

Atlantique) to its biggest market in the Paris region and in eastern France, via its Grandpuits refinery in Brie. Elf Aquitaine is planning to invest F.Fr.5 milliard in the new Donges unit.

#### *Offshore exploration*

Between the late 1960s and the early 1980s 49 exploratory drillings were carried out in the offshore area of metropolitan France without any commercial success except for a few indications in the Gulf of Gascony. This area is at present covered by four hydrocarbon research permits across a total surface area of about 2,971 square kilometres. Elf Aquitaine Production operates three of these over 2,474 square kilometres. Since 1966 24 drillings have been carried out in this area but in spite of significant indications for seven of them there has not been any actual production. However, Essorep's discovery of the Arbousiers field at the end of 1991 rekindled interest in the Parentis basin and its adjacent maritime area. Of all these zones from the continental shelf to the metropolitan mainland, the Gulf of Gascony remains the one which is most likely to reveal a concentration of hydrocarbons. In the Golfe du Lion there were 11 drillings between 1968 and 1985 without any positive outcome, despite the optimism generated by the discovery of the Amposta oil field in 1970 (along the Spanish coast). In the Manche *departement* work is in progress on the Pointe de Barfleur concession and in the Mer Iroise three preliminary prospecting permits have been valid since February 1994.

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## **Gabon**

### **NEWS Production**

Occidental Petroleum will soon achieve a technical record in the form of its first series of three wells in the Gabon offshore region from April 1995. This first series of wells is planned in water of a depth of up to 3,000 feet. In the light of this, Oxy is currently in the process of drawing up an agreement to use the 'semi-sub' Sedco 709. At the moment Oxy is boring in the Philippines with the same platform which was considered to be a likely choice in Shell Nigeria's call for tenders for its 18-month 'deep offshore' programme. Oxy has succeeded in acquiring in stages five of the twelve blocks of the Gabon deep offshore, covered by three licences which it owns 100 per cent (Meboun Marin, Challu and M'Pola); this represents an area of more than 21,800 square kilometres for a single holder.

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#### *Oil production*

Gabon believes that its hydrocarbon production, which reached 16 million tonnes in 1994, will increase in 1995. Income from oil represents the major part of the country's income, and amounted to around \$780 million in 1994.

## **Germany**

### **COMPETITION Gas prices**

*Supervision of gas prices*

Provincial Court of Brandenburg  
21 June 1994  
6 Kart. 1/93, RdE 1995/25

**Facts:** § 22(4) of the German Act Against Restraints of Competition states (in translation):

With regard to market-dominating undertakings the Cartel Authority shall have the powers set out in subsection (5), insofar as these undertakings exploit abusively their market-dominating position in relation to these or any other goods or commercial services. In particular there is an abuse within the meaning of sentence 1 if a market-dominating undertaking, as the supplier or buyer of a certain class of goods or services . . . requests conditions or prices which differ from those which would very likely result under conditions of effective competition; with this respect particularly the behaviour of undertakings in comparable markets with effective competition shall be taken into consideration . . .

The appellant is the regional supplier of town gas within the District C of the former German Democratic Republic. It purchased the gas from the V.-AG at a price of DM0.0773 per kWh. At that time the appellant switched its supply network from town gas to natural gas. According to the tariffs of the appellant which it published on 1 March 1992, its customers had to pay prices which were considerably higher than the prices charged by competing undertakings. The prices also exceeded the prices which the appellant intended to charge according to its published tariffs for the supply of natural gas. In an order of 19 May 1992, the Cartel Authority prohibited the appellant from charging prices for the supply of town gas which exceeded the comparable prices of the

company M.-GmbH plus an extra charge of DM0.005 per kWh and ordered it to agree to the passing on of a lowering of the prices for the purchase of town gas to its customers. The Cartel Authority ordered the instant enforceability of the order and threatened the imposition of a fine in the case of its violation and fixed the administrative fees at DM15,000.

