

## ECONOMIC SURVEY OF GERMANY 2006:

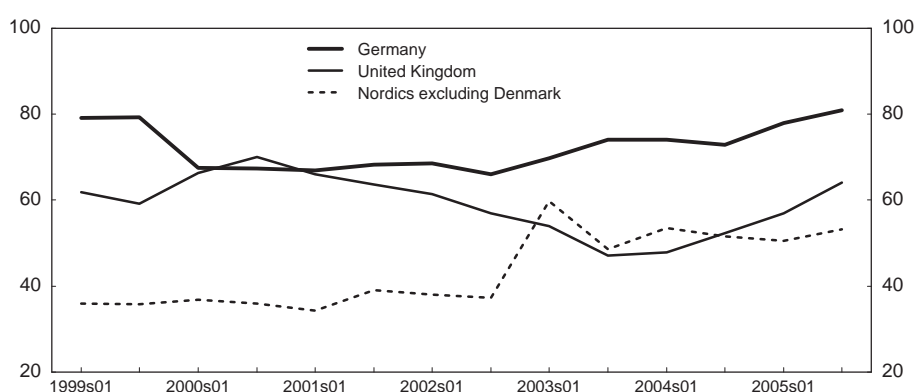
### SUSTAINED COMPETITION IS ABSENT IN ENERGY MARKETS

*This is an excerpt of the OECD Economic Survey of Germany, 2006,  
from the section on regulatory challenges in network industries in chapter 5.*

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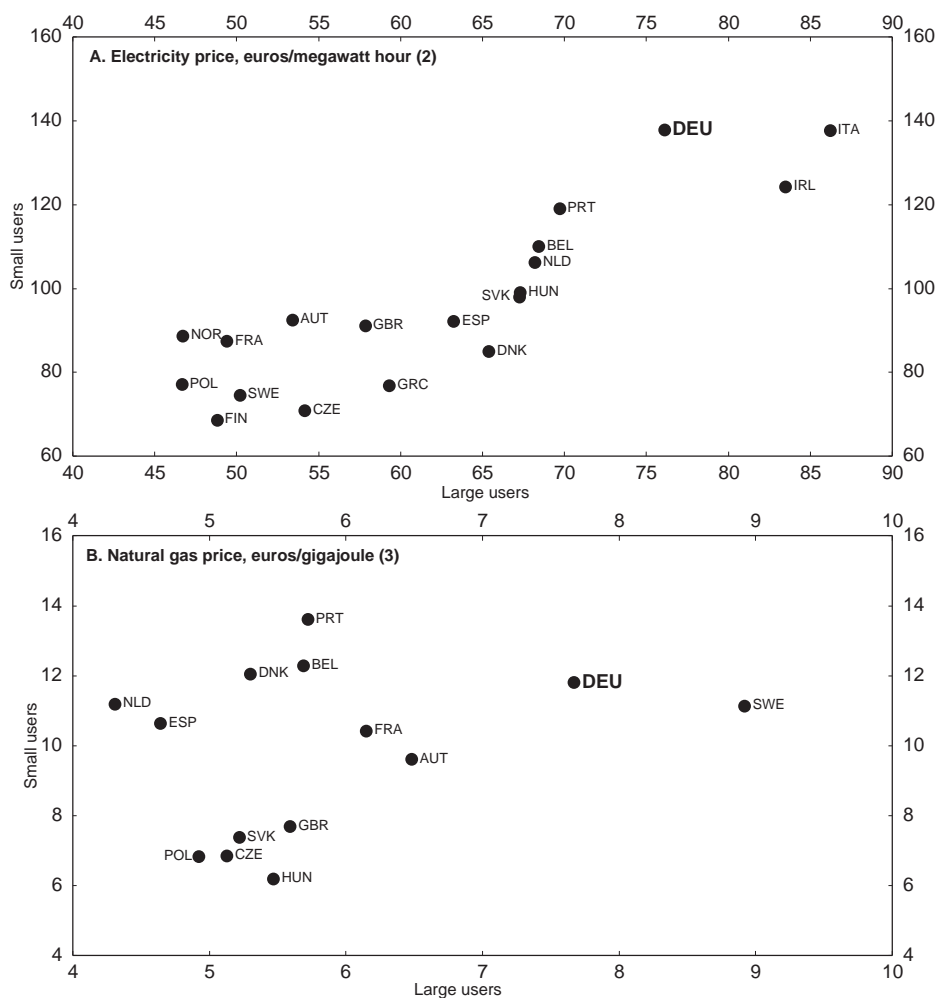
Liberalisation of energy markets in 1998 did not result in sustained reductions in prices. While electricity prices fell in the first two years following liberalisation, notably for large business customers, prices rose again soon after (Figure 1). Gas prices responded less markedly to liberalisation, as the industry was highly concentrated at the wholesale level when liberalisation was introduced (Box 2). While the carbon tax, introduced in 1999, and more recently, the increasing cost of oil and carbon dioxide emission permits contributed to rising electricity prices, these factors appear to account for only a fraction of the increase, while lack of competition appears to have played an important role, driven by increasing market concentration (Box 1).<sup>1</sup> Pre-tax retail prices for gas and electricity are among the highest in EU countries, notably for small customers (Figure 2).

