BundesKartellamt

Dokumentation

Wettbewerbspolitik am Scheideweg?

XI. Internationale Kartellkonferenz – Bonn 2003

Proceedings

Competition Policy at the Crossroad?

11th International Conference on Competition – Bonn 2003

BUNDESKARTELLAMT

Wettbewerbspolitik am Scheideweg?

– Möglichkeiten und Grenzen wettbewerbsrechtlicher Kontrolle –

Competition Policy at the Crossroads?

– Possibilities and Limits of Competition Control –

Dokumentation der
XI. Internationalen Kartellkonferenz
18. – 20. Mai 2003 in Bonn

Proceedings of the
11th International
Conference on Competition
18 – 20 May 2003 in Bonn

Vorbemerkung

Die Globalisierung von Unternehmen und Märkten sowie die Liberalisierung vieler in der Vergangenheit dem Wettbewerb entzogener Wirtschaftsbereiche haben die Unternehmen, aber auch Politik, Rechtsprechung und Wissenschaft, vor große Herausforderungen gestellt. Fragen auf ganz neuen Problemfeldern streben nach Antworten.

Auswirkungen dieser Entwicklung auf die Wettbewerbsordnungen sind unausweichlich. Kann die Politik, können die Wettbewerbsbehörden ihrer Aufgabe als Hüter offener Marktstrukturen mit fairen Zutrittschancen in der Zukunft noch gerecht werden? Reicht das Bemühen der Wettbewerbsbehörden, weltweit auf freiwilliger Basis enger als bisher zu kooperieren, aus, um Fehlentwicklungen entgegen zu wirken? Welche Rolle kommt internationalen Organisationen wie OECD, WTO, UNCTAD und dem International Competition Network (ICN) zu? Bietet das im Entstehen begriffene Netzwerk der Wettbewerbsbehörden innerhalb der Europäischen Union ein übertragbares Beispiel für eine grenzüberschreitende Zusammenarbeit?

Die Diskussion während der XI. Internationalen Kartellkonferenz am 19. und 20. Mai 2003 in Bonn hat die Aktualität und Brisanz der Fragestellungen eindrucksvoll untermauert. Die vorliegende Broschüre hat es sich zur Aufgabe gemacht, alle Vorträge und Podiumsbeiträge mit ihren unterschiedlichen Standpunkten und Lösungsvorschlägen in der Originalsprache zu dokumentieren. Ergänzend dazu wurden die französisch- und deutschsprachigen Beiträge ins Englische übertragen.

Preface

The globalisation of companies and markets and the liberalisation of many economic sectors which had previously not been exposed to competition have posed great challenges not only for the companies themselves but also for policy-makers, legal practitioners and the academic world. Questions relating to entirely new problem areas need to be answered.

It is inevitable that this development will affect competition regimes. Will policy makers and competition authorities be able to fulfil their role as guardians of open market structures with fair access opportunities in future? Will the efforts of the competition authorities to voluntarily cooperate more closely than before at international level suffice to address any adverse developments? What role are international organisations such as the OECD, WTO, UNCTAD and the International Competition Network (ICN) to play in this? Can the emerging network of competition authorities within the European Union act as a model for other forms of international cooperation?

The discussion during the 11th International Conference on Competition in Bonn on 19 and 20 May 2003 clearly underpinned the topicality of these questions. This brochure documents all the speeches and panel discussions with their various standpoints and solution proposals in the original language. It also contains an English translation of the speeches given in French and German.

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INTRODUCTORY PAPERS

Dr. Ulf Böge

Präsident des Bundeskartellamtes

I.

Ich begrüße Sie ganz herzlich zur Internationalen Kartellkonferenz in Bonn, der elften seit 1982.

Der Gedanke, die damals noch kleine „Wettbewerbsfamilie“ zusammen zu führen, geht auf meinen Vor-Vorgänger Wolfgang Kartte zurück. Er gab damit den Startschuss für die Internationalisierung der Wettbewerbspolitik und für eine umfassende Zusammenarbeit der Wettbewerbsbehörden.

Wolfgang Kartte hat vor allem aber die Entwicklung der Wettbewerbskultur in Deutschland mitgeprägt. Die Einführung der Fusionskontrolle in Deutschland gehört mit zu seinem Lebenswerk.

Aus Altersgründen schied er 1992 aus dem Bundeskartellamt aus. Aber er hat sich nicht zur Ruhe gesetzt. Er wurde aktiver Berater in Russland, und noch Anfang März nahm er an einer Kartellkonferenz in Indonesien teil. Er hatte das Land über Jahre bei der Einführung des Kartellrechts unterstützt.

Am 21. März 2003 verstarb Wolfgang Kartte im Alter von 75 Jahren in Berlin für uns alle überraschend. Ich möchte Sie bitten, sich ihm zu ehrendem Gedenken von Ihren Plätzen zu erheben. Ich danke Ihnen.

II.

Das heutige Treffen hat einen gewissen Premierecharakter: Erstmals findet unsere Tagung nicht in Berlin, sondern in der neuen Heimatstadt des Bundeskartellamtes, hier in Bonn, statt.

Eine weitere Besonderheit ist der Ort unserer Konferenz: Wir tagen im ehemaligen Plenarsaal des Deutschen Bundestages. Mit dem Umzug der Bundesregierung nach Berlin als Folge der deutschen Wiedervereinigung hat dieses Parlamentsgebäude in Bonn als Kongreßzentrum eine neue Rolle gefunden. Eine wichtige, denn Bonn ist als Tagungsstadt gefragt.

Das zeigt auch diese Veranstaltung. Ich freue mich, dass ich trotz der in mancher Hinsicht widrigen Umstände 51 Länder mit mehr als 300 Teilnehmern begrüßen darf – mehr als je zuvor.

Aufgrund der Vorsichtsmaßnahmen, die SARS erforderlich macht, haben die taiwanesische und chinesische Delegation abgesagt. Damit leider auch Frau Prof. Wang, die morgen daher nicht an der Podiumsdiskussion mitwirken kann. Ich bedaure das sehr.

III.

Erlauben Sie mir, stellvertretend für die inländischen und ausländischen Teilnehmer, die hier versammelt sind, einige namentlich zu begrüßen.

Herzlich willkommen heiße ich insbesondere die Oberbürgermeisterin der Bundesstadt Bonn, Frau **Dieckmann**.

Sie wird nicht nur gleich ein Grußwort an uns richten. Sie hat uns schon im Vorfeld der Konferenz tatkräftig unterstützt. Ihr gebührt ein besonderer Dank.

Eine besondere Freude ist es mir, auf unserer Tagung wieder Kommissar **Mario Monti** begrüßen zu können. Niemand wäre geeigneter, uns in das Thema aus europäischer Sicht einzuführen. Wir blicken erwartungsvoll auf die Ausführungen und danken schon an dieser Stelle.

Mein besonderer Dank gilt Herrn Staatssekretär **Dr. Tacke** vom Bundesministerium für Wirtschaft und Arbeit. Er ist freundlicherweise kurzfristig für Minister Clement eingesprungen, der seiner Heimatstadt leider einen Korb geben musste. Herr Dr. Tacke wird sicher etwas dazu sagen. Dass Sie für ein paar Stunden Bonn den Vorzug vor Berlin geben, wissen wir zu schätzen, deshalb „willkommen in Bonn".

Als weiteren Redner unserer Eröffnung an diesem Vormittag begrüße ich den Vorstandsvorsitzenden der Deutschen Post World Net, Herrn **Dr. Zumwinkel**.

Die Post in Deutschland vom Staatsmonopol zum privatwirtschaftlichen Dienstleister, konfrontiert mit einer Sonderregulierung und dem Wettbewerbsrecht in Deutschland wie in der EU – eine vielversprechende Konstellation für die Themenbehandlung aus unternehmerischer Sicht. Herzlichen Dank für die Annahme der Herausforderung. Dank aber auch nochmals für die gestrige Gelegenheit, den Sitz des Unternehmens im wahrsten Sinne des Wortes „erfahren" zu dürfen.

Mein weiterer Dank gilt den Moderatoren der beiden Panels, Herrn **Bodo Hauser** und Herrn **Prof. Wernhard Möschel**.

Besonders freue ich mich, dass die internationale Beteiligung an unserer Konferenz auch in diesem Jahr weiter gewachsen ist: Es sind Vertreter der EU-Kommission, der OECD, der Weltbank, der UNCTAD, der WTO, der EFTA, erstmals von CUTS und von 51 nationalen Wettbewerbsbehörden anwesend. Neben Ländern mit langjährig erprobter Wettbewerbsordnung sind auch viele Länder vertreten, die erst seit jüngerer Zeit über ein Wettbewerbsregime verfügen. Stellvertretend für die Repräsentanten der nationalen Wettbewerbsbehörden begrüße ich

- **Ms Deborah P. Majoras**, Deputy Assistant in der US-amerikanischen Antitrust Division im US Department of Justice,

- Madame **Marie-Dominique Hagelsteen**, Präsidentin des Conseil de la Concurrence, Paris,

- **David Lewis** als Vorsitzenden des Competition Tribunal Südafrika,

- **Finn Lauritzen** als Leiter der dänischen Wettbewerbsbehörde und

- meinen Kollegen in der Direktion Wettbewerb in Brüssel, **Philip Lowe**.

Sie alle werden wir noch als Diskutanten auf den Panels erleben zusammen mit

- Herrn **Dr. Josef Ackermann**, Vorstandssprecher der Deutschen Bank,

- Herrn **Prof. Roland Berger**, Geschäftsführer der Roland Berger Strategy Consultants,

- Herrn **Dr. Burckhard Bergmann**, Vorstandsvorsitzender der Ruhrgas AG,

- Herrn **Dr. Ganal**, Mitglied des Vorstandes der BMW AG,

- **Graf Lambsdorff**, früherer Bundesminister für Wirtschaft,

- und nicht zuletzt Herrn **Bo Vesterdorf**, Präsident des EuGH 1. Instanz.

Als Mitglied des Deutschen Bundestages nimmt Herr **Hartmut Schauerte**, als Vertreter des Europäischen Parlaments Herr **Dr. Werner Langen** teil. Es ist mir eine besondere Ehre, Sie als Vertreter der Legislative begrüßen zu dürfen.

Gerichte, Wissenschaft und Anwaltschaft sind mit einer ganzen Reihe von namhaften Personen vertreten, wie auch die Monopolkommission. Ich begrüße stellvertretend

- den Präsidenten des EFTA-Gerichts in Luxemburg, Herrn **Prof. Carl Baudenbacher**,

- den Senatspräsidenten des OLG Wien, Herrn **Dr. Eckhard Hermann**,

- den Präsidenten des Landgerichts Bonn, Herrn **Kurt Pillmann**,

- den Vorsitzenden der Monopolkommission, Herrn **Prof. Martin Hellwig**

- und als Vorsitzenden der Studienvereinigung Kartellrecht, Herrn **Dr. Cornelis Canenbley**.

Für eine breitere Resonanz des Wettbewerbsgedankens in der Öffentlichkeit sorgen die Vertreter der Medien – und das nicht nur anlässlich dieser Tagung, sondern auch im Alltagsgeschäft. Ich heiße Sie herzlich willkommen.

Wenn die Wettbewerbsbehörden aus aller Welt hier so zahlreich vertreten sind, so geht das nicht zuletzt zurück auf die Unterstützung der Veranstaltung durch

- die Deutsche Stiftung für internationale rechtliche Zusammenarbeit,
- die Konrad-Adenauer-Stiftung,
- die Friedrich-Naumann-Stiftung,
- die Heinrich-Böll-Stiftung,
- die Internationale Weiterbildung und Entwicklung gGmbH,
- die Bundesstadt Bonn,
- und natürlich die Studienvereinigung Kartellrecht.

Ihnen allen danke ich herzlich.

IV.

Schon die breite internationale Beteiligung belegt, dass der Wettbewerbsgedanke weltweit immer weitere Verbreitung findet. In mehr und mehr Ländern werden Wettbewerbsordnungen geschaffen. Wenn ich mich auf die Angaben des International Competition Network (ICN) stütze, so ist inzwischen die Marke von neunzig Ländern überschritten, die über eine Wettbewerbsordnung verfügen.

Den weltweiten Siegeszug des Wettbewerbsprinzips können wir alle wohl nur begrüßen.

Doch damit stellt sich gleichzeitig eine Frage mit immer größerer Dringlichkeit: Wie weit darf, wie weit muss der Staat zum Schutz des Wettbewerbs in das wirtschaftliche Geschehen – also in das Handeln der Wirtschaftssubjekte – eingreifen? Dies ist eine Frage von grundlegender Bedeutung für die Akteure im Markt ebenso wie für Wettbewerbsaufsicht und Wettbewerbspolitik.

Wettbewerbsbehörden sollen den Wettbewerb schützen, ohne die wettbewerblichen, dynamischen Prozesse in den Märkten zu beeinträchtigen. Der Schutz des Wettbewerbs darf eben nicht zum Schutz vor dem Wettbewerb werden.

In dynamischen Märkten kommt es zwangsläufig zu Ungleichgewichten zwischen den Marktteilnehmern. Dies ist Ausdruck unternehmerischer Freiheit, mit ihren Chancen und ihren Risiken, und das ist es, was den Wettbewerb auszeichnet. Es ist

nicht Aufgabe der Wettbewerbsbehörden, in diese Dynamik zugunsten der vermeintlich Schwächeren einzugreifen.

Doch: Wo enden die durch den Wettbewerb bedingten, unvermeidlichen und notwendigen Größen- und Machtunterschiede der Marktteilnehmer? Wo beginnen verfestigte, nicht mehr durch Wettbewerb kontrollierte Machtstellungen?

Die Wettbewerbsaufsicht operiert hier in einem schwierigen Spannungsfeld. Das gilt für die Missbrauchsaufsicht, wie es insbesondere in netzgebundenen Industrien deutlich wird.

Ganz eigene Fragen wirft auch die Fusionskontrolle auf.

Gerade bei Unternehmenszusammenschlüssen zeigt sich, dass die Wettbewerbspolitik von der Industriepolitik nur durch eine dünne Linie getrennt ist, die schnell überschritten werden kann.

V.

Zur Einführung in das weite Themenfeld der Tagung hören wir heute Vormittag Vorträge aus der Perspektive der deutschen und der europäischen Wettbewerbspolitik sowie aus der Perspektive eines Global Players im Markt.

In der ersten Podiumsdiskussion am Nachmittag, soll der schmale Grat, auf dem Wettbewerbspolitik und Wettbewerbsaufsicht balancieren müssen, abgesteckt werden.

Die zweite Podiumsdiskussion morgen Vormittag ist den internationalen, den globalen Fragen der Wettbewerbsaufsicht gewidmet. Heute ist die Wettbewerbsordnung nicht mehr eine rein nationalstaatliche Frage. Ein Ansatz, der über die Grenzen einzelner Länder hinausreicht, ist unerlässlich.

An Initiativen hierzu mangelt es derzeit wahrlich nicht. An vorderster Stelle möchte ich hier die Europäische Union nennen. Im Rahmen der gerade erst verabschiedeten neuen Verordnung zur Kartellbekämpfung wird das "European Competiton Network" entstehen. Im Rahmen dieses Netzwerkes werden die europäischen Wettbewerbsbehörden auf einer verbindlichen und rechtlich abgesicherten Grundlage bei der Kartellbekämpfung zusammenarbeiten. Aber auch über Europa hinaus bemühen sich eine Reihe von Initiativen um die Vermittlung eines Grundkonsenses im Bereich der Wettbewerbspolitik.

Ich meine hier die WTO. Die Mitgliedstaaten stehen vor der Entscheidung, ob in Cancun im Herbst dieses Jahres konkrete Beschlüsse zur Aufnahme von Verhandlungen über ein Wettbewerbsabkommen auf-

genommen werden sollen. Parallel zu diesen Bemühungen sind zu erwähnen das Global Forum on Competition der OECD sowie das International Competition Network (ICN).

Die Weichen für die Vermittlung eines weltweiten wettbewerbspolitischen Grundkonsenses sind gestellt. Nur, welche Richtung werden all diese Initiativen einschlagen? Welche wird sich durchsetzen? Welche spiegelt den bislang erzielten Grundkonsens am besten wider?

Die Diskussion hierüber ist dem morgigen Vormittag vorbehalten.

Dr Ulf Böge
President of the Bundeskartellamt

I.

I warmly welcome you to the International Conference on Competition in Bonn, the eleventh conference since 1982.

The idea to bring together the "competition family" which, at that time, was still a small one, goes back to my pre-predecessor Wolfgang Kartte. He thus gave the starting signal for the internationalisation of competition policy and a comprehensive cooperation between the competition authorities.

But above all Wolfgang Kartte left his mark on the development of competition culture in Germany. The introduction of merger control in Germany is one part of his life's work.

In 1992 he retired from the Bundeskartellamt for reasons of age. He did not, however, settle down and rest. He became an active adviser in Russia and as recently as early March this year he participated in a competition conference in Indonesia. He had supported this country in the process of introducing competition law for many years.

To the surprise of all of us Wolfgang Kartte passed away on 21 March 2003 in Berlin at the age of 75 years.

I would ask you now to rise from your seats in memory and respect of him. Thank you.

II.

Our conference today is somewhat of a première as we are not meeting in Berlin, but here in the Bundeskartellamt's new hometown, Bonn.

Another special feature is the venue of our conference: we are meeting in the former Plenary Hall of the German Bundestag. After the federal government had moved to Berlin as a consequence of the German reunification this parliamentary building found a new role as a congress centre in Bonn. And an important one at that, as Bonn is much in demand as a conference venue.

This is also shown by our conference. I am pleased to be able to welcome, despite some unfavourable circumstances, more than 300 participants from 51 countries – more than ever before.

Due to the precautionary measures required because of SARS the Tai-

wanese and Chinese delegations have cancelled their participation. Unfortunately this means that Prof Wang will not be able to participate in the panel discussion tomorrow. I regret this very much.

III.

Let me welcome some of our participants from Germany and abroad:

I would like to extend a particularly cordial welcome to the Mayor of the City of Bonn, **Ms Dieckmann**.

She will not only give a welcoming address later on, but has already actively supported us in preparing this Conference. We owe her special thanks for this.

It is my great pleasure to be able to welcome Commissioner **Mario Monti** again at our Conference. Nobody could be in a better position to give us an introduction into our theme from a European perspective. We are looking forward to your contribution and thank you already very much in advance.

My special thanks go to State Secretary **Dr Tacke** from the Federal Ministry of Economics and Labour. He has kindly agreed at short notice to stand in for Minister Clement who unfortunately had to turn down his hometown. Dr Tacke will surely say a few words about this. We appreciate very much that for a few hours you have given Bonn preference over Berlin, so therefore "welcome to Bonn".

As a further speaker at the opening of our Conference this morning I welcome the Chairman of the Board of Management of Deutsche Post World Net, **Dr Zumwinkel**.

The German postal services developing from a state monopoly to a private-sector service provider confronted with special regulation and both German and European competition law – a promising scenario for discussing our theme from an entrepreneurial perspective. Thank you very much for accepting the challenge. And thank you once again for giving us the opportunity yesterday to literally "experience" your company's headquarters.

My further thanks are due to the moderators of the two panel discussions, Mr **Bodo Hauser** and Prof **Wernhard Möschel**.

