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Competition Policy in Regulated Sectors:
Focusing on the Institutional Design of the Relationship between
Competition Authority and Sectoral Regulators

규제산업의 경쟁정책:
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Dr. Markus Wagemann
Chairman of 11th Decision Division
Bundeskartellamt (Federal Cartel Office)
Germany

**“Regulatory Powers under Competition Law and Sector Regulation in the Area
of Electricity and Gas Networks in Germany”**

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Competition law on the one hand and sector regulation (telecommunication, postal services, electricity + gas networks, railways) on the other hand are separate regimes in Germany as far as legal provisions and the jurisdiction of agencies and of courts are concerned. These regimes have different approaches and different powers, but each of them contains rules on cooperation and the exchange of information in order to avoid parallel action or conflicting decisions.

The following paper starts by describing the competition agency and the sectoral regulator in Germany as well as the scope of the German Act Against Restrictions of Competition (ARC) with respect to energy markets and energy networks in particular (chapter I). It then outlines the liberalisation process in the energy sector and the approach of negotiated third party access in Germany since the mid nineties (chapter II). Since 1998, competition law has applied without substantial restrictions; this new regime will be described in chapter III. Cases of the Federal Cartel Office and the following jurisprudence of German courts on network related issues will be presented in this context. These cases have revealed some problems and limits of statutory powers of competition law with regard to network related markets. That analysis as well as the parallel adoption of EU Directives on electricity and gas resulted in the adoption of new legislation on sector regulation in 2005. The

relationship between the competition agency and the sector regulator ever since will be examined in chapter V. This includes the current cooperation between the Bundesnetzagentur (Federal Network Agency) and the Bundeskartellamt (Federal Cartel Office) and some general conclusions on the relationship between these regimes and on the requirements of regulatory powers following the structure and features of markets which were legally monopolized in the past (chapter VI).

- I. Competition Agency and Sectoral Regulator in Germany
- II. The process of liberalisation in the energy sector in Germany
- III. Energy markets deregulated under competition law between 1998 and 2005
- IV. Relationship between competition agency and sector regulator under the 2005 legislation on sector regulation
- V. Conclusions

I. Competition Agency and Sectoral Regulator in Germany

1. Federal Cartel Office

In Germany the task of protecting competition is undertaken by the Federal Cartel Office, FCO ([Bundeskartellamt](#)) and the competition authorities of the *Laender* (federal states). The FCO is an independent higher federal authority assigned to the Federal Ministry of Economics and Technology. Since 1 October 1999 it is located in Bonn, after operating for 40 years from Berlin. The FCO has a staff of about 300, half of whom are legal or economic experts. The authority's annual budget is 17 million euros. Its activities are based on the [Act against Restraints of Competition](#), ARC (Gesetz gegen Wettbewerbsbeschränkungen, GWB), also referred to as the cartel law, which came into force on 1 January 1958 and has since been amended seven times. The most recent amendment was in 2005.

The FCO enforces the ban on cartels and abusive practices and exercises merger control. While the competition authorities of the *Laender* exclusively deal with those

cases where the alleged infringement does not reach beyond the borders of the state concerned, the FCO is responsible for the remaining cases. Merger control is exclusively enforced by the FCO. Apart from German competition law the FCO also applies European competition law in cases where the European Commission, as the competition authority at European level, is not competent under the Merger Control Regulation or, as far as Articles 81 and 82 EC are concerned, under Regulation 1/2003 and the case allocation criteria that have been developed.

The FCO's decisions are made in a manner similar to judicial proceedings by Decision Divisions which are organised according to economic sectors (see annex 1: FCO Organisation Chart). The Decision Divisions are assisted by a litigation department and by the General Policy Department which provides advice on special competition law matters and coordinates cooperation with other competition authorities, e.g. within the [ECA](#) (European Competition Authorities) and [ICN](#) (International Competition Network) forums. Since 2005, the FCO has a specialised Decision Division for Combating Cartels, assisted by a corresponding unit of the General Policy Department in preparing, carrying out and analysing the results of search operations as part of cartel proceedings.

