Germany

ELECTRICITY
Competition
Supplier in market dominant position—obligation to grant access to competitors

Mainova Case
Federal Supreme Court
June 28, 2005
KVR 27/04

(LT) Access; Cartels; Dominant position; Electricity distribution networks; Electricity supply

This case deals with the obligation of a supplier in a market dominating position to grant access to its mains to competitors, who supply in a downstream market. It refers to the new Energy Economy Act of 2005 which contains special regulations in relation to cartel law concerning the obligation to grant access to grids and mains.

Relevant law

Article 19(1) and (4), cll. 1 and 4 of the German Act Against Restraints of Competition state:

> "Article 19. Abuse of a Dominant Position
>
> (1) The abusive exploitation of a dominant position by one or several undertakings shall be prohibited . . .
> (4) An abuse exists in particular if a dominant undertaking, as a supplier or purchaser of certain kinds of goods or commercial services,
>
> 1. impairs the ability to compete of other undertakings in a manner affecting competition in the market and without any objective justification; . . .
> 4. refuses to allow another undertaking access to its own networks or other infrastructure facilities, against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such concurrent use is impossible or cannot reasonably be expected."

Article 20(1) of the German Act Against Restraints of Competition states:

> "Article 20 Prohibition of Discrimination; Prohibition of Unfair Hindrance
>
> (1) Dominant undertakings, associations of undertakings within the meaning of Articles 2, 3 and 28(1) and undertakings which set retail prices pursuant to Articles 28(2) or Article 30(1) sentence 1, shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification . . ."

The Energy Economy Act of 2005 (in force since July 13, 2005) states in Arts 17 and 110:

> "Article 17 Access to Mains or Grids
>
> (1) Operators of mains or grids for the supply of energy have to grant access to end users, to similar or downstream mains or grids of supply of electricity or gas, and pipes, production and storage installations to technical and economic conditions, which are adequate, without discrimination, transparent and no less advantageous than those, which the operators use in similar cases for the supply within their own enterprise or for the supply of connected or affiliated enterprises.
> (2) Operators of mains or grids for the supply of energy may refuse access in the sense of Subsection (1) if they prove that the grant of access is not possible or acceptable for operational or other economic or technical reasons, taking into account of the aims of Article 1 . . .
>
> Article 110 Object Mains
>
> (1) Parts 2 and 3 of the Act and Articles 4, 5 and 92 are not applicable to the operation of mains for the supply of energy
>
> 1. which are situated on a complex business area and which serve prevailingly the transport of energy within the own enterprise or an affiliated enterprise in the sense of Article 3 No. 38;
> 2. . . .
> 3. which are situated on a complex territory and serve prevailingly the own supply."

Facts

The plaintiff, Mainova AG ("Mainova") appealed on points of law against a Court of Appeal of Düsseldorf's decision, which confirmed an order issued by the Federal Cartel Authority, according to which the plaintiff had committed a violation of the German Act Against Restraints of Competition.

The plaintiff is a regional company engaged in the power supply through its own mains in the city of Frankfurt. So-called area suppliers were concerned by the plaintiff's conduct. Area suppliers are suppliers of low voltage electricity, which use their own mains of supply, in areas such as buildings on a private property used for living or business purposes. They connect their mains through their own transformation installations to distribution mains of suppliers at the medium voltage level. Area suppliers concerned were the Energieversorgung Offenbach AG and the GETEC net GmbH.

In 2002 the plaintiff refused to connect these area mains with its mains for the medium voltage supply of electricity. As a consequence the Energieversorgung Offenbach AG could not take up its business activities. Instead, the plaintiff constructed the area mains itself and supplied end customers with low voltage electricity. The GETEC net GmbH, which had already constructed the area mains, had to sell it to Mainova, because there was no alternative distributor from whom it could acquire the low voltage electricity.

Upon the area suppliers' complaints the Federal Cartel Authority held in an order of October 8, 2003 that Mainova had committed (i) an abuse of a market dominating position, (ii) a breach of Art.19(1) and (4), (iii) a breach of cll. 1 and 4 of the Act Against Restraint of Competition, and (iv) a breach of Art.20(1) of the Act.[1]

Mainova was prohibited to refuse:

- the connection to its mains of supply of medium voltage electricity to the area suppliers; and
- the conclusion of corresponding agreements against an appropriate remuneration.

Upon the Court of Appeal's confirmation of the order Mainova appealed on points of law to the Federal Supreme Court.

Held

A power supply firm, which maintains in its territory of supply electricity mains of different voltage levels and which is the only supplier within this territory, is, accordingly, the addressee of the prohibition of the abuse of a market dominating position. For this reason it may not refuse access to its medium voltage mains to operators of so-called area mains, which serve the supply of buildings or groups of buildings, by reference to its interests in a balanced structure of customers and as an advantageous as possible low cost structure of its low voltage mains.