I am particularly pleased to note that international participation in our Conference has increased further this year as well. Present here today are representatives of the European Commission, the OECD, the World Bank, the UNCTAD, the WTO, the EFTA and, for the first time the CUTS, as well as members

of 51 national competition authorities. Apart from countries with long proven competition systems many countries are represented here which have only recently introduced a competition regime. Representing some of the national competition authorities I welcome

- Ms **Deborah Majoras,** Deputy Assistant Attorney General of the US Antitrust Division at the Department of Justice,

- Madame **Marie-Dominique Hagelsteen,** President of the Conseil de la Concurrence, Paris,

- **David Lewis,** Chairman of the Competition Tribunal in South Africa,

- **Finn Lauritzen,** Head of the Danish competition authority, and

- my colleague at the Directorate General for Competition in Brussels, **Philip Lowe.**

We will see all of them during the panel discussions together with

- **Dr Josef Ackermann**, Spokesman of the Board of Deutsche Bank in Frankfurt,

- **Prof Roland Berger**, Managing Director of Roland Berger Strategy Consultants,

- **Dr Burckhard Bergmann**, Chairman of the Board of Ruhrgas AG

- **Dr Ganal**, Member of the Board of BMW AG

- **Graf Lambsdorff**, former Federal Minister of Economics

- and last not least **Bo Vesterdorf**, President of the European Court of First Instance.

Mr **Hartmut Schauerte** is present as a Member of the German Bundestag and **Dr Werner Langen** represents the European Parliament. It is a special honour for me to welcome you here as representatives of the legislative branch.

Courts of law, academics and lawyers are represented here by a whole range of renowned participants, just as the Monopolies Commission. As representatives of this group I welcome

- the President of the EFTA Court in Luxembourg, **Prof Carl Baudenbacher,**

- the President of the Senate of the Vienna Higher Regional Court, **Dr Eckhard Hermann,**

- the President of the Bonn Regional Court, Mr **Kurt Pillmann,**

- the Chairman of the Monopolies Commission, **Prof Martin Hellwig**

- and the Chairman of the Studienvereinigung Kartellrecht, **Dr Cornelis Canenbley**.

The representatives of the media ensure that the principle of competition will meet with greater resonance by the public - not only on the occasion of this Conference, but also in day-to-day work. I extend a warm welcome to you.

The fact that so many competition authorities from all over the world are represented here today is not least thanks to the support provided by

- the German Foundation for International Legal Cooperation,

- the Konrad Adenauer Foundation,

- the Friedrich Naumann Foundation,

- the Heinrich Böll Foundation,

- InWEnt, Capacity Building International,

- the City of Bonn

- and, of course, the Studienvereinigung Kartellrecht.

My cordial thanks to all of you.

IV.

The large international participation alone shows that the principle of competition is becoming increasingly widespread throughout the world. More and more countries are creating competition regimes. According to information provided by the International Competition Network (ICN) the landmark number of ninety countries relying on a competition regime has meanwhile been surpassed.

I think we can only welcome the worldwide triumph of the principle of competition.

At the same time, however, the following question is becoming more and more urgent: How much can and must governments intervene in economic affairs, i.e. in the activities of the economic actors, in order to protect competition? This question is of profound importance to the actors in the market as well as for competition control and competition policy.

Competition authorities are to protect competition without impairing the competitive, dynamic processes in the markets. Protection of com-

petition must not turn into protection from competition.

In dynamic markets imbalances between the market participants inevitably occur. This is an expression of entrepreneurial freedom, with all its opportunities and risks, and this is the nature of competition. It is not the competition authorities' task to intervene in these dynamics in favour of the supposed weaker parties.

But looking at the inevitable and necessary differences between the market participants in terms of size and power which are caused by competition: at which point do they end? Where do consolidated positions of power which are no longer controlled by competition begin?

In this respect competition control operates in a difficult area of conflict. This also applies to abuse control which is particularly evident in network-related industries.

Merger control also raises very specific issues.

Company mergers above all show that competition policy and industrial policy are only separated by a thin line which can easily be crossed.

V.

As an introduction into the Conference's broad theme area we will hear some speeches this morning from the perspective of German and European competition policy and also from the perspective of a global market player.

The first panel discussion in the afternoon is going to outline the narrow line across which competition policy and competition control have to balance their way.

The second panel discussion tomorrow morning is devoted to the international, global issues of competition control. Today a competition regime is no longer a purely national issue. An approach which transcends the borders of individual countries is essential.

There is indeed no lack of initiatives here. First of all I would like to mention the European Union. Within the context of the new regulation on combating cartels which has just recently been passed the "European Competition Network" will be created. Within the framework of this network the European competition authorities will cooperate in combating cartels on a binding and legally secured

basis. But there are also a number of initiatives which endeavour to achieve a basic consensus on competition policy also beyond Europe.

I am talking about the WTO. The member states will have to make a decision on whether concrete decisions to take up negotiations on a competition agreement are to be adopted in autumn this year in Cancun. Also to be mentioned in parallel to these efforts are the OECD's Global Forum on Competition and the International Competition Network (ICN).

The course has been set for achieving a worldwide basic consensus on competition policy. But which direction will all these initiatives take? Which one will gain acceptance? Which one is best able to reflect the basic consensus achieved so far?

The discussion of these issues is left to tomorrow morning.

Bärbel Dieckmann

Oberbürgermeisterin
der Stadt Bonn

Herr Kommissar Professor Monti,

Herr Staatssekretär Dr. Tacke,

Herr Dr. Zumwinkel,

Herr Dr. Böge,

verehrte Gäste aus mehr als 50 Ländern,

meine Damen und Herren,

viele von Ihnen konnte ich schon gestern bei der Schifffahrt auf dem Rhein willkommen heißen. Heute ist es mir eine ganz besondere Freude, Sie hier im ehemaligen Plenarsaal des Deutschen Bundestages begrüßen zu dürfen. Dieser Plenarsaal wurde erst 1992 fertig gestellt. Er war noch in der Annahme geplant und in Angriff genommen worden, dass er ein modernes Plenum für ein offenes Parlament der Bundesrepublik Deutschland sein würde. Wie Sie wissen, ist der Deutsche Bundestag 1999 nach Berlin übergesiedelt. Seither wird dieses Haus als Kongresszentrum genutzt, vor allem auch als Konferenzort für internationale Tagungen.

Ich glaube, es ist eines der schönsten Kongresszentren in der Bundesrepublik Deutschland mit seiner Lage direkt am Rhein.

Ich glaube, dass seine Helligkeit und Offenheit das Tagungsklima besonders günstig beeinflusst.

Ich glaube, dies ist ein Kongresszentrum, das durch seine parlamentarische Sitzordnung in besonderer Weise Diskussionen fördert.

Ich wünsche Ihnen, dass dieses vom Architekten Behnisch errichtete Gebäude sich auch auf Ihre Beratungen besonders positiv auswirkt. Übrigens planen wir, schräg gegenüber dem Eingang noch einen zweiten größeren Kongresssaal zu errichten. Damit schaffen wir die Voraussetzungen für große internationale Konferenzen der Vereinten Nationen und anderer Veranstalter, beispielsweise großer Aktionärsversammlungen.

Ich will Sie jetzt nicht nach Ihrer Sitzordnung einer Fraktion oder einer Partei zuordnen. Vielleicht könnte sich der eine oder andere getroffen fühlen.

Möge Ihnen dieser helle und ansprechende Raum gute Diskussionen ermöglichen, Diskussionen zu schwierigen Fragestellungen, wie Sie sie sich vorgenommen haben:

Wie weit können und sollen Wettbewerbsbehörden bei ihren Entscheidungen gehen?

Gibt es einen internationalen wettbewerbspolitischen Grundkonsens?

Wenn ja, wie kann dieser in internationalen Organisationen vermittelt werden?

Spannende Fragen, Fragen am Puls der Zeit.

Wenn Sie sich im Umfeld des Plenarsaals im sogenannten ehemaligen Regierungsviertel umschauen, werden Sie feststellen: Hier steht die Zeit nicht still.

Viele von Ihnen waren gestern mit auf dem Posttower, der neuen Konzernzentrale der Post AG. Er ist so etwas wie zu einem neuen Symbol für unsere Stadt geworden.

In die prächtigen Villen des ehemaligen Regierungsviertels, zum großen Teil ehemalige Vertretungen der Bundesländer, sind zwischenzeitlich moderne Dienstleistungs- und Technologieunternehmen eingezogen.

Unser ehemals höchstes Gebäude, der sogenannte "Lange Eugen", der Büroraum für Abgeordnete des Deutschen Bundestages bot, wird gegenwärtig renoviert und wird bald Teil des neu zu gründenden UN-Campus sein. In unmittelbarer Nachbarschaft befindet sich die Zentrale der "Deutschen Welle". Der ursprünglich als Büroraum für Abgeordnete geplante Gebäudekomplex wurde in den vergangenen Jahren zu einer der modernsten Sendeanstalten umgebaut. Im Juni diesen Jahres wird sein neuer Besitzer, die "Deutsche Welle", mit rund 1000 Mitarbeitern in das elegante Gebäude einziehen.

Und erst vor kurzem wurde der ehemalige Presseclub, zu Hauptstadtzeiten die Informations- und Austauschbörse für Presseleute, als "Bonner Presseclub" wieder eröffnet. Heute sind es vor allem die Journalisten der internationalen Pressedienste, die aus der UNO-Stadt Bonn in alle Welt berichten, auch über internationale Konferenzen wie die Ihre.

Schon in den vergangenen Jahren konnte Bonn immer wieder zeigen, dass es ein guter Kongressort ist:

2 Weltklimagipfel, 1 Vertragsstaatenkonferenz des VN-Wüstensekretariates, 1 große internationale Süßwasserkonferenz, 2 Afghanistan-Konferenzen sind Beispiele.

Parallel zu Ihrer XI. Internationalen Kartellkonferenz finden eine Reihe weiterer Tagungen in Bonn statt:

- am 20. und 21. Mai das 6. Deutsche Weltbankforum und das 1. ICT Development Forum auf dem Petersberg. In beiden Konferenzen geht es um den Einsatz von IT zur Bekämpfung von Armut in der Welt;

- der Jahreskongress der Deutschen Gesellschaft für Regula-

tory Affairs, gleich hier nebenan im Wasserwerk;

- die Internationale Konferenz über ländliche Lebensbedingungen, Wälder und Artenvielfalt in der Bundeskunsthalle;

- das sechste Windows-Forum 2003 in der Beethovenhalle.

Dies alles zeigt: Der schwierige Strukturwandel, den diese Stadt zu bestehen hatte, ist weitgehend gelungen.

Als der Deutsche Bundestag 1991 die Entscheidung getroffen hat, das Parlament und Teile der Bundesregierung nach Berlin zu verlagern, hätten wir dies nicht zu hoffen gewagt. Wir haben im Zuge dieser Entscheidung etwa 21.000 Arbeitsplätze verloren. 35.000 Menschen haben die Region um Bonn verlassen. Das ist bei einer Einwohnerzahl von 310.000 Einwohnern eine nicht zu vernachlässigende Größe. Unsere Anstrengungen gingen vor allem dahin, mit den Stärken, die wir in der Zeit als Bundeshauptstadt seit 1949 entwickelt hatten, neue Profile aufzubauen:

- als Stadt von Bundeseinrichtungen und Bundesbehörden

- als UN- und internationale Stadt

- als Wissenschaftsstadt

- als moderner Wirtschaftsstandort

- als Kulturstadt

Der Gedanke, Bonn zur VN-Stadt und zu einem Zentrum für internationale Zusammenarbeit auszubauen, ist schon im Berlin/Bonn-Gesetz von 1991 vorhanden. Bonn hat dafür gute Voraussetzungen geboten. Es ist eine Stadt mit einer guten internationalen Infrastruktur, mit internationalen Schulen, mit internationalen Kindergärten, mit einer international ausgerichteten Universität und mit einer guten internationalen Verkehrsanbindung.

Deshalb waren die Ansiedlungen von UN-Einrichtungen eine wichtige Grundentscheidung. Bisher sind es 12 Einrichtungen mit rund 550 Arbeitsplätzen, die ihren Sitz in Bonn genommen haben. Ich nenne als Beispiele das United Nations Volunteers Programme, das VN-Klima-Sekretariat oder das VN-Wüstensekretariat. Sie arbeiten in einem Umfeld von rund 150 Nichtregierungsorganisationen und Einrichtungen der deutschen Entwicklungszusammenarbeit.

Wir können heute sagen, dass wir nicht mehr der Ort sind, in dem in erster Linie durch den Außenminister und den Kanzler internationale Politik gemacht wird, aber Bonn wird mehr und mehr zum Ort, an dem internationaler Dialog statt-

findet. So hat sich Bundeskanzler Schröder auch dafür ausgesprochen, die von ihm in Johannesburg angekündigte Konferenz über erneuerbare Energien im nächsten Jahr in Bonn abzuhalten.

Der 2. große Profilbereich der Bundesstadt Bonn sind die 6 Ministerien, die ihren 1. Dienstsitz in Bonn behalten haben, und die ca. 20 Bundeseinrichtungen, die von Berlin und Frankfurt nach Bonn übergesiedelt sind. Wir haben uns natürlich darüber gefreut, dass darunter das Bundeskartellamt mit seinem agilen Präsidenten, Herrn Dr. Böge, war.

Mit seiner 1818 gegründeten Universität und ihren heute rund 37.000 Studenten aus 142 Nationen war Bonn als Wissenschaftsstadt prädestiniert. Wir haben erkannt, dass wir hier in einer Wissenschaftsregion mit den Städten Aachen, Bonn, Köln mit immerhin 150.000 Studierenden, 20.000 Professoren und Dozenten leben. In und in der Region Bonn befinden sich zahlreiche große Forschungseinrichtungen und Wissenschaftsmittlerorganisationen.

Was früher weniger ausgeprägt war, was durch die Privatisierung des Ministeriums für Post und Telekommunikation gefördert wurde, das ist der Wirtschaftsstandort Bonn mit der Deutschen Post Worldnet und der Deutschen Telekom, mit etlichen Tochterfirmen. Aber auch im privaten Dienstleistungsbereich sind seit 1991 in Bonn ca. 15.000 Arbeitsplätze entstanden. Darüber hinaus ist es uns gelungen, Arbeitsplätze im Produktionsbereich zu erhalten. Immerhin noch 12 % unserer Arbeitsplätze liegen in diesem Bereich. Und auch dies ist für die städtische Entwicklung nicht unwichtig.

Eigentlich müsste ich es sehr bedauern, dass Sie heute morgen nicht an dem Kulturprogramm teilnehmen können, das unter der Überschrift Kunst und Musik in der Beethovenstadt Bonn steht. Aber vielleicht finden Sie die Zeit, sich etwas erzählen zu lassen über die Museen an der Museumsmeile, über das Bonner Münster, über Beethovens Geburtshaus, und vielleicht haben Sie Lust, noch einmal wiederzukommen.

Wir haben hier in Bonn sehr häufig Ausstellungen, die einen Besuch lohnen. Die Bundeskunsthalle war im vergangenen Jahr nach dem Deutschen Museum in München das am meisten besuchte Museum in Deutschland. Es würde sich aber vor allem auch im September lohnen, zum Beethovenfest nach Bonn zu kommen. Beethoven ist in Bonn geboren. Sein Geburtshaus wird von vielen Menschen aus aller Welt besucht. Ein attraktives Konzertprogramm von Mitte September bis Mitte Oktober lockt in dieser Zeit viele nach Bonn.

Ich wünsche Ihnen eine erfolgreiche Konferenz, gute Gespräche am Rande, vielleicht auch etwas Zeit, einen persönlichen Eindruck von unserer Stadt zu gewinnen und hoffe sehr, Sie im Jahr 2005 wieder bei uns hier in Bonn begrüßen zu dürfen.

Bärbel Dieckmann
Mayor of Bonn

Commissioner Professor Monti,

State Secretary Dr Tacke,

Dr Zumwinkel,

Dr Böge,

dear guests from more than 50 countries,

Ladies and Gentlemen,

I already had the pleasure to welcome many of you yesterday during the cruise on the Rhine. Today it is a special honour for me to welcome you here in the former Plenary Hall of the German Bundestag. This plenary hall was only completed in 1992. It was planned and built on the assumption that it would serve as a modern plenary hall for an open parliament of the Federal Republic of Germany. But as you know, the German Bundestag moved to Berlin in 1999. Since then this building has been used as a congress centre, in particular for international conferences.

I believe that with its direct location on the Rhine it is one of the finest congress centres in the Federal Republic of Germany.

I believe that its lightness and openness in particular positively influence any congress atmosphere. I believe that it is a congress centre which thanks to its parliamentary seating particularly encourages discussion.

I hope that this building, designed by the architect Günter Behnisch, will have a positive effect on your consultations, too. By the way, we are planning to erect a second larger congress hall directly opposite the entrance. This is to create the right conditions for major international conferences of the United Nations and other organisations, among others, large shareholders meetings.

Now I wouldn't like to classify you as belonging to a specific parliamentary group or party from your seating plan today. Perhaps the one or the other amongst you might take this personally.

May this light and appealing hall bring forth good discussions, discussions on complex questions you plan to resolve.

How far can and should competition authorities go in their decision-making?

Is there any basic consensus on competition policy at international level? If so, how can this be conveyed in international organisations?

Exciting questions which touch the very pulse of the time.

If you take a look at the immediate surroundings of this plenary building, that is the so-called former government quarter, you will see for yourselves: Time does not stand still here.

Yesterday many of you were in the Post Tower, the new head offices of Post AG, which has become rather like a new symbol for our city.

Modern service and technology companies have now moved into the splendid villas of the former government quarter, which mostly housed the representations of the Länder.

What was once our highest building, the so-called "Lange Eugen", which contained the offices of the members of the German Bundestag, is now being renovated and will soon form part of the new UN campus. In the immediate neighbourhood are the headquarters of Deutsche Welle, Germany's international broadcaster. The complex, originally planned as office space for Members of Parliament, was converted over the last few years into one of the most modern broadcasting stations. This June its new owner, Deutsche Welle, with around 1,000 staff, will move into this elegant building.

And only just recently the former Press Club, the press's exchange for information and ideas during Bonn's former era as capital, was reopened as the Bonn Presseclub. Today it is mainly journalists from international press services who send out reports from the UNO city of Bonn all over the world, including reports on international conferences such as your own.

Over the past years Bonn has been able to prove its worth as a good congress location:

2 World Climate summits, 1 Conference of the Parties to the UN Convention to Combat Desertification, 1 major international conference on fresh water, 2 Afghanistan conferences, to mention but a few.

Parallel to your 11th International Conference on Competition a number of other congresses are taking place in Bonn:

- on 20 and 21 May the 6th German World Bank Forum and the 1st ICT Development Forum on the Petersberg. Both conferences deal with how IT can be used to combat poverty in the world;
- the Annual Congress of the German Society for Regulatory Affairs, just next door in the Waterworks building;
- the International Conference on Rural Livelihoods, Forests and Biodiversity in the Bonn Art Museum;

- the sixth Windows Forum 2003 in the Beethovenhalle.

This all goes to show: The difficult structural change this city had to make has been largely successful.

When in 1991 the German Bundestag decided to move Parliament and sections of the government to Berlin this was something we had never dared to hope for. As a result of this decision we have lost around 21,000 jobs. 35,000 people have left the Bonn region. Out of a population of 310,000 this is not an insignificant number. Our endeavours lay above all in carving out a new profile for ourselves on the strength of the basis we had developed since 1949 with Bonn as the capital:

- as a city of federal institutions and federal authorities
- as a UN and international city
- as a city of science
- as a modern location of industry
- as a city of culture

The concept of developing Bonn into a UN city and a centre for international cooperation was already incorporated into the 1994 Berlin/Bonn Law. Bonn fulfils the qualifications for this. It is a city with a well-established international infrastructure, with international schools, international kindergarten, an internationally oriented university and good international transport links.

For this reason the location of UN institutions here was an important first decision. Up to now 12 institutions with around 550 jobs have set up their head offices in Bonn. I give you as examples the United Nations Volunteers Programme, the UN Climate Change Secretariat or the UN Desertification Secretariat. They work within a sphere of around 150 non-government organisations and German development cooperation institutions.

Today we can say that we have moved on from the place where primarily international politics was done by the Foreign Minister and the Chancellor - Bonn is increasingly becoming a place of international dialogue. Accordingly Chancellor Schröder has expressed the wish to hold in Bonn next year's conference on renewable energies which he announced in Johannesburg in Bonn.

