



12.7.2010

NOTICE TO MEMBERS

Subject: **Petition 0136/2010 by H. H. (German), on retail price increases to cover cartel fines**

1. Summary of petition

The petitioner is seeking a ban on retail price increases to cover cartel fines or related penalties. He refers by way of example to a fine for overcharging imposed on German power and gas network operators. They were not required to pay the fine directly and were allowed to cover the cost by subsequently increasing electricity and gas rates. The petitioner argues that this gives them an unfair advantage over their German and European competitors, who do not enjoy the same facilities with regard to future pricing structures.

2. Admissibility

Declared admissible on 4 May 2010. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 12 July 2010.

The German Regulator BNetzA has approved tariffs for access to transmission and certain distribution grids (electricity and gas). It has found that in most cases transmission and distribution system operators (TSOs and DSOs) must lower their tariffs, because the underlying costs were not fully justified. Due to the time elapsed between the entry into force of the material provisions on tariffs and costs (GasNEV and StromNEV) and the actual decisions by BNetzA, TSOs and DSOs charged network users too much in the interim period.

According to German law (section 33 of the Energy Act), BNetzA can require TSOs and DSOs to pay back such unjustified revenues. BNetzA has exercised this power. It has decided that the pay-back be realised by means of lower tariffs for some years into the future.

The petitioner requests that the Commission declare this practise unlawful and that it order TSOs and DSOs to pay back the entire amount without delay.

The decisions of BNetzA are in line with the norms of energy law. Article 3 of Regulation (EC) 1775/2005 ("the Gas Regulation") foresees that "tariffs for access to networks shall be transparent, take into account the need for system integrity and its improvement and reflect actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including appropriate return on investments, and where appropriate taking account of the benchmarking of tariffs by the regulatory authorities. Tariffs, or the methodologies used to calculate them, shall be applied in a non-discriminatory manner."

Likewise, Article 4 of Regulation (EC) 1228/2003 ("the Electricity Regulation") requires that "Charges applied by network-operators for access to networks shall be transparent, take into account the need for network security and reflect actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator and applied in a non discriminatory manner. Those charges shall not be distance-related."

The initial decisions by BNetzA ensure that the tariffs are cost-based.

The secondary decisions of BNetzA determining the (indirect) pay-back to network users by means of lower future tariffs is not in contravention to the Gas Regulation or the other legal framework in the field of energy law. The German provision empowering BNetzA to order the pay-back is not based on either Directive 2003/54/EC or Directive 2003/55/EC. Rather, it is a requirement of German law unique to energy- and anti-trust law.

In conclusion, there is no need for the Commission to act.