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Germany

COMPETITION LAW Federal Cartel Authority *Terms of agreements on territorial demarcation held to be invalid*

B8-61 and 62/94
Orders of 10 March 1995

As regards the legal and contractual framework, it was said that the new Law on production-sharing had been ratified, but that there was still a lack of stabilisation of agreements despite the Law on foreign investments, the Law on the sub-surface, the Law on concessions and the Law on oil and gas. It was envisaged that the new Law on production-sharing would regulate the activities of producers, hand over rights to investors and regulate taxes and royalties. However, it was seen that some of the current Russian legislation is lagging behind the practical realities of the export trade.

Although the domestic price of oil in Russia is approximately 45 per cent of the Western oil price, which not only leads to wastage in Russia but gives rise to the opportunity for large profits and corruption, it was stated that there were no plans to regulate the supply and demand of oil which determines such oil prices, and there were no plans to artificially raise the oil price.

The Federal Cartel Authority held that the agreements on territorial demarcation between the BASF/Wintershall group, Kassel, the Verbundnetz AG (VNG), Leipzig, and the Erdgasversorgungsgesellschaft (EVG), Erfurt, were of no effect in the sense of § 1 of the German Act Against Restraints of Competition. According to § 1(1) of the Act which concerns horizontal restraints of competition, agreements made for a common purpose by undertakings shall be of no effect, insofar as they are likely to influence, by restraining competition, production or market conditions with respect to trade in goods or commercial services. The companies had concluded long-term contracts on the supply of natural gas on 31 January 1994. By means of these contracts, WIEH (Wintershall Erdgas Handelshaus) and Wingas (Wintershall Gas GmbH) are enjoined from competing with VNG and EVG for purchasers of gas in nearly the whole of the territory of the former German Democratic Republic. The only exception relates to customers which stood in a contractual relation with WIEH before the conclusion of the agreements and which are affiliated with the BASF company.

The Federal Cartel Authority held that the agreements on territorial demarcation are not exempted from the prohibition of cartels contained in § 1 of the German Act Against Restraints of Competition which is provided for by § 103(1) clause 1 of the Act,¹ for two main reasons: First, the Wintershall group is already present in east Germany with its own fixed mains, the Sachsen-Thüringen-Erdgasleitung (STEGAL), so that the agreements on territorial demarcation do not have the effect of a rationalisation through the avoidance of the duplicated laying of fixed mains which are uneconomical and render the supply more expensive, which is required for the exemption from the prohibition. It may be suggested that this argument appears formalistic, because it would exclude demarcation agreements from the benefit of the exemption if competition existed between public utilities within a certain territory which may have led to the duplicated laying of fixed mains and if the competing undertakings arrived at the conclusion that the maintenance of competition within this territory should no longer be sustained.

Second, the agreements exclude that transmissions of gas may occur which contradicts the decision of the Federal Supreme Court of 15 November 1994 in the case of VNG against WIEH,² according to which transmissions of gas may be enforced by means of the anti-trust law if the refusal would restrain other undertakings unfairly. In its order of 15 November 1994 the Federal Supreme Court held that even the refusal of a transmission of gas which would be constitutive of competition may be an abuse of the dominant market position of a public utility. In its order the Court held:

Whether a transmission is unfairly refused has to be decided upon an evaluation of the interests involved with regard to the aims of the Act to guarantee the freedom of competition. Within this scope it has particularly to be taken into account – apart from the interests of the undertakings which demand the transmission and which would have to perform the transmission – the purpose of the achievement of a secure and reasonably priced supply of gas ... and the effect of the transmission on market conditions, particularly on the conditions of supply for the purchaser of gas of this public utility which has to perform the transmission ... A public utility which refuses a transmission may not argue that its conduct would be unfair for the reason that by means of the transmission a purchaser shall be supplied which was its own customer. In such cases the text of § 103(5) sentence 2 clause 4 of the Act does not generally exclude the assumption of an obligation to a transmission. Also according to the essence and purpose of this provision there is no reason to consider that a refusal of a transmission constitutive of competition would, in principle, exclude an abuse.

