National Reports

Germany

ENERGY SUPPLY

Energy prices

New legislation to control energy prices to end users

Consumer protection; Dominant position; Electricity supply industry; Gas supply industry; Germany; Unfair pricing

Increasingly, legislators make use of antitrust legislation in order to control the pricing of end users.[1] It has been questioned whether antitrust legislation should become a tool of consumer protection policy,[2] however, there seems to be a tendency in this direction not only in German national politics, but also on the EU level.[3] In November 2007, the Federal Parliament (Bundestag) passed the Bill concerning the Fight Against Abusive Pricing in the Fields of the Energy Supply and the Trade with Food. The Bill introduces a new art.29 into the German Act Against Restraints of Competition. This article authorises the cartel authorities to prohibit prices which exceed costs in an excessive manner or those of comparable enterprises. The provision imposes the burden of proof of the reasonableness of the prices upon the enterprise. The provision is of limited effect and expires on December 31, 2012.

The regulation of competition in the energy economy has been discussed for a long time in Germany. Originally, the Act Against Restraints of Competition contained special rules applicable to public utilities. The legislator proceeded upon the assumption that territorial monopolies were acceptable, since the duplicated laying of grids should be avoided for reasons of political economy and since the possibilities of storing energy are limited. In return, public utilities were subjected to a higher degree of control in the sector of pricing and there were special rules, according to which an enterprise had to accept that a competitor's energy was transmitted through their own grids.[4] The 7th Amendment of the Act abolished any special regulations applicable to particular branches of the industry. The present Amendment re-establishes a particular price control of public utilities, which had already been introduced by the 4th Amendment of the Act in art.103(5), sentence 2, cl.2,[5] but which was abolished with the 6th Amendment.

The new provision of art.29 of the German Act Against Restraints of Competition states:

> "Article 29. Energy Economy
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> (Sentence 1) An enterprise, which offers electricity or gas (a public utility), is prohibited from exploiting abusively a market dominating position, which it enjoys alone or together with other public utilities, through:
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> 1. demanding a remuneration or other business terms, which are less favourable than those of other public utilities or enterprises in comparable markets, unless the public utility proves that the disparity is reasonably justified, or
> 2. demanding a remuneration, which exceeds costs in an unacceptable manner.
>
> (Sentence 2) Costs, which, with regard to their scope, would not arise in circumstances of competition, may not be taken into account when assessing whether there is an abuse in the sense of sentence 1.

1 The Federal Minister of Economy explained on December 28, 2007: "The rise of electricity prices and the simultaneous record profits gained by the large companies engaged in the supply of energy, arouses a justified anger with many consumers. Consumers must be protected against inadmissible energy prices. For this purpose the cartel authorities can now make use of effective tools."

2 Daniel Zimmer, "Wettbewerbspolitik am Scheideweg", *Frankfurter Allgemeine Zeitung*, August 18, 2007, p.11.

3 See the Motion by the Free Democratic Party (Liberals) for a Decision by the Federal Parliament on the Strengthening of the Competition Policy as a Basis for the Social Market Economy, German Federal Parliament, document no.16/7522 of December 12, 2007.

4 See, for example, Arnold Vahrenwald, "Refusal to Transmit Gas Through Fixed Mains", Court of Appeals of Berlin of June 19, 1993, (1993) 3 O.G.L.T.R. 93.

5 See Arnold Vahrenwald, "Gas Supply in Germany and Antitrust Law: Article 103 of the German Antitrust Act" (1993) 6 O.G.L.T.R. 174.

(Sentence 3) Articles 19 and 20 of the Act remain unaffected."

A violation of art.29 of the Act constitutes an offence, which may be punished by a fine up to €100,000, see art.81(4) of the Act.

From the beginning of 2008, the Federal Cartel Authority will create a special department, which shall take care of the control of abusive pricing by public utilities.

Article 29 of the Act is special to the general prohibition of abuses of a market-dominating position contained in art.19 of the Act,[6] but art.29 of the Act is not applicable to the control of energy prices within networks, which is regulated by the Energy Economy Act.[7] It is the purpose of art.29 of the Act Against Restraints of Competition to facilitate the control of abuses of market-dominating positions by public utilities, and this control does not relate to the market concerning the transmission of energy. In practice, the new regulation is addressed to control prices charged to end users and households.