2. Federal Network Agency

The Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway, FNA ([Bundesnetzagentur](#)) is – as the FCO - a separate higher federal authority within the portfolio of the German Federal Ministry of Economics and Technology, and has its headquarters in Bonn. On 13 July 2005 the Regulatory Authority for Telecommunications and Posts which superseded the Federal Ministry of Posts and Telecommunications (BMPT) and the Federal Office for Posts and Telecommunications (BAPT), was renamed Federal Network Agency. The FNA has

a staff of about 400 dealing exclusively with regulatory affairs¹ and an annual budget (in 2006) of about 142 million euros (for regulation and other activities). Its task is to provide, by liberalisation and deregulation, for the further development of the electricity, gas, telecommunications and postal markets, including, since 1 January 2006, the railway infrastructure market. Moreover, it acts as the root certification authority as provided for by the Electronic Signatures Act.

The legal framework for the scope of activities of the FNA related to electricity and gas is the [Energy Industry Act](#), EIA (Energiewirtschaftsgesetz) which entered into force on 13 July 2005. The relevant provisions of the EIA concerning access to the gas and power supply grids and the rules of the said Act concerning the rates for access to these grids may also be viewed on the website of the [Federal Ministry of Economics and Technology](#) (Bundesministerium für Wirtschaft und Technologie).

The ordinances entered into force on 29 July 2005.

The purpose of regulation is to establish fair and effective competition in the supply of electricity and gas. The responsibilities of the FNA therefore include ensuring non-discriminatory third-party access to networks and policing the use of system charges levied by market players. The range of tasks also includes the supervision of anti-competitive practices and the monitoring of the regulations governing the unbundling of network areas and the system responsibility of the supply network operators. The FNA performs tasks and executes powers which under the EIA have not been assigned to the *Land* regulatory authorities. The *Land* regulatory authorities are responsible for regulating power supply companies with fewer than 100,000 customers connected to their electricity or gas networks and whose grids do not extend beyond a federal state's borders. The FNA's decisions are made in a manner similar to the FCO's by ruling chambers; there are, inter alia, ruling chambers for the regulation of access to electricity/gas supply networks and for the regulation of use of system charges (see annex 2: FNA Organisation Chart).

¹ Apart from its regulatory staff, the FNA has about 2000 employees performing technical duties in the area of telecommunications all over Germany.

The FNA is a member of various European and international organisations. Most important at European level is the agency's work for the European Commission. This involves meeting its reporting requirements and working in the Communications Committee (COCOM). To facilitate the regulation of electronic communications networks and services, the Agency is a member of both the Independent Regulators Group (IRG, <http://irgis.icp.pt/site/en/>) and the European Regulators Group (ERG, www.erg.eu.int). As for energy regulation, the Agency is a member of the Council of European Energy Regulators (CEER, www.ceer-eu.org) and the European Regulators' Group for Electricity and Gas, www.ergeg.org. Also, the Agency has been nominated to the EU as the competent authority for the regulation of the electricity and gas markets for the application of Regulation EC No 1228/2003 on cross-border exchanges in electricity. Together with representatives from the Ministry the agency participates in the European Electricity Regulatory Forum (Florence Forum) and the European Gas Regulatory Forum (Madrid Forum).

3. Common characteristics

This description of the structure and tasks of the two agencies reveals that they have many characteristics in common: Both authorities work on a specific legal basis and are assigned to the Ministry of Economics and Technology, but adopt decisions through independent "decisions divisions" or "ruling chambers". Both agencies have for the purpose of implementing the aims of competition law or regulation effective procedures and instruments at their disposal including rights of information and investigation as well as the right to impose sanctions. In case of a legal dispute neither the President of the Authority nor the Federal Ministry of Economics and Technology can quash the decision made by these chambers. The rulings by the Ruling Chambers on telecommunications and postal matters may be challenged directly before the administrative courts, and before the civil courts if energy matters of the FNA or competition matters of the FCO are concerned.

Proceedings do not have a suspensive effect as far as decisions on the abuse of a dominant position are concerned.

II. The process of liberalisation in the energy sector in Germany

Regional monopolies existed in the German energy industry until 1998. Vertically integrated utilities had a legally recognised monopoly in their service area. There was substantive supervision and price controls, backed up by the control of anti-competitive practices by the Federal Cartel Office.

The first moves to liberalise the energy market were made at European level. In the 1980s, the European Commission developed a legislative strategy for creating a European single energy market. The EU directives for the internal markets in electricity and gas built on this strategy and aimed chiefly at creating competition-oriented markets.

