

Germany

GAS SUPPLY Post-contractual obligations

Whether concession fee payable after termination where transfer of assets delayed

Federal Supreme Court
22 March 1994

Facts: The plaintiff, a town, and the predecessor organisation of the defendant, a public utility for the supply of gas, concluded a contract in 1961 which contained a concession agreement.¹ In this contract the public utility undertook to supply the town and its inhabitants with gas and the town granted it the exclusive rights to lay and maintain fixed mains and to construct installations for this purpose under its roads. The town exercised its contractual right to terminate the contract because it intended to supply the inhabitants through its own facilities. The parties negotiated without success the price of the fixed mains and installations. On 14 to 16 December 1992 the parties negotiated a new contract. The public utility had continued the supply after the termination of the contract which ended on 30 June 1984. The town asserted that the concession fee continued to be payable by the public utility for six months after the termination of the contract. The Provincial Court ordered the defendant to pay the fees. The defendant appealed.

Held: (1) the contract, concluded in 1961, contained a gap, because the parties did not make provisions for the time between its termination and the transfer in the property of the fixed mains and installations of the public utility. This gap has to be filled, because the plaintiff, by consenting to the right of way even after the termination of the contract, renders a performance which is comparable, at least in part, with the contractual one.

(2) It results from a complementing interpretation of the contract that the plaintiff is entitled to receive the concession fees even after the termination of the contract. As a consequence of the termination of the contract, the defendant will, generally, negotiate the transfer of its fixed mains and installations within time. This transfer can only be made directly after the termination of the contract if the price for the fixed mains and installations has been established. If the actual value of the fixed mains and installations is not established at the termination of the contract, the public utility will have to continue the supply to the users in application of § 6 of the Energy Economy Act.

(3) The post-contractual relation between the parties is not subject to the application of § 1 of the Antitrust Act which prohibits cartels between competing undertakings, but it is exempted insofar as § 103 of this Act exempts public utilities from the application of the prohibition in § 1 of the Act. The parties, in application of the duty to act in good faith, would have stipulated as reasonable contractual partners the continuation of the obligation for the payment of the concession fee at the same amount at least for a period of six months which is reasonably necessary for the establishment of the actual value of the fixed mains and installations of the defendant by experts beyond the duration of the contract.

Comment: The judgment concerns the legal problem of the post-contractual obligations of concession agreements after the termination of the contract. The particular conditions in the case of public utilities engaged with the supply of gas necessitates territorial exclusivity so that the duplicated laying of fixed mains is avoided for the benefit of a reasonably priced supply. In order to facilitate the conclusion of concession agreements by means of which territorial authorities grant public utilities exclusive rights of way, the legislator has, to a large extent, exempted such agreements from the prohibition of cartels.

The termination of such agreements generally means for the public utility that it will have to transfer the property in the fixed mains and installations to a competitor. In the case decided by the Federal Supreme Court initially the town intended to take over the supply of gas with its own facilities. In accordance with the contract, one year before the contractual relation ended, the parties asked experts to assess a fair price according to the actual value. Similar terms are usually employed in concession agreements. At the end of the contractual relations, the experts had not arrived at a conclusion. § 6 of the Energy Economy Act obliged the public utility to continue the supply of gas.

The Federal Supreme Court sustained the judgment of the lower instance according to which the application of the principle that obligations be executed in good faith requires that the public utility continues the payment of the concession fee, at least for a duration equivalent to the time which could reasonably be expected to be needed by the experts. The court thus did not assume that the contractual relation was impliedly prolonged nor did it consider that the parties acted on a factual contractual relation. The court also rejected the application of § 557 of the Civil Code by way of analogy according to which

¹ On concession agreements, see A. Vahrenwald, 'Gas supply in Germany and Anti-trust Law', [1993] 6 OGLTR 174 at 178.

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the lessee is obliged to continue the payment of the rent if he does not give back the leased thing after the termination of the contract. The application of the principle of good faith appears to be reasonable in order to solve the conflict between the interests of the parties involved.

Ireland

JUDICIAL REVIEW Competition Authority

Challenge to category licence granting procedure

Cronin v The Competition Authority, the
Minister for Enterprise and Employment,
Ireland and the Attorney General
High Court
Costello J
24 June 1994

The applicant in this case operated a petrol filling station which was exclusively tied to Texaco (Ireland) Ltd ('Texaco') for supplies of motor fuels.

On 13 March 1992 it was advertised by the Competition Authority that five different types of agreement had been notified to the Authority by Texaco, with whom Mr Cronin had an agreement. On 6 November 1992 the Competition Authority advertised that another notification had been made by Texaco of a new version of its licence agreement. Subsequently, the solicitor for Mr Cronin and other members of his retail association requested details of the notifications made by Texaco both from the Competition Authority and from the solicitors for Texaco. The Authority replied that details of a notification were confidential until a summary of the facts was published by the Authority at the notice of intention stage, with an invitation to interested parties to make submissions. The solicitors for Texaco replied that it was the practice of the Authority to publish a summary of the notification and to make that available to members of the public inviting submissions.

On 11 December 1992 the Authority advertised its intention to grant a category licence and a draft of the licence was made available to interested parties including Mr Cronin. A detailed submission was then prepared on behalf of Mr Cronin which requested further information and an exchange of views between the parties arising from the information to be furnished.

On 9 July 1993 notice was given that a category licence under section 4(2)(a) of the Act had been granted, and it is this decision that was sought to be quashed by Mr Cronin. This category licence is similar to the provisions of Regulation 1984/83 and those provisions which concern motor-vehicle fuel in particular. Costello J rejected the contention of Mr Cronin that the procedures of the Authority were in breach of the rules of fair procedure in that Mr Cronin did not get copies of the agreements or summary of the agreement notified by the party with whom he had an existing arrangement. The applicant argued that he was unaware of which agreement was considered by the Authority and what were the terms of those agreements. Mr Cronin also contended that he was entitled to a copy of Texaco's notification or a summary of that notification. It was also contended that there should have been an exchange of views so that the submissions of Texaco could be commented on adequately by Mr Cronin. Costello J rejected the criticism of the procedure even though he accepted that the applicant had *locus standi*.

Costello J said that it was unnecessary for him to hear any argument on the constitutional issues raised by the applicant because of the way in which the Competition Authority has met the case. He stated: 'The Act is not unconstitutional on the ground that it permitted an unconstitutional decision to be made.'

It is understood that this judgment has been appealed to the Supreme Court.

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Ivory Coast

NEWS

Projection of mineral and oil production figures

According to several recent reports, the Ivory Coast, which accounts for 60 per cent of the West African economy, might eventually export three to five tons of gold and begin production of nickel, magnesium and iron. Oil production should be able to meet the country's needs from year one and the associated production of gas should allow the production and export of electricity. TL