

Germany

COMPETITION LAW Fee structure

Application of fee structure failed to take individual circumstances into account

Provincial Court of Naumburg
29 June 1994
RdE 1995/204

Facts: The appellant was constructing a closed network of fixed mains for the transport, supply and distribution of natural gas in the northern part of Sachsen-Anhalt, which included the territories of 11 districts in the former German Democratic Republic. In order to obtain the exclusive right for the laying of fixed mains the appellant concluded with the competent territorial authorities concession agreements which had a duration of 20 years.¹ These agreements were notified to the provincial cartel authority in application of §§ 9 and 103(3) of the German Act against Restraints of Competition. The authority issued orders for the payment of fees which were based upon a schedule for fees which differed according to the number of inhabitants within the territory to which the concession related. The lowest fee was DM400, which was applicable in the case where the number of inhabitants did not exceed 25,000. All 255 concession agreements concerned this class, and many of the territories to which the concession agreements related had only a few hundred inhabitants. The authority issued eight orders for the payment of the administrative fees, against which the appellant appealed to the Provincial Court in application of the German Act against Restraints of Competition, § 80 of the German Act against Restraints of Competition of 1957, as subsequently amended, states:

...
(2) In the proceedings before the Cartel Authority fees are charged to cover the administrative costs. Subject to the payment of fees are (activities subject to fees):

1. Notifications according to § 9(1)—also in relation to § 103(3) ...

(3) The amount of the fee is ascertained by the personal and actual expense of the Cartel Authority with due regard to the economic importance which the subject-matter of the activity subject to fees assumes. The rates of fees may not exceed ...

6. DM5,000 in the cases of ... § 103(3) ...

If the personal or actual expenses of the Cartel Authority with due regard to the economic importance of the activity subject to fees are, in the circumstances of the individual case, exceptionally high, the fee may be increased up to double. For reasons of equitableness the fee which is established according to sentences 1 to 3 can be reduced to a tenth.

(4) For the purpose of the discharge of several similar official acts or similar notifications of the same debtor of fees rates of compounded fees can be provided for which reflect the little scope of administrative expenses. ...

Held: The fixing of the fees by the cartel authority for the notification of a concession agreement concerning natural gas exceeded their discretionary powers, but not for the reason that the cartel authority had used a schedule of fees the gradations of which were based upon the number of inhabitants in the territory to which the concession related. In general, the number of inhabitants reflects the—decisive—economic importance of the agreement. However, the cartel authority has to examine in each individual case whether particular circumstances—with respect to the economic importance of the agreement or the efforts of the administrative expense—demand a deviation from the gradation according to the schedule of fees.

The scattered nature of the communities of a province ("Land") of the German Federation may lead to the fact that nearly all concession agreements are classed in the same (lowest) grade of the schedule of fees and are treated similarly with respect to their economic importance. In the case where a plurality of largely identical concession agreements are notified and if the activity of the cartel authority is, after the examination of a "model agreement", exhausted by the verification of other agreements with respect to possible deviations, the administrative expense for the individual agreement is, in general, below average; accordingly, the fee to be charged must fall short of the fee envisaged in the gradation of the schedule of fees.

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

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