The EU Directive on the internal market in electricity was transposed into national legislation with the amended Energy Act 1998. The aim of the Act was to open the market for networked energy. The regional monopolies set up by the State were thus abolished. A reorganisation of the energy statutes brought about the implementation, in 2003, of the EU directive on the internal market in natural gas.

That same year, it was decided to issue new directives to achieve the single energy market. The aim of these acceleration directives, as the name suggests, was to give a further boost to energy liberalisation and the creation of uniform conditions for competition in the internal electricity and natural gas markets. Other than their predecessors, the acceleration directives no longer allow Member States to choose between negotiated or regulated network access. On the contrary, regulated network access was laid down as the only route by which European law was to be transposed. The amended Energy Act of 7 July 2005 implemented the European

directives on the internal markets in electricity and natural gas into national legislation (EIA).

III. Deregulated energy markets under competition law between 1998 and 2005

After a dynamic start to competition in the German electricity market in 1999/2000, it very soon became difficult for new entrants to compete with the incumbents. Price differences were too small to convince household customers to change their supplier. To some extent, industrial customers were able to reduce their purchase prices, either by changing supplier or by achieving more favourable conditions from their current supplier. The significance of the abuse control of powerful and dominant companies in the energy sector increased during that period. A clear focus was the network-based electricity sector while competition in the gas sector had not yet started in the years after 1998. In the electricity sector the first prohibition decisions on account of abusively high fees for network use (system charges) were issued in early 2003. Further abuse proceedings conducted by the FCO related, inter alia, to the unfair hindrance or the squeezing out of competitors from the market and calls for boycotts against companies.

Having set up, with effect of August 2001, a separate Decision Division for enforcing non-discriminatory access to electricity networks, the FCO was able to considerably intensify its control of abusive practices in the electricity sector. Equally, since August 2001 a newly established Task Force on Network Access within the Ministry of Economics and Technology developed Best Practices on technical and commercial network-related issues, e.g. on the mechanism of switching customers between network operators in case of a change of supplier. With regard to the enforcement of the principle of competition, the FCO's cooperation with the competition authorities of the *Laender* and the Federal Ministry of Economics and

Technology, in particular with the latter's Task Force, is of great significance. The final report of the "Working Group on Electricity Network Use" from April 2001² established by the Federal and *Laender* competition authorities proved a useful guidance not only for the competition authorities but also for market participants and courts dealing with network use issues. In that report the competition agencies drafted joint concepts for establishing that abusively excessive fees are being charged for using networks, as well as guidelines for assessing other impediments to network access.

Some of the central problems which arose after the opening up of the market no longer play an important role today. Practices such as the general denial of access to electricity networks now only occur in exceptional cases. A number of other obstacles to electricity network access such as the demanding of transfer fees and the so-called "double-contract model" could also be eliminated.

The main problem in Germany now is the excessive level of fees for network use (system charges). In view of the high fees for network use, alternative electricity providers hardly have any possibility to make attractive offers to end customers. In exercising its abuse control the FCO did not accept the reference to the Associations' Agreement on electricity II plus ("VV Strom II plus") from January 2003 by network operators to justify abusive conditions for network use or abusive fee-structuring. While the "Associations' Agreement on electricity II plus" did bring about improvements in terms of competition, one of its decisive weaknesses was that its principles on establishing prices threatened to perpetuate the calculation of excessive fees for network use. After preliminary proceedings against 22 network operators, the FCO opened abuse proceedings in January 2002 against 10 electricity network operators on account of their charging excessively high fees for

² See press release of 24 April 2001 (http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2001/2001_04_24.php). The report is only available in German on [www. Bundeskartellamt.de](http://www.bundeskartellamt.de).

network use³. In two of the proceedings concerning system charges, i.e. against Stadtwerke Mainz and Thüringer Energie AG, formal prohibition decisions were issued in early 2003 (see below). Some of the competition agencies of the *Laender* equally opened proceedings against network operators because of alleged excessive system charges.