The second main area of profile of the Federal City of Bonn are the 6 ministries, which have kept their first official seat in Bonn, and around 20 federal institutions, which have moved from Berlin and Frank-

furt to Bonn. We were glad, of course, that the Bundeskartellamt, with its very active President, Dr. Böge, was amongst them.

With its university, founded in 1818 and numbering 37,000 students from 142 nations, Bonn was predestined to become a centre of science. We have recognised that we live in an academic region spanning the cities of Aachen, Bonn and Cologne with what is after all 150,000 students, 20,000 professors and lecturers. In and around the Bonn region we have a large number of major research institutions and academic exchange organisations.

What was earlier a less distinctive feature of the city but which has since been further developed through the privatisation of the Ministry for Post and Telecommunications is its status as a location of industry with Deutsche Post Worldnet and Deutsche Telekom, with their several subsidiaries. Since 1991 around 15,000 jobs have been created in Bonn in the private service sector, too. In addition we have been able to maintain jobs in the production sector. After all 12 % of our jobs are in this sector. This is also of significance in urban development terms.

I should really be sad that you are unable to participate in the cultural programme this morning, under the rubric art and music in the city of Beethoven. But perhaps you will find some time to learn something about the museums along the Museum Mile, Bonn Minster, Beethoven's birthplace and maybe you will want to return here another time.

We often have exhibitions here in Bonn which are well worth a visit. After the German Museum in Munich the Federal Art and Exhibition Hall in Bonn was last year Germany's museum with the highest attendance rates. A visit to Bonn would be particularly worthwhile in September when the Beethoven Festival takes place. Beethoven was born in Bonn. Many people from all over the world come here to visit the house in which he was born. An attractive concert programme running from mid September to mid October draws many to Bonn during this time.

I wish you a successful conference, positive discussions and perhaps some time to gain a personal impression of our city and I very much hope to have the pleasure to welcome you here again in Bonn in 2005.

Dr. Alfred Tacke

Staatssekretär im
Bundesministerium für Wirtschaft
und Arbeit

Es ist eine Freude für mich, auf dieser Kartellkonferenz zu Ihnen sprechen zu können und hier Minister Clement zu vertreten, der sich zur Zeit auf einer Reise in den Vereinigten Staaten befindet. Angesichts der Notwendigkeit, unsere Beziehungen zu intensivieren, Differenzen auszuräumen und den großen Bereich der Gemeinsamkeiten darzustellen, kommt dieser Reise aus Sicht der Bundesregierung eine besondere Bedeutung zu.

Wettbewerb und Wettbewerbsschutz sollen in einem komplementären Verhältnis stehen. Es gilt, die richtige Balance zu finden zwischen Unternehmenswachstum und Wettbewerbsschutz. Dies ist manchmal eine Gratwanderung. In Deutschland ist sie gekennzeichnet durch die Entscheidungen des Kartellamtes, aber auch durch die Möglichkeit und Chance der Ministererlaubnis. Darin zeigt sich die industriepolitische Orientierung und die Gesamtverantwortung der Politik. Dies ist immer und wird immer ein Spannungsverhältnis bleiben.

Wettbewerbspolitik im Zeitalter der Globalisierung: Globalisierung hat sich intensiviert, vor allem durch das Ende der politischen Spaltung der Welt. Wenn wir heute davon ausgehen können, dass 20 % aller Güter global erzeugt werden, so werden dies in weniger als drei Jahrzehnten 80 % sein. Diese Welt wird eine globalisierte, vernetzte Welt sein, mit extremer Arbeitsteilung, sinnvoller Kooperation von Ländern und Unternehmen und einer wachsenden Zahl von globalen Unternehmen, selbst im mittelständischen Bereich.

Dies führt dazu, dass unsere gegenseitige Abhängigkeit zunimmt und wir die Zusammenarbeit in den Finanz- und Kapitalmärkten intensivieren müssen. In Zukunft werden wir von Entwicklungen in Lateinamerika, in Asien, in den mittel- und osteuropäischen Ländern, in den USA und in Europa beeinflusst werden. Und nur wenn in allen großen Wirtschaftsregionen dieser Welt wirtschaftliche Stabilität herrscht, kann Wachstum, das so dringend benötigt wird, herbeigeführt werden.

Die Globalisierung hat dazu beigetragen, dass viele Länder, die in der Vergangenheit vom Wirtschaftswachstum ausgeschlossen waren, wie etwa Länder in Mittel- und Osteuropa, in Asien oder in Lateinamerika, heute in intensiver Weise am Wettbewerb teilhaben und in vielen Bereichen auch dominante Marktstellungen erreichen. Dies ist von enormem Vorteil gewesen für die wirtschaftliche, soziale und kulturelle Entwicklung dieser Länder.

Sicherlich ist ein Teil des Protestes gegen die Globalisierung in Europa und in anderen Regionen darauf zurückzuführen, dass gespürt wird, dass in dieser arbeitsteiligen Welt dauerhafte Wettbewerbsfähigkeit erforderlich ist, dass Produktionsanteile und Wertschöpfungsanteile nicht selbstverständlich sind, sondern jedes Jahr im Wettbewerb – und nicht geschützt durch nationale Barrieren – neu errungen werden müssen.

Deutsche Direktinvestitionen im Ausland haben sich alleine in den letzten zehn Jahren mehr als vervierfacht. Es kann und wird immer Kritik an Globalisierung geben. Aber es gibt kein Zurück aus dem erfolgreichen Prozess der Globalisierung unserer ökonomischen und auch politischen Strukturen.

Für die Bundesrepublik Deutschland gilt, dass im Jahr 2000 der Umsatz deutscher Tochterunternehmen im Ausland weltweit doppelt so hoch war wie unser gesamter Export. Und dass ein Drittel der deutschen Güterexporte und -importe zwischen verbundenen Unternehmen stattfinden. Der wirtschaftliche Erfolg der deutschen und der europäischen Wirtschaft hängt von unserer Exportfähigkeit ab und von der Funktionsfähigkeit der internationalen Kapital- und Exportmärkte.

Diese Anzeichen für einen immer enger werdenden Verbund in der Konjunktur und im Handel sind deutliche Hinweise auf die Notwendigkeit, durch internationale Vereinbarungen diesen Prozess dauerhaft zu stabilisieren. Krisen in einzelnen Regionen, unzureichendes Wirtschaftswachstum, überträgt sich auf andere Regionen und führt zu einer empfindlichen Störung des Wachstumsprozesses.

Dieses globale Wechselspiel zwischen Industrieländern und Entwicklungsländern ist von entscheidender Bedeutung, um langfristig eine weitere Angleichung der Lebensverhältnisse zu erreichen. Es hat dazu in der Vergangenheit bereits beigetragen.

Die neue Handelsrunde, begonnen in Doha und fortzusetzen in Cancún im September dieses Jahres, dürfte viele wichtige Impulse liefern. Sie liegt im europäischen und im deutschen Interesse und sie soll durch den Abbau von Barrieren dazu beitragen, den Entwicklungsländern, insbesondere in Afrika, eine bessere Perspektive zu geben. Wir sind alle aufgefordert, im Agrarbereich und im Bereich der industriellen Produkte dazu Beiträge zu leisten.

Globalisierung kann nur gelingen, wenn die Funktionsfähigkeit der Finanzmärkte gesichert ist. Der Internationale Währungsfonds und die Weltbank leisten dazu wichtige Beiträge. Die Modernisierung ihrer Instrumente ist ein wichtiges Element der Stabilität der Finanz-

märkte. Sie entlässt nationale Regierungen nicht aus ihrer Verantwortung, aber sie macht deutlich, dass die acht großen Industrieländer eine große Verpflichtung haben, durch ihre Beiträge sicherzustellen, dass sich nationale Wirtschaftskrisen nicht zuspitzen. Ich denke, dass die Stabilisierung, die beobachtbar ist in Brasilien, in Argentinien und in der Türkei, insgesamt zur Stabilisierung der Weltwirtschaft in einer schwierigen Zeit beigetragen hat.

Die USA haben in der zweiten Hälfte der 90er Jahre viel dafür geleistet, dass das weltwirtschaftliche Wachstumspotenzial genutzt wird. Durch transparente Märkte, durch hohe Wachstumsdynamik, durch neue Technologien. Jetzt, nachdem sich die Entwicklung in Amerika durch das Ende des Technologiebooms verändert hat, wird von Europa erwartet, dass es einen wachsenden Beitrag leistet. Und wachsende Beiträge kann Europa, wie alle Länder die vor einer veränderten Altersstruktur stehen, nur leisten, indem Reformen nicht nur angekündigt, sondern durchgeführt und durchgesetzt werden.

Das Phänomen einer alternden Gesellschaft gilt für Japan genauso, wie für die Vereinigten Staaten, wie für alle Länder Europas und ist eine große Herausforderung. Es erfordert die Reform der Gesundheitssysteme, die Modernisierung der Pensionssysteme und eine effizientere Nutzung unseres Arbeitskräftepotenzials. Die Themen sind in allen wichtigen Industrieländern gleich. Es bietet sich jetzt die Chance, Wettbewerbsfähigkeit auszubauen und unsere Strukturen zu modernisieren.

Die Verzichte, die geleistet werden müssen, und die Reformanstrengungen, die notwendig sind, sind vergleichsweise gering zu den Anstrengungen, die erfolgreich in den letzten Jahren von den Ländern gemacht wurden, die heute einen ganz wesentlichen Teil zur weltwirtschaftlichen Leistungsfähigkeit beitragen, ob in Osteuropa oder in Asien.

Natürlich bleibt die Wettbewerbspolitik auch internationale Wettbewerbspolitik. Sie ist, und Sie haben dies formuliert Herr Kommissar Monti, kein Trojanisches Pferd. Sondern sie liegt im eigenen Interesse aller Länder. Staaten ohne funktionierendes Wettbewerbsrecht werden auf Dauer keine guten Entwicklungsperspektiven haben. Nicht umsonst zeigt sich, dass gute Regierungsführung, die Qualität der staatlichen Institutionen, die Funktionsweise der Märkte und die Funktionsfähigkeit des Wettbewerbs zentrale Elemente sind für überdurchschnittliches Wirtschaftswachstum und politische Stabilität.

Sicherlich liegen viele Probleme von Entwicklungsländern nicht darin

begründet, dass zuwenig getan wird, um zu ihrer wirtschaftlichen Entwicklung beizutragen, sondern weil die internen Probleme nicht bewältigt werden können. Und nicht ohne Grund spielt gute Regierungsführung nicht nur in den Industrieländern, sondern auch in den Entwicklungsländern eine wachsende Rolle. Sie ist ein wesentliches Element der Wettbewerbsfähigkeit geworden und eine große Herausforderung an die Politik, ob in Lateinamerika, Europa, Asien oder den USA. Good Governance ist ein ganz zentrales Element. Und dies gilt auch für die Unternehmen. Funktionsfähigkeit der Finanzmärkte und Kapitalmärkte setzt voraus, dass Vertrauen erhalten und verstärkt wird.

In Europa ist die Arbeit der EU-Kommission ein wesentliches Element für die Marktöffnung und die Wettbewerbsfähigkeit. Sie hat wesentliche Beiträge dazu geleistet, dass Europa sich zu einer gemeinsamen Wirtschaftsregion entwickeln konnte. Ich denke, dass wir mit der Erweiterung Europas die Aufgabe haben, den Aufbau von Wettbewerbsbehörden in den Beitrittsländern mitzugestalten und mit zu unterstützen. Hier ist in den letzten Jahren vieles erreicht worden. Der Aufbau in den Beitrittsländern ist gelungen. Diese gemeinsame Anstrengung zeigt, welche positiven Wirkungen der Erweiterungsprozess hat, nicht nur für Europa sondern auch für die Beitrittsländer.

An dieser Stelle begrüße ich herzlich die aus Paris kommenden Teilnehmer des OECD Joint Global Forum on Trade and Competition. Das Global Forum leistet einen hervorragenden Beitrag zu einem besseren gegenseitigen Verständnis von Industrieländern und Entwicklungsländern.

Neben der WTO ist mit dem International Competition Network ein weiteres gutes Diskussionsforum entstanden. Die Vielzahl von multilateralen Initiativen, die ständig steigende Zahl der Staaten, die über eigene Wettbewerbsbehörden verfügen, ist ein positives Signal für einen fortschreitenden Prozess der Globalisierung und der positiven Effekte dieses Prozesses.

Wir sind auf einem guten Weg, der Globalisierung der Wirtschaft international konvergierende Wettbewerbsregeln und Durchsetzungsmechanismen folgen zu lassen. Auf der europäischen Ebene gibt es vor allem zwei Herausforderungen für die Wettbewerbspolitik: Die Integration von neuen Mitgliedern und, natürlich auch aus deutscher Sicht von zentraler Bedeutung, die Fortsetzung der Marktöffnungspolitik.

Das Lissabon-Ziel, wirtschaftliches Wachstum zu beschleunigen, kann nur erreicht werden, wenn diese

sehr erfolgreiche Marktöffnungspolitik fortgesetzt wird. Dies ist aus meiner Sicht von zentraler Bedeutung, und wir sollten diesen Prozess nicht verzögern. Im neuen europäischen Wirtschaftsraum werden dann für 450 Millionen Menschen die einheitlichen Wettbewerbsregeln des EG-Vertrages gelten. Mit kontinuierlichen Reformbemühungen werden wir gemeinsam und nur gemeinsam, dem globalen Wettbewerbsdruck standhalten können.

Der wesentliche wettbewerbspolitische Aspekt ist die Marktöffnungspolitik. Es gibt kein besseres Beispiel dafür, welche positive Wirkung Wettbewerb entfaltet. Das gilt für die preissenkenden Effekte, aber natürlich auch für Innovation.

Vor 15 Jahren begann die Liberalisierung der Telekommunikationsmärkte, vor 7 Jahren der Strommärkte und innerhalb der letzten 6 Jahre, wenn auch unter großen Schwierigkeiten, die Öffnung der Post, Gas- und Bahnmärkte. Teilweise sind wir noch am Start dieses Prozesses. Aber sicherlich wird dieser Prozess sich durchsetzen und positive wirtschaftliche und innovative Konsequenzen haben. Für die Bundesrepublik Deutschland ist er eine wichtige Grundlage für wirtschaftliche Entwicklung.

Die große Teilhabe an den Telekommunikationsmärkten – 70 % der Bevölkerung verfügen über Mobilfunk, über 50 % nutzen das Internet, und wir erwarten auch in diesen Bereichen in den nächsten Jahren wesentliche Wachstumsraten – sind nur möglich gewesen durch die Marktöffnungspolitik, durch Wettbewerb und die damit ausgelösten Innovationen. Sie sind ein Wachstumsmotor und sie haben positiv zur Beschäftigungsentwicklung beigetragen. Auch auf dem Strommarkt hat der Wettbewerb für die Verbraucher zu sinkenden Energiepreisen geführt.

Natürlich gibt es noch Prozesse nachzuholen. Es geht um die Öffnung der Gasmärkte, der Bahnmärkte. Es geht um weitere Sektoren, in denen einheitliche Wettbewerbsbedingungen hergestellt werden müssen. Die positiven Auswirkungen des Wettbewerbs machen deutlich, dass man staatliche Monopole verhindern muss, dass es keinen Sinn macht, staatliche Monopole fortzusetzen, und dass einer der wichtigsten Beiträge der Europäischen Union, neben der Marktöffnungspolitik und der politischen Einigung, gerade dieser Prozess der Innovations- und Wachstumsbeschleunigung ist.

Ich glaube, dass ein Großteil der Zufriedenheit der Bevölkerung mit dem europäischen Einigungsprozess mit dem wirtschaftlichen Erfolg dieses großen Binnenmarktes und der einheitlichen Währung zusammenhängt. Sie ist ein ganz zentraler Bestandteil der Stabilität in Eu-

ropa, auch in wirtschaftlichen und teilweise politisch schwierigen Zeiten. Ich glaube, dass der Staat die Aufgabe hat, Marktbedingungen herzustellen, die es dem Wettbewerber erlauben, sich im Wettbewerb zu behaupten. Er sollte durch die richtigen Rahmenbedingungen dazu beitragen, dass die Unternehmen sich erfolgreich entwickeln können, und wir werden dies immer im internationalen Wettbewerb tun. Wir müssen und wir werden Unternehmen, Unternehmerinnen und Unternehmern, beste Rahmenbedingungen bieten, damit wir international erfolgreich sind.

Der Staat setzt durch seine Wettbewerbspolitik Rahmenbedingungen. Er kann die Innovationsfähigkeit aber an keinem Punkt durch staatliche Projekte ersetzen, er kann sie nur fördern. Deshalb kommt der Liberalisierung von Märkten und der Förderung von guten Rahmenbedingungen die zentrale Bedeutung neben der Wettbewerbspolitik zu. Wir haben die Strommärkte geöffnet. Wir haben die Postmärkte geöffnet. Es waren sicherlich schwierige Diskussionen. Aber ich bin mir sicher, dass private Unternehmen immer bessere Dienstleistungen für die Kunden schaffen als die überholten alten Staatsmonopole. Und dass die Infrastruktur vor allem durch private Unternehmen hergestellt werden kann, aber nicht durch das Festhalten an veralteten, scheinbar stabilen Strukturen. Wir meinen, dass gerade die Marktöffnungspolitik der Europäischen Union dazu beigetragen hat, diese Bedingungen herzustellen.

Den Kartellbehörden kommt eine zentrale Funktion zu. Sie sollen das Entstehen von Monopolen verhindern. Sie sollen missbräuchliches Verhalten ahnden. Und sie handeln damit im Interesse der Verbraucher.

Natürlich hat es in den letzten Jahren in Europa Fusionswellen in den großen Märkten gegeben. Und diese Fusionswellen werden sich fortsetzen. Sie dienen der Herausbildung effizienter europäischer Unternehmen. Und diese Fusionen und Zusammenschlüsse sind notwendig im globalen Wettbewerb.

Die Kartellbehörden haben gute Beiträge dazu geleistet haben, den Wettbewerb zu sichern, missbräuchliches Verhalten zu ahnden und auch Fusionen dort zu wiedersprechen, wo sie zu monopolartigen Strukturen führen. Die Herstellung einer bestimmten Struktur sollte kein Leitbild sein, weder des deutschen noch des europäischen Wettbewerbsrecht. In diesem Sinne ist meines Erachtens die Wettbewerbspolitik auf einem guten Weg.

Es wäre ein großer Fehler, wenn wir in Europa dauerhaft einzelne Sektoren regulieren und sie zum Gegenstand von Politik machen. Ich meine, dass die Kartellbehörden

auf lange Sicht besser geeignet sind, Wettbewerb herzustellen als die Politik und sie sind zur Sicherung des Wettbewerbs besser geeignet als sektorspezifische Regulierung.

Die sektorspezifische Regulierung von Märkten muss ein Übergang bleiben und darf sich nicht verstetigen. Dies ist meines Erachtens von besonderer Bedeutung. Denn wir würden die Ergebnisse und die positiven Effekte der Marktöffnungspolitik gefährden, wenn wir dauerhaft meinten, politisch intervenieren und dazu das Instrument der sektorspezifischen Regulierung nutzen zu können.

Wir befinden uns in einer Umstellungsphase, in der die nationale Wettbewerbsordnung zwischen dem Vorrang des Gemeinschaftsrechts auf der einen Seite und der Gestaltung des Subsidiaritätsprinzips auf der anderen Seite neu bestimmt wird. Diese Umstellung ist eine Konsequenz der wachsenden Bedeutung der internationalen Wettbewerbspolitik und des europäischen Wettbewerbsrechts. Und natürlich sind die Spielräume und die Gestaltungsmöglichkeiten im nationalen Bereich angesichts des großen Binnenmarktes zu eng geworden.