**Figure 1. Evolution of electricity prices for large industrial consumers**  
Euros/megawatt hour<sup>1</sup>



*Note:* All prices exclude all taxes and are for Eurostat category *i.e.* 2005s1 refers to the first half of 2005.  
*Source:* Eurostat, New Cronos.

Figure 2. **Energy prices**<sup>1</sup>  
2005, second half



1. All prices exclude all taxes.

2. The price for large users is the average of prices for larger industrial consumers (Eurostat categories Ie and Ig); that for small users is the average of prices for small industrial and medium household consumers (Ib, Dc and Dd). Prices for Germany include municipal charges for rights of way.

3. The price for large users is the average of prices for larger industrial consumers (categories I3 and I4); that for small users is the average of prices for small industrial and medium household consumers (I1, D2 and D3).

Source: Eurostat, New Cronos.

### Box 1. The electricity market

Full liberalisation of the electricity market was followed by a wave of mergers. Nine vertically integrated electricity suppliers (*Verbundunternehmen*), owning the country's electricity transmission network as well as the bulk of its generation, merged to four, which control about 80% of generation capacity. With much of the remaining 20% of capacity supplied by plants for which electricity is a by-product (combined heat and power plants) or guaranteed preferential access to the transmission grid (renewable energy), the share of price-setting power plants controlled by the four *Verbundunternehmen* is even larger.<sup>1</sup> There has been no significant entry of new firms into the generation business since liberalisation, although foreign firms acquired stakes in the *Verbundunternehmen*, and suppliers of subsidised renewable energy emerged. In other countries, entry mostly occurred through gas-powered plants. Attempts to enter the generation business with such plants failed in Germany, with the potential competitors citing, *inter alia*, problems with gas supply contracts and high gas prices as the reasons for their withdrawal. Also, wholesale prices have been relatively low, reducing the profitability of entry in the electricity generation business.<sup>2</sup>

The distribution network is locally fragmented, consisting of about 950 small mostly municipality-owned local utilities (*Stadtwerke*), considerably more than in any other European Union country.<sup>3</sup> The *Stadtwerke* integrate both distribution and retailing services. They also provide gas distribution and retailing services, heat, water supply, waste collection and public transport. The degree of vertical integration has been increasing, with the large four *Verbundunternehmen* acquiring shares in the *Stadtwerke*. For example, the two largest electricity generation and transmission network owners, RWE Energie and E.on, acquired stakes in about 40 local utilities between 2000 and 2002.<sup>4</sup> Vertical integration is further strengthened through municipality ownership in the *Verbundunternehmen*, notably in RWE.