1. Case “Stadtwerke Mainz AG”

In August 2002 the FCO issued a warning to Stadtwerke Mainz AG on the suspicion of its charging excessive fees for network use. Investigations had shown that, based on the comparative market concept, the fees for network use charged by Stadtwerke Mainz were clearly higher than those of the comparative company RWE Net AG. The basis for this result was a comparison of the respective revenue from fees for network use in relation to the respective length of the distribution network (revenue per kilometre of transmission line). Such a revenue-based comparison is considerably more precise than comparisons based on single purchases because it allows for a complete quantity weighting of the fees for network use. Quantity weighting, which basically takes into account a network operator’s customer structure, was not possible before as the necessary figures were not publicly available. In the present case the FCO established that Stadtwerke Mainz as a municipal utility derived clearly higher turnovers from network use than RWE Net AG which was taken as a comparison. However, the level of the differences established in the turnovers achieved per km of transmission line is partly justified since the costs for laying and maintaining electricity lines (which due to its urban structure are higher in the Mainz supply area than in the RWE supply area which has a predominantly rural structure) are to be taken into account, in favour of Stadtwerke Mainz. In addition, the higher fees charged by the upstream high voltage network operator in comparison to RWE Net were taken into account in favour of Stadtwerke

³ See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002_01_29.php.

Mainz. However, even taking into account these cost disadvantages in favour of Stadtwerke Mainz, its revenue per kilometre of transmission line is still higher than that of RWE Net. In addition, even in consideration of the fee reductions that had meanwhile been carried out, the suspicion remained that the fees were abusively excessive. A prohibition decision was therefore issued to Stadtwerke Mainz in April 2003⁴. The decision was revoked by the Duesseldorf Higher Regional Court in March 2004. Upon an appeal on points of law filed by the FCO the Federal Court of Justice referred the case back to the Higher Regional Court at the end of June 2005. The Federal Supreme Court confirmed the methodology of the comparable markets concept as applied in this case. As a result of this judgement, the comparison of prices, revenues or costs has been incorporated in the sector regulation (section 29 EIA).

2. Case Thueringer Energie AG (TEAG)

In the proceedings against Thueringer Energie AG (TEAG) the appropriateness of its fees for network use were assessed under economic aspects on the basis of a cost evaluation. The basis for cost control were first of all the criteria laid down in the report by the “Working Group on Electricity Network Use” of the Federal and *Laender* competition authorities (see above under III.).

If non-accountable cost items are deducted, TEAG’s network costs, which form the basis for calculating its fees for network use, are reduced by about 10 per cent. In February 2003 a prohibition decision was issued⁵. The decision was also quashed by the Duesseldorf Higher Regional Court on the basis of a legal presumption of “good practice” of the Association Agreement (see below under 5.).

3. Cases on metering prices and balancing energy

In early 2003 the FCO issued a ruling on abusive practices against the electricity

⁴ See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_04_17.php.

⁵ See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_02_19.php.

network operator RWE Net AG on account of alleged excessive metering and billing prices.

In addition the FCO has been working towards creating a more competitive environment for the procurement of balancing energy. It was thus able to discontinue its proceedings against several electricity network operators, suspected of charging inappropriate and in some cases fictitious costs for balancing energy to companies requesting network access, without issuing a ruling after the network operators had agreed to introduce tendering systems for the procurement of balancing energy which conform to the principles of competition⁶. Several aspects of the tendering system as developed by the FCO have later been incorporated in the sector regulation.

4. Gas sector

In contrast to developments in the electricity sector, the competition situation in the gas sector has hardly improved as a result of liberalisation. Although progress had been made on some individual issues, the “Associations’ Agreement on natural gas II”, passed in May 2002, was not appropriate for removing existing deficits in the area of network access. The negotiations on a further improvement of the Associations’ Agreement in terms of competition failed in the spring of 2003.

5. Evaluation and further development

In my experience the course Germany has taken in opening up competition in the network-based energy sector by opting for negotiated network access backed by abuse control under competition law did, after all, not prove to be the right one in the electricity and gas sector. In view of the monopolized market structures in the German network-based energy sector with hundreds of network operators at different network levels, this approach to liberalisation appeared at the beginning to

⁶ See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2001/2001_10_30.php; http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002_02_21.php.

be sufficient, but practice and law suits have shown that it was finally not superior to a comprehensive ex-ante price regulation of all network operators. It is true that the partial amendment of the Energy Industry Act, passed in April 2003, embodied the immediate enforceability of rulings in abuse cases against energy network operators in law as a general rule, thus strengthening the competition authorities' instruments. It however acknowledged the legal presumption of the "good professional practice" of the Associations' Agreements on gas and electricity. These private law agreements at association level have thus been "juridified" and were more or less exempted from competition rules on the abuse of dominance in the view of the Duesseldorf Higher Regional Court.

