(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.

Article 24(2) of the German Rules on Business Terms for the Supply of Distance Heat (AVBFernwärmeV)—Invoice, clauses on the adaptation of prices

(1) The remuneration is invoiced dependent upon the choice of the public utility engaged in the supply of distance heat in monthly intervals or in intervals, which may not substantially exceed 12 months.
(2) If the prices change within a period of calculation, the factors, which are relevant for the calculation of the price, have to be appropriately taken into consideration for each type of users. . . .
(3) Clauses on the adaptation of prices have to take into consideration the development of costs in the production and supply of heat by the public utility and the relevant conditions on the market of heat. They have to contain information on relevant factors for the calculation in plain and simple language. In the case of clauses on the adaptation of prices the price factor, which corresponds with the share of the costs for energy in percent, has to be indicated separately with each change of prices.

Facts

The plaintiff, a public utility engaged in the distance supply of heat, claimed from the first and second defendant the payment of its remuneration for the supply of distance heat for the period from February 12, 2001 to December 31, 2001. The first defendant had concluded with the plaintiff a "service contract on the supply of heat" on June 1, 2001 with retroactive effect from February 12, 2001 onwards. The contract indicated as purchasers the first and the second defendant, who at that time was not married to the first defendant, but who lived together. The second defendant did not sign the contract. Annexed to the contract was information on the "Determination of the Prices of Heat", which contained and explained the formulas for the annual calculation of the basic, general and measurement prices. The basic price for the general price was indicated as DM 62 per MWh of heat supplied plus VAT for the month of April 1999.

The plaintiff's invoice of September 12, 2002, which concerned the heat supplied in 2001, amounted to the claimed sum of €1,013.98 with due regard to the first defendant's advances, which were paid by him every month and set off accordingly. In the calculation the plaintiff proceeded on a general price of €57.2028 per MWh plus VAT, which was calculated and explained in a "Determination of Prices" by reference to the basic prices for gas and electricity of April 1999 and the weighed average prices for the supply of gas and electricity during the period of calculation. The calculation of the new general price included the gas price with a factor of 0.93 and the electricity price with a factor of 0.07.

The Magistrates' Court rejected the claim. The plaintiff appealed to the District Court, which rejected the appeal. The plaintiff appealed to the Federal Supreme Court. This Court's judgment rejected the appeal in part, but was also favourable for the plaintiff.

Held

(a) A control of reasonableness in the sense of Art.315(3) of the German Civil Code of prices of a public utility engaged in the distance supply of heat may not take place, if the factors for the calculation of a change of the price are contractually determinate to such a degree that there is no discretionary assessment possible (so-called automatic price adaptation clause).
(b) The term "prices" referred to by Art.24(2) of the German Rules on Business Terms for the Supply of Distance Heat concerns those prices which are invoiced by a public utility, but not a public utility's purchase prices.

In the Federal Supreme Court's view the plaintiff's invoice of September 12, 2002 corresponded with the demands imposed by Art.24(3) sentence 3 of the German Rules on Business Terms for the Supply of Distance Heat so that the first defendant was held liable to pay the price of €1,013.98 for the supply of distance heat for the period between February 12 to December 31, 2001

In the Court's view, the interest in a reasonably priced supply with (foreign) natural gas did not justify a temporal junction between the long-term contracts, by means of which E.ON acquired its gas from abroad, and its distribution contracts with public utilities. This interest, the Court observed, would have to be brought into line with the liberalisation of the energy markets, which constitutes another and similarly significant aim of the Energy Economy Act. The Court considered that the demand of gas was likely to subsist in the future so that E.ON would not have to fear a decline of its sales. Additionally, an undertaking such as E.ON could not rely on a protection of its sales, since it should participate in a competitive market like other enterprises.

Prof. Ph.D. Arnold Vahrenwald LL.M.

India

ELECTRICITY

Transmission

Transmission projects in India—private power operators

LT Electricity supply industry; India; Private companies

Following its success with the bids for the Sasan and Mundra ultra mega power projects, India's Power Ministry has now announced ultra mega transmission projects for private sector participation—something that was previously only possible through joint ventures with Powergrid Corporation, the state-owned entity. The Power Ministry is expected to start the process of tariff-based competitive bidding for 14 transmission projects which are likely to be commissioned by 2011–12.

The Power Ministry has appointed Power Finance Corporation (PFC) and Rural Electrification Corporation (REC) to do the initial groundwork for the projects, which will be awarded on a build-own-operate basis. In the next three to four months, PFC and REC will prepare detailed project reports, with the projects being awarded between September and December 2007. As with the ultra mega power projects, state-owned entities such as Powergrid will also be eligible to participate in the bidding process.

A special purpose vehicle (SPV) will be set up for each of the transmission projects. The SPV will help with land acquisition and forest clearance, and may initiate other clearances that will be required. It will also start the process for right of way clearances. The SPV will be transferred to the developer with the lowest tariff-based bid; all costs incurred by the SPV will then be borne by the developer.

The transmission projects are to be awarded through tariff-based competitive bidding. The first projects will be evacuation lines for North Karanpura (1,980MW) and the Talcher-Kolar augmentation project, for which REC has already invited Expressions of Interest (EoIs). PFC has invited EoIs for transmission systems associated with the Maithon (1,000MW), Kodarma (1,000MW) and Bokaro (500MW) projects. Based on the feedback, the Power Ministry will finalise various criteria for participating in the process.

In order to ensure higher investment from the private sector, the Power Ministry has formulated the guidelines for the participation of the private sector in transmission. It is hoped that the efforts by REC and PFC may help alleviate some of the concerns of private developers, who have historically viewed transmission as a monopoly of the state-owned PowerGrid Corporation.

Kalpana Unadkat
Ashurst

Mexico

ENERGY

Industry developments

Appointment of CEOs of Petróleos Mexicanos and Comisión Federal de Electricidad

LT Appointments; Electricity supply industry; Mexico; Oil companies

On December 2, 2006, President Calderon appointed Mr Jesus Reyes Heroles as the new CEO of Petróleos Mexicanos (Mexico's state oil company), and ratified Mr Alfredo Elías Ayub as CEO of Comisión Federal de Electricidad (CFE), Mexico's state power utility company.

Mr Reyes Heroles holds a Ph.D. in Economics from the Massachusetts Institute of Technology, and has a strong background in economics within the Mexican federal government, including as Director General of Banobras, Minister of Energy between 1995 and 1997 and thereafter Ambassador to the US from 1997 to 2000.

Mr Elías Ayub holds an MBA from Harvard University, he was Chief of Staff of the Ministry of Energy from 1986 to 1988, from 1988 to 1993 he was Undersecretary of Mining and Basic Industry, and from 1993 to 1995 Undersecretary of Energy. He has been the Director General of CFE since 1999.

Mexico's President Felipe Calderon designated on December 11, 2002, the Undersecretaries that will be working with Mrs Georgina Kessel, Minister of Energy.