According to the motives of the Bill,[8] the Federal Government conceded:

> "The markets, which are on lower or higher levels (die den Energienetzen vor- und nachgelagerten Märkte) than those of the energy networks (grids), did not develop a working competition even after they had been opened to competition through legislation some eight years ago. In particular, there are deficits in the markets of the production of electricity and—caused by the still insufficient working models for the transmission—in the market of the supply of gas to households . . ."

The Federal Government was alarmed:

> "The energy markets are characterized by a strong vertical integration and an increasing concentration. Energy prices rose up to a critical level, from the point of view of the political economy, which seems hardly justifiable by the rise of costs of primary energy and which imposes a high burden upon industrial users and households."

The price control, which art.29 of the Act permits, shall improve the cartel authorities' possibilities to take measures against market-dominating

6 The Act Against Restraints of Competition art.19 states:

"Section 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;
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."

7 According to art.111 of the Energy Economy Act, special rules contained in the Energy Economy Act prevail over the more general rules on the prohibition of abuses of a dominant market position. For example, in the case of access to networks, such a special regulation concerning terms and the remuneration is contained in art.21 of the Energy Economy Act, which states in subs.(1):

"The terms and the remuneration for access to a network must be reasonable, non-discriminating and transparent, and they must not be less favourable than those, which are applied by operators of networks in comparable cases for services within their enterprise or with regard to connected or associated enterprises and which are invoiced in fact or on a basis for calculation."

8 See German Federal Parliament (Bundestag), document no.16/5847 of June 27, 2007, p.9.

enterprises, which abuse their powers through high pricing and demanding other business terms, which they could not demand under circumstances of competition. The Government stated in the motives, "[t]he facilitation of control of abuses is necessary until a competitive market is fully established also in the energy economy".

Article 29 of the Act offers the following similarities and particularities with regard to the general regulation of abuses of a market dominating position (art.19 of the Act Against Restraints of Competition and Art.82 of the EC Treaty).

Similarities of the new mechanisms (art.29 of the Act) with traditional control of abuses of enterprises in a dominant market position (art.19 of the Act):

(1) The cartel authorities can examine abuses "ex post", that is to say, an abuse can be identified after it has occurred and after the public utilities applied the abusive prices or business terms; the system of the "ex ante" control, applicable in the case of networks according to art.111 of the Act on Energy Economy, was not extended to the control of abuses of a dominant position of public utilities.

(2) The regulation in art.29 of the Act is not a "new" type of control, it merely improves the cartel authorities' possibilities of control.

(3) The examination of the relation between profits and costs has to be based on general mechanisms/standards for the development of prices (*Preisbildungsmechanismen*) in competition. Standards applicable are, apart from general principles applicable to a competitive economy which are based on the Act Against Restraints of Competition, in particular the standard established by the Energy Economy Act concerning a reasonably prices supply of energy.

(4) The Act does not contain a definition of the term "costs", for example a definition, which could be based on average costs. Cartel authorities have to apply generally accepted economic theories when applying art.29 of the Act. For example, they have to apply the principle that in the case of perfect competition the prices correspond with marginal costs (*Grenzkosten*). According to art.59 of the Act, a cartel authority may ask the public utility to present its pricing policy, including its elements/factors and the basis of its calculation.

(5) According to the principles developed by jurisprudence with regard to art.19(4) cl.2 of the Act, those prices, which are excessive on the basis of a comparison of markets, may nevertheless be justified for reasonable grounds. Here the rules developed for art.19(4) cl.3 of the Act are applicable.

Particularities of art.29 of the Act:

(1) According to art.29, sentence 1, cl.1 of the Act, the cartel authorities may measure the existence of an abuse by reference to other public utilities. The comparability of such public utilities has to be justified on the basis of reasonable standards, but comparable enterprises may also be those which do not belong to the energy sector. What matters is that the markets are comparable in the sense of art.19 of the Act. These may be markets, which are totally or partially determined by network structures. Also markets of resources, the prices of which are essentially determined by futures exchanges, may be considered as comparable markets. It does not matter, whether enterprises to which cl.1 relates, are active in markets with or without a working competition. To this regard, a reference to the jurisprudence, which developed to art.19 of the Act, may suffice.

(2) Also markets without working competition may be used for the comparison in the sense of art.29, sentence 1, cl.1 of the Act.

