EnLAG);
- the Transmission Network Expansion Acceleration Act;
- the Renewable Energies Act 2014 (EEG 2014);
- the Combined Heat and Power Act (KWKG);
- the Nuclear Energy Act, which defines the framework for nuclear power generation;
- the Green House Gas Permission Trading Act, which deals with the allocation and trading of emission allowance certificates; and
- the Act against Restraints of Competition, which constitutes the general antitrust statute. Its rules apply unless sector-specific norms prevail.

2 Organisation of the market

What is the organisational structure for the generation, transmission, distribution and sale of power?

Electricity is generated by an increasingly diverse group of producers. A significant number of power plants are owned and operated by the four incumbent operators, namely RWE, E.ON, EnBW and Vattenfall Europe. In addition, independent producers and self-suppliers, as well as renewable electricity units (such as wind power plants and solar power generation facilities) add to the diversity of power generators. As network operators are required to take off and feed in electricity generated from renewable energy sources or from combined heat and power facilities, power generation from such facilities plays an increasingly important role in the German electricity market. Accordingly, new players arise on the markets for power generation, direct sales and balancing power, aggregating decentralised units within virtual power plants.

Transmission networks are operated by the legally unbundled entities Amprion, TenneT, EnBW Transportnetze and 50Hertz Transmission, originally spun off from the four incumbent operators RWE, E.ON, EnBW and Vattenfall Europe. In order to comply with commitments offered to the EU Commission in the context of antitrust investigations, E.ON sold its power grid to the Dutch company TenneT and Vattenfall sold its transmission grid to Elia, the Belgian grid operator (60 per cent), and the Australian Industry Funds Management (40 per cent), operating the transmission grid under the company name 50Hertz Transmission. RWE sold its majority shareholding, but still holds 25.1 per cent in Amprion. EnBW still owns its formerly integrated transmission grid as an independent operator.

Regional or local distribution networks are operated by a large number of utilities, in many of which the four large-scale suppliers RWE, E.ON, EnBW and Vattenfall hold shares. However, the Federal Cartel Office has in the past blocked acquisitions of interests by large-scale operators in regional players, stating that such acquisitions would strengthen dominant market positions. Now, municipalities and large public utility companies, the so called 'Stadtwerke', not only remain to control local network operators, but continue to increase their shares in the generation and network operation markets based on independent or cooperative acquisitions with other public utility companies.

In accordance with European Union law, Germany has liberalised the markets for the sale of electric power. Large-scale industrial consumers of electricity and private consumers alike are free to purchase electricity from the supplier of their choice. This has created more competition in the market. Attracted by the market potential, new players entered and new products like 'green power' from renewable sources are increasingly successful, even more so since the 2011 Fukushima incident.

Germany has recently opened the market for metering services, which the local grid operator will perform by default. According to a 2008 amendment of the Energy Industry Act and the implementation of the Federal Decree on Metering Access, customers may opt to receive metering services from a suitable provider of their choice. A new Metering System Regulation (MSysV) has been created, based on the increase in smart metering technology requirements. A widespread market roll-out was expected before federal elections in September 2013, but has been delayed as a consequence of a data protection and cost impact discussion.

Regulation of electricity utilities – power generation

3 Authorisation to construct and operate generation facilities

What authorisations are required to construct and operate generation facilities?

The construction of power generation facilities is subject to the general requirements of the planning and building laws. Furthermore, environmental provisions need to be observed, in particular the Federal Emmission Control Act (BImSchG). This applies not only to generation facilities that use fossil fuels but also to wind power plants with a height of more than 50 metres.

4 Interconnection policies

What are the policies with respect to interconnection of generation to the transmission grid?

The connection of power plants to the transmission grid is mainly subject to the Federal Decree on Power Plant Network Access, which entered into force on 27 June 2007. It applies to the connection of power plants with a capacity of at least 100MW to networks operating at a minimum voltage of 110kV. According to the Energy Industry Act grid operators have to connect power plants to the grid, unless providing access is technically impossible or economically unreasonable.

To enhance the generation of electricity from renewable sources and combined heat and power plants, the network operator is generally obliged to connect these privileged plants to the grid. Because of the lower voltage level, this mostly concerns operators of the regional distribution grids.

