

Frankfurt, 25 March 2021

Lawsuit against water charges – GÖRG successful for City of Kassel before German Federal Administrative Court

In relation to the clarification of the legality of the calculation of water charges in Kassel and Vellmar, the German Federal Administrative Court (BVerwG), in its decision of 23 March 2021, overturned the ruling of the Hesse Administrative Court (VGH) of 11 December 2018 and referred the matter back to the VGH for a different hearing and ruling.

At the time, the VGH had considered the water charges levied by the city of Kassel to be unlawful. In the opinion of the VGH, the concession fee included in the calculation of the fees pursuant to the Energy Industry Act for the use of public transport routes should not have been taken into account. Fees for external services, such as the fee agreed here between the municipal utility KASSELWASSER and Städtische Werke Netz+Service GmbH (NSG), may only be included in the fee calculation in the amount required for the water supply. As a rule, external service charges were necessary if they complied with the provisions of the Annex to Regulation PR No. 30/53 on Prices for Public Contracts of 21 November 1953 (Guidelines for Price Determination on the Basis of Cost Price). However, this was not the case, according to the VGH, because the city itself created costs through the chosen form of organisation, which were ultimately financed by the fee payer and flowed into the general budget. This contradicts No. 4 (2) of the guiding principles for price determination, because according to this, only those costs are to be taken into account which arise in the case of economic management for the provision of the services.

The BVerwG has now objected to this interpretation of federal price law. When examining the fee agreed between the municipal utility and the NSG, the VGH should not have looked at the city of Kassel – as was done – but should have focused on the reasonable costs of the NSG. For NSG, however, concession fees are operational costs that inevitably arise with the provision of services.

According to the BVerwG, the finding that the concession fee is permissible under price law within the framework of the fee paid to the utility company does not clarify whether it can also be taken into account in the calculation of the fee and passed on to the end consumers. This would depend on further prerequisites of the municipal levy law, which are assessed solely according to the Hessian state law and therefore do not have to be decided in the appeal proceedings. The BVerwG therefore set aside the judgement and referred the case back to the VGH for a different hearing and ruling.

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