force grid owners to grant access to their supply system to competitors. The Ministry also pointed to the 'essential facilities' doctrine of the European Court of Justice as another instrument to enforce TPA. In applying the prohibition against discriminatory behaviour by dominant enterprises (sections 22(4) and 26(2) GWB) a balancing of interests shall be made in order to determine whether the grid owner is obliged to grant TPA. This reflects fundamentally the reasoning of the German Federal Court (BGH) in its landmark 'VNG' decision.[1]

The German reform plan was announced in advance of the 7 May meeting of the European Council of Energy Ministers in Brussels where another attempt was to be made to reach agreement on a European Union directive for liberalisation of the electricity and gas markets. The German Government stated that it did not expect a breakthrough on a European level in the near future and would pursue its own plans regardless.

However, the passing of the Bill is not yet certain. In 1993, Rexrodt had already proposed a liberalisation bill along quite similar lines and, before the federal elections, had then suffered defeat in the cabinet which refused to make it a government bill. The present proposal will still face determined opposition from the energy industry as well as from municipalities. German municipalities profit greatly from the concession fees they charge in consideration of the exclusive rights of way for public street land which they grant to the monopoly suppliers under the present system. The Economics Minister has assured them that this income would remain untouched and transitory provisions would have to be found. On the other hand, pressure from the energy consuming industry on the government has consistently grown to ease the burden which high German energy prices puts on it. In the context of the dominant public debate on the international competitiveness of 'Standort Deutschland' (Germany as a business location) this argument which implies the threat to move production and jobs abroad, may well be strong enough to ensure that at least some features of the Rexrodt proposal will soon become law in Germany. The official timetable foresees that the cabinet will decide on the draft in July with parliamentary deliberations starting after the summer break and the law entering into force at the beginning of next year.

1 [1995] 8 OGLTR 307.

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COMPETITION LAW
Concession fees

Renewal of concession as condition for fee increase held not to be in restraint of trade

Schönau v KWR
Provincial Court of Karlsruhe
25 October 1995
6 U 238/94 (Kart.), ET 1996/181

The applicable law

In Germany the municipal and rural boroughs may ask public utilities to pay concession fees for the laying and operating of fixed mains by using public streets and ways. There is no uniform system for the establishment of concession fees. Whereas some municipal boroughs stipulated the duty to pay concession fees in contracts with public utilities, others did not do so. Also the prices of the fees may differ. Thus within its territory of supply a public utility may have to pay concession fees within the boundaries of some municipal boroughs, lower fees within the boundaries of others or even none within other municipal boroughs. In 1989 the sum of the concession fees for the right to lay and operate fixed mains for the transmission of gas amounted to some DM500 million in West Germany.[1] The former policy of the German Government which aimed to reduce or abolish concession fees was not successful because of the difficulty in compensating the loss of income which would accrue to municipal boroughs. The Federal Administrative Court held, in 1990,[2] that by reason of the principle of equal treatment applicable also in public law those municipal boroughs which up to that time did not charge concession fees or which charged lower fees should have the right to charge fees up to the highest amount possible.

The Order concerning Concession Fees for Electricity and Gas of 9 January 1992 states:

> Article 1. Scope Of Applicabilty.
> (1) This Order regulates the admissibility and calculation of the payment of concession fees which public utilities in the sense of Article 2(2) of the Energy Economy Act have to pay to municipal and rural boroughs.
> (2) Concession fees and remunerations for the grant of the right of distribution to end users with electricity or gas within the territory of a municipal borough through the use of public streets and ways for the laying and operation of fixed mains.
> . . .
> Article 4. Establishment Of Tariffs.
> (1) Concession fees have to be published with the general tariffs [of the public utilities]. If the general prices of tariffs are applicable for several municipal boroughs, it is sufficient to indicate the relevant highest amount applicable. It shall also be indicated that agreements according to which no or lower concession fees will be payable, shall prevail over this regulation.

1 Obernolte and Danner, 'Energiewirtschaftsrecht', commentary, C.H. Beck, EnergieG, EnergPreis III, at III 245.
2 German Federal Administration Court of 20 November 1990, RdE 1991/32.

(2) Insofar as in territories of supply of several municipal boroughs, the public utility and the municipal borough stipulate that for the supply of electricity no concession fees or lower ones than those according to Articles 2 and 8 shall be payable, the general tariffs for prices shall be reduced accordingly.