This legal situation as well as the development of energy markets and the long-lasting proceedings in precedent cases of competition authorities led to the following conclusion as summarized in a Monitoring Report of the Ministry of Economics and Technology: "The existing abuse control under the Act against Restraints of Competition is insufficient in monitoring network access fees. This is, inter alia, due to the complexity of cases and methods, lengthy proceedings and to the rejection of immediate effect decisions by German courts"⁷.

It was, however, not a mere government decision to implement sector regulation on energy networks in Germany. The new European Internal Market Directives for the energy sector and the new Regulation on cross-border trade in electricity which had both been adopted in 2004 set new rules on the unbundling of transmission and distribution network operators, the supervisory authorities' areas of responsibility and consumer protection. These rules required regulatory adjustments of the German legal framework for the energy sector. The aim is to create an effective European internal energy market. As part of the implementation of the European directives into national law the regulatory framework for the network-based energy

⁷ Report of the Ministry for Economic Affairs and Technology to Parliament on effects of the Association Agreements on the energy sector and on competition (31 August 2003), <http://www.bmwi.de/BMWi/Navigation/Service/publikationen,did=23954.html>.

sector has been fundamentally revised and the current competition regulatory regime restructured (see below under IV).

6. Abuse control since 2005

As to the market structure in Germany, the FCO continues to take a critical view of the strategy of the grid companies E.ON and RWE to promote their vertical integration through participations in regional and local electricity and gas providers and to strengthen and consolidate their market positions in the various gas and electricity markets. The FCO considers „smaller“ concentration projects as part of an overall strategy to foreclose sales markets to competitors by means of participations. In view of the highly concentrated market structures and the low degree of residual competition even small strengthening effects are of considerable competitive relevance and lead to structural changes in market conditions. In the reporting period several concentration projects concerning participations by E.ON or RWE in regional suppliers were thus prohibited by the FCO or only cleared subject to remedies. In a very recent landmark decision on the acquisition by E.ON of a 33 per cent share in the municipal utility Stadtwerke Eschwege, the Düsseldorf Higher Regional Court confirmed that Germany's electricity markets are still dominated by a powerful duopoly of the two large energy companies E.ON and RWE and that this duopoly is foreclosing markets and expanding its market power by a joint strategy of acquiring successive shares in municipal utilities⁸.

As far as cases of abuse control are concerned, an examination of end customer prices for electricity in most cases does not fall into the FNA's sphere of responsibility. Objections to excessive rates for end customers continue to be dealt with by the federal states (*Land* cartel authorities) or by the civil courts. The FCO is

⁸ See http://www.bundeskartellamt.de/wEnglisch/News/press/2007_06_06.php. To quote an excerpt from the Higher Court Decision: "There is no substantial competition against E.ON and RWE in the domestic electricity markets which could control the scope of action emanating from their paramount market position."

responsible for verification in the case of the energy prices levied by energy suppliers operating on a nationwide basis. As to industrial customer prices for electricity, in 2005 the FCO received complaints filed by the German industry about the pricing policy of the major German electricity providers. The main accusation is that the major electricity companies add the price for CO² emission certificates, which are allocated free of charge by the Federal Government, as costs to the electricity price, basing their calculation on excessive stock market prices for the certificates. In addition, according to the complainants, the market price for CO² emission certificates at the Leipzig Stock Exchange is boosted by executing only a small number of transactions and trading only a limited number of CO² emission certificates. The FCO is investigating whether E.ON Energie AG, Munich, and RWE AG, Essen, are abusing their dominant position on the electricity market for major customers in connection with the emission trading. The authority sent statements of objection to both companies at the end of 2006. A final decision could be adopted in the course of 2007.

