

Environmental concerns, the protection of lignite and power generation from CHP plants as well as the particularities of the gas sector were other issues discussed at length during the hearing. A transcript of the hearing can be obtained from: Deutscher Bundestag, Ausschuß für Wirtschaft, Bundeshaus, 53111 Bonn, Germany.

The Committee for Economic Affairs discussed the results of the hearing on June 11, 1997, but did not come to a conclusion. It is now adjourned and deliberation will continue in September when it will decide on amendments and on its final recommendation to the Bundestag. It is still intended to enact the new Energy Industry Act before the end of this year.

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Stadtwerke Walsrode GmbH and HASTRA
Provincial Court of Celle
November 6, 1996
E.T. 1997, Issue 1/2 at 95

Facts: The establishment of the purchase price of facilities belonging to public utilities has occasionally led to controversies. According to Article 103(1) clause 2 of the German Act Against Restraints of Competition public territorial authorities may grant public utilities exclusive concessions for the laying of fixed mains.¹ The concession agreements concerning the exclusive right of way may have a duration of up to 20 years (Article 103a(1) sentence 1 of the Act). Concession agreements often stipulate that at the end of the agreement the territorial authority may purchase the facilities of the public utility. The town Walsrode and the HASTRA company, Hanover, agreed in 1972 that the town should have the right to acquire facilities of the public utility HASTRA at the end of the concession agreement against the payment of their actual value. The town had assigned its rights to the Stadtwerke Walsrode GmbH company ("SWW"). SWW declared its preparedness to acquire the facilities only at the price which was based on the historical cost price corresponding with HASTRA's investments at the beginning of the concession agreement. SWW claimed to be entitled to the acquisition of the facilities at this price and demanded the handing over of the facilities from HASTRA.

Held: The Provincial Court of Celle held that SWW's claim against HASTRA for the handing over of the public utility's facilities against the payment of a price lower than the actual value was unfounded. The clause concerning the acquisition of the facilities contained in the contract of 1972 between the town Walsrode and HASTRA was effective and legally valid. The stipulation of the purchase price to be established on the actual value did not violate principles of antitrust law. Even if it was conceded that a lower price of the facilities would mean a lower price for the consumption of energy payable by the end consumer, this did not lead to the consequence that the assessment could only be made on the basis of the historical cost price which corresponded with HASTRA's investments at the beginning of the concession agreement. The court considered that such an assertion would be in conflict with the constitutional guaranty of property in Article 14 of the German Basic Law.²

The amendment of Article 103a of the German Act Against Restraints of Competition had the purpose of opening the territories for the supply of energy to competition. The transfer of local distribution networks from one public utility to another at a price different from the actual value would actually impede further transfers of the distribution network for an indeterminate time, if the new public utility would economically be identical with the territorial authority, because in this case both parties would be inclined to renew the contracts within 20-year periods. The court indicated that by reason of the close economic interests between the territorial authority and the new public utility, the public utility (which in fact constituted an economic affiliate of the territorial authority) would hardly be forced by the territorial authority to sell the facilities at the end of the 20-year period if it could only ask for a price on the basis of the historical cost price. Under such circumstances the development of a competitive market for the distribution of energy in the territories for supply would be unlikely. The court, accordingly, sustained that the establishment of the price for the facilities had to be based on their actual value.

1 See Arnold Vahrenwald: "Gas Supply in Germany and Anti-trust Law", (1993) 6 O.G.L.T.R. 174 at 178.

2 Article 14 of the German Basic Law states: "Property, Inheritance and Expropriation. (1) The property and the right of inheritance are guaranteed. Their content and limitations are defined by the law. (2) ..."

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