Mit der neuen EU-Kartellverordnung, die im Mai 2004 in Kraft treten wird, ist der kontinuierliche Wandel von einer nationalen zur einer europäischen Wettbewerbspolitik beschritten. Bisher gibt es trotz des Vorrangs der zentralen Wettbewerbsvorschriften der europäischen Verträge eine relative Vielfalt bei der nationalen Ausgestaltung. Ab Mai 2004 werden alle nationalen Kartellbehörden der Europäischen Union unmittelbar europäisches Wettbewerbsrecht bei der Kontrolle von Kartellen und der Aufsicht über marktbeherrschende Unternehmen anwenden. Keine europäische Behörde der in Zukunft 25 Mitgliedstaaten der Union darf bei der Anwendung des Kartellverbotes weniger strenge nationale Maßstäbe anlegen, aber auch keine strengeren. Die Kommission erhält umfassende Rechte, den nationalen Behörden Fälle zu entziehen und selbst zu entscheiden.

Natürlich drängt sich aus nationaler Sicht die Frage auf: Werden nationale Kartellbehörden zu einer Art Außenstelle der Europäischen Kommission? Um dieses zu vermeiden, haben Rat und Kommission eine gemeinsame politische Erklärung über die Zusammenarbeit im zukünftigen Netzwerk der Kartellbehörden verabschiedet. Mit der neuen Kartellverordnung ist ein grundlegender Wandel verbunden. In Zukunft können und müssen die Unternehmen in Europa selbst beurteilen, ob sie bei Kooperationen gegen das Kartellverbot verstoßen. Eine behördliche Kontrolle ist im Regelfall nur noch nachträglich möglich.

Das als besonders streng geltende deutsche System einer präventiven Kartellkontrolle, mit behördlicher Prüfung und der ausnahmsweisen Zulassung eines Kartells, ist bisher gewissermaßen Leitbild gewesen für das europäische Kartellrecht und die Kartellaufsicht. Nun wird dieses System im Wege der Anpassung des Gesetzes gegen Wettbewerbsbeschränkung an die neue EU-Kartellverordnung abgeschafft werden. Wir werden den Regierungsentwurf noch in diesem Jahr vorlegen.

Wie im europäischen Recht sollen auch in Deutschland wettbewerbsbeschränkende Vereinbarungen automatisch freigestellt sein, wenn sie gesetzliche Ausnahmetatbestände erfüllen. Mit der Reform ist ein grundsätzlicher Wechsel vom bisherigen deutschen System kasuistischer Freistellungstatbestände hin zu einer Generalklausel verbunden. Auch die Handlungsinstrumente des Bundeskartellamtes werden an die der Europäischen Kommission angeglichen. Nur so kann sich Deutschland als Mitspieler im zukünftigen Netzwerk der europäischen Kartellbehörden behaupten.

Auch das „Grundgesetz der deutschen Marktwirtschaft“, wie das GWB genannt wird, wird danach sein Gesicht völlig verändern. Natürlich kann die Schaffung eines level playing field auf dem Gebiet des Wettbewerbsrechts für ganz Europa als echter Fortschritt gewertet werden. Diese Entwicklung wird von der deutschen Wirtschaft, wird von uns allen begrüßt.

Auch die bevorstehende Modernisierung der europäischen Fusionskontrolle ist positiv zu bewerten. Sie muss und wird weiter entbürokratisiert werden. Denn eine Unternehmensfusion, die sich in einer Vielzahl von Mitgliedstaaten auswirkt, darf nicht durch zahlreiche Anmeldepflichten und parallele Verfahren unzumutbar behindert werden.

Der aktuelle Zustand im Falle von Mehrfachanmeldungen ist nachteilig für die Wettbewerbsfähigkeit der europäischen Wirtschaft. Die Haltung der Kommission ist hier, und dafür sind wir dankbar, eindeutig. Sie fordert in den Verhandlungen zum europäischen Konvent außerdem, auch die Wettbewerbspolitik in ihre ausschließliche Zuständigkeit zu überführen.

Natürlich bestehen wir darauf und sind wir daran interessiert, die Subsidiarität zwischen europäischer und nationaler Wettbewerbspolitik zu erhalten. Natürlich gilt das, was hier seitens der Europäischen Kommission gefordert wird, schon so lange wie die Handelspolitik besteht. Und natürlich gibt es gute Gründe hierfür.

Aber wir meinen schon, dass es für die europäische Wettbewerbspolitik

wichtig ist, dass es weiterhin ein gutes Miteinander von europäischer und nationaler Wettbewerbspolitik geben wird. Europa wird sich auf Dauer einer weiteren Entwicklung stellen müssen, in der weitere nationale Kompetenzen auf Europa übergehen werden. Dies kann und wird Ergebnis des Konvents sein.

Dies gilt natürlich auch für die Wettbewerbspolitik. Aber wir sollten darauf achten, dass auch in diesem neuen Europa eine Subsidiarität zwischen nationalen und europäischen Entscheidungskompetenzen gegeben sein wird. Deshalb sollten Fragen der Wettbewerbsordnung auch dezentral entschieden werden.

Dies wird sicherlich eine zentrale Diskussion in den nächsten Monaten sein, und ich bin sehr interessiert, Herr Kommissar Monti, wie Sie diese Entwicklung beurteilen. Ich bin Ihnen sehr verbunden für die klaren Konturen, die Sie durch Ihre Tätigkeit der europäischen Wettbewerbspolitik geben. Sie hat dazu beigetragen, dass nicht der Eindruck einer nationalen Benachteiligung oder einer europäischen Willkür entstanden ist. Sie hat dazu beigetragen, dass die Unternehmen Europa akzeptiert haben und, wenn auch manchmal mit großem Widerstand, die Regeln der europäischen Wettbewerbspolitik akzeptieren, weil sie sie als rational empfinden.

Die europäische Wettbewerbspolitik ist eines der ganz aktiven, positiven Elemente des europäischen Einigungsprozesses. Und wir haben uns in diesen schwierigen Zeiten des weltwirtschaftlichen Strukturwandels nur behaupten können, weil wir eine einheitliche Währung haben, funktionierende europäische Institutionen und in Europa einen gemeinsamen Wirtschaftsraum, in dem nicht mehr genau nachgerechnet wird, welche Region davon profitiert oder dabei verliert, in dem nicht mehr darüber diskutiert wird, ob man durch nationale Maßnahmen, die zum Nachteil eines anderen Landes sind, die wirtschaftliche Entwicklung befördern kann.

Natürlich haben sich die Rahmenbedingungen für uns alle verändert. Für alle Nationalstaaten, für alle großen Wirtschaftsräume, ob es der Europäische oder der Amerikanische ist, gilt heute, dass sie neben den Konsumenten, neben den Wählern, natürlich auch um Investoren ringen.

Wir sind nur so gut, wie wir in internationalen Wirtschaftsräumen beurteilt werden. Für die Beurteilung der Investoren und die weitere Entwicklung ist die Bonität und Kreditfähigkeit von Ländern von zentraler Bedeutung. Länder, die sich in politischen, wirtschaftlichen Krisen befinden, haben genau diese Probleme nicht gelöst. Das zeigt, dass wir in international stabilen und

sehr transparenten Märkten leben und dass genau registriert wird, ob Wachstumsperspektiven erfüllt und ob die Reformanstrengungen umgesetzt werden. Und dies ist sicherlich für einen großen Wirtschaftsraum, für einen traditionellen Wirtschaftsraum wie Europa, eine der zentralen Herausforderungen.

Deshalb kommt der Reformpolitik in Europa eine ganz zentrale Bedeutung zu. Sie ist der Maßstab für die Glaubwürdigkeit der europäischen Wirtschafts- und Wettbewerbspolitik. Aus den Erfahrungen der Vergangenheit heraus, dem Gelingen des Einigungsprozesses und der positiven wirtschaftlichen Entwicklung können wir optimistisch sein, dass die Wirtschafts- und Wettbewerbspolitik weiterhin einer der tragenden Pfeiler des europäischen Einigungsprozesses sein wird. Dafür allen, die in den letzten Jahren an diesem Prozess beteiligt waren, herzlichen Dank. Wir haben allen Anlass, auch in einer schwierigen wirtschaftlichen Lage optimistisch zu sein.

Dr Alfred Tacke

Administrative State Secretary at the Federal Ministry of Economics and Labour

It is a pleasure for me to speak to you at this Conference on Competition and to represent Minister Clement who is currently on a trip to the United States. In view of the need to intensify our relations, overcome differences of opinion and underline the broad common ground between our countries, the Federal Government attaches particular importance to this visit.

Competition and protection of competition are meant to complement one other. What is essential is to find the right balance between corporate growth and the protection of competition. This is sometimes a tightrope walk. In Germany this balancing act takes the form of decisions taken by the Bundeskartellamt on the one hand and the possibility of a ministerial authorisation and the opportunities it offers on the other. This reveals a clear orientation towards industry policy and the overall responsibility of politics. This has always been and will always be an area of tension.

Competition policy in the age of globalisation: Globalisation has intensified, above all as a result of the end of the political division of the world. Assuming that today 20 per cent of all goods are produced globally, this figure will rise to 80 per cent in less than three decades. The world will then be a globalised, networked one, characterised by extreme division of labour, useful cooperation between countries and companies, and a growing number of global companies, even in the small and medium-sized business sector.

This means that our interdependence will increase and we will have to intensify cooperation in the financial and capital markets. In future we will be influenced by developments in Latin America, Asia, the central and eastern European countries, the USA and Europe. Only if there is economic stability in all the major economic regions in the world can growth, which is so urgently needed, be created.

Globalisation has contributed to the fact that many countries which were previously excluded from economic growth such as countries in central and eastern Europe, Asia or Latin America, today participate intensively in competition and in many sectors even achieve dominant market positions. This has been enormously beneficial for the economic, social and cultural development of these countries.

No doubt the protest against globalisation in Europe and other re-

gions is partly due to the fact that people are aware that this labour-division based world needs enduring competitiveness, and that shares in production and added value cannot be taken for granted but have to be regained from one year to the next, in competition and without protection by national barriers.

German direct investment abroad has more than quadrupled over the past ten years alone. Globalisation can and always will be criticised. But there is no turning back from the successful process of the globalisation of our economic and political structures.

In the Federal Republic of Germany the worldwide turnover achieved in 2000 by German subsidiaries abroad was double our entire export volume. In addition one third of German exports and imports of goods is done between affiliated companies. The economic success of German and European industry depends on our export ability and the efficiency of international capital and export markets.

These signs of an ever closer integration in economic activity and trade are clear indications of the need to bring permanent stability to this process through international agreements. Crises in individual regions and insufficient economic growth will spread to other regions and considerably hamper the growth process.

This global interplay between industrial and developing countries is crucial in order to achieve greater convergence of living conditions in the long term. It has already been conducive to this aim.

The new trade round, started in Doha and to be continued in Cancun this September, should provide many important incentives. This trade round is in the interest of Europe and Germany and is designed to help developing countries, particularly in Africa, gain better perspectives by removing barriers. We are all called upon to contribute to this in the agricultural and industrial products sectors.

Globalisation can only be successful if the efficiency of the financial markets is ensured. The International Monetary Fund and the World Bank contribute significantly to this. The modernisation of their instruments is an important element in the stability of financial markets. It does not release national governments from their responsibilities but makes clear that the eight major industrial countries are under a great responsibility to ensure, through their efforts, that national economic crises are prevented from escalating. I think the stabilisation we see in

Brazil, Argentina and Turkey has contributed to the overall stabilisation of the world economy in difficult times.

During the second half of the nineties the USA did a great deal to assure that the world economy's growth potential is made use of: through transparent markets, high growth dynamics and new technologies. Now that developments in the US have changed after the end of the technology boom, Europe is expected to make an increasing contribution. However, like all countries faced with a changed age structure, Europe can only make an increasing contribution if reforms are not merely announced but actually implemented and enforced.

The phenomenon of an ageing society equally affects Japan, the United States and all European countries, and it poses a great challenge. It requires health system reforms, the modernisation of pension systems and a more efficient use of our labour potential. The relevant issues are the same in all the major industrial countries. Now is the opportunity for us to build on our competitiveness and modernise our structures.

The sacrifices and reform efforts this involves are small compared to the successful efforts made over the past years by those countries which today contribute an essential share to the productivity of the world economy, whether in eastern Europe or in Asia.

Of course competition policy is also international competition policy. It is, as you put it, Commissioner Monti, no Trojan horse but is in the interest of all countries. The development perspectives of countries without an effective competition law will be poor in the long term. It is not for nothing that good governance, the quality of government institutions, the functioning of markets and the effectiveness of competition are key elements for above-average economic growth and political stability.

Surely many problems in developing countries are not rooted in a lack of effort to promote their economic development, but in the failure to solve their domestic problems. And it is not without reason that good governance plays an increasing role not only in industrial countries but also in developing countries. It has become a key element of competitiveness and a major challenge for politics, whether in Latin America, Asia or the USA. Good governance is a most central element, even in the company sector. The efficiency of financial and capital markets requires that trust is maintained and increased.

In Europe the European Commission's work is a key element for

opening up markets and for competitiveness. It was vital in helping Europe to develop into a common economic area. I think the enlargement of Europe poses the task for us to help shape and assist the establishment of competition authorities in the acceding countries. Considerable progress was made in this area over the past years. Endeavours towards development in the acceding countries have been successful. This joint effort shows the positive effects of the enlargement process, not only for Europe but also for the acceding countries.

At this point I would like to warmly welcome the participants of the OECD Joint Global Forum on Trade and Competition who have arrived directly from Paris. The Global Forum makes an excellent contribution to improving understanding between industrial and developing countries.

With the International Competition Network another useful discussion forum has been created in addition to the WTO. The great number of multilateral initiatives and the constantly growing number of countries with their own competition authorities are positive signals for the progress of globalisation and its positive effects.

We are on the right track to follow up the globalisation of the economy with internationally converging competition rules and enforcement mechanisms. At European level competition policy faces two major challenges: to integrate new Member States and, what is of course of central importance from a German point of view, to continue the policy of market liberalisation.

The Lisbon objective of accelerating economic growth can only be achieved if this very successful market liberalisation policy is continued. In my view this is crucial and we should not delay this process. In the new European economic area the uniform competition rules of the EC Treaty will then apply to 450 million people. With constant reform efforts, we will together, and only together, be able to stand the global competitive pressure.

The most important aspect of competition policy is market liberalisation policy. There is no better example of the positive effects of competition. These include price-reducing effects and of course innovation.

15 years ago we started to liberalise the telecommunications markets, 7 years ago the electricity markets and within the past 6 years, although with great difficulties, we have begun opening up the postal, gas and railway markets. In some cases we are still at the initial stages of this process. But it will

certainly be successful and have positive economic and innovative consequences. For the Federal Republic of Germany this process represents an important basis for economic development.

The large participation in the telecommunications markets (70 per cent of the population now have mobile phones, over 50 per cent use the Internet, and we expect considerable growth in these areas in the coming years) has only been possible due to market liberalisation policy, competition and the resulting innovations. They are a driving force of growth and have been a positive factor in employment development. In the electricity market too competition resulted in falling energy prices for consumers.

Of course there are some processes where more progress needs to be made, i.e. in the liberalisation of the gas and railway markets as well as further sectors where uniform competition conditions need to be created. The positive effects of competition show that state monopolies must be prevented, that it makes no sense to continue state monopolies, and that it is precisely this process of accelerating innovation and growth which, besides market liberalisation policy and political unification, is one of the European Union's most important contributions.

I believe that the population's satisfaction with the European unification process is to a large extent due to the economic success of this huge single market and its single currency. This satisfaction is a key element of stability in Europe, even in times of economic and to some extent political difficulty. I believe that the state has the task of creating market conditions that allow competitors to stand their ground in competition. By setting the right framework conditions the state should contribute to the successful development of companies. And in doing so we will always take international competition into consideration. We must and will offer companies and entrepreneurs the best framework conditions for us to be successful internationally.

Through its competition policy the state sets framework conditions. However it is in no position to replace innovative ability with state projects. It can only promote it. Therefore market liberalisation and the promotion of good framework conditions are of key significance besides competition policy. We opened up the electricity markets. We opened up the postal markets. While this certainly involved difficult discussions I am sure that private companies will always provide customers with better services than outdated state monopolies. I am also sure that infrastructure can be created above all by private com-

panies, not by sticking to antiquated, seemingly stable structures. We think the market liberalisation policy of the European Union in particular helped to create these conditions.

Competition authorities have a central role to play: to prevent the creation of monopolies, and punish abusive behaviour. And this is in the interest of the consumers.

Certainly, the major European markets have seen merger waves over the past years. And these merger waves will continue to occur. They serve to create efficient European companies. And these mergers and concentrations are necessary in global competition.

The competition authorities have contributed considerably to ensuring competition, punishing abusive conduct and opposing mergers which would result in quasi-monopolistic structures. The creation of a specific structure, however, should not be a model, neither for German nor European competition law. I think that competition policy is on the right track here.

It would be a big mistake if in Europe we were to subject individual sectors to constant regulation and make them the objects of politics. I think in the long term competition authorities are better suited than the political sector to create competition. And they are better suited than sector-specific regulation to ensure competition.

Sector-specific market regulation must remain a transitional arrangement. It must not become a permanent solution. In my opinion this is of particular significance. For we would jeopardise the results and positive effects of market liberalisation policy if we were to think that we can always intervene politically using the instrument of sector-specific regulation.

We are currently in a phase of transition in which our national competition systems are being redefined in view of the primacy of Community law on the one hand and the application of the principle of subsidiarity on the other. This transition is a result of the growing importance of international competition policy and European competition law. And of course the leeway and scope for shaping the respective national systems have been limited due to the large single market.

With the new EU Regulation on the implementation of competition rules, which will come into effect in May 2004, the continuous change from a national to a European competition policy has been initiated. Despite the primacy of the central competition rules under the European treaties there has been relative diver-

sity in national rules. From May 2004 onwards, all national competition authorities of the European Union will directly apply European competition law in controlling cartels and dominant companies. No European authority in any of the future 25 Member States of the Union may apply either less or more stringent national criteria in applying the prohibition of cartels. The Commission is assigned comprehensive powers to withdraw cases from national authorities and decide on them itself.

In the national context, of course, the following question arises: Will national competition authorities turn into some kind of suboffices of the European Commission? In order to prevent this, the Council and the Commission have issued a joint political statement on cooperation within the future network of competition authorities. The new Regulation on the implementation of competition rules involves a fundamental change. In future companies in Europe can and must decide themselves whether they violate the prohibition of cartels when engaging in cooperations. As a rule only ex-post regulatory control will be possible.

The German system of preventive cartel control which is based on official examination and the permission of cartels in exceptional cases, and which is considered to be particularly rigorous, has so far been a model system, as it were, for European cartel law and cartel control. Now this system is to be abandoned in the process of adapting the Act Against Restraints of Competition to the new EU regulation on the implementation of competition rules. We will submit our government bill by the end of this year.

As under European law, anticompetitive agreements are to be automatically exempted in Germany as well if they fulfil the statutory preconditions for exemption. The reform involves a fundamental change from the current German system of casuistic exemptions to a general clause. The Bundeskartellamt's instruments of action will also be adapted to those of the European Commission. Only in this way can Germany stand its ground as an active player in the future network of European competition authorities.

The "basic law of the German market economy", as the ARC is called, will also take on a completely different form. Of course the creation of a level playing field in competition law can be considered as real progress for the whole of Europe. This development is welcomed by German industry and by all of us.

The forthcoming modernisation of European merger control is a posi-

tive step, too. It has to and shall be debureaucratised even further. A company merger with effects in a number of Member States must not be unreasonably impeded by multiple obligations to notify and parallel proceedings.

The current situation with regard to multiple filings is detrimental to the competitiveness of the European economy. The Commission's position on this issue is clear and we are thankful for that. In the negotiations on the European Convention the Commission has furthermore called for exclusive competence for competition policy.