New firms entered the electricity retailing business following liberalisation, although many initially successful firms have since gone out of business. Margins in retailing appear to be low, with 40% of the household retailing market estimated to be subject to margins below the cost of retailing in 2004.<sup>5</sup> The share of small customers who have switched retailer since liberalisation is 5%, considerably less than in the UK, where more than 50% switched. Switching was more widespread among customers with high consumption, but still fell short of levels observed in the Nordic countries and the UK.

Interconnection capacity across the borders to several countries is low, limiting the degree of competition that can originate from foreign electricity generators. Moreover, potential competition from French imports is limited by the substantial stake EdF, the dominant vertically integrated electricity supplier in France, owns in *Energie Baden Württemberg* (EnBW), the *Verbundunternehmen* operating in the south western region of Germany.

1. OECD (2005a), *OECD Economic Surveys: France*, OECD, Paris.

2. Recently, wholesale prices have increased significantly, which may reflect higher prices for pollution permits.

3. Brunekreeft, G. and S. Tweleemann (2005), "Regulation, Competition and Investment in the German Electricity Market: RegTP or REGTP", *Energy Journal*, Vol. 26, special issue and European Commission (2005a).

4. Kuhlmann, A. and I. Vogelsang (2005), *The German Electricity Sector – Finally on the Move?* CESifo DICE Report 2/2005.

5. Müller, C. and W. Wienken (2004), "Measuring the Degree of Economic Opening in the German Electricity Market", *Utilities Policy*, Vol. 12.

Network access prices in the electricity and gas sectors are some of the highest among EU countries.<sup>2</sup> Wide disparities in the access prices of local distribution networks within Germany also suggest that considerable scope to achieve price reductions has remained unused.<sup>3</sup> High network access prices have reduced scope for competition to exert downward pressure on retail prices, allowing vertically integrated companies to cross-subsidise their activities in potentially competitive markets (retail and wholesale trading of gas and electricity, as well as electricity generation), squeezing the price-cost margins of potential competitors.

## Box. 2. The gas market

Most German gas is imported, with about 18% originating from domestic production. Concentration in wholesale supply of gas, from domestic and imported sources, was already strong before 1998. Since then *Ruhrgas* has retained control over 50% of wholesale gas supply.<sup>1</sup> *Ruhrgas* also controls more than a third of transmission pipelines and a large share of storage facilities. Wholesale gas suppliers have also strengthened their position through long-term supply contracts with their customers, making market entry of competitors difficult. In response to high network access costs, *Wingas*, a joint venture of BASF, a large industrial consumer of gas, and of *Gazprom*, a Russian gas producer, has built its own pipeline network, which in part runs parallel to a fraction of the *Ruhrgas* network.

As in the electricity sector, vertical integration has grown significantly following liberalisation. The owners of transmission pipelines (such as *Ruhrgas*) increasingly purchased shares in the *Stadtwerke*, which dominate the geographically fragmented distribution and retailing sectors, with about 730 distribution networks owners operating in the market. *Ruhrgas*, for example, owns stakes in 8 regional and 15 local distribution companies. Moreover, the gas and the electricity industries are closely intertwined, with two of the electricity *Verbundunternehmen* being major gas wholesale suppliers and owning substantial proportions of the gas transmission network. Ownership across the two sectors increased considerably when *Ruhrgas* and *EON* merged in 2002, following a decision of the Economics Ministry to overrule the Federal Competition authority's disapproval of the merger. The merger also increased vertical integration within the gas industry, combining *Ruhrgas* position as the leading wholesale supplier and owner of a large part of the gas transmission and storage network with *EON*'s gas distribution activities. Few gas customers have switched suppliers, and switching has been virtually absent among small customers.

