

Bavarian Ministry of Economic Affairs, Regional Development and Energy

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Competition Law

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LAW ON PRICING ABUSES IN ENERGY SUPPLY AND TRADE

The legislative change which came into force on 22 December 2007 is intended to counter pricing abuses in the areas of energy supply and the food trade. There have also been numerous editorial corrections in the ARC and in the Energy Industry Act (EIA) and an identical new promulgation of the penalty provisions of § 81 ARC. Furthermore, the ARC now provides for the immediate enforceability of measures concerning the abuse of competition laws.

Special Control of Abuses in the Energy Sector

§ 29 ARC, valid in the first instance until 2012, is designed to combat abuses in the energy sector more effectively. Due to the primacy of price regulation for networks laid down in the Energy Act, § 29 ARC (German: EnWG) only applies for upstream and downstream markets (electricity generation and end-consumer business). For the control of abuses by power-supply undertakings which dominate the market, the following additions to the general control of abuses in § 19 ARC are laid down:

- The expansion of the concept of comparable markets in § 29 No. 1 ARC allows greater opportunities to choose between potential comparable undertakings or comparable markets in the energy sector.
- The introduction of a concept limiting profit in § 29 No. 2 ARC prohibits charges that exceed costs to an unreasonable extent.
- In proceedings before the competition authorities, the burden of proof that deviations from comparable undertakings are objectively justified lies with the utility undertakings (reversal of the burden of proof).

Prohibiting Pricing Abuses in Trading

- Through an amendment to § 20 Para. 4 ARC, likewise valid in the first instance until 2012, the occasional sale

of food below cost price was also prohibited in principle. The sale of food below cost price is objectively justified and therefore admissible, however, if the quick sale of the food can prevent deterioration or threat of unsaleability and in similarly severe cases.

- As an example of unfair obstruction, the law now normalizes the case that undertakings that are in competition with small or medium-sized undertakings on the downstream market for the sale of goods or commercial services demand a higher price from these than they themselves demand on the corresponding downstream market (§ 20 Para. 4 Sentence 2 No. 3 ARC).