5 Alternative energy sources

Does government policy or legislation encourage power generation based on alternative energy sources such as renewable energies or combined heat and power?

Producers of electricity from renewable sources and combined heat and power plants benefit from preferential access to power grids. Furthermore, the network operators are obliged to take off electricity produced in such facilities. Whereas, before the latest amendment to the Renewable Energies Act, the network operators were required to purchase the electricity at fixed regulated feed-in tariffs (which is still applicable to some small facilities and in exceptional cases, however, including a significant deduction), the new Renewable Energies Act 2014 implemented the system of promoted direct sales to third parties, mostly electricity traders. The 'produce and forget' system is no longer in force. However, a financial support mechanism is still in place securing the difference between the previously applicable fixed feed-in tariff and the weighted average price on the EPEX Spot market in Paris. The support mechanism still applies for the year after initial operation plus a period of 20 full calendar years.

The compensation of the costs caused by the support mechanism is warranted by a special renewable energies cost surcharge mechanism.

Moreover, each electricity supplier is obliged to inform its customers of the proportion of different energy sources in relation to the overall power mix of the supplier, as well as of the carbon footprint and radioactive waste attributable to the respective electricity generation. These labelling requirements are part of Germany's effort to promote the use of energy generated from renewable sources.

The Renewable Energies Act 2014, which entered into force on 1 August 2014, sets as (non-binding) target that 40–45 per cent of power generation will be based on renewables by 2025. By 2035 this amount shall increase to 55–60 per cent and by 2050 at least to 80 per cent. In order to achieve these goals, specific quantitative targets for the expansion of renewable energies were set out. The increase of generation capacity of onshore wind turbines should be 2,500MW (net) each year. The electricity produced by offshore wind turbines shall reach 6,500MW by 2020 and 15,000MW by 2030. With regard to solar energy systems an annual increase of 2,500MW (gross) is aimed for, leaving only 100MW each year (gross) for biomass electricity production, since this has been deemed as most expensive renewable source. By 2020 renewables shall account for 18 per cent of gross final energy consumption. Compared to 2008, primary energy consumption shall decrease by 20 per cent by 2020 and by 50 per cent by 2050. This will require an increase in energy productivity of 2.1 per cent per year.

The renewable direct sales system was implemented in the Renewable Energies Act 2012, in order to increase market integration of renewable electricity generation, to create new markets, increase competition and attract investors. However, since direct sales have significantly increased since January 2012, the previously enacted Management Bonus Regulation has ceased to be in force for new plants as part of the Renewable Energies Act 2014. However, incumbent plants that were commissioned before 31 July 2014 are still covered by a safeguard existing standard in the transitional provisions.

With regard to the solar sector, the significant changes which had been enacted as part of the previous Renewable Energies Act as of 1 April 2012 mainly remain in place in the new Renewable Energies Act 2014. Since the German solar equipment producers were already struggling before such amendment, largely due to increasing competition from Asian suppliers, this has led to several insolvencies of major market players and acquisitions by international investors. As a consequence, the EU threatened to implement strict penalty customs duties on solar panel imports from China in order to protect the European solar markets which, in the end, led to an agreement including a minimum import module price of €0.56/watt until 2015. However, import penalties apply for manufacturers who rejected to enter the agreement.

In November 2012, the German government enacted a new regime regulating the liability of grid operators for delayed network access of offshore wind farms. The transmission network operators are liable in case the network access cannot be granted on time, but their liability is limited to a certain amount.

6 Climate change

What impact will government policy on climate change have on the types of resources that are used to meet electricity demand and on the cost and amount of power that is consumed?

In accordance with the government's coalition agreement (2009), greenhouse gas emissions are targeted to be reduced by 40 per cent until 2020 and by at least 80 per cent until 2050. This translates into minus 55 per cent by 2030, minus 70 per cent by 2040 and minus 80 per cent by 2050, all compared to 1990.

Energy efficiency forms an important part of the German government's climate policy. As already announced in September 2010, amendments to the electricity and energy tax laws were adopted in November 2012 according to which, from 2013, reductions on electricity and energy tax shall only be granted to companies that have introduced energy management systems. Medium-sized companies shall have access to programs promoting energy efficiency. The Federal Ministry of Economics and Technology set up an efficiency fund promoting certain energy efficiency activities for consumers, companies and municipalities with a fund volume of €500 million per year. The new federal government, which has been appointed after federal elections in September 2013, established a climate protection plan to define concrete targets and provisions for the reduction of greenhouse gas emissions up to 80–95 per cent by 2050.

