

“It is only reasonable to give high values to more polluting products than to less polluting products. I of course hope that the member states will follow the commission on this environmentally sound initiative”.

The proposal will now be considered by the Member States at ministerial level, with further lobbying on both sides expected ahead of the meeting of ministers.

Canada does not currently export oil sands crude to Europe but is concerned that, if the EU treats oil sands differently from conventional crude, it will set a precedent strengthening the hand of opponents of oil sands in other countries, including the United States. As Natural Resources Minister Joe Oliver has said: “We just don’t want that kind of stigmatizing judgement to be made against our oil sands, without any scientific basis.”

A final decision on the European Commission’s proposal is expected by June but the European Commission has decided to carry out an impact assessment which is likely to delay this until early 2013.

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GERMANY

CONCESSION FEES IMPUTABLE TO THIRD SUPPLIERS FOR THE TRANSMISSION OF THEIR GAS

¹ Abuse of dominant position;
Concessions; Gas supply
industry; Germany

Report on the judgment of the Court of Appeal of Düsseldorf of October 19, 2011, file No.IV-3 Kart 1/11(V)¹

“GAG Gasversorgung Ahrensburg GmbH”

The law

Act Against Restraints of Competition (GWB)

“Section 19 - 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 (...)
- (3) An undertaking is presumed to be dominant if it has a market share of at least one third. (...)
- (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. (...)
 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

¹ Court of Appeal of Düsseldorf of October 19, 2011, file No. IV-3 Kart 1/11(V), ZNER 2011 at [623].

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.”

“Section 130 - Public Undertakings, Scope of Application

- (1) (...)
 (3) The provisions of the Energy Industry Act shall not preclude the application of §§ 19, 20 and 29 to the extent that no other regulation is provided under § 111 of the Energy Industry Act.”

Energy Industry Act (EnWG)

“Section 30 - Abusive Conduct of an Operator of Grids

- (1) Operators of energy grids are enjoined from abusing their market position. In particular, there is an abuse if the operator of energy grids:
1. Does not correspond with provisions contained in Parts 2 and 3 of the Act or with regulations issued on the basis of these provisions,
 2. Unfairly restrains other enterprises directly or indirectly or interferes considerably with their freedom or competition without objectively justifiable reason,
 3. (...).”

Regulation on Concession Fees for Electricity and Gas (KAV)

“Preamble

Order by the Federal Minister of Economy on the basis of Sections 7(1) and 12 of the Energy Industry Act (...).”

“Section 1 - Scope of Application

- (1) This Regulation regulates the admissibility and calculation of the payment of concession fees of enterprises of public utilities in the sense of Section 3 clause 19 of the Energy Industry Act to towns and districts (Section 7 of the Regulation).
- (2) Concession fees are the remuneration for the grant of the right to use public ways for the laying and operation of grids, which serve the direct supply of end users with electricity and gas within the territory of a local authority.
- (3) Tariff customers in the sense of this Regulation are customers, who are supplied on the basis of Articles 36, 38, 115(2) and 116 of the Energy Industry Act; prices and tariffs according to these provisions are tariffs in the sense of this Regulation.
- (4) Special contract customers in the sense of this Regulation are customers, which are not tariff customers.

Section 2 - Calculation and Admissible Amount of Concession Fees

- (1) Concession fees may be agreed upon only in Cent per kw/h.
- (2) The following maximum amounts per kw/h may not be exceeded in the supply of tariff customers:
 - a) In the case of gas exclusively for cooking and warm water in towns:

up to 25,000 inhabitants 0,51 Cent,

up to 100,000 inhabitants	0,61 Cent,
up to 500,000 inhabitants	0,77 Cent,
up to 500.000 inhabitants	0,93 Cent,

b) In the case of other tariff supplies in towns:

up to 25,000 inhabitants	0,22 Cent,
up to 100,000 inhabitants	0,27 Cent,
up to 500,000 inhabitants	0,33 Cent,
up to 500,000 inhabitants	0,40 Cent.