1 § 103(1) clause 1 of the Act exempts demarcation agreements from prohibition if they are concluded between public utilities supplying gas and other utilities insofar as one of the parties thereby agrees to refrain, in a certain territory, from supplying the public utility with gas through fixed mains. On the exemption of the prohibition of cartels by § 103 of the German Act Against Restraints of Competition, see Arnold Vahrenwald, 'Gas Supply in Germany and Anti-trust Law', [1993] 6 OGLTR at 174 to 183.

2 Federal Supreme Court, order of 15 November 1994, reference KVR 29/93; on the decision in this case of the Federal Cartel Authority of 29 June 1992, see Vahrenwald, Note 1 above, at 182; on the 'second instance', see Vahrenwald, 'Refusal to Transmit Gas through Fixed Mains: Order of the Court of Appeals of Berlin, 9 June 1993', [1994] 3 OGLTR 93.

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ENVIRONMENTAL PROTECTION Economic Offences Act

Fine imposed under new Act

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TAXATION Depreciation

*Restrictions on depreciation on certain
new mining assets to be lifted*

Alexandra van Ermel Scherer
Price Waterhouse
The Hague

Nigeria

OIL STRIKE

Effects of oil strike

Accordingly, the Federal Cartel Authority held that the agreements on territorial demarcation could not benefit from the exemption provided for by § 103(1) clause 1 of the Act from the prohibition of cartels in the sense of § 1 of the Act. Possibly, the demarcation agreements might have been permissible if they had contained a clause which excluded the obligation for a transmission of gas unless this would be constitutive of a reprehensible behaviour in the sense of § 103(5) of the Act.

On 21 March 1995 the District Court of Amsterdam fined a mining company Dfl.75,000 for spilling oil-based mud into the sea last December. This was a landmark in Dutch legal history as it was the first case to be tried under the economic offences regime.

With effect from April 1994, legislation covering pollution of the sea by mining activities was transferred from the Mining Act Continental Shelf to the Act of Economic Offences. Under this Act fines of up to Dfl.1 million can be imposed, depending on the circumstances.

It is not known whether the mining company will appeal against the fine.

The Dutch Ministry of Economic Affairs has reached an agreement with the Dutch Ministry of Finance on a new proposal to stimulate the mining industry on the Dutch part of the continental shelf.

On the basis of this proposal, new investments in assets such as wells, platforms and pipelines operating on the Dutch part of the continental shelf can be freely depreciated by the oil- and gas-producing companies for Dutch corporate income tax purposes. There will be no restrictions on the depreciation period chosen: it is possible to fully depreciate the asset concerned in the first year of investment.

A Ministry of Finance regulation will explicitly indicate which assets can be freely depreciated. Furthermore, the 1976 Royal Decree will be amended by the Ministry of Economic Affairs, in order to bring the levying of the State Profit Share into line with the corporate income tax treatment of these investments.

This proposal is considered to be the final piece in a package of measures by the Dutch Ministry of Economic Affairs to stimulate the exploitation of the smaller oil and gas fields on the Dutch part of the continental shelf. The previous proposals, aimed at lowering the royalty on oil and gas produced and lowering the state participation from 50 per cent to 40 per cent for new production licences, were accepted by the Dutch Lower House and came into effect on 12 March 1995.

In addition, the Ministry of Economic Affairs is considering creating co-operative ventures between oil and gas companies, in order to encourage the exploitation of the smaller oil and gas fields in the North Sea.

A strike of the National Union of Petroleum and Natural Gas Workers ('NUPENG') started in July last year, and lasted for about two months. The strike occurred for a variety of reasons, primarily industrial, but also to campaign for the release of Chief Moshood Abiola, who was widely believed to have won the elections which were held in June, which were annulled by Ibrahim Babangida's Government. The strike ended largely through sovereign might, and without the release of Chief Abiola.

During the strike period several onshore fields were shut down and Nigerian production was affected. The Minister of Petroleum is believed to have said that the Federal Government lost about N150 million.

Prior to the strike, there had been intermittent fuel shortages in the southern cities including Lagos, which is the commercial centre and until recently the capital. In the north and in remote parts of the south, fuel scarcity had been for the last two years a way of life. This would appear to stem from the fact that the Nigerian refineries were producing below their installed capacities. Also, the disparity in price between Nigeria and neighbouring states had made smuggling attractive. Therefore, in some parts of the country, the fuel strike made little or no difference.