Emission allowance trading is intended to limit the effects of climate change. As of 1 January 2013, the third allocation period (2013 to 2020) favours the full auctioning of emission certificates for power utilities (exceptions may apply). Thus EU member states shall not allocate free certificates, as practised during the first (2005 to 2008) and to a significant extent also during the second (2008 to 2012) allocation period. In January 2014, the EU member states followed the European Commission's recommendation to adopt an amendment to the Auctioning Regulation

and change the timing of the back-loading schedule. This will postpone the auctioning of 900 million allowances from the years 2014–2016 until 2019–2020.

7 Government policy

Does government policy encourage or discourage development of new nuclear power plants? How?

In the aftermath of the nuclear incident of Fukushima, the German government imposed security checks for each of the 17 nuclear power plants and a phase-out for nuclear energy generation. Eight of the 17 nuclear power plants have been shut down. The remaining nine nuclear power plants will be decommissioned by 2022 at the latest, one of them (ie, the nuclear power plant Grafenrheinfeld) most likely in spring 2015.

Germany is accelerating the transition from nuclear power and fossil fuels to an age of renewable energy. The previous amendments with respect to the solar power sector and the Combined Heat and Power Act, which aimed for increasing the promotion of the generation, storage and transmission of combined heat and power, have proven successful and, thus, have only been slightly modified within the new Renewable Energies Act 2014.

Regulation of electricity utilities – transmission

8 Authorisations to construct and operate transmission networks

What authorisations are required to construct and operate transmission networks?

The construction and operation of a network generally requires the approval of the competent authority of the federal state in which operations are intended. This regional authority can only refuse the licence to operate the network if the applicant lacks the reliability, the staff or the overall capacity to operate the network. Moreover, operators of transmission networks require a certification of the Federal Network Agency in cooperation with the European Commission. The construction and operation of overhead lines with a voltage of 110kV or more is subject to an administrative approval, which needs to be obtained by means of a formal planning procedure. This administrative procedure takes account of all regulatory aspects and therefore has a concentrating effect, which relieves the applicant from having to obtain additional permits under different planning or environmental statutes.

9 Eligibility to obtain transmission services

Who is eligible to obtain transmission services and what requirements must be met to obtain access?

In Germany, network operators are required to grant non-discriminatory third party access to their infrastructure. Access can be denied only where granting it would be impossible or unreasonable for operational, capacity, technical or commercial reasons. In its decision of 22 May 2008 (C-439/06), the European Court of Justice clarified that the obligation to provide access also applies to systems located on a geographically connected operation zone of an undertaking, which predominantly serve to supply the energy needs of the undertaking itself and of affiliated undertakings. Since the amendment to the Energy Industry Act in 2011, the regulations regarding closed distribution networks have been updated. Network access still needs to be granted, but under restricted requirements. Furthermore, the status as a closed distribution network needs to be granted by the Federal Network Agency on a mandatory basis since certain regulatory provisions, such as network and balancing services, incentive regulation or network access fee and monitoring requirements, do not apply to these networks.

10 Government incentives

Are there any government incentives to encourage expansion of the transmission grid?

The German government has announced plans to significantly improve the grid by 2050. These plans cover the expansion of the existing grid, plans for an overlay grid and possible pilot lines, a North Sea grid, cluster connections for offshore wind parks and improved integration of the German grid into the European grid. Based on a 10-year expansion plan, which the grid operators shall be required to develop, the government is working on a federal grid plan. Furthermore, planning and permitting procedures for power lines shall be accelerated.

To promote investments and security of supply, investment budgets of transport system operators can be approved for necessary extension and restructuring investments. Approved costs may be included in the network fees, which need to be paid by the network users. By means of this special treatment, the Federal Network Agency can encourage investments.