1. European Commission (2005a).

*The new regulatory authority needs to be firmly established...*

The regulatory framework proved inadequate to bring network access prices down to internationally comparable levels. The terms of access to the networks were largely determined by self-regulation through “*Association Agreements*” (*Verbändevereinbarungen*), in which associations of suppliers and consumers in the electricity and gas markets were represented. Network access prices were subject to *ex post* control by the Federal Cartel Office on the basis of general competition law, notably the requirement to provide non-discriminatory access to the networks and the prohibition of abuse of market power. Requirements to separate network services from the potentially competitive retailing and generation activities were at first limited to accounting separation, with the exception of electricity transmission, where legal and managerial unbundling was required, in line with EU legislation,<sup>4</sup> while no measures were taken to limit vertical ownership integration in the industry.

Several features of the regulatory framework contributed to the unsatisfactory outcome: By allowing incumbent suppliers to collectively negotiate network access conditions with customers' associations, the interests of incumbent suppliers (as opposed to those of potential market entrants, who were not represented) were likely to play a substantial role in the negotiated outcomes. Indeed, small customers were underrepresented in the *Association Agreements*.<sup>5</sup> In addition, the powers of the FCO proved to be too limited to ensure non-discriminatory access to the networks and information on costs available to the FCO were unsatisfactory. For example, the FCO could only formally request information on costs from network operators which were suspected to breach competition law, which hampered cost comparisons across network providers.<sup>6</sup> In addition, although a special unit of the FCO was devoted to cases in the electricity industry, staffing was limited.

Against this background, the government has put the FNA in charge of regulating the terms of access to most of the electricity and gas network grids, with regulation of small, local networks<sup>7</sup> assigned to state regulatory authorities. Indeed, an independent sector regulator can potentially offer more scope to foster

competitive market conditions, acting to raise consumer welfare, leaving less room for the vested interests of incumbent suppliers, than the Association Agreements. Assigning some distribution network operators to regulation by the state authorities and others to regulation by the FNA may, however, lead to an uneven playing field among, for example, companies using electricity as an input. Regulation at the level of the states could also raise concerns about conflicts of interest, given that the states may be close to the interests of the local governments within their respective territories, which own most of the electricity distribution network operators. While a committee (*Länderausschuss*) has been installed at the FNA to harmonise regulation, the need to harmonise the regulatory stance may be associated with higher regulatory costs. Regulation of all electricity and gas network operators should be assigned to the FNA.

... while effective ex-ante regulation is needed...

New legislation setting the rules for the regulation of network access in the electricity and gas industries was introduced in July 2005. In a transitory phase expected to last for a year, the FNA and state regulators are approving all network access prices in the gas and electricity industries on the basis of average cost benchmarks for groups of network operators with similar cost characteristics (such as population density). The regulators are subsequently expected to move to price-cap regulation,<sup>8</sup> although this move will require further legislation. Moreover, the powers of the new regulators have been strengthened, for example, with respect to obtaining cost information from network operators. The new regulators also have more staff at their disposal than the FCO used to have and the burden of proof in court cases has been shifted to network operators.<sup>9</sup> The move to benchmark and price cap regulation, backed up by stronger powers of the regulator, generates scope for lowering network access prices while preserving incentives for operators to reduce operation costs. Indeed, experience in other countries shows that price cap regulation has resulted in substantial cost reductions in network transport costs.<sup>10</sup> In the UK, for example, network access prices have fallen by 50% since introduction of price cap regulation.

However, the new regulatory framework for the determination of network access prices leaves some issues unresolved. The detailed cost-based rules draw to a large extent on the cost accounting rules of the *Associations Agreements*,<sup>11</sup> which have not proven effective in ensuring low network access prices and may leave too little room for the Federal Network Agency to develop best practice on the basis of its own regulatory experience. For example, the regulatory rates of return on capital for network operators in the electricity and gas industries that the FNA has been prescribed to calculate cost-based regulated prices, have been kept at 6.5 and 7.3%, respectively until the onset of price-cap regulation, which are likely to be excessively high, in view of the relatively low risk involved in operating the networks.<sup>12</sup> The government plans to review the regulated returns on capital. Indeed, excessively high prices set in the cost benchmarking exercise may lead to excessively high prices in the longer term, as they will serve as starting point in price cap regulation. Moreover, different depreciation rules apply to capital which is already installed and new capital, introducing the risk of an un-level playing field between incumbents and potential market entrants. Some observers have voiced the concern that cost benchmarks for regulated network access prices might be based on average costs of network providers rather than the costs of the most efficient provider.<sup>13</sup> Notwithstanding greater powers for the FNA to obtain cost data from operators, data on cost continue to be based on commercial law accounting rules, which may not best serve regulatory purposes.