An addressee of Art.19(4), cl.4 and of Art.20(1) of the Act Against Restraints of Competition may not refuse the joint use of his installations of infrastructure with the argument that the competition, which would be rendered possible on downstream or upstream markets, could cause him damage. Even though, in principle, he is not obliged to foster competitors to his own disadvantage or to offer to third persons certain goods or services at all, this principle is modified by the "essential facilities" doctrine. The statutory provisions, which are based on this doctrine, oblige an enterprise in a dominant market position to grant access to its installations of infrastructure, since competition can only be ensured if these installations are used by several competitors.

Comment

The *Mainova* decision may already be outdated on the basis of Arts 17 and 110 of the German Energy Economy Act of 2005, which entered into force on July 13, 2005. The Energy Economy Act of 2005 contains special provisions on cartel law, in particular the following.

According to Art.111 of the Energy Economy Act of 2005, Art.17 of the Act regulates comprehensively the issue of access to mains or grids of public utilities, so that the provisions of Arts 19 and 20 of the Act Against Restraints of Competition are no longer applicable. It seems that Art.110 of the Act does not exclude the obligation of upstream public utilities with regard to the grant of access to enterprises in downstream markets. The legal definition

1 See BKartA WuW/E DE-V 811.

of "object mains" is not based on existing jurisprudence concerning "area mains". The purpose of the exclusion of object mains from large parts of the Act in the sense of Art.110 lies in the fact that the application of the provisions on unbundling of affiliated enterprises and the control of public utilities is not appropriate if the business of the supply of energy is relatively limited according to the definition of Art.110(1), Nos 1–3 of the Act.

ELECTRICITY
Liability
Public utility supplying electricity—limitation of liability

Liability for Irregularity of Supply
Federal Supreme Court
May 26, 2004
VIII ZR 311/03

Electricity supply industry; Germany; Limit of liability

This case deals with limitation of liability, business terms and tariffs of a public utility engaged in the supply of electricity

Facts

The plaintiff, who operated an engineer's office, purchased electricity as a tariff customer from the defendant, a public utility. On July 1, 2002 the plaintiff's supply was interrupted. The plaintiff managed the situation by means of his own emergency electrical supply plant. After the elimination of the defect, the defendant connected the plaintiff; however, inadvertently, the connection was not made with the 220 volt network, but with the 400 volt network. The plaintiff asserted that this caused damage to the office's technical equipment amounting to some €26,000, which was the subject-matter of the dispute. It was not contested between the parties that the wrong connection was based on the fault of a defendant's employee. The defendant's liability insurance paid some €2,500, but the defendant and his insurer refused any further payments, based on Art.6 of the Regulation of the Business Terms Applicable to Customers of Public Utilities Engaged in the Supply of Electricity of 21 June 1979 ("AVBEltV").[1]

The relevant text of Art.6 of the Regulation states:

"(1) The electrical utility, which supplies a customer, is liable for damages based on contract or tort, which the customer suffers through the interruption of the supply or through irregularities in the supply, in the case of:

1. . . .
2. damages to a thing, unless that the damage is caused neither by intent nor by gross negligence of the enterprise or one of his agents or assistants of supply,
3. damages to the assets, unless that damage is caused neither by intent nor by gross negligence of the owner of the enterprise or an organ authorized to represent it or by a partner of the utility.

(2) In the case of damages caused to the customer by gross negligence the public utility's liability for damages caused to things or assets is limited to EUR 2,500 . . ."

The parties could not agree whether the defendant could rely on the limitation of his liability according to Art.6 of the AVBEltV.

Held

The Court held that the wrong connection with high voltage electricity amounted to an "irregularity" in the sense of Art.6(1) of the AVBEltV.

It upheld the view of the court of lower instance according to which the supply of electricity with too high a voltage constitutes an irregularity in the sense of Art.6(1) of the AVBEltV. The definition of the term "irregularity" would include deviations in the voltage and frequency of the electrical supply in so far as the threshold of tolerance in the sense of Art.4 of the AVBEltV would be exceeded. The supply of electricity with a voltage of 400 instead of 220, which was contractually agreed upon, constituted such a "deviation", which surpassed by far the threshold of tolerance. It would not make a difference whether the excessive voltage occurred during a current supply or in the case of the taking up of an interrupted supply. The reason for the irregularity would not matter. Only the effect on the damaged customer would be decisive.

Additionally, the Court, which referred to legal writers and commentaries, explained:

> "It is the purpose of the privilege concerning liability in the sense of Article 6 AVBEltV to limit the liability in cases, which relate to typical risks of the supply of electricity based on grids, in the interest of low prices. With regard to this purpose the limitation is always applicable without

1 Federal Gazette 1979, I, 684.