As to end customer prices for gas, formal abuse control proceedings were initiated at the end of 2004 / beginning of 2005 against seven gas providers on suspicion of abusive pricing. The proceedings focused inter alia on the question of whether the price increases carried out in the course of the linkage of gas prices to oil prices merely reflected the increase in natural gas procurement costs or whether additional surcharges had been included. Four proceedings could be closed after the companies had agreed either not to impose certain price increases or to offer a fixed price tariff in the future that was independent of the development of oil prices⁹. One of the proceedings which had been referred to the *Land* competition authority of Baden-Wuerttemberg was discontinued by this authority. In the case of some companies which in a nationwide comparison proved to be less expensive, the FCO

⁹ See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_04_06.php.

refrained from initiating formal abuse proceedings after some of these companies had announced their intention to reduce planned price increases or not to implement any further increases in the current heating period and to reimburse their customers if the proceeds from the price increases carried out exceeded their own increased procurement costs. In January 2007, in cooperation with the competition authorities of the *Laender* the FCO published for the first time a list of gas prices for household consumers charged by 739 gas suppliers throughout Germany. The gas price comparison with tariffs for the gas year 2006/2007 is available at www.bundeskartellamt.de on the FCO's website. In view of significant price differences at national level, the control of abusive pricing by the competition authorities will be more effective in future because they are now able to conduct a national comparison of the gas suppliers across *Laender* borders, allowing prices to be measured with those of particularly efficient and structurally comparable gas suppliers.

In late 2003 the FCO had instituted proceedings under Article 81 EC against 16 gas transmission companies on suspicion of market-foreclosing long-term gas supply contracts with municipal utilities. In the FCO's view the common practice of binding gas transmission companies with long-term contractual commitments constitutes a significant impediment for effective competition in the gas market because it makes it considerably more difficult for domestic and foreign competitors to enter the market. In early 2005, after extensive investigations and discussions with the companies concerned, the FCO published a discussion paper on the assessment of long-term gas supply contracts¹⁰. In the paper the authority assumes, inter alia, that supply contracts with terms of more than two years and a requirement satisfaction of over 80 per cent are just as inadmissible as supply contracts with terms of over four

¹⁰ See press release of 28 January 2005, http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_01_28.php (The Paper is only available in German).

years and a requirement satisfaction of over 50 per cent. The discussion paper met with strong resonance in the sector and the professional public. The FCO received in total more than 90 comments on the issue from gas transmission companies, municipal utilities, trade associations and experts. The results were discussed with the European Commission and, in particular, with the parties to the proceedings. A prohibition decision against the market leader E.ON Ruhrgas followed in January 2005¹¹. In an expedited proceeding in June 2006, the Duesseldorf Higher Regional Court declared the immediate enforceability of the FCO's decision to be legitimate. The court emphasized, in particular, that the decision does not endanger the security of energy supply. Other gas transmission companies followed that line in November 2006¹².

IV. Relationship between competition agency and sector regulator under the 2005 legislation on sector regulation

1. Cooperation foreseen by the Regulation Act (IEA)

The cooperation between the FCO and the FNA is regulated by law but has in practice developed much further than the legal "minimum" requirements. In order to avoid diverging interpretations of competition and regulatory law, parallel competencies of the FNA, the FCO and the competition authorities of the *Laender* were minimized and the cooperation was specified in Section 123 Telecommunications Act (TA), Section 48 Postal Act (PA) and Section 58 EIA. The FNA plays no role in FCO proceedings relating to cartel ban enforcement. Similarly, the FCO is generally not involved in FNA activities which are of a more technical nature such as frequency and licensing, universal service, numbering etc.

¹¹ See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2006/2006_01_17.php.

¹² See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2006/2006_11_27.php.

The FNA, the FCO and the competition authorities of the *Laender* are entitled to comment on each other's proceedings (section 58 para. 1 and 2 EIA). Where the FNA takes decisions in proceedings regarding access regulation, price regulation and other abusive practices, it is to give the FCO (or, for certain cases relating to the energy sector, the competition authority of the *Land* concerned) the opportunity to state its views in good time before closure of the case. Similarly, where the FCO investigates cases regarding abusive practices or second phase mergers in the telecommunications or energy sector, it will give the FNA the opportunity to state its views in good time before closure of the case. Both authorities will seek to achieve a consistent interpretation of the acts they enforce. They are to inform each other of all observations and findings which may be of significance to the discharge of their respective functions.

Thus the FNA'S main contribution provided for by law is to give an expert opinion on the specific cases at issue. The FNA is free to comment on any aspect of a competition case. Thus the contribution of the sectoral authority takes into account both the specific interests characterising the respective sectors and a judgement about the lawfulness of the case from the competition point of view.