The FNA is empowered to develop a coherent model for the forthcoming price-cap regulation framework. Within this framework, the FNA should be given more room for deviating from the cost accounting rules, increasing the scope for the regulator to draw from its own experience in regulating the industries in the future. It should be carefully monitored whether network access prices in the energy sector are determined according to the costs of the most efficient providers. The regulatory rates of return on capital which enter the calculation of regulatory price caps should be brought into line with the return on

investments with similar risk characteristics. A level playing field between incumbents and entrants should be ensured and the quality of cost information be raised.

*... and widespread vertical market integration requires a policy response*

The high degree of vertical integration in the electricity and gas industries has generated incentives for incumbent companies to discriminate against market entrants in competitive market segments, such as electricity generation. With the regulation of network access prices likely to become more effective, incentives on the part of vertically integrated network operators to engage in non-price discrimination are likely to become stronger.<sup>14</sup> While rules against abuse of dominant market power apply, the powers of the FNA to prevent non-price discrimination could be stronger. For example, vertically integrated electricity network operators can terminate contracts with competitors, *e.g.* in the retailing business, at any time for an important reason, leaving room for the operator to exercise discretion in such decision subject to subsequent judicial review, with the energy regulator exercising no specific control as to whether such practices would be discriminatory.<sup>15</sup> The powers of the FNA to prevent non-price discrimination should be strengthened.

Vertical integration of generation and transmission in incumbent electricity companies (*Verbundunternehmen*), in particular, has created scope for incumbents to exploit information advantages over competitors. For example, the procurement of *balancing energy*, which is needed to keep electricity supplied and demanded on the transmission network equal at all times, has been a source of discrimination of competing generation companies (see Box 5.6). Indeed the costs of *balancing energy* in Germany are considerably higher than in other European countries.<sup>16</sup> In the electricity industry, an independent systems operator should be introduced for the transmissions network, with no ownership links to the electricity generation industry.

The degree of vertical integration has further risen following liberalisation of energy markets. Ongoing acquisitions of shares in the local utilities (*Stadtwerke*) by the *Verbundunternehmen*, in particular, have been widening scope for incumbents to discriminate against potential competitors. In addition, the acquisitions have been reducing the degree to which local utilities can act as independent purchasers of wholesale electricity and gas. With the high degree of horizontal concentration in electricity generation and wholesale suppliers of gas and the limited scope for retail customers to exert competitive pressure on suppliers, independence of purchasers and sellers in wholesale markets is crucial to ensure that the large incumbent wholesale suppliers are exposed to competitive forces. While the Federal Competition Authority has successively reduced the participation threshold above which it investigates such acquisitions under merger control procedures to 10%, the *Verbundunternehmen* have continued to acquire stakes below the threshold. While unbundling requirements have been raised in the new regulatory framework, with legal and operational unbundling applying to transmission network operators with immediate effect, implementation of this requirement has been deferred until 2007 for the distribution networks, the latest admissible date under EU legislation. Electricity generation companies and wholesale gas suppliers should, as a minimum, be prevented from acquiring further stakes in distribution networks. Divestment of stakes in distribution networks held by electricity generators would be preferable. Operational and legal unbundling for distribution networks should be introduced as soon as possible.