§ 22(1) and (4) of the German Act Against Restraints of Competition concern the supervision of prices of market-dominating undertakings by the Cartel Authorities. The Court considered that the appellant is, within its territory of supply, a market-dominating undertaking so that it was subject to the supervision of the Cartel Authority. According to the Cartel Authority, there was an abuse of the market-dominating position by charging prices for the supply of town gas which could not be enforced in a market under conditions of competition with other substituting energy carriers, as shown by the lower prices which the appellant charged for natural gas. The Cartel Authority stated that the appellant's prices would also exceed the prices charged for town gas by other regional public utilities, charged for the sale of heating oil in the region, and the prices of natural gas in the former provinces of the German Democratic Republic. The structure and the amount charged for town gas could, according to the order appealed against, not be justified based on the cost price of the appellant. Insofar as this cost price was a consequence of the economic policy of the former German Democratic Republic, the Authority held that customers may not be charged with such a burden which should be carried by the shareholders of the public utility. The fact that the appellant was incapable of supplying town gas below its cost price would not relieve it from the obligation to charge only such prices which could have been enforced in the conditions of potential competition. An undertaking should be capable of enduring short periods of loss-making and the losses should be assessed as an investment made in order to maintain its customers before it achieves the switch to the more lucrative business of the supply of natural gas. According to the Cartel Authority, the appellant did not prove that the investments which established the high cost price and which the appellant presumably had to make were necessary for the maintenance of a reasonable supply of town gas. The Authority assumed that these investments would also be beneficial for the supply of natural gas.

**Held:** (1) The order of a Cartel Authority which prohibits a public utility from charging its customers prices which lie above the comparable prices of another regional public utility, plus a certain additional extra charge, is void, because it does not allow the public utility to establish its prices in an acceptable manner.

(2) The protection of the customer which is envisaged by § 22 of the German Act Against Restraints of Competition does not demand that a public utility engaged in the supply of gas should supply its customers at prices which are 'justified by competition' but which do not even cover its own cost price. The supervision of abusive behaviour may not lead to the consequence that public utilities are endangered in their existence or affected in their disposition to perform services through the imposition of prices below a cost price.

*To (1)*

The Court considered that the order was void, because it did not enable the appellant to establish its prices directly. The appellant would have to examine the development of the prices of its competitor and could not even be sure that it had fixed its prices in accordance with the order which referred to the competitor's tariffs in force at the date of the release of the order, if, at the time of the order's service, the competitor had already modified its prices.

The Court decided that the order was void of legal basis, because it had the effect of transferring the power of influencing the determination of the appellant's prices which is the task of the Cartel Authority according to § 22 of the Act to one of the competitors of the appellant.

*To (2)*

With reference to jurisprudence<sup>1</sup> and German legal writers<sup>2</sup> the Court interpreted the purpose of § 22 of the Act as lying in the protection of the customers of a public utility against the fixing of exploitative prices, but this does not, however, mean that the appellant has to charge 'competitive' prices which do not cover its cost price. A public utility has to ensure that its capability of supply and of innovation is maintained and improved in the interests of its present and future customers.

There will not be competition between town gas and natural gas, and since natural gas will replace town gas in the near future, the initial costs of the supply of natural gas have to be considered as costs for the supply of gas in general. The customers will finally benefit from the improvement of the gas supply through the switching from town gas to natural gas. Accordingly, it

1 Federal Supreme Court BB 1972, 259; Court of Appeal of Berlin OLG WuW/E 2053, 2066 and 2617.

2 Manfred Schoening, 'Zur kartellrechtlichen Missbräuchlichkeit unrentabler Energiepreise', BB 1993, 1463 to 1466 at 1464.

appears appropriate to conceive of the factors which determine the cost price as generally necessary for the improvement of the supply of gas.

**Comment:** Would the decision of the Cartel Authority of Brandenburg be exempt from the criticism of German Cartel Authorities which was recently uttered by Wolf?<sup>3</sup> The way in which the Cartel Authority of Brandenburg justified the excessive pricing of town gas by the appellant will certainly relieve other east German companies from anxieties that those standards which are applicable in Germany's western provinces<sup>4</sup> will not allow their slow adaptation to the principles of a competitive market. According to Schoening,<sup>5</sup> the supervision of the behaviour of inefficient undertakings may not lead to the imposition of prices through the Cartel Authorities which exceed the cost price. Schoening argues that the constitutional freedom of economic activity prevails over the interest in the securing of results deriving from an analogy to potential competition where the conditions of a competitive market are not given. However, it has to be said that high energy prices in the provinces of the former German Democratic Republic are a substantial problem for the population and for the efficiency of the economy in the east of Germany.