On 26 August 2009, the Statute on the Expansion of High-voltage Electricity Networks entered into force, promoting the expansion of high-voltage (380kV) overhead and underground lines, as well as the development of storage technologies. It also facilitates the connection of new power plants and offshore wind farms by streamlining administrative requirements. On 28 July 2011, the Transmission Network Expansion Acceleration Act took effect in order to improve the transport of power generated by the offshore wind farms to the south of Germany, where several nuclear power stations have gone off the grid. Just recently, after completion of the consultation procedures, the four German transmission system operators published drafts of the modified Electricity Network Development Plan (NDP) and the Offshore Network Development Plan (O-NDP) in April and May 2014. The NDP and O-NDP serve as drafts for a Federal Requirements Plan, in order to cover transmission network expansion for the next two decades.

On 1 January 2012, a new element encouraging investments became part of the incentive regulation of electricity networks. This new quality element rewards the reliability of the performance of a network by adding a quality component in the form of increases (bonus) or reductions (malus) of the system operator's revenue cap. During the first regulatory period 2012–2013, out of a total of 202 system operators, 143 companies will have an amount added (bonus), and 59 an amount deducted (malus). The highest amount added is approximately €4.7 million. To minimise the financial risks for system operators posed by major fluctuations, bonuses and maluses will be symmetrically capped for 2012 and 2013. The cap was fixed at plus or minus four per cent and relates to the revenue cap for 2011. The quality regulation system aims to achieve revenue neutrality, which means all bonuses and penalties are offset across all system operators. The relevant data is currently collected and revised by the Federal Network Agency in order to determine the quality element for the second regulatory period from 2014–2016.

11 Rates and terms for transmission services

Who determines the rates and terms for the provision of transmission services and what legal standard does that entity apply?

The Federal Decree on Network Access Fees determines how a network operator may calculate the rates for transmission services. Rather than identifying specific tariffs, the German sector regulator decided to provide an incentive to network operators to increase their efficiency.

To this end, the German government has adopted the Federal Decree on Incentive Regulation, including the aforementioned quality element. According to this instrument, the prices or revenues of a transmission or distribution network operator do not solely depend on its cost base (as was the case under the former regulatory framework), but allow higher returns for efficient companies. To enable the Federal Network Agency to determine which operators are more efficient than others, each network operator needs to provide the sector regulator with information about its cost base.

Having audited these costs, the Federal Network Agency determines which operators are relatively efficient and which are not. Based on, inter alia, the audited costs and the relative efficiency of each network operator, the Federal Network Agency will determine an overall level of tariffs that the network operator will be allowed to charge for its transmission services during a defined regulatory period.

The Federal Decree on Incentive Regulation is based on the idea that each network operator will try to become more efficient than others, so that it will be allowed a higher return compared to other grid operators. Since all network operators will try to achieve the same goal of becoming the efficiency leader, the Federal Decree on Incentive Regulation is designed to promote a 'race to the bottom', resulting in higher efficiency and lower tariffs.

12 Entities responsible for assuring reliability

Which entities are responsible for assuring reliability of the transmission grid and what are their powers and responsibilities?

The Federal Network Agency monitors the reliability of the transmission grids. Interruptions of supply need to be reported and can be examined. Reliability of the transmission grid is one of the key responsibilities of the network operators, on transmission as well as on distribution levels. By law, they are required to operate, maintain and expand the network in line with demand and to cooperate with other operators to warrant the safety and reliability of the transmission system. Failure to comply with these responsibilities can result in the loss of the licence required to operate the network or, starting in 2012, in a revenue cap reduction based on the quality element calculation (see also question 10). Furthermore, in the case of security and reliability of supply being at risk, network operators are required to take network-related as well as market-related measures, including power plant regulation, the procurement of balancing power from conventional as well as renewable power plants (see also questions 2 and 9) or demand-side management. Furthermore, if renewable power plants have been forced out of operation, reimbursement measures apply according to the Renewable Energies Act.

Recently, German transmission network operators initiated the first tender for interruptible loads on their mutual internet platform www.regelleistung.net. The tender was based on the Federal Decree on Interruptible Loads, which was adopted on 28 December 2012 based on the 2012 amendments to the Energy Industry Act.

Regulation of electricity utilities – distribution

13 Authorisation to construct and operate distribution networks

What authorisations are required to construct and operate distribution networks?