Of course we insist on and are interested in maintaining subsidiarity between European and national competition policy. And naturally that exclusive competence which the European Commission now calls for in competition policy has already long been reality in the area of trade policy. And of course there are good reasons for this.

Nevertheless we do think it is essential for European competition policy that the relationship between European and national competition policy continues to work well. In the long term Europe will have to face up to another development which will involve the transfer of further national competencies to Europe. This can and will be the result of the Convention.

Of course this also applies to competition policy. But we should take care that in this new Europe there will continue to be subsidiarity between national and European decision-making competencies. Therefore decisions on competition regime issues should be made decentrally.

This will certainly be a central topic of debate in the coming months and I am very interested in how you, Commissioner Monti, judge this development. I am much obliged to you for the clear contours you have given European competition policy through your work. You have helped to prevent the impression being created of discrimination against individual Member States or European arbitrariness. You have also contributed to the fact that companies have accepted Europe and, although sometimes with great resistance, accept the rules of European competition policy because they find them rational.

European competition policy is one of the very active, positive elements of the European unification process. And in these difficult times of global economic structural change we were only able to stand our ground in Europe because we have a single currency, effective European institutions and a common economic area in which we no longer check exactly which region benefits or loses, or discuss whether

economic development can be promoted through national measures that are to the disadvantage of another country.

Of course the framework conditions have changed for all of us. Today all nation-states, all major economic areas, whether it be in Europe or America, not only compete for consumers and voters, but of course also for investors.

We are only as good as we are considered to be in international economic areas. For its evaluation by investors and its further development, the financial standing and creditworthiness of a country is of key significance. Countries undergoing political or economic crises have failed to solve precisely these problems. This shows that we live in internationally stable and very transparent markets and that exact note is taken whether we fulfil growth perspectives and actually implement reform efforts. For a large, traditional economic area like Europe this certainly is a key challenge.

Therefore reform policy is of most central significance in Europe. It is the measure of the credibility of European economic and competition policy. Based on our past experience, the successful unification process and positive economic development, we can be optimistic that economic and competition policy will continue to be one of the pillars of the European unification process. For this I would like to express my sincere thanks to all those involved in this process over the past years. We all have good reason to be optimistic even in times of economic difficulty. Thank you very much!

Mario Monti
Member of the
European Commission

A. Introduction

I would like to thank the Bundeskartellamt for organising this event that gathers today delegates from about 60 competition authorities around the world and that will certainly create the opportunity for a fruitful debate on the role of competition policy. The topic chosen for the debate is wide ranging. Competition policy is indeed at a crossroad. The choice it makes about its own role, the principles it feels bound to, may be crucial for the future.

Today we are invited to reflect in particular on "The narrow line between competition policy and protection of competition", tomorrow on "Competition law as regulative factor in the globalised market economy". I will concentrate on the first subject, letting it for Philip Lowe, Director General of the Competition Directorate, to present the position of the European Commission as to international developments.

B. Entrepreneurial freedom and EC competition law

Going back to the debates that took place at the very origin of antitrust law, although according to the different legal traditions and political sensitiveness in the United States and in the various European countries, competition law is born to protect entrepreneurial freedom. Therefore, competition policy is about protecting competition as the most efficient system for allocating the ressources of the society and not about protecting competitors. In the EC Treaty competition law is also linked to the achievement of a single market for all Member States of the EU. The single market is based on the principles of free movement of goods and capital, free provision of services and right of establishment. Effective implementation of competition principles ensures that benefits deriving from removal of barriers to trade are not annulled by anticompetitive practices, such as a cartel between producers, which harms both enterprises and consumers. For instance, last year the Commission adopted a decision against a cartel concerning production of Methionine, a substance used to compound animal feeds and premixes. Given that the cartel members accounted for the majority of the world-wide methionine production, downstream undertakings were not in the position to easily change

suppliers to obtain better conditions. In addition, the evidence gathered during the investigation clearly showed that cartel members actually discussed between each other measures to damage the non-members.

I once described this type of practices "the cancer of the economy" and I made the fight against cartel one of the key priorities of my mandate as Competition Commissioner. And indeed, the Commission in the last years has clearly intensified its efforts in this respect. In 2001 the Commission adopted 10 prohibition decisions, for a record amount of EUR 1,8 billion. Again in 2002 nine prohibition decisions were issued and fines for about EUR 1 billion imposed in sectors ranging from banking services to chemicals and from auction houses to construction materials. I am confident that we are going to follow the same pace in 2003. Cartels, however, do not represent the only type of anti-competitive constraint to freedom of trade. In some industries, vertical agreements as well may impose disproportionate burdens on economic operators. The reform of the so called motor vehicle block exemption regulation (Regulation 1400/2002) adopted by the Commission last summer is an example of intervention of competition law which enhances the entrepreneurial freedom of the various operators involved.

- While the two former regulations only exempted one single format for the distribution of new vehicles and for servicing, under the new rules, manufacturers can now base their distribution network on different formats (i.e. selective distribution, territorial exclusive distribution or exclusive customer allocation), according to market needs.

- Moreover, the new rules do away with several limitations imposed on dealers. For instance, they could not always sell cars to all consumers, i.e. domestic consumers and consumers from other EU-Member states, since they could not get enough vehicles from the manufacturer. Moreover, dealers were not allowed to sell different brands without making prohibitive and unnecessary investments and they were not allowed to grow by opening secondary outlets elsewhere in the EU.

- Finally, the new regulation ensures all repairers who meet the quality standards of a brand have to be given the authorization from the relevant manufacturer to join its network of authorized repairers. It also gives independent repairers the right of access to electronic diagnostic tools, software and training

in order to allow them to continue their entrepreneurial activity and to offer services of good quality to consumers.

Of course, the "abuse of private power", if I may say so, resulting from anticompetitive agreements or unilateral practices are not the only threat to entrepreneurial freedom that antitrust policy should be concerned about. Our EU competition policy is set to defend trade within the single market against possible distortions arising from public intervention as well. This is done not only ensuring that competition rules are applied as well to public undertakings, but also preventing the grant of State aids. An example of Commission intervention in this field would be the proceedings opened as regards certain forms of financial support granted by the French State to France Telecom. We believe that the financial difficulties experimented in the telecommunications area do not justify the grant that would favour single operators or industries to the detriment of competitors and competition. I think we can look back over the work of the past few years in state aid with some satisfaction. State aid granted by the fifteen Member States was estimated at €86 billion in 2001, compared with €102 billion in 1997. In relative terms, the amount of aid granted in 2001 amounts to slightly less than 1% of the EU's GDP. Moreover, this aid is increasingly oriented towards horizontal objectives of Community interest, such as R&D, and away from the more distortive individual aid measures. There is, however, still much work to do in this area.

A further instrument that EU antitrust law may use to reduce interference of public powers with freedom of trade is liberalisation of economic activities for which Member States granted special or exclusive rights and where the justifications for such exclusivity are not longer valid. A case in point are the several telecommunications services for which natural monopoly conditions cannot be claimed and where the maintenance of the monopoly were unduly restricting freedom of trade for both potential competitors and for users who were bound to the sole supplier Network industries, however, should not be seen as the only field where liberalisation policy could free up market opportunities. One of the areas currently under the scrutiny of the Commission is liberal profession services. Regulation of professional services varies greatly from one EU country to another particularly with regard to prices, advertising and inter-professional collaboration. The Commission launched a consultation on whether some of the restrictions - which retrace their origin in the medieval guilds - are still needed in the modern world

and might not have adverse effects for businesses, which are active users of professional services, and consumers alike.

C. The narrow line between entrepreneurial freedom and protection of competition

So far I recalled that competition policy is first of all a powerful instrument to bound both private and public powers to prevent either of them from constraining freedom of trade. I shall now turn to the issue of the narrow line between entrepreneurial freedom and protection of competition which the organiser of the conference wished us to reflect upon. This narrow line, then, seems to point at the following question: how far can competition policy go in limiting the exercise of market power by companies without itself unduly restricting businesses' choices? A question which, in turn, suggests me two possible issues. First, the difficulties sometimes encountered by competition policy enforcers in distinguishing between market practices that are legitimate expression of business freedom and anticompetitive conduct. Second, the debate about the scope of competition policy remedies in redressing competition concerns. Certainly I do not aim at providing an exhaustive answer to those questions which will form the basis for today's debate, but I will attempt to address the issues on the basis of Commission's experience.

As to the first question, EC competition policy explicitly considers hard core restrictions like price-fixing and market sharing as irremediably illegal arrangements. However, it also recognises that other agreements, while restricting competition, have redeeming features to be balanced against their restrictive nature. Article 81(3) of the EC Treaty allows to balance the negative effects on competition with the economic benefits that derive from these agreements. The Article 81(3) analysis allows to identify those forms of market co-ordination that effectively translates into benefits for consumers.

I will rapidly go through the four conditions of Article 81(3) to give you a flavour of the balancing exercise involved.

- The existence of economic benefits is reflected in the first condition of Article 81(3). These benefits can consist of lower costs, new products or services or products or services of a better quality.

- The important goal of promoting consumer welfare is reflected in the second condition of Article 81(3), according to

which consumers must receive a fair share of the benefits that result from the agreement. If, for example, an agreement improves the quality of goods and services these gains must be such as to compensate for any increase in price caused by the agreement.

- According to the third condition it must be assessed whether the restriction is indispensable to achieve the perceived benefits or whether there are less restrictive means to achieve the benefits. This is a proportionality test.

- Under the fourth and last condition the agreement must not afford the undertakings the possibility of eliminating competition.

I believe that the balancing exercise outlined by the analysis of this four conditions is key to draw the line between (legitimate) entrepreneurial freedom and forms of co-operation which unduly constrain the choice of other economic operators.

Let me also say that, as part of the preparation for the implementation of the new antitrust procedural Regulation as from 1st May 2004, the Commission will produce a Notice that will set out in more detail and with some methodological rigour the assessment under Article 81(3). I shall also emphasise that under the new Regulation, an agreement that fulfils the conditions of Article 81(3) is legal from the beginning without need for notification.

These same principles are reflected in the framework of block exemption regulations that creates a presumption of legality providing extensive guidance for businesses in areas where a complex balancing exercise is necessary. I mentioned already the motor vehicles block exemption. Another case in point is the area of intellectual property licensing agreements for which, in December 2001, the Commission started a thorough review of its policy. Re-evaluating the Technology Transfer Block Exemption Regulation, the Commission recognises that licensing, also when it contains restrictions on licensee or licensor, will often be pro-competitive as it helps disseminating technology. However, licensing agreements and restrictions therein may also sometimes be used to restrict competition, in particular in those cases where the IPR does provide the company with market power. It is therefore important in such cases to find the right balance between protecting competition and protecting intellectual property rights.

Some scope for appraisal of economic benefits exists not only in the antitrust field, but also in EC merger control. I want to recall

that the Merger Regulation itself explicitly refers to several factors that the Commission shall take into account in order to assess the compatibility of a merger with the common market. Some of these factors clearly give the Commission ground for a contextual appraisal of efficiencies resulting from a merger, provided that certain conditions are met. Clarifications on the extent to which efficiency considerations are taken into account in the Commission's merger analysis will be contained in the Guidelines on the assessment of dominance in horizontal mergers for which a consultation is currently underway.

I shall now turn to the issue of the scope of remedies. In the antitrust area, as you are aware, a new Regulation on procedures and sanctions will be applicable from 1 May 2004. The regulation now spells out that the Commission may impose on companies any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

This is a helpful clarification, not a sensational extension of the Commission's enforcement powers. The European Courts have long held that the Commission may order companies to *do* certain acts in order to remedy infringements.

As we read Article 7 of the new Regulation, it spells out the requirements that follow from the principle of proportionality. According to this principle the measures that can be imposed must not exceed what is appropriate and necessary to attain the objective of effectively ending the infringement. Three additional remarks are necessary to put this in the proper context:

- First, the Regulation gives precedence to behavioral remedies insofar as they are equally effective as structural remedies and are not more burdensome on the companies concerned.

- Second, the term 'structural remedy' as used by the Regulation encompasses all measures that oblige an undertaking to sever physical or other assets held by it. The need for such measure is particularly visible in cases where the infringement itself consists in a structural operation, for instance where a dominant company acquires a minority shareholding in a competitor that would allow it to influence that competitor's behavior. It is this type of enforcement situations that are more likely to occupy us in practice.

- Third, changes to the structure of an undertaking as it existed prior to the infringement are certainly a much less frequent situation. Un-

der the Regulation, such measures may only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

In the context of merger control, particular attention to avoiding market distortion is devoted already in the procedure to submit remedies. In proposing remedies, the undertakings themselves are in control of the process and able to decide which remedy fits best their entrepreneurial strategy while at the same time addressing the competition concerns raised by the merger. The Commission, applying the principle of proportionality, only accepts the proposed commitments to the extent that they are necessary to resolve the competition concerns.

Where a proposed merger leads to competition concerns, in general a divestiture is the most effective remedy to restore competition. It is also the less intrusive way, while behavioural remedies would require the Commission to monitor the entrepreneurial behaviour of the parties on a continuous basis and to interfere with the competitive process in the market. However, whilst being the preferred remedy, divestiture is not the only remedy acceptable to the Commission. In situations where a divestiture of a business is impossible, the Commission will consider alternative way to redress competition, but always according to proportionality reasons.

All in all, I can certainly affirm that merger control limits the scope of entrepreneurial freedom only to the extent necessary. In this respect, the recently published *Best practice guidelines for divestiture commitments* should further enhance efficiency and transparency of merger proceedings.

D. Improving the efficiency of EC competition law

If a careful analysis is often needed to find the right balance between protecting competition and entrepreneurial freedom, certainly the ongoing processes of market globalisation and EU enlargement render the challenge faced by our competition policy all the more demanding. In addition, the increasing complexity of markets requires a more sophisticated analysis of market dynamics and increased co-operation between competition policy makers around the world. Yet I believe that competition policy should take these challenges as opportunities to do better.

For instance, some recent CFI judgments have highlighted certain aspects of the way in which the Commission conducts merger investigations which would benefit

from improvement. As a result, we intend to take practical measures to remedy the situation. It will be necessary to ensure that there are sufficient management resources available to deal with the Commission's full merger case-load, that case teams are sufficiently large, and that they are equipped with the expertise necessary to cope with in-depth investigations. We must also see to it that due attention is paid to the quality of evidence, and to ensuring that decisions reference such evidence clearly and comprehensively.

I shall also recall how important it is for competition authorities to achieve a true understanding of market processes, in order to make sure that competition cases are founded on sound reasoning and do not unnecessary restrict the freedom of economic operators. In this respect, the increasing consideration given to economic analysis that may allow a better understanding of the impact of certain conduct on the market, reducing the scope for per se prohibitions and focusing on truly anti-competitive behaviour. Accordingly, a new position of Chief Economist will be created within the Competition DG, with the staff necessary to provide both an independent economic viewpoint to decision-makers at all levels, and to provide guidance throughout the investigation process in both antitrust and merger control fields. On the other hand, you may have heard that the Competition Directorate General of the Commission is undergoing an internal reorganisation that will allow to capitalise on the sector specific market knowledge gained by different services.

Enhancing economic analysis and improving internal organisation are only part of the reforms that the Commission has undertaken to improve the efficiency of competition policy. A much larger reform is the one represented by the Modernisation of antitrust procedural rules, to which I have already made some references. This reform shall constitute an important step towards decentralisation of the application of EC antitrust law. It is in fact a new system of governance for the application of the Community antitrust rules which is better suited to the enlarged Community. At the same time, the reform also contains a number of safeguards ensuring a consistent application of the rules throughout the Community both as regards the national courts and the national competition authorities. To that end, the ECN (European Competition Network) was set up in October 2002. It comprises the Commission and the Competition authorities of the 15 Member States plus 10 acceding countries. The works within the ECN are currently concentrated on the implementation of the new system: criteria for the allocation of cases, timing and

content of the various exchanges foreseen in the Regulation, practicalities of the exchange of confidential information, organisation of joint investigations.

Finally, last December a proposal for a new Council Regulation on the control of concentrations between undertakings (the new EC Merger Regulation) was transmitted to the Council of Ministers for adoption, with a view to replacing the current EC Merger Regulation. The proposed entry into force of the new Regulation is 1 May 2004.

Besides introducing important clarifications of the substantive test, one of the main objectives of the review is to optimise the allocation of merger cases between the Commission and national competition authorities in the light of the principle of subsidiarity. We are at same time tackling the phenomenon of "multiple filing", i.e. notification to various competition authorities within the EU. In order to facilitate international co-operation on merger cases, as well as to allow merging parties to better plan their merger process, it is proposed to introduce more flexibility in the rules that govern at what time a notification must be submitted. Finally, we are proposing to refine the timeframe for merger investigations, in particular in complex phase-two cases.

I am convinced that this extensive plan of reforms which proves our commitment to face the challenges of a modern competition policy. In addition, I should mention the various initiatives to increase international co-operation at both bilateral and international level, such as the International Competition Network. But, as already said, I will leave the task of discussing international governance to Philip Lowe.

Conclusions

A few concluding remarks.

I am convinced that competition policy is called to play an increasingly important role in defending individual freedoms in the market against possible abuses of private and public powers. Yet, the complexity of a global economy has raised the standard of proof and made the case for sounder decision making and increased co-operation. This is certainly time for choices and re-organisation, this is certainly time for EU competition policy to taking up the challenge and do even better.

Dr. Klaus Zumwinkel

Vorstandsvorsitzender
Deutsche Post World Net

Herzlich Willkommen in Bonn. Einige von Ihnen durfte ich bereits gestern Nachmittag in unserer neuen Zentrale des Konzerns Deutsche Post World Net, im Post Tower, begrüßen. Sie haben sich für Ihre diesjährige, die XI. Internationale Kartellkonferenz, einen geschichtsträchtigen, aber sehr lebendigen Ort ausgewählt.

Wie kaum eine andere Stadt hat Bonn die letzten 50 Jahre Deutschlands geprägt. Heute, einige Jahre nach dem Umzug unserer Regierung nach Berlin, geht sie neue Wege – die der internationalen Organisationen, der global handelnden Konzerne - wie Deutsche Post World Net oder Deutsche Telekom - oder der wichtigen Bundesbehörden, wie das Bundeskartellamt, Ihr Gastgeber, eine ist.

Bonn, Deutschland und die deutsche Wirtschaft haben in den vergangenen Jahrzehnten von den guten und gefestigten Freundschaften mit den Staaten dieser Welt profitiert. Und auch wir Deutschen haben unseren Beitrag zu diesen Partnerschaften geleistet. Aus meiner Sicht ist es heute unser aller Aufgabe, daran zu arbeiten, dass wir gemeinsam diesen Status nicht nur festigen, sondern weiter ausbauen. Die deutsche Wirtschaft kann und wird dazu Ihren Beitrag leisten.

Lassen Sie mich Ihnen zu Beginn meiner Ausführungen kurz darstellen, wo wir, der Konzern Deutsche Post World Net, herkommen und wie wir uns über die letzten 13 Jahre entwickelt haben. Denn die Entwicklung unseres Konzerns hängt sehr eng mit den Aspekten von Privatisierung, Liberalisierung und Wettbewerb zusammen.

Als ich 1990 als Vorstandsvorsitzender der Deutschen Bundespost Postdienst startete, erwirtschaftete die damals noch nationale Behörde mit rund 380.000 Mitarbeitern einen Umsatz von 9 Mrd. EURO, der im Wesentlichen (über 98 %) in Deutschland erzielt wurde. Die Bilanz wies ein Defizit von 720 Mio. EURO auf. Die Post in Deutschland arbeitete höchst defizitär und auf sehr niedrigem Qualitäts- und Servicelevel. Im Oktober 1990 haben wir im Zuge der Wiedervereinigung unseres Landes die völlig marode Post der DDR übernommen und integriert. Wir mussten damals unsere westdeutsche Behördenstruktur mit einem defizitären, kommunistischen Kombinat zusammenführen – a merger between two different corporate cultures.

