

Germany**ENERGY
Supply**

Increases in gas and electricity prices for consumers may amount to the abuse of a market dominant position

 Dominant position; Electricity supply industry; Gas supply industry; Germany; Pricing

The German Federal Cartel Authority is concerned about the public utilities' practice concerning the increase of prices for consumers. Its president, Mr Ulf Böge, explained on September 25, 2006 that a growing number of consumers complained about the undertakings' practice of threatening an interruption of the supply until the demanded price increases are paid. The president stated:

"If public utilities engaged in the supply of energy make such a threat without that the reasonableness of the price increase was proved by them or confirmed by a court, this would amount to an abusive conduct. A public utility's threat to interrupt the supply is possible only because of its factual monopoly position within its relevant territory of supply. In the case of a working competition the customers would have possibilities of alternative supply and could make use of it in the case of a threat."

In one of the cases referred to by the president the public utility had issued such a threat twice within a year. Even though the threats were withdrawn, the Federal Cartel Authority instituted an administrative procedure against the undertaking. The president explained that in his view many consumers, particularly the older and poorer, could be intimidated by such threats. They would make the requested payments even if the public utility did not prove the reasonableness of the increase. In order to avoid disadvantages for consumers the Federal Cartel Authorities had issued warnings directed at any public utilities engaged in the supply of energy that a violation of the prohibition of the abuse of a market dominant position by threatening the interruption of the supply in the case of an unreasonable price increase would be pursued as an offence in the sense of Arts 19 and 81 of the Act Against Restraints of Competition, which envisage a fine of up to €1 million.

Relevant legislation**Article 19 of the German Act Against Restraints of Competition**

Abuse of a Dominant Position:

- (1) The abusive exploitation of a dominant position by one or several undertakings is prohibited.
- (2) An undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services on the relevant product and geographic market, it:
 1. has no competitors or is not exposed to any substantial competition, or
 2. has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.

Two or more undertakings are dominant insofar as no substantial competition exists between them with respect to certain kinds of goods or commercial services and they jointly satisfy the conditions of sentence 1. The relevant geographic market within the meaning of this Act may be broader than the scope of application of this Act.

- (3) An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if it:
 1. consists of three or fewer undertakings reaching a combined market share of 50 percent, or
 2. consists of five or fewer undertakings reaching a combined market share of two thirds, unless the undertakings demonstrate that the conditions of competition may be expected to maintain substantial competition between them, or that the number of undertakings has no paramount market position in relation to the remaining competitors.

(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;
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account;
3. demands less favourable payment or other business terms than the dominant undertaking itself demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;
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 81 of the German Act Against Restraints of Competition—Provisions Concerning Administrative Fines

(1) . . .

(2) An administrative offence is committed by whoever intentionally or negligently

1. violates a provision in §§ 1, 19(1), § 20(1), also in conjunction with (2) sentence 1, § 20(3) sentence 1, also in conjunction with sentence 2, § 20(4) sentence 1 or (6), § 21(3) or (4) or § 41(1) sentence 1 concerning the prohibition of an agreement referred to therein, of a decision referred to therein, of a concerted practice, of an abuse of a dominant position, a market position or of superior market power, of an unfair hindrance or differential treatment, of the refusal to admit an undertaking, . . .

(4) In the cases of paragraph 1, paragraph 2 no. 1, no. 2a) and no. 5 and paragraph 3 the administrative offence may be punished by a fine up to EUR 1 million. If in these cases a fine is imposed on an undertaking or an association of undertakings, the fine for each undertaking or association of undertakings participating in the infringement may not, beyond sentence 1, exceed 10 percent of its total turnover in the preceding business year. In all other cases, the administrative offence may be punished by a fine up to EUR 100,000. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

(5) . . .

ENERGY Supply

*Federal Supreme Court (in the second instance: District Court of Wiesbaden, in the first instance: Magistrates Court of Bad Schwalbach)
October 11, 2006
VIII ZR 270/05*

 Energy; Gas supply; Germany;
Pricing; Service contracts; Utilities

Relevant statutory provisions

Article 315(3) of the German Civil Code (Bürgerliches Gesetzbuch)—Determination of a performance by a party

(1) If a performance shall be determined by a party to the contract, it has to be presumed in case of doubt that the determination shall be made with reasonable discretion.

(2) The determination is made by declaration to the other party.

(3) If the determination shall be made with reasonable discretion, a determination made will become binding for the other party only if it corresponds with reasonableness. If it does not correspond with reasonableness, the determination will be made by a judgement; this is also applicable if the determination is delayed.