(3) Individual elements relating to the remuneration contained in business terms may be challenged individually, art.29, sentence 1, cl.1 of the Act.

(4) The Act imposes the onus of proof in correspondence with general principles to the market dominating enterprises, art.29, sentence 1, cl.1 of the Act.

(5) According to art.19, sentence 1, cl.2 of the Act, an absolutely excessive price may constitute an abuse. In such a case an unreasonable cost-price-relation may justify the assumption of an abuse in the field of the energy economy. Therefore, art.29 of the Act contains a codification of the principles which were applied for the assessment whether there is an abuse in the sense of art.19(1), (4), cl.2 of the Act and Art.82 of the EC

Treaty, where it is recognised by jurisprudence (European Court of Justice, February 14, 1978, "*United Brands*", 1978/207).
(6) Big differences between costs and prices may be indicative of an unreasonable cost-price relationship. However, when assessing the reasonableness, special factors may also have to be taken into account. For example, a big difference between prices and costs could possibly be explained by extraordinary increases in efficiency or by a deferral of investments during a period, leading to a reduction of expenses in the relevant time. Also, standards based on experiences from other economic fields than the energy economy may possibly be used when assessing whether there is an abusive relation between prices and costs.
(7) Sentence 2 of art.29 of the Act makes it clear that the hypothetical competitive market constitutes the standard for the evaluation of costs when assessing the abuse of the dominant position. This means that costs, which an enterprise would avoid in the case of working competition or which it would not recover or not be able to include in its pricing policy, may not be taken into consideration in the interests of the parties concerned when applying art.29 of the Act.
(8) Excessive pricing, which is defined as remuneration, which exceeds costs in an unacceptable manner, is inadmissible; art.29, sentence 1, cl.2 of the Act. Here the price control does not have to focus on other comparable markets or remunerations.

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Mexico

GAS

Regulatory developments

New Liquefied Petroleum Gas Regulations

LT Liquefied petroleum gas; Mexico; Regulation

On December 6, 2007, Mexico's new Liquefied Petroleum Gas Regulations (*Reglamento de Gas Licuado de Petróleo*) (the new LP Gas Regulations) became effective in Mexico. All permits granted in accordance with the former LP Gas Regulations will be grandfathered until the expiration of their term. However, permit holders may request to adjust their permits pursuant to the terms of the new LP Gas Regulations.

The new LP Gas Regulations are mainly intended to: (i) promote competition in the liquefied petroleum gas (LPG) industry, particularly in the midstream and downstream activities where the market is open, and to gradually create the required measures to open up competition in the supply of LPG; and (ii) increase the transparency of the first-hand sales of LPG made by Pemex Gas y Petroquímica Básica (PGPB), Mexico's government-owned LPG and natural gas company.

One of the main changes contemplated in the new LP Gas Regulations is that the Energy Regulatory Commission (*Comisión Reguladora de Energía*) (autonomous federal agency entrusted with the regulation of the natural gas and power industries, known by its Spanish acronym as CRE), is vested with the authority to regulate rates, terms and conditions under which PGPB may offer LPG supply, based on various considerations including the domestic market conditions and international industry trends. This is an important policy change, where traditionally the LPG market price has been unregulated and determined by PGPB, based in many cases on political and other non-market considerations.

Additionally, the new LP Gas Regulations set forth the regulatory framework governing the participation of private parties in the following LPG as midstream and downstream activities: (i) transportation, either through pipelines, tank-trucks or vessels; (ii) storage; and (iii) distribution. Such activities are subject to a permit regime, with jurisdiction divided between two federal agencies: the Ministry of Energy (*Secretaría de Energía*) (known by its Spanish acronym as SENER) and the CRE. From these activities, the only one contemplating restrictions to foreign investment participation is distribution.

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GAS

Regulatory developments

New Directive for liquefied natural gas rates

LT Liquefied natural gas; Mexico; Pricing; Regulation

On December 28, 2007, the Energy Regulatory Commission (*Comisión Reguladora de Energía*) (CRE) published a new directive regulating the rate methodologies for the determination of the regulated rates applicable to open access natural gas transportation, distribution and storage services and liquefied natural gas (LNG) regasification terminals.

This new directive, which is called the "Directive for the Determination of Rates and Pass-through Prices for Natural Gas Regulated Activities DIR-GAS-011-2007", became effective on December 29, 2007. For all purposes other