(...)

- (3) When supplying special contract customers the following maximum amounts per kw/h may not be exceeded:
1. In the case of electricity: 0,11 Cent,
 2. In the case of gas: 0,03 Cent.
- (4) (...)
- (6) If third persons transmit electricity or gas to end users, concession fees may be paid or agreed upon in relation between the operator of the grids and the town up to the amount, which the operator of grids has to pay them in comparable situations for supplies by his enterprise or by connected or associated enterprises within the territory of concession. These concession fees may be added to the transmission fees (which the operator demands from the third person). If the third person asserts that lower concession fees would be payable for his supplies than those, which were contained in his transmission fees, he may prove these facts in relation to the operator of the grids also by the affidavit of an auditor or a sworn accountant.
- (7) Irrespectively of Section 1(3) and (4) deliveries of low voltage electricity (up to one kilovolt) are considered as supplies to tariff customers for the purpose of concession law, unless the customer's measured performance exceeds in at least two months of the year of calculation 30 kilowatt and the annual consumption exceeds 30,000 kilowatt hours. (...)"

Facts

In German jurisprudence it is controversial at what amount concession fees may be included into the remuneration for the transmission of gas, which the operator of the grids charges to the third persons, who request the transmission. The (Federal) Regulation on Concession Fees establishes maximum fees, which operators of grids may charge to its tariff customers, and those, which they may charge to special contract customers. According to s.1(3) and (4) of the Regulation, special contract customers are all those customers, which do not qualify as tariff customers and tariff customers are defined on the basis of the Energy Industry Act. According to this Act, tariff customers benefit from an obligation of supply imposed upon the distributor, s.36 of the Act. In practice tariff customers are household customers, which are supplied on the basis of tariffs, see s.40 of the Act.

In Germany operators of grids and local authorities conclude concession agreements, by means of which the local authority grants the operator the right to make use of public ways for the construction, operation and maintenance of grids against the payment of concession fees. In practice, local authorities did not develop a unitary practice for the calculation of concession fees. For this reason the Federal Ministry of Economy was afraid that uncertainties deriving from different practices could lead to distortions in competition. Therefore, the Federal Minister of Economy had issued the

Regulation on Concession Fees. Based on this Regulation the operators of grids and local authorities may agree on the payment of concession fees, which the operator may charge to end users, however, only up to certain limits. For example, in the case of gas supplied to tariff customers exclusively for cooking and warm water in towns up to 25,000 inhabitants the maximum amount is €0,51, see s.2(2) cl.2.a) of the Regulation. But in the case of special contract customers, s.2(3) cl.2. of the Regulation establishes the maximum amount at merely €0,03.

The public utility concerned—the GAG Gasversorgung Ahrensburg GmbH—was owned by the relevant territorial authority, with which it concluded a concession agreement—the city of Ahrensburg. In 2006, the city of Ahrensburg and its public utility had stipulated in their concession agreement that customers supplied with up to 100,000 kWh per annum should be charged with the higher concession fee applicable to tariff customers, but that the reduced rate of special contract customers should be applied if supplies exceeded that amount per year. According to the concession agreement this method of calculation of the concession fee would also be applied in the case of transmissions of gas through the public utility's grids requested by third suppliers.

A controversy arose between towns and operators of grids on the one side and third suppliers and the Federal Cartel Authority on the other side about the correct calculation of concession fees payable in the case of the transmissions of gas to end users for third persons in the sense of s.2(6) of the Regulation. Whereas local authorities and operators of grids tried to apply the higher concession fees, reasoning that such transmissions should be considered as made to tariff customers, third suppliers requesting such transmissions argued that they were supplying their special contract customers so that the lower concession fees should apply.