Man kann ohne zu übertreiben sagen, die öffentliche Dienstleistung Post hatte zu diesem Zeitpunkt

echte Herausforderungen vor sich und eine Menge Hausaufgaben zu erledigen. Wir haben uns damals zwei klare und anspruchsvolle Ziele gesetzt: Wir wollten zukünftig Spitzenqualität im internationalen Maßstab für 82 Mio. Menschen bieten und ein wirtschaftlich gesundes Unternehmen aufbauen und führen.

Heute – 13 Jahr später – ist die Deutsche Post World Net ein weltweit aufgestellter Logistikkonzern mit einem Umsatz von fast 40 Mrd. EURO, einem betrieblichen Gewinn von über 2 Mrd. EURO und rund 380.000 Beschäftigten, von denen 150.000 im weltweiten Ausland arbeiten. Wir sind am Aktienmarkt notiert und sind im Deutschen Aktienindex enthalten.

Der Konzern Deutsche Post World Net steht heute auf vier starken Säulen: den Unternehmensbereichen BRIEF, EXPRESS, LOGISTIK und FINANZDIENSTLEISTUNGEN.

Hinter BRIEF stehen etwa 72 Mio. Sendungen, die in Deutschland täglich für den nationalen und internationalen Verkehr bearbeitet werden. In 83 modernen Briefzentren werden rund um die Uhr, an 7 Tagen der Woche 87 Prozent der Briefe automatisch bearbeitet. Wir verfügen heute über ein hochleistungsfähiges Netz, das allein in Deutschland für 37 Mio. Haushalte – und etwa 3,5 Mio. Geschäftskunden arbeitet. Selbstverständlich haben wir mit diesem Gesamtkonzept nicht nur die Produktivität, sondern auch die Qualität unserer Dienstleistungen verbessert. Mit einer durchschnittlichen Laufzeit von 1,06 Tagen bei Briefen nehmen wir heute im europäischen und internationalen Vergleich eine klare Spitzenposition ein.

Wir richten heute bei BRIEF unseren Focus stark auf Europa, die weitere Liberalisierung der europäischen Postmärkte und die Chancen, die sich dadurch für einen global handelnden Konzern ergeben.

Bei EXPRESS und LOGISTIK sind wir heute mit rund 150.000 Mitarbeitern in über 220 Ländern dieser Welt aktiv. Wir haben beide Bereiche im Januar 2003 unter der Dachmarke DHL zusammengefasst.

Im Expressbereich bauen wir an einem Netz für 420 Mio. Menschen in Europa, das gleichzeitig über ein Landnetz und ein Luftnetz die Wirtschaft in Europa verbindet – ground based parcels und air express.

Hier haben wir in Europa einen Markt der gleichen Größe und ähnlicher Anforderungen, der in den USA in den letzten 20 Jahren große starke Expressfirmen wie UPS und FedEx hervorgebracht hat. Das gleiche versuchen wir in Europa als Deutsche Post World Net.

Mit DHL sind wir weltweit ebenfalls gut aufgestellt – insbesondere

in Asien. In den USA versuchen wir zur Zeit und gegen erheblichen Widerstand eine Position zu etablieren. Die Globalisierung fordert unsere Industrie. Sie wissen, der Welthandel wächst stärker als das Weltsozialprodukt und Welthandel muss transportiert werden. Dazu sind heute gesamteuropäische und globale Transport- und Distributionsnetze erforderlich.

Im Logistikbereich, der die größeren und größten Güter – denken Sie an Container – transportiert und speditiert, sind wir heute die Nr. 1 in der globalen Luftfracht und die Nr. 2 in der globalen Seefracht.

Den Bereich FINANZDIENSTLEISTUNGEN unseres Konzerns repräsentiert die Postbank, die eine Bilanz-Summe von 140 Mrd. EURO ausweist. Mit 10 Mio. Kunden ist sie die größte Retailbank Deutschlands und stützt sich auf das flächendeckende Netz von rund 13.000 Postfilialen deutschlandweit. Nur dadurch kann überhaupt eine so umfassende Infrastruktur aufrechterhalten werden. Weit über das nationale Bankgeschäft hinaus bieten wir unseren nationalen und internationalen Kunden die Finanzierung ihrer Geschäfte rund um Logistik und Transport an.

Ich will ein erstes Fazit ziehen: Den Weg von einer nationalen, defizitären Behörde zum profitablen global player haben wir geschafft, und das – für mich das Wichtigste – im Interesse und zum Vorteil unserer Millionen nationalen und internationalen Kunden.

Das war nur aus zwei Gründen möglich. Einmal, weil die Bundesrepublik Deutschland Anfang der 90er Jahre die politischen Rahmenbedingungen in Richtung Liberalisierung und Privatisierung änderte; zum anderen, weil man meinem Management-Team und mir allen Freiraum gab, um die weltbesten Managementmethoden einzusetzen.

Ich will im Folgenden einen Blick auf die politischen Rahmenbedingungen für den deutschen und die europäischen Postmärkte und die Debatte um dessen weitere Liberalisierung werfen.

Mit der Postreform I ebnete die Bundesrepublik Deutschland 1990 der Deutschen Post den Weg von der nationalen Behörde zu einem privatwirtschaftlichen Unternehmen. Zunächst wurden die drei Unternehmen Telekom, Postbank und Post voneinander getrennt und auf eigene Füße gestellt. Mit der Postreform II 1995 wurde das Unternehmen Post dann in eine Aktiengesellschaft umgewandelt und zur Deutschen Post AG. Im November 2000 haben wir mit dem Börsengang der Deutschen Post AG und der Platzierung am Aktienmarkt den vorläufigen Höhepunkt der Umwandlung erreicht.

Die politische und volkswirtschaftliche Idee hinter dieser Entwicklung ist einfach: Wettbewerb ist die Regel, das Monopol des staatlichen Anbieters eine zu begründende Ausnahme.

Ende der 80er Jahre gelangten wir in Deutschland zu der Auffassung, bestimmte politisch-hoheitlichen Aufgaben von den betrieblich-unternehmerischen zu trennen und die Unabhängigkeit der wirtschaftliche Leitung in den Einzelunternehmen zu stärken.

Dennoch wurden zunächst insbesondere aus infrastrukturellen Gründen reservierte Bereiche - unter anderem auch im Briefdienst der Deutschen Post - aufrechterhalten.

Das deutsche Postgesetz und die daraus folgenden „Postuniversaldienstleistungsverordnung“ (PUDLV) räumen unserem Handeln in Deutschland heute einerseits die notwendigen Freiräume für ein privatwirtschaftliches Unternehmen ein. Andererseits sind uns aber auch definierte Gebote und Grenzen im Sinne einer postalischen Daseinsvorsorge für alle Bürger auferlegt.

Aus den Erfahrungen mit diesen Verpflichtungen ziehe ich heute folgende Schlüsse: Universaldienstleistung und Wettbewerb schließen sich nicht aus. Aber, die Verpflichtung zur Universaldienstleistung muss für ein privates Wirtschaftsunternehmen finanzierbar sein. Und im Vergleich und im Wettbewerb mit anderen Postgesellschaften in Europa müssen wir sicherstellen, dass in einzelnen Mitgliedsstaaten der EU nicht Universaldienstleistungen erlassen werden, die weit über den Rahmen der Postdiensterichtlinie hinausgehen.

Postuniversaldienstleistungen sehen die Grundversorgung der Bevölkerung mit postalischen Dienstleistungen vor.

Die Deutsche Post World Net ist heute z.B. verpflichtet, 12.000 Postfilialen in Deutschland zu betreiben. In zusammenhängenden Wohngebieten ist alle 1000 Meter ein Briefkasten aufzustellen und zu bearbeiten. Weiterhin besteht eine Verpflichtung zur Beförderung von Briefsendungen bis 2000 Gramm oder adressierter Pakete bis 20 kg. Die Auslieferung hat an sechs Werktagen zu erfolgen, also von Montag bis Samstag. Für Postdienstleistungen, für die eine Exklusivlizenz besteht, ist ein Einheitstarif anzuwenden.

Das heißt, die Deutsche Post World Net bearbeitet einen Brief zum gleichen Preis, unabhängig von realen Produktionskosten und egal ob er nur innerhalb Berlins oder von einer Nordseeinsel in die bayerischen Alpen versandt wird.

Wir haben in Deutschland stark rationalisiert. Dazu zwei Beispiele:

1. Wir haben 140.000 Stellen – aber ohne eine einzige betriebsbedingte Kündigung – abgebaut. 2. Von 30.000 Filialen Anfang der 90er sind wir heute auf 12.800 runter. Und glauben Sie mir, jede Schließung von Filialen über all die Jahre oder auch das Abhängen von Briefkästen löst immer einen Sturm der Entrüstung aus.

Zur Finanzierung der Universaldienstleistungen wurde unserem Konzern eine Exklusivlizenz eingeräumt, die einen bestimmten Bereich der Dienstleistungen für sie als alleinigen Anbieter reserviert. Dies ist in Europa und vielen anderen Ländern der Welt das politische Arrangement. Der Staat verlangt bestimmte Leistungen (z.B. Postfilialen und Einheitstarif), dafür zahlt er nicht direkt, sondern mit den Einnahmen aus einem definierten Monopol.

Die Exklusivlizenz in Deutschland umfasst heute hauptsächlich Briefsendungen bis 100 Gramm, ab 2006 bis 50 Gramm. Sie wurde durch den Gesetzgeber bis Ende 2007 verlängert. Die Verlängerung dieser Lizenz ist unmittelbare Folge der schleppenden Entwicklungen der letzten Jahre zur Liberalisierung auf europäischer Ebene.

Das Europäische Parlament und der Rat hatten im Dezember 1997 die EU-Richtlinie zur Liberalisierung der europäischen Postmärkte erlassen. Ziel der Richtlinie ist die Einführung gemeinsamer Vorschriften für die Entwicklung des Postsektors, die Verbesserung der Qualität der Postdienste sowie eine schrittweise und kontrollierte Öffnung der Märkte. Zu den Kernpunkten der Richtlinie gehört die langfristige Garantie postalischer Universaldienstleistungen.

Mit der Entscheidung Ende 2001, die europäischen Briefmärkte in den kommenden Jahren schrittweise für den Wettbewerb zu öffnen, hat die EU dem Wettbewerb um diese Märkte wieder neuen Auftrieb gegeben. Danach sollen Europäisches Parlament und Rat auf Grundlage eines bis 2006 vorzulegenden Vorschlags der Kommission bis Ende 2007 über weitere Liberalisierungsschritte entscheiden, die dann ab 2009 zum Tragen kommen könnten.

Im Rahmen der Liberalisierungsdiskussion hat sich der Konzern Deutsche Post World Net immer für eine schrittweise und kontrollierte Öffnung der Märkte ausgesprochen. Wir sind davon überzeugt, dass nur der faire Wettbewerb dem Binnenmarkt Europas, der Qualität der Dienstleistungen und der Sicherheit von Arbeitsplätzen dienen kann. Die substanzielle Öffnung der Postmärkte und die Fixierung eines Enddatums für deren vollständige Liberalisierung sind die richtigen und vernünftigen Antworten auf die Anforderungen des europäischen Binnenmarktes und auf die Kundenbe-

dürfnisse in Europa. Ein konkretes Enddatum bedeutet Planungssicherheit für alle Postunternehmen.

Dies vor allem, da doch grundsätzliche Einigkeit in Europa darüber besteht, staatliche Monopole abbauen zu wollen. Andererseits muss eine weitere Liberalisierung im Gleichklang aller Mitgliedsstaaten erfolgen, um die Chancengleichheit aller Unternehmen auf den Märkten zu gewährleisten. Eine einseitige Öffnung in einigen wenigen Ländern liefe der Idee des gemeinsamen europäischen Marktes zuwider, würde ihn ad absurdum führen. Das gilt in gleichem Maße für die aufkommende Diskussion in Europa über die Erhebung von Mehrwertsteuer auf postalische Universaldienstleistungen.

Die Deutsche Post World Net hat ihre Bemühungen intensiviert, sich in den Briefmärkten Europas eine Ausgangsposition für den Wettbewerb zu schaffen. Beispiele dafür sind jüngste und vielversprechende Engagements auf den Briefmärkten in den Niederlanden und in Großbritannien.

Aber natürlich handeln wir als global operierender Konzern auch auf den Märkten der Welt, die weit über Europa hinausgehen. Von daher sind die laufenden GATS-Verhandlungen für uns von besonderem Interesse. Sie zielen darauf ab, Handelshemmnisse abzubauen und beziehen ausdrücklich Post- und Expressdienstleistungen ein. Die Ende 2001 in Doha (Katar) stattgefundene WTO-Ministerrunde hat den Zeitplan für die Verhandlungen abgesteckt, die in 2005 beendet sein sollen. Soeben hat die EU ihre Forderungen als „initial requests“ an die WTO-Verhandlungspartner weitergeleitet und u.a. eine Öffnung der Märkte für Post- und Expressdienstleistungen entsprechend der Liberalisierung in der EU gefordert.

Auf den internationalen Märkten treffen wir immer wieder auf wettbewerbsrechtliche und –politische Fragen, die uns bei unserer täglichen Arbeit stark beschäftigen und fordern. Ich will Ihnen dazu zwei Beispiele geben, die exemplarisch verdeutlichen, wie komplex unser heutiges Thema und ihr tägliches Brot für einen Konzern wie unseren sein kann.

1. Die USA sind einer der wichtigsten Express- und Logistikmärkte der Welt. Ein global agierender Logistikkonzern kommt nicht umhin, seine Präsenz dort zu suchen und auszubauen. Wir haben das zunächst mit unserer Beteiligung an DHL begonnen und werden dies mit der Fusion mit Airborne Express, die wir vor kurzem angekündigt haben, fortsetzen. Beide Vorhaben sind allerdings keineswegs so einfach zu realisieren, wie man manchmal zu glauben geneigt ist.

Seit der Übernahme des internationalen Expressdienstleisters DHL durch Deutsche Post World Net versuchen unsere großen Konkurrenten UPS und FEDEX mit allen rechtlichen und politischen Mitteln und einem fantastisch hohen Lobbying–Etat DHL vom amerikanischen Markt fernzuhalten.

Dazu muss man wissen, dass UPS und FEDEX den US-Paketmarkt in einer Art Duopol mit einem Anteil von 80 % beherrschen, während DHL dort einen Marktanteil von 0,9 % hat.

Als rechtlich-politischen Hebel für die Abschottung des US–Marktes gegen ausländische Wettbewerber nutzen unsere Konkurrenten eine Vorschrift, die besagt, dass Fluggesellschaften nur dann als US–Carrier gelten, wenn mindestens 75 % der Stimmrechte in der Hand von US-Bürgern liegen.

Das trifft für DHL–Airways in USA zu, nachdem die Deutsche Post den Landtransport und die Airline nach dem Erwerb von DHL in 2 Gesellschaften aufgespalten hatte und wir nur noch mit 25 % an DHL-Airways beteiligt sind.

Dies hat auch das Department of Transportation (DOT) der USA festgestellt und bereits vielfältige Eingaben von UPS und FEDEX abgewiesen.

Beide Konzerne und protektionistische Interessengruppen führen die Auseinandersetzung dennoch unverändert im politischen Bereich weiter.

Die Auseinandersetzung eskalierte nach dem Erwerb des amerikanischen Express–Dienstleisters Airborne durch DHL, obgleich die zu Airborne gehörende Airline nicht mit gekauft wird und zu 100 % bei den bisherigen Shareholdern von Airborne verbleibt.

Der republikanische Senator Stevens (Alaska), Vorsitzender des Haushaltsausschusses des US-Senats, hat am 16. April 2003 ein Amendment zum Kriegsbudget durchgesetzt, nach dem Fluggesellschaften, die nicht effektiv von US-Bürgern kontrolliert werden, mehr als 50 % der Umsätze von einem ausländischen Unternehmen erzielen oder einem fremden Staat gehören, keine Militäraufträge aus den jetzt freigegebenen Haushaltsmitteln erhalten dürfen. Diese Bestimmung trifft einzig und allein auf die Firma DHL-Airways zu, diskriminiert also auf dem US-Markt in eklatanter Weise ein einziges Unternehmen.

Man muss dazu wissen, dass sowohl das Pentagon als auch das State Department bedeutende Kunden von DHL-Airways sind, weil DHL Ziele anfliegt, die die Wettbewerber gar nicht anbieten (z. B. Afghanistan). Gegen dieses Amend-

ment hatten sich deshalb das Weiße Haus, das Pentagon, das Verkehrsministerium und zwei Senatoren ausgesprochen. Dennoch wurde es Gesetz. Die wettbewerbsfeindliche Haltung steht dabei deutlich im Kontrast zu den freien Betätigungsmöglichkeiten von US-Unternehmen in Deutschland/Europa.

Müssen wir uns damit abfinden, dass wir auf kaum absehbare Zeit in den USA mit diesen protektionistischen Konflikten leben müssen? Entscheidend ist für uns die Frage, wie diese Konflikte von den für Wettbewerbsrecht und –politik verantwortlichen Menschen und Behörden beantwortet und geregelt werden. Denn erst dort beweist sich doch, wie sehr eine Nation bereit ist, sich dem freien und fairen Wettbewerb zu stellen und ihn tatsächlich zuzulassen.

Ein zweites Beispiel soll Ihnen aufzeigen, dass es aber auch Regionen gibt, die uns und vielen Unternehmen neue Chancen bieten. Ich will von den Entwicklungen in Asien sprechen und insbesondere auch auf die Situation in China eingehen.

Asien ist heute einer der Wachstumsmärkte dieser Welt. Die absehbaren Zuwachsraten in den asiatischen Ländern schlagen die, die wir in den stark entwickelten Nationen Europas und Nordamerikas erreichen werden bei weitem. Global handelnde Konzerne investieren heute in Asien und stellen sich dort für die Zukunft auf. Es wird auch in Asien darauf ankommen, die Wirtschaft über den Wettbewerb voran zu bringen und zu stärken.

Mit dem Beitritt Chinas zur WTO Ende 2001 hat sich das Land nach 15-jährigen Verhandlungen und Zusagen über weitreichende Öffnung von Märkten der internationalen Wirtschaft und dem globalen Handel zugewandt.

In Antizipation des Beitritts erreichten die Investitionen ausländischer Unternehmen bereits 2001 einen Rekord; der positive Trend setzte sich in 2002 weiter fort. Chinas Staats- und Parteiführung nutzt diese Erfolge und spielt in der regionalen Wirtschaftspolitik eine immer aktivere Rolle.

China hat sich mit dem WTO-Beitritt zu einer weitgehenden außenwirtschaftlichen Liberalisierung innerhalb von fünf Jahren verpflichtet. Ein einheitlicher chinesischer Binnenmarkt muss geschaffen, heute noch vielfach bestehende Marktzugangsbeschränkungen und lokale Monopole müssen beseitigt werden. Das Investitionsklima wird sich, das hoffen wir alle, mit dem Beitritt weiter verbessern.

Deutsche Post World Net setzt auf die weitere Liberalisierung und den freien Wettbewerb in China und

Asien. Mit unseren Töchtern DHL und Danzas sind wir in China bereits seit langem aktiv. DHL ist seit 1986 in China tätig und dort die Nr. 1. DHL kann in China in Bezug auf die Tonnage auf Wachstumszahlen von 40 % verweisen, Zahlen die auch in anderen Ländern Asiens zu erreichen sind und die zur Zeit in Bezug auf den Umsatz regelmäßig zweistellige Zuwachsraten erbringen.

Mit Danzas sind wir seit den frühen 90er Jahren in China präsent und haben als einziges europäisches Unternehmen eine nationale und internationale A-Lizenz des Landes erhalten. Das heisst, uns werden alle Aktivitäten in China unter unserem eigenen Namen und dem eigenen Management gestattet.