Like the operation of a transmission network, the operation of a distribution network requires a licence from the competent authority of the federal state in which operations are intended. Furthermore, the construction of an overhead line requires a building permit. It will also need to be compatible with environmental laws. A formal planning procedure is required for the construction of overhead lines operating at 110kV or more, regardless of whether the line is part of a transmission or distribution network.

14 Access to the distribution grid

Who is eligible to obtain access to the distribution grid and what requirements must be met to obtain access?

As is the case with transmission networks, the operator of a distribution grid is obliged to grant non-discriminatory third-party access. Details concerning the connection to and the use of the grid will be addressed in agreements to be concluded between the grid operator and its customer.

Since the adoption of the Federal Decree on the Connection to Low-Voltage Grids (NAV) on 8 November 2006, local network operators are obliged to connect any facility within their area to the local grid. The customer requesting the connection can be required to pay for some of the related costs.

15 Rates and terms for distribution services

Who determines the rates or terms for the provision of distribution services and what legal standard does that entity apply?

Generally, the same principles apply as for transmission networks. However, differences exist in the way investments or expansions of the network are accounted for in the context of tariff regulation.

Furthermore, where a grid operator has fewer than 100,000 customers, the network access fees are to be determined by the regulatory authority of the federal state in which the network operator conducts its operations. However, several of the federal states have conferred their responsibility to the Federal Network Agency. This contributes to a uniform application of the relevant statutes within the Federal Republic of Germany.

Regulation of electricity utilities – sales of power

16 Approval to sell power

What authorisations are required for the sale of power to customers and which authorities grant such approvals?

Anyone wanting to supply private households with electricity needs to submit a respective notification to the Federal Network Agency. When filing the notice, the supplier needs to demonstrate that it has the technical and commercial capacity to provide such services. Where it lacks such capacity or where the management of the supplier proves to be unreliable it can be disqualified. Once operating as a supplier, certain minimum standards concerning several business processes must be applied.

17 Power sales tariffs

Is there any tariff or other regulation regarding power sales?

Suppliers providing private households with electricity are obliged to publish their general terms and conditions and their standard prices. The local network operators are generally obliged to connect private households to their grid. Furthermore, the local incumbent supplier is obliged to supply private households in the respective area with electricity based on published general terms and conditions and prices, which have to be in line with the requirements set forth in the Federal Decree on Terms and Conditions of the Supply of Regular Consumers. The remaining tariffs of the incumbent supplier as well as from other suppliers are not regulated and subject to competitive market conditions based on the terms of electricity supply agreements.

18 Rates for wholesale of power

Who determines the rates for sales of wholesale power and what standard does that entity apply?

The supply of non-household customers sourcing certain minimum quantities of electricity is not subject to sector-specific price regulation. However, the pricing policies of suppliers are subject to review by the competition authorities.

The European Energy Exchange (EEX) in Leipzig, Germany, continues to stimulate competition in the wholesale markets for future power products in Germany and Austria. The EEX provides market prices for standard electricity products on the basis of the PHELIX (Physical Electricity Index). EEX and the French Energy Exchange Powernext jointly control the EPEX Spot, located in Paris, where spot market products are traded. The calculated index of Germany and Austria (PHELIX), Switzerland (Swissix) and France provided by the EPEX is called ELIX (European Electricity Index). Both indices constitute important indicative values for the OTC-market.

19 Public service obligations

To what extent are electricity utilities that sell power subject to public service obligations?

The local incumbent supplier is under a legal obligation to supply electricity to private households in the relevant area. The relevant terms and conditions and prices need to be published on the internet.

An exception to the general obligation to supply private households applies where having to supply the customer would be economically unacceptable for the supplier, or if the network has been granted the status of a closed distribution network by the Federal Network Agency (see also question 9).

The local grid operator is obliged to connect any facility within its area to the local grid, according to the Federal Decree on the Connection to Low-voltage Grids which came into effect on 8 November 2006.

Regulatory authorities

20 Policy setting

Which authorities determine regulatory policy with respect to the electricity sector?

On the federal level, the regulation of the electricity sector falls within the domain of the Federal Ministry of Economics and Energy and to a minor degree to the Federal Ministry of Environmental Affairs. The Federal Network Agency, which reports to the Federal Ministry of Economics and Energy, holds a key position in implementing regulatory policies applicable

to the electricity sector. Furthermore, the respective state-level authorities also have an impact on regulatory policies. The same holds true for the Monopolies Commission, an independent but highly regarded advisory body for competition policy.