The Federal Cartel Authority reprimanded the GAG Gasversorgung Ahrensburg GmbH's practice. Subsequently, the city of Ahrensburg and its public utility amended their practice by stipulating that customers, which were supplied in excess of 10,000 kWh per year would be treated as special contract customers and charged with lower concession fees accordingly. But this was not satisfactory for the Federal Cartel Authority. In its order of 2009 it had decreed that from January 1, 2007 onwards the public utility should classify any supplies of gas, which were made upon the request by third suppliers, as made to special contract customers and be charged with the reduced concession fees in the sense of s.2(3) cl.2 of the Regulation and that the fees charged in excess of these amounts should be repaid.

With regard to the considerable income accruing to local authorities through concession fees charged by their public utilities, the German Monopoly Commission considered it necessary to assume a position in the public interest and found in its report on "Electricity and Gas 2009: Energy Markets between the Poles of Politics and Competition"²: according to s.2(6) of the Regulations, the operator of the grids and the third supplier requesting the transmission, may contractually agree on the inclusion of concession fees, applicable in the case of tariff customers into the price payable for the transmission of gas. If a public utility engaged with the supply of gas agreed with the local authority exclusively on the application of concession fees relating to tariff customers, it may ask its customers only for the payment of higher concession fees, applicable in the case of tariff customers, and it may pass on these higher concession fees also on third suppliers requesting transmissions to its own end users through the public utility's grids, even if these customers are special contract customers.

² German Monopoly Commission: "Strom und Gas 2009: Energiemärkte im Spannungsfeld von Politik und Wettbewerb", Special Expert Opinion according to s.62(1) of the Energy Industry Act, Berlin, August 4, 2009, cl.521 and onwards.

The Federal Cartel Authority considered that this practice constitutes a restraint of competition, by means of which the operator of grids—and finally the local authority—receives high concession fees. For the third supplier this means higher costs, so that margins and the attractiveness of market entry are reduced. By reason of the close relation between the local authority and its public utility the amount of the concession fee remains irrelevant, taking into account that the concession fee and the realised margin will be received by the local authority. In the Federal Cartel Authority's view this constitutes a hidden distribution of profits to the local authority and a restriction of competition for a third supplier.

The Monopoly Commission agreed with the Federal Cartel Authority's position. It observed that it was the original purpose of the Regulation to avoid that third suppliers might be charged with lower concession fees so that local public utilities could be placed at a disadvantageous position in competition.³ But now the situation changed. The Commission feared that the protection of local public utilities could be abused to the disadvantage of third suppliers. In fact, the statutory regulation favoured the establishment of joint interests between local authorities and public utilities, which they owned. The joint interest induced them to stipulate high concession fees, which would also have to be paid by third suppliers. By this means the local authority and its public utility reduced third suppliers' margins. From the point of view of free competition, this practice constitutes a considerable impediment. For the local public utility the practice is not damaging, because it transfers concession fees and profits to the local authority with the likelihood to receive cross-subsidies. In order to achieve clarity about the interpretation of s.2(6) of the Regulation, the Monopoly Commission recommended a re-draft of the text. However, upon the appeal of the GAG Gasversorgung Ahrensburg GmbH's appeal against the Federal Cartel Authority's order of 2009 the Court of Appeal of Düsseldorf had to decide the issue on the basis of the present text.

Held

The Court of Appeal of Düsseldorf held, the legal requirements of the prohibition of restraints of competition are met according to s.19(4) cl.1 of the Act Against Restraints of Competition and according to the—here exclusively applicable—s.30(1) sentence 2 cl.2 of the Energy Industry Act. The public utility abused its position as an operator of grids, by charging excessive concession fees and for this reason it restricted the freedom of competition of other enterprises on the downstream market for the supply of end users with gas within its territory of supply in a substantial manner and without objectively justifiable reasons.