With a view to market definition and market analysis in the areas of telecommunications and posts as well as to determine whether a vertically integrated energy supplier is covered by the EIA (and in terms of access refusal to gas networks under the EIA), the FNA is to take decisions in consensus with the FCO (sec. 58 para. 1 subpara. 1 EIA). For market definition and analysis proceedings in telecommunications, the FNA also needs to reach consensus with the European Commission in accordance with Directive 2002/21/EC (sec. 123 TA). In practice, cooperation in the field of market assessment has involved much more than the mere act of asking the FCO for agreement. The intensity of cooperation varies by case and is mainly determined by the FNA based on how much it wishes to resort to the experience and opinions of the FCO. Often cooperation in market

assessment starts at a very early stage, at the very beginning of an investigation, by drafting questionnaires, etc. The FNA usually writes the initial drafts and the FCO comments on them. In this way, the authorities usually agree on solutions at a very early stage before any substantial disagreements may arise.

Case examples of those comments are manifold and include several hundreds of FNA proceedings. On the whole, the FCO has agreed with most FNA decisions but has frequently criticized individual aspects of the decisions.

2. Informal cooperation

As explained above, the FCO gives the FNA the opportunity to state its views in good time before cases are closed in which the FCO investigates abusive practices or second-phase mergers in the telecommunications or energy sector (Section 123 TA, Section 58 EIA).

However, in practice the cooperation between the two authorities and the contribution of the sectoral authority go beyond the legal requirements. Outside formal proceedings, both inform each other about consumer complaints or general observations. Mutual information also takes place in informal ad-hoc meetings on general or specific topics. The FCO and the FNA may also ask each other for formal assistance, which can be rendered either in the form of "Amtshilfe" (administrative assistance) or by asking the other authority for an expert opinion on a specific aspect of the proceedings. Joint proceedings have been infrequent so far but can be appropriate for making use of complementary expertise, e.g. the FCO may profit from the cost auditing and technical expertise of the FNA.

3. Potential influence exercised by the Government

The organisation structure of the FCO as an independent authority is based on several (currently nine) sector-specific Decision Divisions. As described above, similar to the way German courts work, each case is investigated by a case handler

and decided on by a collegiate body composed of three members of the Decision Division: The case handler, the chairperson, and a third member of the Decision Division. The three members do not receive any orders and decide by majority vote. The high degree of independence of the FCO and its Decision Divisions was achieved through many years of case work which has gained general recognition and a continuous effort to maintain this independence. In order to avoid sector-specific influence and lobbying (“regulatory capture”), there are frequent personnel exchanges between the different Decision Divisions. External observers have described the independent institutional culture of the FCO as perhaps “the defining feature of German competition policy”¹³. Some limited governmental influence has been retained through the so-called “ministerial authorisation” of mergers. Where the FCO prohibits a merger on competition grounds, the Ministry may authorise the merger in exceptional cases if its anti-competitive effects are outweighed by advantages to the economy as a whole or if the concentration is justified by an overriding public interest. This provision makes the consideration of non-competition-related factors transparent and thus ultimately contributes to the FCO’s independence. In practice, this instrument has only been applied in a very small number of cases (less than 10 cases compared to 30,000 merger notifications since 1973).

The Ruling Chambers of the FNA have been modelled on the FCO Decision Divisions; their decisions are also taken by a collegiate body of three members. Procedural rules are to a large extent identical in both laws (ARC and EIA). In contrast to the provisions of the ARC, there is no scope for a formal ministerial authorisation in the sector regulation. This, however, does not prevent the ministry from exercising informal influence on decisions of the FNA. Similar to that of the FCO, an important element of the FNA’s independence is that its decisions are subject to judicial review. There has been some criticism of the role of politicians in

¹³ See OECD Review of Regulatory Reform in Germany, Paris 2004.

the FCO's Advisory Board (Beirat), which consists of 16 members of the German Bundestag (1st Chamber of Parliament) and 16 representatives of the German Bundesrat (2nd Chamber of Parliament). The German government's ownership share in regulated companies, which is still very high, bears the potential for interest conflicts between the dual roles as shareholder and regulator.

4. Envisaged activities of the agencies in their respective jurisdictions

The pending proceedings of the FCO described above reveal that restraints of competition and alleged abuses of dominant positions in upstream and downstream markets related to energy networks are in the focus of the federal competition agency. This is equally true for the agencies of the *Laender*.