According to § 22(4), (quoted in part above), there is abusive pricing if a market-dominating undertaking charges prices which differ from those which would very likely have resulted under conditions of effective competition. The fact that public utilities do, *qua definitionem*, enjoy a territorial monopoly within their territory of supply does not authorise them to charge monopoly prices. In order to balance the exclusivity which public utilities enjoy by reason of concession agreements with the local authorities and agreements on territorial demarcation with competitors, the German Act Against Restraints of Competition establishes particular rules for the supervision of prices in § 103(5) and (6), according to which it is abusive if a public utility imposes less favourable prices than public utilities of the same kind, unless it proves that the difference arises from distinguishing circumstances which are not attributable to it.<sup>6</sup> However, the order of the Provincial Court of Brandenburg did not focus on the differentiation between §§ 22 and 103 of the Act. Against the reasoning of the court it may well be argued that the supervision of abusive pricing does not only aim at the prevention of discretionary pricing but, in the interests of the general public, also aims at the securing of a reasonably priced supply of gas. If a public utility cannot respond to this condition, there is no reason why customers within its territorial monopoly should suffer from the maintenance of prices which substantially exceed the prices charged by public utilities in other comparable regions. Thus the imposition of prices below the cost price through the Cartel Authority appears to serve the interests of the maintenance of an efficient economy according to the Act Against Restraints of Competition. If the public utility proves incapable of adjusting its cost price below the price imposed by the Cartel Authority it will have to quit the market and make way for a more efficient successor.

3 Andreas Wolf, 'Energiepreise zwischen Kosten und Wettbewerb', WuW 1994, 415 to 426 at 425.

4 See for example Arnold Vahrenwald, 'Comparison of Gas Prices, Directive of 11 January 1994 of the Bavarian Ministry of Economy and Transport', [1994] 10 OGLTR D—72.

5 See Schoening, Note 2 above, at 1465.

6 See Arnold Vahrenwald, 'Gas Supply in Germany and Anti-trust Law', [1993] 6 OGLTR 174 to 183 at 181.

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## **GAS Third Party Access**

*Federal Court delivers reasons for judgment on third party access*

'VNG Case'  
German Federal Court of Justice

The German Federal Court of Justice (Bundesgerichtshof – 'BGH') has now delivered its reasoning for its decision of 15 November 1994 in the so-called 'VNG case', which will probably become the leading case on third party access ('TPA') in Germany.

The Federal Cartel Office ('FCO') had ordered VNG, which owns large parts of the East German natural gas pipeline system, to grant access to one of its pipelines to WIEH, an indirect joint venture between BASF and Gazprom which is a gas trading company which wanted to supply an industrial consumer located about 20 kilometres away from WIEH's own long-distance pipeline (decision of 29 June 1992<sup>1</sup>). Up till then, VNG itself had sold gas to this customer via a regional distribution company. Both suppliers were themselves supplied with natural gas from Russian Gazprom through the Czech pipelines.

The BGH had upheld the earlier decision of the Berlin High Court (Kammergericht – 'KG') to quash the FCO order (decision of 9 June 1993<sup>2</sup>). However, the reasoning of the BGH differs from the KG decision in some important points and provides guidance for future TPA cases in Germany. The FCO has already announced that it will continue to enforce TPA on the basis of the present statutes (a draft for amendment of the German Energy Law from the Ministry for Economic Affairs aimed at liberalisation has got stuck in the governmental decision-making process since the federal elections last autumn).

According to the BGH, pipeline owners without a competitor who owns a parallel pipeline are *per se* dominant on the market for transmission services for the route of their pipeline and thus subject to the provisions of the German

1 *Energiewirtschaftliche Tagesfragen* 1992, 634.

2 WuW 1993, 1037.