The public utility is an operator of grids in the sense of s.30(1) of the Energy Industry Act. As such, it is the only offeror of services related to the supply of gas through grids and, as the owner of the concession, exclusively authorised to add concession fees to remunerations, which it charged to third suppliers for the transmission of gas. Accordingly, the public utility is without competitors and thus, market dominating in the sense of s.19(1)–(2) sentence 1 cl.1 and (4) of the Act Against Restraints of Competition. The public utility abuses its market dominating position on the upstream market for the transmission of gas through grids, including the charging of concession fees, since it asked from third suppliers excessive concession fees. In the case of transmissions requested by third suppliers, which had concluded special contracts with their customers, the public utility charged—apart from the remuneration for the transmission—also concession fees applicable in the case of tariff customers instead of those applicable in the case of special contract customers. But in the case of transmissions requested by third

³ See Federal Government, *First Decree on the Modification of the Regulation on Concession Fees*, Federal Council, document No. 358/99 of June 9, 1999, p.4.

suppliers concerning special contract customers, only concession fees applicable in the case of special contract customers may be charged by public utility operating the grids.

Focusing on the intent on which the Regulation was based the court held, the focusing on objective criteria, which the Ministry of Economy intended in s.1 of the Regulation, would be circumvented if the operator of the grids would have the possibility to influence the amount of concession fees payable by a third supplier's special contract customers, to which gas is transmitted. If one considered this as a lawful practice the operator could negatively influence its competitors' cost structures and, positively, its own's by means of cross-subsidising. This would counteract the aim of unbundling and the strict separation between the supply and the operation of grids, which shall ensure a high degree of transparency and a non-discriminatory configuration and handling of the network with the aim to achieve a working competition in the supply and the avoidance of cross-subsidising.

The public utility had used the argument that in the case of the supply of electricity s.2(7) of the Regulation focuses on a certain amount of supply of electricity—low voltage electricity up to 30,000 kWh per year—which establishes a borderline between the supply of tariff customers and special contract customers, so that equivalent borderlines of consumption could also be used to delimit the consumption of tariff customers of gas from that of special contract customers. However, differently the court stressed, that from the fact that such a statutory regulation does not exist in the case of the supply of gas it could only be inferred that the Ministry expressly refrained from the establishment of such a rule in the gas sector. Actually, according to the motives of the Regulation⁴ the Ministry did not want to interfere with the competition of substitution in oil and gas markets. For this reason there was no lack of a regulation, which could be complemented through the application of a similar rule by way of analogy.

The court explained, whereas before the adoption of the new energy policy there was identity between the operator of grids and the public utility, this identity came to an end with the legal and operational unbundling of the operation of grids in the sense of ss.7 and 8 of the Energy Industry Act. But factually the public utility remained the operator of grids, and it remained also the basic supplier of tariff customers within its network. However, it is not the public utility, which determines who is tariff customer or special contract customer. This determination is done by the Regulation, and subs.(6) of s.2 of the Regulation has to be interpreted accordingly. Even if this has the consequence that local authorities will, in the end, suffer considerable losses of income, this has to be accepted, taking into account that many political attempts to modify the Regulation in order to secure local authorities an increased income from the concession of gas grids failed.

Finally, the court observed that the demand of excessive concession fees, which were payable in the case of tariff consumers instead of those payable in the case of special contract customers, restrained competition on the downstream market for the supply of end users of gas in a substantial manner (s.19(4) cl.1 of the Act Against Restraints of Competition and s.30(1) sentence 2 cl.2 Energy Industry Act). According to the court the requirement of "substantiality" is already fulfilled if, in the light of experience, a certain conduct leads to risks for competition. This does not only concern the competition where the enterprise in question is dominant, but also third markets. This principle is applicable also in the case of s.30(1) sentence 2 cl.2 of the Energy Industry Act. The court stated:

"It is not necessary that other enterprises should really have suffered disadvantages through the conduct complained about, but it suffices, if the conduct, by reason of its kind and scope, is susceptible to cause a further worsening of competition for other enterprises. (...) Excessive

⁴ See *Federal Council, document No.358/99 of June 9, 1999*, p.6.

concession fees are counter-productive with regard to the opening of energy markets for competition, which is intended by the legislator in Article 1 of the Energy Industry Act - the ensuring of a cheap supply of energy. Undoubtedly a competitor is restrained on a downstream market if the operator of grids charges it with concession fees of tariff customers instead of special contract customers."