In the field of the sector regulation of energy networks, the FNA is about to introduce an incentive regulation base upon an ordinance which has been adopted by government and should be confirmed by the Bundesrat very soon. The incentive regulation is supposed to start in 2009. For 2007/2008, the FNA will have to regulate system charges once again on a cost plus basis. Another FNA project will focus on the unbundling of network operators within vertically integrated electricity or gas companies. German sector regulation contains obligations for the legal and operational unbundling of those companies with more than 100,000 customers.

V. Conclusion

Antitrust law enforcement in regulated sectors raises two questions:

- Is there a need for sectoral regulation or is common competition law sufficient?
- As to the institutional framework, what is the scope of jurisdiction of competition agency and regulator and what kind of cooperation has been established between the agencies?

The above presentation of the situation in Germany outlines one national model among many others established all over the world. Others may be better or are at least more experienced as they have been established earlier (e.g. in the US, in Scandinavian countries, United Kingdom or the Netherlands). The German model says “yes” to the need for regulation in the area of electricity and gas networks (as well as in telecommunications, postal services and railways). This furthermore includes a close cooperation between the competition agency and the sector regulator. Enhancing competition is the common overall principle of this cooperation. With the coming into effect of the new Energy Industry Act on 1 July 2005 the course has been set for regulation in the electricity and gas sector and thus for the activities of the Federal Network Agency. The competence of the FNA is exclusively confined to the regulation of networks, whereas control of an abuse of dominant positions and merger control in all upstream or downstream markets of the network sector will remain within the competence of the FCO and the competition authorities of the *Laender*¹⁴. Furthermore, the competence for merger control and cartel proceedings in the energy sector as a whole remains with the competition authorities. As in the coordination between the two authorities, an agreement must be reached or a comment must be requested from the other authority in issues and statements which concern the activities of both authorities.

In any case, to promote competition in the network-based energy sector a holistic approach is needed which ensures non-discriminatory transmission competition, while at the same time taking into consideration the prevention of horizontal or vertical market concentrations and contracts with foreclosure effects for new competitors.

As these goals are “classical” topics of competition law, the FCO is to some extent sceptical about creating regulatory authorities in charge of regulation in specific

¹⁴ Parallel action might only occur when the FCO applies Art. 82 EC, i.e. the provision of European competition law on abuse of a dominant position, in a network-related case.

sectors while it is in favour of having the competition agencies apply general competition law in all sectors:

- Sector-specific regulators may be more susceptible to being influenced by private interest groups (“regulatory capture”)
- Tasks overlapping with those of the competition agencies require permanent coordination efforts and may result in conflicts over competence and differing interpretations. This was the case in the late nineties in the telecommunication sector, but has been resolved and is – fortunately – not at all the case in the energy field.
- Setting up new authorities involves high costs (e.g. new staff of 160 for the regulation of electricity and gas networks). These costs are all the higher as experience has shown that it is difficult to abolish authorities once they have been established. In practice, it appears unlikely that the regulatory authority will be reduced in size or abolished according to arising competition.
- The instruments provided by general competition law are in many cases sufficient. Only where ex ante price regulation is required, should sector regulation prevail. In principle, it is the very aim of markets to ensure competition. Price control by the state prevents this and should be limited to exceptional situations.

The FCO has therefore spoken out against creating new sectoral regulators. Where those sectoral regulators already exist, the FCO supports releasing the regulated industries from (ex ante) sectoral regulation and gradually making them subject only to general competition law. As expressed in EU Directive 2002/21/EC, sectoral regulatory obligations should not be imposed where competition law remedies are sufficient to address the problem.

At present, markets for electricity and gas are still far from being driven by effective competition. Former incumbents are in most of the markets, be they national or

regional in scope, in a dominant position which becomes visible by market share or by an oligopolistic market structure. Sector regulation will therefore be required in Germany for quite a long time. Regulation will, however, not ensure low energy prices since electricity/gas prices are composed only by about 30 – 40 % (gas: 20 %) of network fees, by 40 % of taxes and by about 30 % of pure energy supply. Expectations of a considerable price decrease should thus be modest, whether the legal framework is competition law or sector regulation.

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Postal address

Kaiser-Friedrich-Str. 16
53113 Bonn
Tel: 49-228 - 9499 – 0
Fax: 49-228 - 9499 – 400
IVBB: 01888 7111 – 0
e-mail: poststelle@bundeskartellamt.bund.de

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