21 Scope of authority

What is the scope of each regulator's authority?

The Energy Industry Act authorises the federal government to enact subordinate legislation such as the decrees referred to above. At present, the Ministry of Economics and Energy is in charge of the electricity dossier.

The Federal Network Agency and the respective state level authorities are primarily charged with enforcing the rules on network connection, network access and access fees. In this regard, the Federal Network Agency is an enforcement agency and may initiate proceedings against network operators. It also watches over the observation of unbundling requirements, of cross-border electricity trading, the notification required for the initiation of the supply of private households and any abusive conduct of network operators with regard to network access and usage, provided that it does not fall within the competence of the Federal Cartel Office (see also question 26).

The Federal Cartel Office enforces the competition statutes, especially with regard to merger control and abuse of dominance. In a decision of September 2010, the Federal Cartel Office found that several providers of electric heating had abused their market power and required them to pay refunds to households that had been overcharged. Lately, the Federal Cartel Office took major decisions in the gas sector, approving the acquisition of E.ON's subsidiary Open Grid Europe by an investment consortium consisting of Macquarie, the Abu Dhabi Investment Authority, British Columbia Investment Management Corporation and MEAG MUNICH ERGO AssetManagement. It also approved Gazprom's acquisition of a minority interest in VNG. Furthermore, the Federal Cartel Office enacted measures to increase competition in the markets for water as well as long-distance heating.

On the state level, state regulatory authorities are competent for the licensing of distribution network operators and the supervision of security of network operations. Furthermore, the state-level competition authorities enforce competition law in cases affecting only a single federal state.

The coordination of actions between the different national regulatory authorities in the EU is the task of the Agency for the Cooperation of Energy Regulators (ACER), established in 2010 in Ljubljana (Slovenia). ACER is also responsible for monitoring the implementation of the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) in the member states, which the EU adopted at the end of 2011 in order to enact new stringent rules on wholesale energy trading and transparency. The main objective of the regulation which is directly applicable in the member states of the EU is to prevent the use of insider information and other forms of market abuse that distort wholesale energy prices. By law, the Federal Network Agency was provided with the necessary examination and execution powers to enforce the regulations set forth in the REMIT. However, a market transparency unit for wholesale trade in electricity and gas has been formed under the mutual supervision of the Federal Network Agency as well as the Federal Cartel Office.

22 Establishment of regulators

How is each regulator established and to what extent is it considered to be independent of the regulated business and of governmental officials?

All regulatory authorities are completely independent of the regulated business. Both the Federal Network Agency and the Federal Cartel Office are in the portfolio of the Federal Ministry of Economics and Energy. Within the agencies, the various decision-making chambers maintain a certain degree of autonomy.

23 Challenge and appeal of decisions

To what extent can decisions of the regulator be challenged or appealed, and to whom? What are the grounds and procedures for appeal?

The regional administrative courts are competent to hear most appeals against decisions of state-level authorities.

Decisions by the Federal Network Agency and the Federal Cartel Office are subject to judicial review by the competent court of appeals, chiefly the Higher Regional Court Düsseldorf, where specialised chambers exist. The court may also order interim measures. With a limitation to points of law, decisions by the Court of Appeals can be reviewed by the Federal Court of Justice.

Acquisition and merger control – competition

24 Responsible bodies

Which bodies have the authority to approve or block mergers or other changes in control over businesses in the sector or acquisition of utility assets?

Unless a transaction is subject to filing requirements under the EC Merger Regulation – namely Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings – the Federal Cartel Office in Bonn is competent to review mergers in Germany. Within the Federal Cartel Office, a specialised chamber deals with transactions related to the energy sector. It examines whether the transaction would result in the creation or strengthening of a dominant market position (for recent cases see question 21). Within the scope of the eighth amendment to the Act against Restraints of Competition, which was enacted in June 2013, the substantive test for merger control by the Federal Cartel office was aligned with the EU Merger Regulation and focuses now on the SIEC test, 'significant impediment to effective competition'.

