

Comment

In their contractual relations with consumers German public utilities engaged in the supply of gas often rely on tariffs. Such tariffs may be increased if certain legal requirements are met. For example, AVBGasV art.4(2) provides that changes of general tariffs become effective only after public notification. Taking into account that such an increase of tariffs is a procedure, which facilitates the management of contracts, an individual increase of prices of contracts with millions of customers would be cumbersome. But these rules on tariffs are applicable only to so-called tariff customers, and not to other customers, in particular special customers. Contracts with special customers often do not regulate price increases, in particular if former tariff customers were treated by the gas suppliers as special customers without an express change of contract. The Court of Appeal of Düsseldorf found that by reason of the fact that the gas supplier had offered its tariff customers more favourable terms than those established in the tariffs the customer could no longer be considered as a tariff customer, but had become a special customer. Neither the court of the first instance, nor the plaintiff or the defendant had considered this legal question. The Court of Appeal's finding that the public utility's price increases, corresponding with provisions applicable to increases of gas tariffs, could not find application in relation with the former tariff customer, which had become a special customer. In order to find a practicable solution it may be recommended that gas suppliers, which offer their tariff customers the supply on more favourable terms, would expressly include in this offer the statement that upon acceptance the consumer would become a special customer, that price increases would be determined in relation to published tariffs, and that AVBGasV art.4(2) should be incorporated into the business terms of the supplier.

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MONITORING REPORT 2009 OF THE GERMAN NETWORK AGENCY

 Competition; Electricity markets; Gas markets; Gas supply; Germany

On October 13, 2009 the Federal Network Agency published its Monitoring Report on the development of the electricity and gas markets. Energy Economy Act arts 35 and 63(4) oblige the Agency to publish a report, which reflects, inter alia, developments in the operation of suppliers and their fulfilment of demand, including storage and transport capacities, but also legal issues like the compliance of suppliers with requirements of transparency and unbundling or the competition in the market, in particular in grids of supply including the proposal of measures for its improvement. Competition is becoming increasingly intense in the energy sector. The Agency intended to increase liquidity, thereby facilitating gas trading and promoting competition. To achieve these aims market entry barriers were lowered, consumers must be enabled to change their supplier easily, and transport costs have to be reduced by stipulating new, simplified balancing rules and promoting the merger of market areas.

A key factor in this respect is access to gas networks. Here, the business processes used for changing supplier, i.e. for the switching of consumers from one supplier to another, had to be standardised to be suitable for large-scale use. The Agency promoted this aim by stipulating uniform business processes for the changing of the gas supplier (GeLi Gas); since August 2008 these processes must be applied by market participants. By issuing a determination in May 2008, the Agency also established new rules for gas balancing and new conditions for balancing group agreements in the gas sector. The basic model for balancing services and balancing rules in the gas sector (GABi Gas), applicable since the beginning of the previous gas year, remedies these faults mainly by introducing balancing on a daily basis. This facilitates market entry for new providers and cuts transport costs within a network considerably, two important prerequisites for more liquidity in the market. Some 25 per cent of suppliers reported changing their supplier to other networks.

Another major condition for strengthening competition in the gas sector is a reduction in the number of gas market competitors within Germany. A number of large gas network operators merged their share of the high calorific market with effect from October 1, 2009. The operators Bayernnets, Eni Gastransport Deutschland, E.ON Gastransport, GRTgaz Deutschland and GVS Netz cooperate under the name "NetConnect Germany". The transporters Dong Energy Pipelines, Gasunie Deutschland, Ontras—VNG Gastransport, StatoilHydro Deutschland and Wingas Transport merged their market share under the name "Gaspool". Reducing the number of suppliers to the gas

market from ten to six came as a result of difficult negotiations in which the Agency played an instigating role.

Growing competition in the gas market

Competition in the gas market is becoming more intense. Whereas three years ago consumers were unable to change their gas supplier, they can now choose from a large number of suppliers, on average there is a choice of 12 providers in a post code area. Some 382 distribution system operators provide final consumers with gas from two to five alternative suppliers. Some distribution system operators even carry gas from more than 30 suppliers to final consumers. This development is also attributable to the Agency's Geli and GaBi Gas decisions, as a result of which changing suppliers and trading have been greatly facilitated. The further development of competition depends very much on the consumers' behaviour, and this means that they should take advantage of their new power to change the supplier in order to cut their gas bills.

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FEDERAL SUPREME COURT, ORDER OF JANUARY 20, 2009, REFERENCE VIII ZB 47/08

 Germany; International commercial arbitration; Publication; Service of foreign process; Statements of claim; Time limits

Facts of the case

The plaintiff claims to be entitled to take over the shares of a company, which operates a gas field, alternatively the plaintiff claims damages. The plaintiff applied for a service by publication at the first instance court (District Court of Berlin) on the grounds that the service upon the defendant abroad would not be possible and a compliance with the request for legal assistance could not be expected within a foreseeable time. The District Court rejected the plaintiff's application. The plaintiff filed an immediate complaint, which was rejected by the Court of Appeal of Berlin. However, the Court of Appeal of Berlin allowed a complaint on points of law to the Federal Supreme Court.

During the procedure of the immediate complaint before the Court of Appeal of Berlin, an attorney at law declared to the Court that he represented the defendant, and he showed his power of attorney to the District Court of Berlin. The plaintiff asked the Federal Supreme Court to serve a certified copy together with a simple copy of the statement of claims upon the defendant including attachments and translations with a certificate of delivery. Subsequently, the plaintiff declared that the complaint on points of law was closed and asked the court to ascertain that this procedure was closed. The defendant objected. He considered that the transmission of the statement of claims upon the application did not constitute an effective formal service of notice.

Held

"The service by publication of a statement of claims to a foreign defendant, whose address, where the statement of claims may be served, can only be allowed if the service of the statement of claims by means of legal assistance would take such a long period of time that the plaintiff could not reasonably be expected to wait for such a long period which would very likely exceed the time of six to nine months."

The plaintiff's application for the ascertainment that the procedure of the complaint on points of law was closed is unsound, because the complaint on points of law was unsound from its beginning. The declaration that the appeal on points of law was closed could be made unilaterally by the plaintiff if the facts which lead to the closure are not disputed (see Federal Supreme Court of July 5, 2005, reference VII ZB 10/05, WM 2005, 1991). This is the case here. After the service of the statement of claims upon the defendant's attorney there was no longer the need for a public service so that the plaintiff's interest in the carrying out of the procedure for the appeal on points of law lapsed. But the appeal on points of law, which was admissible (see arts 574(1) sentence 1 cl.2 and 575 of the Code of Civil Procedure) was unsound from its beginning.

The requirements, which necessitate a public service in the sense of art.185 of the Code of Civil Procedure, were not met. According to this provision, a public service of a statement of claims to a defendant, whose address abroad is known, requires that the service abroad is not possible or without a chance of success. Both presuppositions are not met.