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Successful action by CMS Hasche Sigle in SWM Infrastruktur Region case before Munich Higher Regional Court: No claw-back of excess revenue without consideration of revenue shortfalls due to quantity forecasts

Munich – On 18 October 2012, Munich Higher Regional Court partially overturned a revenue limit adjustment and amendment decision by the government of Upper Bavaria following a complaint brought by SWM Infrastruktur Region GmbH.

The government had imposed a claw-back of excess revenues calculated for the period between the initial application for a permit in 2006 and issuing of the permit under section 23 a of the Energy Industry Act (EnWG) in 2007. The claw-back mechanism is intended to return to network users excess revenues generated by the network operator through continued application of the previous (unregulated) grid fees in the period between the application being submitted and the permit being issued, as allowed under the EnWG.

The relevant government agency had divided the excess revenue claw-back period into two annual periods and only taken revenue shortfalls due to quantity forecasts into account for one of the periods, where they were lower than the excess revenues achieved through retaining the previous fees. The agency did not take them into account for the second period, where they were higher than the excess revenues. The HRC ruled that the agency was not allowed to act in this manner.

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A team from CMS Hasche Sigle led by energy and competition law partner Dr Rolf Hempel represented SWM Infrastruktur Region GmbH, a network operator owned by Munich's municipal utility company, Stadtwerke München GmbH, in the complaints procedure.

The HRC denied leave to appeal against the decision. The agency can however appeal against denial of leave to appeal.

Advisers CMS Hasche Sigle

Dr Rolf Hempel

Agnes Wippich, both Energy

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