Any decision by the Federal Cartel Office to block a merger can be appealed to the Federal Ministry of Economics and Energy. It can grant a ministerial permission, and did so for the acquisition of Ruhrgas by E.ON in 2002. Furthermore, decisions of the Federal Cartel Office are subject to judicial review by the courts, notably the Higher Regional Court Düsseldorf. Recently the decision of the Federal Cartel Office to block E.ON's proposed acquisition of shares in Stadtwerke Eschwege, a local supplier, was upheld by the Higher Regional Court Düsseldorf and subsequently by the Federal Court of Justice. It was held that E.ON (collectively with RWE) dominates the market for electricity in Germany. The courts confirmed that the transaction would have strengthened this position, as the local supplier would have been enticed to source power from its shareholder.

Recently, the exemption from network charges for large electricity consumers, stated in section 19 of the Federal Decree on Network Access Fees, has been examined on a national as well as European level. On 6 March 2013, the Higher Regional Court Düsseldorf ruled that the specifications made by the Federal Network Agency regarding that exemption are unconstitutional (Az. BK8-11-024). However, the decision is not yet legally binding and a complaint with the Federal Supreme Court is likely to be filed. At the same time, the European Commission announced the opening of an in-depth inquiry into whether the regulation in section 19 of the Federal Decree on Network Access Fees violates EU state aid law, since only large electricity consumers are exempted from network charges. However, the decision to open such procedure had been postponed to late 2013 after the exemption provisions for electricity-intensive consumers were amended in July 2013, and further assessments have been discarded in the course of the negotiations of the new German Renewable Energies Act 2014.

25 Review of transfers of control

What criteria and procedures apply with respect to the review of mergers, acquisitions and other transfers of control? How long does it typically take to obtain a decision approving or blocking the transaction?

Generally, transactions need to be notified to the Federal Cartel Office where, in the most recently completed financial year, the parties' revenues exceeded three cumulative thresholds:

- €500 million in combined worldwide revenues of the target, the purchaser and the purchaser's affiliated undertakings;
- €25 million in German revenues of either the target, or the purchaser and its affiliated undertakings; and
- €5 million in German revenues of another party to the transaction.

Update and trends

In autumn 2014, the competent Federal Ministry of Economics and Energy intends to publish a 'green book' on the future electricity market design open for discussion in order to further develop the market design. An important role within the evaluation is played by the conceivable, but uncertain implementation of a capacity market and a new structure for the power production and feed-in management in Germany. In 2015, concrete steps taking into account the results shall be compiled in a 'white book'. Presumably in 2015, amendments to the Energy Industry Act will be made in order to align the network integration mechanism of renewable energies with conventional energies.

Furthermore, the federal government already announced another amendment to the Renewable Energies Act likely in 2016 to set forth rules and regulations to shift the renewables funding mechanism for new renewable power plants from the current support mechanism to a public tender-based mechanism. Based on the new Renewable Energies Act 2014, pilot tender projects shall initially be auctioned at the beginning of 2015, aiming for a total capacity of 600MW of ground-mounted PV power plants over the next two years. Based on the experiences gained during such pilot projects, the future tender-based mechanism shall be evaluated for all renewable sources.

Since the introduction of the third threshold in March 2009, a transaction is only subject to filing requirements where both the purchaser and the target have significant business activities in Germany.

The Federal Cartel Office normally reviews merger filings within one month. Where substantial concerns require an in-depth investigation, it can extend the review period to a total of four months.

The parties may not complete the transaction before the Federal Cartel Office has cleared the transaction. It is therefore advisable to submit the merger filing as early as practicable.

26 Prevention and prosecution of anti-competitive practices

Which authorities have the power to prevent or prosecute anti-competitive or manipulative practices in the electricity sector?

Anti-competitive practices related to grid connection and network access are within the competence of the sector regulators, namely the Federal Network Agency and the respective state-level authorities. Otherwise, the power to prevent and prosecute anti-competitive practices rests with the competition authorities, namely the Federal Cartel Office and the respective state-level authorities.

27 Determination of anti-competitive conduct

What substantive standards are applied to determine whether conduct is anti-competitive or manipulative?

With regard to anti-competitive agreements, the German authorities apply the same standard as other EU competition authorities under article 101 Treaty on the Functioning of the European Union and Regulation (EC) No. 1/2003. With regard to unilateral conduct, the general provisions of competition law are applied to the energy sector, unless the sector-specific rules described above (namely, on third-party access, connection or pricing) prevail.