Die weitere Liberalisierung in China wird zu einem intensiven Wettbewerb um die wirtschaftlich lohnenden Märkte führen, die dieses Land zukünftig anbieten kann. Wir setzen auch dabei auf einen freien und fairen Wettbewerb, der die besten Konzepte und Ideen belohnt.

Lassen Sie mich zum Ende meiner Rede noch einmal zusammenfassen. Und ich will gerne noch einmal das Motto Ihrer Konferenz aufnehmen: „Wettbewerbspolitik am Scheideweg?“

Für die Unternehmen und Konzerne, die auf ihren Heimatmärkten, aber auch international agieren, kommt es heute und zukünftig darauf an, dass wir mit den besten Ideen, den besten Konzepten und den besten Menschen auf ein wettbewerbsrechtliches und -politisches Umfeld treffen, das es uns erlaubt, unsere Unternehmen im freien und vor allem fairen Wettbewerb zu positionieren. Anders gesagt: Wer handeln will und kann, muss auch handeln dürfen.

Ich glaube nicht, dass wir mit unserer Wettbewerbspolitik am Scheidewege sind. Aber die Hausaufgaben, die nun zu machen sind, sind offensichtlich. Sie beginnen immer vor der eigenen Haustür, im eigenen Land und setzen sich dann bis auf die multilaterale Ebene fort. Ein Blick auf die weitere Liberalisierung der Postmärkte in Europa oder auf die laufenden GATS-Verhandlungen über den Abbau von Handelshemmnissen zeigen, dass es genug zu tun gibt. Dabei werden natürlich Sie gefordert sein, aber auch die Unternehmen, die sich mit Ihren Vorstellungen artikulieren müssen und damit die Politik bei ihrem weiteren Vorgehen und Verhandlungen unterstützen.

Ich bedanke mich für Ihre Aufmerksamkeit, wünsche Ihnen für die weitere Konferenz anregende und fruchtbare Diskussionen und hoffe, dass ich mich mit meinem Konzern Deutsche Post World Net zukünftig mit unseren Konzepten in freiem und fairen Wettbewerb bewähren kann.

Dr Klaus Zumwinkel

Chairman of the Board of Management,
Deutsche Post World Net

Welcome to Bonn. I already had the pleasure of welcoming some of you yesterday afternoon in the Post Tower, the new headquarters of Deutsche Post World Net. You have chosen a historic but very lively venue for the 11th International Conference on Competition.

Bonn, as hardly any other city, has shaped Germany's past 50 years. Today, some years after our government moved to Berlin, Bonn is treading on new ground: there are international organisations, globally active groups such as Deutsche Post World Net or Deutsche Telekom, or important Federal authorities like your host, the Bundeskartellamt.

Over the past decades Bonn, Germany and the German economy have benefited from the good and established friendships with other countries around the world. And we Germans, too, have contributed our share in these partnerships. I believe that today we must all work together not only towards consolidating but also towards further developing these partnerships. The German economy can and will contribute its share.

Let me first of all briefly explain where we, Deutsche Post World Net, come from and how we have developed over the past 13 years. After all, the development of our group is very closely connected with the issues of privatisation, liberalisation and competition.

When I became Chairman of Deutsche Bundespost Postdienst in 1990, the company, at that time still a national authority with around 380,000 staff members, generated revenue of approx. 9 billion euro, essentially in Germany (over 98%), and showed a balance sheet deficit of 720 million euro. The operations of the German postal services were highly deficit-ridden and delivered very poor quality and service. In October 1990, in the wake of the reunification of our country we took over and integrated the ailing postal service of the German Democratic Republic. At the time this meant that we had to integrate a deficit-ridden communist collective into our West German authority structure – a merger between two different corporate cultures.

One can say without exaggerating that the public postal services at the time were faced with real challenges and had a lot of homework to do. We set ourselves two clear and ambitious goals for the future: to offer top quality of international standard to 82 million people and

to establish and operate an economically sound company.

Now, 13 years later, Deutsche Post World Net is a globally operating logistics group with a revenue of almost 40 billion euro, a profit from operating activities of over 2 billion euro and approx. 380,000 employees, 150,000 of which work abroad in all parts of the world. We are listed on the stock exchange and are a member of the German DAX index.

Today Deutsche Post World Net stands on four strong pillars: the corporate divisions MAIL, EXPRESS, LOGISTICS and FINANCIAL SERVICES.

The MAIL division processes about 72 million items daily for national and international shipment. In our 83 modern mail centres 87 per cent of the letters are processed automatically around the clock, 7 days a week. Today we operate a high-performance network which in Germany alone works for 37 million households and about 3.5 million business customers. With this overall concept we have, of course, not only improved our productivity but also the quality of our services. With an average transit time of 1.06 days for letters we now clearly occupy a top position in Europe and internationally.

In the MAIL division, we focus strongly on Europe, the further liberalisation of the European postal markets and the opportunities thereby offered to a globally active group.

In the EXPRESS and LOGISTICS divisions we are active in more than 220 countries with approx. 150,000 employees. In January 2003 we combined both sectors under the DHL umbrella brand.

In the EXPRESS division we are establishing a network for 420 million people in Europe connecting the European economy simultaneously via a ground network and an air network – ground based parcels and air express.

In this area the European market has the same size and similar requirements as the US market in which large and powerful express companies such as UPS and FedEx emerged over the past 20 years. We, Deutsche Post World Net, are trying to achieve the same in Europe.

With DHL we are also well-positioned worldwide, especially in Asia. In the USA we are currently trying to establish a position while facing substantial resistance. Globalisation is challenging our industry. As you all know, world trade is growing faster than the gross world product and it needs transportation. Today this requires pan-European and global transport and distribution networks.

In the logistics area, which involves transporting and forwarding large and very large goods – think about containers for example – we are the No. 1 in the global air freight sector and the No. 2 in global ocean freight.

Our FINANCIAL SERVICES division is represented by Postbank which shows total assets of 140 billion euro. With 10 million customers it is Germany's largest retail bank based on a comprehensive network of approx. 13,000 postal retail outlets throughout Germany. Only in this way can such an extensive infrastructure be maintained at all. Going far beyond the national banking business we offer our national and international customers full financing services in the area of logistics and transport.

Let me draw a first conclusion: We successfully achieved the transformation from a deficit-ridden national authority to a profitable global player, and, most importantly to me – this was in the interest and to the advantage of our millions of national and international customers.

All this was only possible for two reasons. Firstly because in the early nineties the Federal Republic of Germany changed its political framework conditions towards liberalisation and privatisation; secondly because my management team and myself were given every freedom to employ the world's best management methods.

I will now take a look at the political framework conditions for the German and European postal markets and the debate about their further liberalisation.

With the postal reform I in 1990 the Federal Republic of Germany paved the way for Deutsche Post to transform itself from a national authority to a private-sector company. As a first step the three companies Telekom, Postbank and Post were separated and made to stand on their own two feet. With the postal reform II in 1995 the postal services company was then transformed into a stock corporation, Deutsche Post AG. In November 2002 this transformation reached its preliminary peak with Deutsche Post AG going public and being floated on the stock market.

The political and economic concept behind this development is simple: Competition is the rule, the state-owned supplier's monopoly an exception that needs to be justified.

At the end of the eighties we came to realise in Germany that certain sovereign political tasks should be separated from operational/entrepreneurial ones, and that independence in the economic management of individual companies should be strengthened.

Nevertheless reserved areas were still being maintained, particularly for infrastructural reasons. This also concerned the letter mail service of Deutsche Post.

On the one hand the German Postal Act and the resulting "Postal Universal Service Ordinance" (PUDLV) now give us the necessary freedom for acting as a private-sector company in Germany. On the other hand we are subject to existing regulations and limitations in the interest of providing basic postal services to all citizens.

Our experience with these obligations leads me to the following conclusions: Universal service and competition do not exclude one another. The universal service obligation must, however, be affordable for a private-sector company. Moreover, in comparison and in competition with other European postal companies, we have to ensure that there are no universal services going far beyond the scope of the Postal Services Directive in individual EU Member States.

The purpose of universal postal services is to provide basic postal services to the population.

Today, Deutsche Post World Net, for example, is obliged to operate 12,000 postal retail outlets in Germany. In contiguous built-up residential areas we have to install and maintain a postbox every 1,000 meters. In addition we have an obligation to deliver letters weighing up to 2,000 g and addressed parcels weighing up to 20 kg. Delivery has to be made on six working days, from Monday to Saturday. A nationwide uniform tariff is to be charged for postal services provided under an exclusive licence.

This means that irrespective of real production costs and whether a letter is delivered only within Berlin or from an island in the North Sea to the Bavarian Alps, Deutsche Post World Net processes it at the same price.

We implemented substantial rationalisation measures in Germany. Let me give you two examples: 1. We cut 140,000 jobs, but without a single lay-off. 2. From 30,000 retail outlets in the early nineties we are now down to 12,800. And believe me, every change to this infrastructure triggered intensive debate.

In order to finance universal services our group was granted an exclusive licence which reserves a certain service area for us as sole supplier. This is the political arrangement in Europe and many other countries. The state demands certain services (e.g. postal retail outlets and nationwide uniform tariff) for which it does not pay directly but through income achieved from a defined monopoly.

The exclusive licence in Germany today mainly covers letters weighing up to 100 g, from 2006 up to 50 g. The license has been extended by parliament until the end of 2007. The extension of this license is a direct result of the sluggish development of liberalisation efforts at European level in recent years.

In December 1997 the European Parliament and Council issued the EU Directive on the liberalisation of the European postal markets. The aim of the Directive is the introduction of common provisions on the development of the postal sector, improvement of postal service quality and a gradual and controlled opening up of the markets. One of the crucial points of the Directive is to guarantee postal universal services in the long run.

With its decision in late 2001 to gradually open up European mail markets to competition in the following years, the EU provided a new impetus to compete for these markets. This means that the European Parliament and Council have to decide by the end of 2007, on the basis of a proposal to be submitted by the Commission by the end of 2006, on further liberalisation steps which could then come into effect from 2009.

In the discussion on liberalisation Deutsche Post World Net has always advocated a gradual and controlled opening up of markets. We are convinced that only fair competition can serve the European internal market, quality of services and job security. The substantial opening up of the postal markets and the setting of a final date for their complete liberalisation are the right and reasonable responses to the requirements of the European internal market and customers' needs in Europe. A definite final date means planning security for all postal companies.

And this is all the more important as there is basic agreement in Europe that state monopolies should be removed. On the other hand further liberalisation has to take place in harmony with all Member States in order to ensure equal opportunities for all companies in the markets. A unilateral liberalisation in only a few countries would be contrary to the idea of the common European market and would render it absurd. This applies equally to the emerging discussion in Europe on levying VAT on postal universal services.

Deutsche Post World Net has intensified its efforts to gain a starting position for competing in the European mail markets. An example of this is our recent and promising involvement in the Dutch and British mail markets.

But, as a globally operating group, we are of course also active in

global markets far beyond Europe. The current GATS negotiations are thus of particular interest to us. They aim at removing trade barriers and explicitly include postal and express services. The 2001 WTO Ministerial Conference held in Doha (Qatar) set the timetable for these negotiations which are due to end in 2005. The EU has just transmitted its "initial requests" to the WTO negotiating partners including, among other points, the demand to open up the markets for postal and express services in accordance with liberalisation in the EU.

In international markets we are constantly faced with issues relating to competition law and policy which greatly preoccupy and challenge us in our daily work. I would like to give you two examples which illustrate how complex our topic and your daily work can be for a group such as ours.

1. The USA is one of the most important express and logistics markets worldwide. A globally active logistics group cannot avoid establishing and building up its presence there. We started this process by our participation in DHL and will continue this by putting into effect our merger with Airborne Express which we have recently announced. Both projects are by no means as easy to achieve as one sometimes tend to believe.

Since the takeover of the international express service provider DHL by Deutsche Post World Net our large competitors UPS and FEDEX have been using every legal and political means available as well as a fantastically high lobbying budget to try and keep DHL away from the American market.

In this respect it is important to know that UPS and FEDEX dominate the US parcel market with a share of 80 per cent whereas DHL holds a market share of 0.9 per cent.

What our competitors use as a legal and political lever for sealing off the US market against foreign competitors is a provision stipulating that airlines are only considered as US carriers if at least 75 per cent of the voting rights are held by US citizens.

This applies to DHL Airways in the United States as Deutsche Post split up ground transport and airline into two companies after the acquisition of DHL, so that we now only hold a 25 per cent share in DHL Airways.

This was also established by the US Department of Transportation (DOT) which already turned down a large number of petitions filed by UPS and FEDEX.

However, the two companies as well as protectionist interest groups

still continue to pursue this argument in the political sector.

The argument escalated after DHL's acquisition of the US express service provider Airborne, although the airline belonging to Airborne was not acquired and remains to be owned 100 per cent by the previous Airborne shareholders.

On 16 April 2003 the Republican Senator Stevens (Alaska), Chairman of the US Senate's budget committee, pushed through an amendment to the war budget stipulating that no military orders from the now released budget funds can be placed with airlines which are not actually controlled by US citizens, achieve more than 50 per cent of their revenue from a foreign company or are owned by a foreign state. This provision applies solely to DHL-Airways which means that one single company in the US market is discriminated against in a most striking way.

One must know in this context that both the Pentagon and the State Department are important DHL-Airways customers as DHL flies to destinations its competitors do not offer at all (e.g. Afghanistan). The White House, the Pentagon, the Transport Ministry and two Senators had therefore voiced their opposition against the amendment. Nevertheless it became law. This anti-competitive attitude is in clear contrast to the freedom of operation US companies enjoy in Germany/Europe.

Do we have to put up with the fact that we will have to live with these protectionist conflicts in the USA for a hardly foreseeable period of time? For our group the decisive question is how these conflicts are being addressed and settled by those persons and authorities responsible for competition law and policy. After all this is the point which proves to what extent a nation is prepared to face free and fair competition and to actually let it develop.

One further example will show you that there are also regions which offer new chances for us and many other businesses. I would like to speak about the developments in Asia and particularly about the situation in China.

Today Asia is one of the world's growth markets. The foreseeable growth rates in the Asian countries by far exceed those we will achieve in the strongly developed nations of Europe and North America. Globally acting groups are investing in Asia today and are positioning themselves over there for the future. What will be important in Asia, too, is to promote and strengthen the economy through competition.

With China's accession to the WTO in late 2001 the country has turned towards international economy and global trade after 15 years of negotiations and commitments to a far-reaching liberalisation of markets.

In anticipation of accession, investments by foreign companies reached a record level as early as 2001, and this positive trend continued in 2002. China's state and party leaders have taken advantage of these successful developments and have been playing an increasingly active role in regional economic policy.

With its WTO accession China has committed itself to a far-reaching foreign trade liberalisation within five years. A single Chinese internal market has to be created and the many barriers to market entry as well as local monopolies still in place today must be removed. We all hope that the investment climate will further improve after the accession.

Deutsche Post World Net counts on further liberalisation and free competition in China and Asia. With our subsidiaries DHL and Danzas we have been active in China for a long time. DHL has been active in China since 1986 and is the number one over there. In terms of tonnage DHL achieves 40 per cent growth rates which are also attainable in other Asian countries and which at present regularly account for two-digit growth rates in terms of revenue.

With Danzas we have been represented in China since the early 1990s and we are the only European company which has been granted a national and international A licence in this country. This means we are permitted to undertake all activities in China under our own name and management.

China's further liberalisation will lead to intensive competition for those markets which are economically worthwhile and which this country will be able to offer in the future. In this respect as well we are counting on free and fair competition which rewards the best concepts and ideas.

Let me give you a brief summary at the end of my speech. And I will gladly come back once again to the title of your conference: "Competition Policy at the Crossroads".

What is important today and in the future for companies and groups which are not only active in their domestic markets, but also at international level, is that our best ideas, concepts and people encounter a competition law and policy framework which allows us to position our companies in an environment of free and, above all, fair competition. In other words: Those

who are both willing and able to take action must be allowed to do so.

I do not think that we are standing at the crossroads with our competition policy. But it is obvious which homework we have to do now. This always starts at one's own doorstep, in one's own country and then continues up to the multilateral level. One glance at the further liberalisation of the European postal markets or the ongoing GATS negotiations on the elimination of trade barriers shows that there is enough work to be done. Of course this process will challenge *you*, but also the companies which must articulate their views, thus supporting policymakers in their further actions and negotiations.

I would like to thank you for your attention and wish you inspiring and fruitful discussions in the further course of your conference. I hope that my group, Deutsche Post World Net, and I will be able to prove ourselves in the future within a framework of free and fair competition.

PODIUMSDISKUSSION I

Unternehmerische Freiheit und Schutz des Wettbewerbs – ein schmaler Grat

PANEL DISCUSSION I

The narrow line between entrepreneurial freedom and protection of competition

Bodo H. Hauser
Programm-Geschäftsführer
Fernsehsender PHOENIX

Das Thema lautet: „Unternehmerische Freiheit und Schutz des Wettbewerbs – ein schmaler Grat“

Ein aktuelles und brisantes Thema, wie die Diskussionen in den letzten Monaten gezeigt haben. In Deutschland hat das Bundeskartellamt seit 45 Jahren einen festen Platz als Hüter des Wettbewerbs eingenommen. Im Bewusstsein der Öffentlichkeit ist es fest verankert und auch in vielen anderen Ländern wird das Wettbewerbsrecht zunehmend als wichtige ordnungspolitische Stütze erkannt. In ungefähr 100 Ländern gibt es Institutionen, und die Aufgabe des Wettbewerbsschutzes erfreut sich international einer wachsenden Akzeptanz. Aber es sind auch kritische Töne zu hören und zwar aus wissenschaftlichen und aus Wirtschaftskreisen.

So wird den Wettbewerbsbehörden mitunter vorgeworfen, der Freiheit des Wettbewerbs mit den Eingriffen in die Wirtschaft gelegentlich mehr zu schaden, als zu nutzen.

Wie das gestellte Thema schon andeutet, bewegt sich im Wettbewerbsschutz jede Wettbewerbsbehörde auf einem schmalen Grat. Denn im Wettbewerb versuchen Unternehmen stets Vorteile vor ihren Konkurrenten zu erlangen. Das ist das Wesen des Wettbewerbs. Es schließt ein mögliches Ausscheiden unterlegener Unternehmen ein. Dynamischer Wettbewerb erzeugt damit auch unweigerlich temporäre Machtungleichgewichte. Wichtig ist dabei aber auch, der Wettbewerb lebt von der unternehmerischen Freiheit.

Die Wettbewerbsbehörden stehen somit vor der Aufgabe, den Wettbewerb zu schützen, ohne die natürliche Dynamik der Märkte zu behindern. Der Wettbewerbsschutz darf sich eben nicht in einen Schutz vor dem Wettbewerb verkehren. Gleichermaßen darf staatliche Lenkung nicht an die Stelle marktwirtschaftlicher Koordinierung treten.

Es muss also gegen die Zementierung von überragender Marktmacht angegangen werden. Wie weit aber dürfen Wettbewerbsbehörden im Einzelfall gehen, ohne dass sich die angestrebte Wirkung ins Gegenteil verkehrt und dem Wettbewerb geschadet wird, statt ihm zu nützen? Kontroversen zu dieser Frage resultieren zumeist aus einer unterschiedlichen Beurteilung der Selbstheilungskräfte des Marktes. Dort stellen sich die Fragen: Hat sich die Dynamik der Märkte z.B. durch die rasante Entwicklung der Informations- und Kommunikationstechniken erhöht? Haben die Selbstheilungskräfte des Marktes zugenommen? Auch die Globalisierung spielt in diesem Zusammenhang eine Rolle.