### Box. 3. Discrimination of competitors in electricity generation: the case of balancing energy

In Germany procurement of balancing energy from generation plants is the responsibility of the four owners of the transmission network, the *Verbundunternehmen*. The market for *balancing energy* is split into four regions which correspond to the geographic coverage of the transmission network of each of the four *Verbundunternehmen*. Since the *Verbundunternehmen* own most of generation capacity, they operate both on the demand side and supply side of the balancing energy market, generating incentives to procure balancing energy from their own power plants at a high price, discriminating against potential competitors in the generation market. Scope to discriminate arises from information advantages of the *Verbundunternehmen* over competing generation companies.<sup>1</sup> For example, technical standards which have to be met by suppliers of *balancing energy*, can be set such as to discourage competitors.

While each of the large four *Verbundunternehmen* can, in principle, supply *balancing energy* in regions covered by other transmission network owners, this does not appear to happen in practice.<sup>2</sup> Persistent price differentials between the price of balancing energy and the spot price on the power exchange suggest that the balancing market is not competitive, as market participants do not appear to take advantage of the opportunity to arbitrage by shifting supply from the spot market towards the balancing market. Rising costs of *balancing energy* have contributed substantially to rising access charges to the high-voltage transmission network.

The need to actively manage the transmission network to balance electricity supply and demand makes discrimination of competing generation companies by vertically integrated companies owning both transmission and generation particularly difficult to detect and regulate. Indeed, international experience shows that the operator<sup>3</sup> which carries out balancing energy operations, needs to be fully independent from generation companies.<sup>4</sup> One option is to separate ownership of the transmission network from generation and let transmission owners carry out balancing energy operations. Indeed, ownership separation of generation and transmission has been successfully practiced in many countries, such as the UK and the Nordic countries. Alternatively, an independent systems operator with no ownership ties to the *Verbundunternehmen* could be introduced. Such independent system operators have, for example, been put in place in some states of the US.<sup>5</sup>

Of these two options, ownership separation of transmission from generation is, in principle, preferable. Introducing an independent systems operator while leaving transmission and generation in the ownership of the *Verbundunternehmen* would entail separation of transmission asset ownership from transmission asset management, which may result in inefficiencies. However, in the case of Germany, transmission and generation are privately owned, so ownership separation of transmission from generation may be difficult to achieve.

1. Brunekreeft, G. and S. Tweleemann (2005), "Regulation, Competition and Investment in the German Electricity Market: RegTP or REGTP", *Energy Journal*, Vol. 26, special issue.
2. Monopolkommission (2004), *Sondergutachten der Monopolkommission*.
3. This is referred to as "systems operator", who is in charge of ensuring that services for the efficient operation of the transmission network are provided ("ancillary services"), including balancing energy.
4. See, e.g.: OECD (2005c); Hunt, S. (2002) *Making Competition Work in Electricity*, John Wiley and Sons, New York; IEA (2001), *Competition in Electricity Markets*.
5. See, e.g. Hunt, S. (2002) *Making Competition Work in Electricity*, John Wiley and Sons, New York.

The adverse consequences of the high degree of horizontal concentration are aggravated, in the electricity generation industry, by low interconnection with neighbouring countries, as well as the geographic segmentation of the *balancing energy* market (see Box 5.7). Therefore, interconnection of the transmission grid with neighbouring countries should be strengthened. Segmentation of the market for balancing energy should be overcome to allow for more competition in the market for electricity generation if it is consistent with energy security objectives.

### *Environmental objectives in energy market regulation could be achieved at lower cost*

Environmental objectives play an important role in energy market regulation in Germany. In particular, the government is committed to reaching the Kyoto target for greenhouse gas emissions. Raising renewable energy production and increasing the efficiency of energy consumption play an important role in achieving this objective since the government is also committed to decommissioning every nuclear power plant after 32 years of use.