Since December 2007, the Act against Restraints of Competition includes a sector-specific provision on abusive pricing: A dominant supplier of electricity or natural gas may not charge prices that exceed its cost base in an unreasonable manner or the price level in similar markets, unless the supplier is able to demonstrate that there is an objective justification for the higher price level. This provision has already resulted in several enforcement actions, which prompted gas suppliers to offer refunds to customers. In September 2010, this was also the case with suppliers of electric heating.

The eighth amendment to the Act against Restraints of Competition became effective in June 2013. With regard to the energy sector, the excessive abuse control competence of the Federal Cartel Office over electricity and gas suppliers has been prolonged until 31 December 2017. Furthermore, the energy sector competences have not been extended on district heat markets.

28 Preclusion and remedy of anti-competitive practices

What authority does the regulator (or regulators) have to preclude or remedy anti-competitive or manipulative practices?

The regulators may commence investigations on their own initiative, or following a complaint by an injured party. The Federal Cartel Office also initiated a leniency (bonus) programme in order to encourage cartelists to unveil anti-competitive behaviour. Both the sector regulators and the competition authorities have the power to order the discontinuation of the unlawful conduct and to impose significant fines.

International

29 Acquisitions by foreign companies

Are there any special requirements or limitations on acquisitions of interests in the electricity sector by foreign companies?

The Federal Ministry of Economics and Energy may review acquisitions of a German company by investors from outside the EU or EFTA and block these for reasons of national security or public policy. There is no mandatory filing requirement, but parties to a transaction may request a letter of comfort.

The relevant law entered into force in April 2009. The government has not yet made use of such powers in the electricity sector, but several references to electricity infrastructure were made in the legislative process.

30 Cross-border electricity supply

What rules apply to cross-border electricity supply, especially interconnection issues?

Access to the network for cross-border supply in electricity is harmonised in the European Union, of which Germany is a member. Regulation (EC) No. 1228/2003 contains rules on network access charges, congestion

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management and an inter-transmission system operator compensation mechanism.

As of 3 March 2011, this Regulation was replaced by Regulation (EC) No. 714/2009, which aims at enhancing the cross-border supply of electricity and network access in the context of the EU's internal market. The new Regulation lays down basic principles with regard to tariffs and capacity allocation and establishes the European Network of Transmission System Operators (ENTSO) for Electricity. In order to ensure greater transparency regarding the entire electricity transmission network in the EU, the ENTSO for Electricity shall draw up, publish and regularly update a non-binding 10-year network development plan. Viable electricity transmission networks and necessary regional interconnections, relevant from a commercial or security of supply point of view, should be included in that network development plan for the EU.

All transmission grids in the EU are connected. When the European transmission networks were constructed, the idea of interconnection was to facilitate temporary mutual assistance rather than enabling European-wide trade. Owing to insufficient interconnection capacities, cross-border trade is still limited. The European legal framework and the different price levels in the member states of the EU promoted the idea of one European power grid, what has been called the 'European copper plate', which basically stands for 'one grid – one price'. Market coupling constitutes a substantial step on the way to achieving this goal. The idea of market coupling is the optimal use of interconnection capacities, involving the network operators and the power exchanges of the participating member states.

Transactions between affiliates

31 Restrictions

What restrictions exist on transactions between electricity utilities and their affiliates?

The obligation to provide non-discriminatory access and connection, as described above, implies that a grid operator may not grant preferential treatment to its affiliates.

The provisions regarding unbundling of vertically integrated electricity utilities and network operators are intended to restrict the misuse of the advantage of the natural monopoly, where control of the electricity network favours affiliates.

32 Enforcement and sanctions

Who enforces the restrictions on utilities dealing with affiliates and what are the sanctions for non-compliance?

The non-discrimination rules can be invoked in court proceedings. In addition to private enforcement, the regulators also ensure compliance (see question 21).

Getting the Deal Through

Acquisition Finance
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Anti-Money Laundering
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Aviation Finance & Leasing
Banking Regulation
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Dominance
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Enforcement of Foreign Judgments
Environment
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Franchise
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Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
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Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
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Private Equity
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Product Recall
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