Facts: In Germany towns were allowed to charge concession fees[3] for the grant of the right to lay and operate fixed mains under public streets. But not all towns made use of this right in contracts with public utilities. In order to remedy the situation, the Government aimed to phase out the towns' right to charge concession fees but since it could not provide for an alternative income, it prevented, in a first measure, towns from concluding new contracts with public utilities which would establish a duty to pay concession fees or to increase the fees. The German Federal Administration Court[4] declared this prohibition null and void. Subsequent to this judgment towns asked public utilities for an increase in the fees of existing concession contracts up to the maximum amount which could be charged by law and for the conclusion of concession agreements in territories where no contracts had been concluded before. Often the public utilities declared that they were prepared to agree, subject to the condition that the towns renewed the existing concession contracts with a duration of 20 years. Because demarcation contracts concluded between public utilities allocated larger territories for supply to a single public utility, the public utility was often the only company which could reasonably be expected to conclude a new contract with a town. The town of Schönau had assigned its rights to receive concession fees arising from the grant of the concession to lay and operate fixed mains for the purposes of the public utility Kraftübertragungswerke Rheinfelden AG ('KWR') to the Netzkauf Schönau GdbR ('Schönau'). Schönau increased the concession fees up to the highest limit permissible by law. KWR offered the conclusion of a new concession contract with a duration of 20 years, but it refused to pay the increase in the fees during the last four years of the existing contract. Schönau brought a suit against KWR for the payment of increased concession fees before the District Court of Mannheim. On 30 September 1994 the District Court of Mannheim[5] rendered a judgment in favour of Schönau. The Court held that Schönau could not base a claim for an increase of the payment on the doctrine of the lapse of the basis of the transaction. According to this doctrine, a party may claim an amendment of the contract if both parties, at the time of the conclusion of the contract, could reasonably have been expected to agree on this term if they could have imagined the future development of facts. In the Court's view this doctrine is only applicable if the maintenance of the contractual terms would be unacceptable to the disadvantaged party. Since the existing concession contract had a duration of only four years the Court considered that the loss of the increase of the fees would be reasonable. But the Court held that KWR's offer to pay the increased fee of Schönau concluded a new concession contract for the duration of 20 years constituted a violation of the prohibition of discrimination according to Article 26(2) sentence 1, 2nd alternative of the German Act Against Restraints of Competition[6] and would render the company liable in tort for the payment of damages according to Article 35(1)[7] of the Act. On KWR's appeal the Provincial Court of Karlsruhe reversed the judgment and rejected Schönau's claims. The Court held that Schönau's claims could neither be based on contract, nor on the doctrine of the lapse of the basis of the transaction according to the general principles of the German Civil Law nor on tort law according to the German Act Against Restraints of Competition.

Held:

(1) A territorial authority's right to claim an increase in the contractual concession fees up to the highest sum permissible in law, after the legal rule containing the prohibition to increase concession fees had been held invalid,[8] cannot be based on the principle of the lapse of the basis of the contract, insofar as the maintenance of the terms of the contract is not unreasonable to the town.

(2) The refusal of a public utility to pay an increase of the contractual concession fees to the territorial authority, after the legal rule containing the prohibition to increase concession fees had been held invalid,[9] and its offer to pay the increased fees only if the territorial authority agrees to conclude a new concession contract with a duration of 20 years after the termination of the contract in force, does not constitute a prohibited discrimination of the territorial authority which would render the public utility liable for damages.

Comment: Similar to the Court of the First Instance, the Provincial Court held that the doctrine of the lapse of the basis of the transaction does not give Schönau a right to claim an increase in the concession fees up to the highest amount permissible in law. The Court held that even though KWR

3 On concession agreements, see Arnold Vahrenwald, 'Gas Supply in Germany and Anti-trust Law', [1993] 6 OGLTR 174 to 183, at 178.
4 German Federal Administration Court of 20 November 1990, RdE 1991/32.
5 District Court of Mannheim of 30 September 1994, ET 1994/802.
6 Article 26 of the German Act Against Restraints of Competition contains the prohibition of discrimination. Subsection 2 states:

> Market dominating undertakings . . . may not unfairly restrain another undertaking in the course of business which is commonly accessible to similar undertakings, neither directly nor indirectly, and they may not discriminate similar undertakings without justifying reason, neither directly nor indirectly. Sentence 1 is applicable also to undertakings . . . insofar as smaller or medium-sized undertakings are dependent upon them as supplier or purchaser of a certain kind of goods or commercial services in such a manner that sufficient or acceptable possibilities to contract with other undertakings are not available. It is presumed that a supplier of a certain kind of goods or commercial services is dependent upon a purchaser in the sense of sentence 2, if the purchaser obtains regularly special favourable conditions which are not given to similar purchasers, additional to rebates concerning prices or other conditions commonly agreed upon.