Most renewable energy production benefits from direct and indirect subsidies for electricity produced from these energy sources. The indirect subsidies result from guaranteed feed-in tariffs, which network operators have to pay to the producers of renewable energy.<sup>17</sup> All feed-in prices are digressive over time and are guaranteed for 20 years. These subsidies are difficult to justify with regard to their impact on reducing emissions of greenhouse gases, as the marginal cost of reducing carbon-dioxide emissions on the basis of these subsidies is considerably higher than the marginal cost of reducing greenhouse-gas emissions through a reduction in the consumption of electricity – for example, *via* energy saving measures – from fossil-fuel powered generation plants. Indeed, the costs of abating carbon dioxide emission through expansion of photovoltaic electricity generation are about 25 times higher and for wind energy about five times higher than the abatement cost resulting from reducing consumption of electricity produced in, say, gas-fired power plants, taking both the carbon tax and the price of carbon dioxide emission certificates into account.<sup>18</sup> Moreover, the IEA has estimated that the programmed reduction in the feed-in tariffs is smaller than likely efficiency gains in the production of renewable energy in the future. Subsidies to renewable energy should be reduced more quickly over time. While the overall costs of the indirect subsidy inherent in the preferential feed-in tariffs are published by the federal government, the transparency of the overall level of the subsidies could be improved by channelling all subsidies through the government budget, rather than through guaranteed feed-in tariffs.

Subsidies for improved insulation of dwellings also form part of the government's strategy for greenhouse-gas emission reductions. These subsidies are likely not to be the most cost-effective means to achieve greenhouse gas emissions reductions. Since insulation subsidies reduce heating costs, they provide incentives for households to increase ambient temperature in their homes, offsetting part of the emission-reducing effect of the subsidies. In addition the subsidy programmes are likely to entail higher administrative costs. Thus, relying on incentives provided by energy prices to reduce heating energy consumption, for example by raising taxation of carbon dioxide emissions, would be more cost effective, provided potential tenants of dwellings have sufficient information concerning the heating cost efficiency of different dwellings. Indeed, minimum standards concerning information that has to be available on heating efficiency of dwellings have recently been introduced. Subsidies for improving the insulation of dwellings should be abandoned in favour of more reliance on prices to provide incentives for greenhouse gas emission reductions. Adverse consequences on the real income of poor households should be dealt with through the tax and transfer system.

## **Notes**

1. Kuhlmann and Vogelsang (2005).
2. OECD (2004b).
3. See *e.g.* Müller and Wienken (2004), pp. 283-290.

4. See OECD (2003a) and OECD (2004b) for more details.
5. OECD (2004b).
6. In addition, the FCO's rulings were not generally enforceable pending an appeal (this was reversed in 2005) and the FCO's decisions were often overturned in court (see Böge, 2004).
7. These are networks which cover not more than one state and have fewer than 100 000 customers. In the gas industry, these networks cover about 20% of the market, in the electricity industry they cover 10% of the market.
8. Network operators whose access prices exceed the average of costs of a group of network operators with similar structural characteristics (*e.g.* population density) will be required to reduce network access prices.
9. Schmitt (2005), pp. 93-100.
10. IEA (2001).
11. However, in the gas industry, the legislation introduces improved access rules on which stakeholders failed to agree in the last attempt to improve the *Association Agreement* for the gas industry.
12. OECD (2004b).
13. In the forthcoming price-cap regulation regime, the regulator plans to use the costs of the most efficient network provider as a benchmark. If the costs of a network access provider are above the average of costs, the burden of proof that the provider is nonetheless efficient lies with the provider. If costs are below the average but above the costs of the most efficient provider the burden of proof lies with the FNA.
14. Kuhlmann and Vogelsang (2005) and Brunekreeft and Tweleemann (2005).
15. Kuhlmann and Vogelsang (2005).
16. European Commission (2005a) and Monopolkommission (2004).
17. Kuhlmann and Vogelsang (2005).
18. According to OECD (2004f), abatement costs implied by photovoltaic and wind energy subsidies amounted to € 1 217 and € 167 per tonne. Carbon taxes applying to gas-powered plants amount to about € 17 per tonne, to which the price of carbon dioxide emission certificates of about € 25 per tonne should be added.

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