The court considered that in the case of gas used for cooking and hot water the difference caused by the application of the wrong concession fees constituted one-tenth of the cost price, and in the case of gas used for heating the cost price differed by one-twentyfifth.. Accordingly, competitors' margins would be reduced considerably. In the court's view this conduct was typically for unfairly raising rivals' costs. Competitors could be driven out of the market or they would refrain from market entry thus, enforcing the market dominating enterprise's position. Finally, the court held that the Federal Cartel Authority's decision, which was based on the prohibition expressed by s.19(4) cl.1 of the Act Against Restraints of Competition, did not have to be reversed, because this provision was wrongly applied instead of s.30(1) sentence 2 cl.2 of the Energy Industry Act. The court found that the legal requirements contained in both prohibitions were identical, even if the words were merely similar. Likewise the legal consequences of a violation of the prohibition were identical. The court admitted an appeal on points of law to the Federal Supreme Court, since the dispute was of basic importance, and the GAG Gasversorgung Ahrensburg GmbH took this chance so that the German Federal Supreme Court is likely to pronounce a final word in this dispute.⁵

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RUSSIA/KAZAKH

INVESTMENTS IN RUSSIAN AND KAZAKH POWER GRIDS—LEGAL REGULATION OF THE PRIVATIZED POWER GRID SECTOR

☞ Electricity distribution networks; Electricity supply industry; Foreign investment; Kazakhstan; Regulatory bodies; Russia

Investment opportunities regarding the Russian and Kazakh power grid sectors are currently of particular concern.

The power demand of Russia is expected to rise from 941 billion kWh in 2005 through 1740–2164 billion kWh by 2030.¹ The Kazakh power demand is supposed to rise from 60.5–72 billion kWh in 2010 through 90–130 billion kWh by 2030.²

Any growth in power generation requires corresponding adaptations of the power grids, otherwise the new generation capacities are unusable.

The needed investments and know-how are supposed to be provided partly from the state, but mainly from private investors.³ Thus, Vladimir Putin, Prime Minister of Russia, had repeatedly stated that the Russian electricity sector strives for close cooperation with the Western energy sector in the form of mutual shareholding and exchange of knowledge.⁴

Therefore, the Russian electricity sector (generation, grid and sales), formerly combined in the state-owned company RAO UES of Russia JSC, has been unbundled and privatized from 2003 through 2008.⁵

⁵ The GAG Gasversorgung Ahrensburg GmbH indicated in a press release that it appealed to the Federal Supreme Court on points of law, see http://www.gag-ahrensburg.de/cms/Pressemeldungen/Konzessionsabgabe_Tarifkunden_18153.html [Accessed May 3, 2012].

¹ Annex 1 of the "Energeticheskaya strategiya Rossii na period do 2030 goda" (Russian energy strategy until 2030) enacted by Government Decree No.1715-p on November 13, 2009 (SZ November 30, 2009 No.48).

² No.2.1 "Programma razvitiya elektroenergetiki do 2030 goda" (Agenda on the development of electric energy by 2030) enacted by Government Decree No.384 on April 9, 1999.

³ No.VI, 7; Russian energy strategy until 2030.

⁴ Vladimir Putin "Von Lissabon bis Wladiwostok" (*From Lisbon to Vladivostok*) in: *Sueddeutsche Zeitung*, November 25, 2010, available at: <http://www.sueddeutsche.de/wirtschaft/putin-plaedoyer-fuer-wirtschaftsgemeinschaft-von-lissabon-bis-wladiwostok-1.1027908> [Accessed April 7, 2012].

⁵ "Kontseptsiya strategii OAO RAO" EES Rossii "na 2003 — 2008 gg" (*Strategy paper of RAO UES of Russia JSC from 2003 through 2008*).