7 Article 35(1) of the German Act Against Restraints of Competition obliges a person who violated the provisions of the Act negligently or with intent to pay damages to those protected by the provision.
8 The invalidity of the legal rule which prohibited towns from increasing concession fees in contracts with public utilities and to conclude new concession contracts stipulating the obligation to pay fees in territories where no concession fees were charged before was established by the German Federal Administration Court of 20 November 1990, RdE 1991/32.
9 *Ibid.*

paid these higher concession fees to other towns, the refusal to pay the claimed increase was not unreasonable, because the town of Schönau was not competing with these other towns which would have necessitated the conclusion of similar concession contracts in order to avoid distortions of competition. Assuming that at the time of the conclusion of the contract, the parties had taken into consideration the possibility that the German Federal Administrative Court would have abolished the legal prohibition to increase the concession fees, the Court was not convinced that the parties would have stipulated higher fees. A reference point for this view was the absence of any adjustment clause concerning fees in the concession contract.

The Provincial Court rejected the District Court's view that KWR's offer to pay the increased fees conditional on Schönau's acceptance of the conclusion of a new concession contract constituted an unfair restraint or an unjustified discrimination of the town of Schönau in the sense of Article 26(2) of the German Act Against Restraints of Competition which could have rendered Schönau liable for damages. The Court held that it would not be unreasonable that KWR pursued a business policy which is based on the conclusion of long-term concession contracts in order to lower the cost price through the assurance of an efficient network for supply. KWR's conduct, which would bind Schönau to observe the terms of the existing contract at the end of the contractual relation if Schönau would not agree to the conclusion of a new concession contract, would limit Schönau's freedom of action but this restraint would not result from KWR's dominating position in the market but from Schönau's contractual obligations which it had incurred freely. The Court mentioned that the fact that new concession contracts are concluded before the termination of existing contracts was a common practice which met with the approval of German cartel authorities. Also the terms in the existing contract, which concerned the regulation applicable in the case of the termination of the contractual relation, in particular the taking over of the installations, were not unreasonable in the sense that these terms would have exercised an inadmissible pressure on Schönau to renew the concession contract in the sense of Article 103a of the German Act Against Restraints of Competition, and even if it were so, this would not have caused the invalidity of the whole concession contract but only the invalidity of the particular term after the termination of the contract.

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RENEWABLE ENERGIES

Legalities of Electricity Feed Law

The German Electricity Feed Law (*Stromeinspeisungsgesetz*, 'StrEG') took effect on 1 January 1991 and regulates the obligation of public utilities to take delivery of so-called renewable energies and their liability to pay. Section 3 settles a detailed list of remunerations for various energy sources considered renewable. For example electricity run by hydro-power or biogas has to be remunerated with at least 80 per cent and wind-power by 90 per cent of the average yield per kWh of the electricity sale to all customers. This means that in 1994 the utilities had to pay more than 0.15DM for hydro-power electricity and almost 0.17DM for wind electricity.

The utilities have complained about the Electricity Feed Law ever since it came into force. The point in dispute is not the fact that utilities are obligated to take and pay the deliveries, for this duty has always been regulated in section 26(2) and section 103(5) sentence 2 number 3 of the German Law Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, 'GWB'). The utilities resent the extra costs imposed by the Electricity Feed Law. They argue that the levy imposed on them with the aim of subsidising renewable energies is a violation of German constitutional law. Therefore they have been looking for an opportunity to have the legality of the subsidy checked. For this reason several larger utilities refused to pay the proper payment according to the StrEG.

Finally the hydro operator Richard Keil Wasserwerke took Badenwerk to court. The Karlsruhe court[1] shared the utility's doubts about the legality of the StrEG. Thus it froze the case and submitted the question of whether the payment system under the StrEG is an infringement of the Constitution to the Federal Constitutional Court (*Bundesverfassungsgericht*, 'BVerfG'). The BVerfG sent the case back to Karlsruhe[2] ruling that the court had not stated its conviction appropriately as to why the StrEG leads to a breach of the German Constitution. It was not satisfied with the reasons given by the Karlsruhe court that according to several experts the StrEG's payment system imposes a 'special levy' (*Sonderabgabe*) on public utilities being allowed only under very strict circumstances.

The Karlsruhe court has not yet decided whether it will take the case to the BVerfG again. There can be no doubt, however, that eventually the German power-producing industry will succeed in bringing the question before the German Federal Constitutional Court.

1 Landgericht Karlsruhe, 7 July 1995, File 2 O 176/95.
2 BVerfG, 17 January 1996, File 2 BvL 12/95.

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