Ein offener grenzüberschreitender Handel sorgt für mehr Konkurrenz. So werden die Unternehmen der Europäischen Union möglicherweise nach der Erweiterung stärkere Konkurrenz von Unternehmen aus Osteuropa erfahren.

Wettbewerbsbehörden entscheiden aufgrund der Prognosen, die sie zu den Auswirkungen einer potentiellen Beschränkung auf den Wettbewerb machen.

In einigen Bereichen können diese Entscheidungen diskutiert werden. In Deutschland gehören dazu die unter Einstandspreisfälle gegen Aldi, Walmart und Lidl, und die Frage des Netzzugangs im Energiemarkt, und die Auflagen zum Zusammenschluss RWE/VEW. Ein weiterer Fall, der im internationalen Kontext für viele Kontroversen gesorgt hat, war der schon so oft diskutierte Fall General Electric/Honeywell. Daran entzündete sich die Diskussion, ob eine mögliche Bündelung von Komponenten zu einem Paketangebot als wettbewerblicher und effizienter Vorgang zu bewerten sei, oder ob es sich schon um eine Wettbewerbsbeschränkung zur Absicherung und Zementierung überlegener Marktmacht handelte?

An dieser Stelle kommt die Rolle der ökonomischen Analyse ins Spiel. Dort ist entscheidend, dass die ökonomische Analyse stets mit großer Sorgfalt auf die tatsächlichen Gegebenheiten übertragen werden muss, sonst hilft sie nicht weiter.

Sowohl die ökonomische Wettbewerbstheorie als auch die Wettbewerbspolitik werden sicher auch in Zukunft noch weiter daran arbeiten müssen, konkretere und praktikablere Kriterien für die Beurteilung einiger Wettbewerbsbeschränkungen zu liefern. So kann als Ziel des Wettbewerbsrechts nur der Wettbewerbsschutz in Frage kommen. Andere Ziele, wie z.B. die Förderung internationaler Konkurrenzfähigkeit „National Champions“ – führen notwendigerweise zu Wettbewerbsverzerrungen.

Deshalb muss die Wettbewerbsbehörde eine kompetente Prüfung durchführen und die Entscheidungen müssen überprüfbar sein. Betroffene Unternehmen müssen die Entscheidung der Behörde angreifen können. Dazu müssen sie über die Gründe der Entscheidung ausreichend informiert sein. Dabei sollten sich die Wettbewerbsbehörden auf Verbote beschränken und nicht positiv gestaltend in die Wirtschaft eingreifen. Dies setzt aber im internationalen Bereich eine Koordination unter den verschiedenen involvierten Wettbewerbsbehörden voraus, um unterschiedliche Entscheidungen zu vermeiden.

Bodo H. Hauser
Programme Managing Director
PHOENIX TV

Our topic is: "The narrow line between entrepreneurial freedom and protection of competition"

As discussions in the past months have shown this is a topical and explosive issue. In Germany the Bundeskartellamt has firmly occupied its place as the guardian of competition for 45 years now. It is thoroughly embedded in the public consciousness, and in many other countries competition law is also increasingly recognised as an important regulatory pillar. Competition institutions exist in around 100 countries and the task of protecting competition is gaining increasing international acceptance. Nevertheless there are also critical voices coming from both academic and business circles.

For example competition authorities are at times accused of causing more harm than good for the freedom of competition through their intervention into the economy.

As the given topic suggests, each competition authority balances on a narrow line in protecting competition. After all, in competition companies always try to gain advantage over their competitors. This is the very nature of competition. And this includes the potential exit of inferior companies. Consequently, dynamic competition inevitably also causes temporary imbalances of power. On the other hand, it is also an essential feature of competition that it depends on entrepreneurial freedom.

Hence competition authorities are faced with the task of protecting competition without impairing the natural dynamics of the markets. This means that protection of competition must not turn into protection from competition. At the same time state control must not replace free-market coordination.

Therefore, what must be prevented is the cementing of paramount market power. But how far may competition authorities go in individual cases without reversing the desired effect and damaging rather than benefiting competition? Controversies on this question mostly result from differing evaluations of the market's self-healing powers. In this connection the following questions arise: Have market dynamics increased, for example as a result of the rapid development of information and communication technologies? Have the market's self-healing powers increased? Globalisation, too, plays a role in this connection. Open, cross-border trade creates more competition. After the enlargement companies within the European Union will thus possibly face stronger com-

petition from eastern European companies.

Competition authorities base their decisions on their prognoses made on the effects of a potential restraint of competition.

In some areas such decisions may be debatable. In Germany these include the sales below cost price cases against Aldi, Walmart and Lidl as well as the issue of network access in the energy market and the obligations imposed in the RWE/VEW merger case. Another case which resulted in a number of controversies at the international level is the much-debated General Electric/Honeywell case. It sparked off the discussion as to whether a possible bundling of components into a package offer is to be considered as a competitive and efficient process or whether it rather constitutes a competition restraint aimed at securing and cementing paramount market power.

At this point the role of economic analysis comes into play. In economic analysis it is important that greatest care must be taken in applying it to the actual circumstances, otherwise it will not be very useful.

In the future both economic competition theory and competition policy will certainly have to continue their efforts to provide more concrete and practicable criteria for evaluating certain restraints of competition. Hence the aim of competition law can only be to protect competition. Other objectives such as promoting international competitiveness - national champions – will necessarily result in distortions of competition.

The competition authority therefore has to carry out a competent examination and its decisions must be subject to judicial review. The companies concerned must be able to challenge the authority's decision. In order to do so they have to be sufficiently informed about the reasons for the decision. Here the competition authorities should restrict themselves to prohibitions rather than interventions into the economy in terms of positively shaping it. At the international level, however, this presupposes that the various competition authorities involved coordinate with each other in order to prevent differing decisions.

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I. Introduction

Good afternoon. It is a true privilege to be invited to participate in the 11th International Conference on Competition, which has become a premier event addressing international competition policy. I would like to thank the President of the Federal Cartel Office, Dr. Ulf Böge, for allowing me to speak in place of Hew Pate today. Hew had very much been looking forward to being here. But, the Senate Judiciary Comm. decided last week to have a hearing on his nomination this week. I welcome the opportunity to share this program with my good friend Commissioner Monti, as well my colleagues from other competition authorities, including Director General Lauritzen, who has played a very constructive role in the International Competition Network, among other joint efforts.

We have heard a thoughtful and enriching exchange on the topic of "The Narrow Line Between Entrepreneurial Freedom and Protection of Competition." It is a narrow line in some respects, and this afternoon I would like to offer a few thoughts on how we in the United States have attempted to walk that line and to enforce the law against anticompetitive conduct without chilling vigorous and aggressive competitive behavior.

The metes and bounds of US antitrust law have been evolving over 110 years. Our understanding of what types of conduct give rise to antitrust concerns has changed as our tools of analysis have matured. In the US, there has developed a rough continuum, based in many ways on our economic learning over the years, in the type of analysis that is required to assess the likely competitive effects of different categories of conduct.

The analysis of cartels and hardcore price-fixing falls at one end of the continuum. In our experience, such conduct is so clearly devoid of any efficiency-enhancing potential that no inquiry is required to conclude that the conduct in question is anticompetitive, and under our system, such conduct will be condemned as "per se" illegal.

In the middle of the continuum are mergers, joint ventures, and similar forms of competitor collaborations. The likely competitive effects of such conduct are not so readily apparent in certain instances. However, over the years there has developed a sound, economically-grounded, and highly principled framework of intensive review that

allows courts and enforcers to assess with some degree of confidence the likely competitive outcomes of these competitor collaborations. This is not to say that merger analysis is free from controversy – far from it. But there is a broad core of agreement regarding the proper analytical tools to apply.

At the other end of the continuum is single-firm conduct. Here the most careful analysis is needed. It is with respect to this type of conduct that it may be most difficult to differentiate between healthy competition on the merits and harmful exclusionary conduct. It is here where enforcers and courts run a significant risk of deterring hard competition. It is also an area in which, even if we are able to conclude that certain conduct is anticompetitive, it may be more difficult to effect workable remedies that will restore any lost competition.

With such a full array of conduct before us, it is of course appropriate to keep a major focus on the fundamentals – deterring the types of actions that are most clearly anticompetitive and harmful to consumers: cartels and price-fixing. Here, where the conduct is detected, we can act with certainty in protecting consumers. With respect to mergers, joint ventures, and other forms of competitor collaborations, the analysis is more difficult. Nevertheless, we have a fair amount of confidence in the ability of enforcers and courts to predict correctly the competitive effects. With respect to single-firm conduct, our Supreme Court instructs us that we must be more humble about our ability to assess the competitive effects of such behavior. We must be mindful that "a monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits." [1] It is in this area that we must tread most carefully, recognizing that a competitive outcome is often dictated by the operation of the market. Yet, where enforcement is warranted, it is no less important that we act decisively.

II. Unilateral vs. Concerted Conduct

US antitrust law has always tended to treat concerted action more severely than single-firm conduct. This is because even though concerted action can be efficiency-enhancing, it also runs the risk of depriv[ing] the marketplace of the independent centers of decision-making that competition assumes

1 Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) (internal quotations omitted).

and demands."[2] Courts, by contrast, have applied Section 2 of our Sherman Act – the substantive section relating to single-firm conduct – only in narrowly limited circumstances and only in carefully measured ways.

Why is this the case? It is an appreciation for the value of ruthless competition that has led US courts to limit the avenues available for challenges to the conduct of single firms. Sound antitrust policy is based on faith in the competitive process, even when that process is not pretty. Judge Learned Hand had it right when he noted nearly 60 years ago that "the successful competitor, having been urged to compete, must not be turned upon when he wins."[3]

Again, returning to the spectrum: Certain forms of collusive conduct do not generate any efficiencies and are presumed to harm competition. Cartels are designed to restrict output and raise price above competitive levels, and shield participants from the market forces that would otherwise lead to innovation and competition on the merits. In the US cartels and price-fixing offenses are treated as crimes and are punishable as felonies, with significant jail time for individual violators. Since the beginning of FY 1997, the Antitrust Division has prosecuted international cartels affecting well over $10 billion in US commerce. The cartel activity uncovered in these cases has cost US businesses and consumers many hundreds of millions of dollars annually. For example, our investigation of price-fixing in the lysine industry found that prices increased by 70 % in the first 6 months of the conspiracy, and eventually doubled over the course of the conspiracy.[4] In taking action against this type of hard core cartel behavior, the risk of punishing firms for engaging in what is actually competitive behavior and of generating "false positives" is very low.

2 Cooperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984).

3 United States v. Aluminium Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

4 In addition, prices rose by over 30 % during the duration of a conspiracy affecting the citric acid industry, and by 60 % during the course of a conspiracy to fix prices in the graphite electrodes industry. Likewise, a 2002 survey conducted by the Organization for Economic Cooperation and Development revealed that the amount of commerce affected by just 16 large cartel cases reported exceeded 55 billion dollars world-wide. The cartel markup in some of these cases was as much as 50 % or more.

Other forms of concerted conduct, such as mergers and joint ventures, are in many instances likely to be either procompetitive or competitively benign. For example, at the Antitrust Division, we clear over 97 percent of mergers within 30 days of their notification. Of course, some mergers are likely to create or increase market power; the Division ultimately challenges two-thirds of those mergers that are not cleared within the first 30 days and result in an extensive Second Request investigation. In comparison to cartel behavior, the likely competitive effects of mergers and joint ventures may not be immediately apparent, but they are ascertainable through extensive factual investigation and economic analysis.

In performing this analysis, we are guided both by the prevailing case law and our Horizontal Merger Guidelines. The Guidelines provide a clear analytical framework and eschew drawing general conclusions based merely on market shares and other structural factors. They invite agencies and the courts that sometimes apply them to engage in a rigorous factual and economic analysis of the transaction. As a result, although we are constantly seeking to build upon and improve our understanding of the likely effects of mergers and joint ventures, we believe that such an economic- and fact-based analytical framework helps ensure sound enforcement decisions.

With respect to Section 2 actions challenging single-firm conduct, however, there is a greater risk that enforcement action may actually prohibit competitive conduct and otherwise chill competition on the merits. The difficulties associated with distinguishing competitive from exclusionary conduct, combined with the fact that the courts of general jurisdiction and juries that hear and decide upon these cases often lack antitrust expertise, create a risk that misapplication of Section 2 might deter competitive behavior.

Our Supreme Court has held that it is not "enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression... In part because it is sometimes too difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."[5]

5 Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752, 767-68 (1983).

Applying this standard is not without its difficulties. Jude Frank Easterbrook recently has put the matter this way: "Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike."[6]

Given the difficulties associated with distinguishing between competitive and aggressive conduct, should courts and enforcement agencies focus only on cartel and merger enforcement and look the other way when it comes to most forms of single-firm conduct, as Judge Easterbrook also has suggested? No, not at all.

Rather, as the Antitrust Division's recent efforts in the Microsoft and American Airlines cases attest, we believe that courts and enforcers be vigilant in taking action against anticompetitive single-firm conduct. However, we also believe it is important that the antitrust laws allow even dominant firms – many of whom achieve their success due to superior production techniques, innovation, or management capabilities – to compete aggressively. As such, we have sought to apply standards of single-firm conduct that are transparent, objective, and administrable, so that antitrust laws do not unduly interfere with the competition they are meant to protect.

III. A few words on the Standards: Standards Governing Single-Firm Conduct

The US Supreme Court has held that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[7] Following this line of antitrust jurisprudence in determining whether conduct is predatory, the Division has found it useful in many contexts to ask whether the conduct would make economic sense for the defendant but for its elimination or softening of competition. It is a standard that we have advocated in several recent enforcement actions, including the Microsoft and American Airlines cases, and

6 Frank H. Easterbrook, When Is it Worthwhile to Use Courts to Search for Exclusionary Conduct?, _ Columbia Bus. L. Rev. 101 (2003) (forthcoming).

7 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), citing Robert Bork, The Antitrust Paradox 138 (1978).

in a recent Supreme Court brief, in Verizon v. Trinko. In applying this standard, we do not mean to suggest that it necessarily encompasses every single type of conduct that may violate Section 2 of the Sherman Act. The all-purpose, one-sentence, universal test for Section 2 liability is a "holy grail" that may never be precisely located. However, we do believe this test sets forth an objective, transparent, and economically-based framework for assessing single-form conduct, as well as for firms to abide by. Let me give you some examples of how we have applied it.

American Airlines

In the complaint in Mai 1999, the Division filed a complaint alleging that American Airlines had violated Section 2 of the Sherman Act by engaging in successful predation that involved adding money-losing capacity to drive lower-cost carriers out of four of American's Dallas – Forth Worth ("DFW") Airport routes. Where low-cost entrants threatened significant expansion of low-cost service, American flooded the routes with additional capacity – more flights, bigger planes, or both. We have claimed that by providing this additional capacity, American lost money, and that it made no business sense except for the fact that American stood to gain much more in the long run by forestalling competition and keeping prices higher once competition was driven away.

The district court hearing the case granted the defendant's motion for summary judgment, which we have appealed. In our brief on appeal, we have argued that the proper inquiry in reviewing American's conduct is whether "the increases made business sense unless they excluded rivals," that is, "whether the conduct would be profitable, apart from any exclusionary effects."[8]

American's own documents explained the predation scheme designed to drive lower-cost carriers out of business. As we cited in our brief, an American "DFW Vulnerability" study concluded that any strategy to make a lower-cost carrier unprofitable at DFW "would definitely be very expensive in terms of American's short term profitability." Former CEO Bob Crandall also noted, "If you're not going to get them out then [there is] no point to diminish profit."

In offering these examples from documents, let me be clear in stat-

8 Brief for Appellant, United States of America v. AMR Corporation, American Airlines, Inc. and American Eagle Holding Corporation, No. 01-3202 (10th Cir. Jan. 11, 2002).

ing that this case is not simply about the internal rumblings of a dominant firm seeking to preserve its market position. The Division's economic expert performed an extensive quantitative analysis that confirmed that the incremental costs American incurred as a result of the challenged capacity additions substantially exceeded the incremental revenues attributable to them. Thus, as we alleged in our appellate brief, American's conduct made sense only as what Judge Bork called "an investment in future monopoly profits."[9]

Microsoft

The *Microsoft* case[10] is the most notable recent enforcement action the Division has taken involving single-firm conduct, so I would be remiss in not offering a few observations about the case. Certainly, some – in particular Microsoft's competitors – viewed Microsoft's dominant position in the market for Intel-compatible PC operating systems as a problem whether or not Microsoft obtained that monopoly through lawful means, and believed that antitrust policy should be a vehicle for restructuring the operating system market.

The Division consistently has indicated, however as we said in our appellate brief back in 2001, that "if Microsoft had confined itself to improving and promoting its products on their merits, it would have faced no antitrust liability, whatever the effect on its rivals."[11] Following the antitrust jurisprudence of the Supreme Court, we asserted that the proper standard of inquiry in the Microsoft case was whether the conduct "would not make economic sense unless it eliminated or softened competition and thus permitted the costs of the conduct to be recouped through higher profits resulting from the lack of competition."[12]

Applying this standard, we argued – and the Court of Appeals subsequently found – that Microsoft

9 Robert H. Bork, The Antitrust Paradox 145 (1978).

10 See United States v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002) and State of New York, et al. v. Microsoft Corp., 231 F. Supp. 2d 203 (D.D.C. 2002) (conditionally approving the settlement); Order, United States v. Microsoft Corp. (November 12, 2002) (entering the Third Revised Proposed Final Judgment as the final judgment); and State of New York, et al. v. Microsoft Corp., 224 F.Supp. 2d 76 (D.D.C. 2002) (rejecting virtually all of the additional remedies proposed by the dissident states).

11 Brief for Appellees, United States of America and State of New York, et al., v. Microsoft Corporation, Nos. 00-5212, 00-5213 (D.C. Cir. Feb. 9, 2001).

12 Id.

took actions to discourage the development and deployment of rival Web browsers and Java technologies, in an effort to prevent them from becoming middleware threats to Microsoft's operating system monopoly. Microsoft's anticompetitive campaign to exclude rival web browsers went far beyond offering its own Internet Explorer browser to original equipment manufacturers ("OEMs") in a bundle with Windows at no extra charge; it discouraged and threatened to penalize individual OEMs that wanted to pre-install and promote rival browsers.

This actions against OEMs included, among others, preventing OEMs from: (1) removing the desktop icons, folders, or "Start" menu entries of Microsoft's own Internet Explorer browser; and (2) using the Windows Active Desktop to promote third-party brands. The Division argued that these types of restrictions "stifled innovation by OEMs that might have made Windows PC systems easier to use and more attractive to consumers," and "harmed consumers who preferred a different browser or none at all.[13]

Conclusion

We think that the standard articulated by the Division in cases such as American Airlines and Microsoft can inject greater transparency and objectivity in to what is often a precarious process of distinguishing competitive from exclusionary conduct. Most recently, in Verizon v. Trinko, a case involving the scope of an incumbent telecommunications firm's duty to deal with its competitors,[14] the Division has taken the position that essential facilities and monopoly leveraging claims also must at a minimum include some showing that the defendant's conduct would not make economic sense unless it tended to reduce or eliminate competition. These are two other areas of Section 2 law where we believe greater clarity is needed. Ultimately, we believe that a more objective, economics-based approach to evaluating conduct under Section 2 of the Sherman Act can better ensure that enforcement remains correctly focused on protecting the competitive process.

13 Id.

14 Brief for the United States and Federal Trade Commission as Amici Curiae, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682 (U.S. Sup. Ct. Dec. 13, 2002).

Dr. Josef Ackermann

Vorstandssprecher
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Im Vergleich zu anderen Branchen sind Banken ebenso wie andere Finanzinstitutionen im Hinblick auf Wettbewerbsfragen eine eher unauffällige Branche. Dies gilt im Kern sowohl in Deutschland als auch auf europäischer Ebene.

Es gibt eine gute Erklärung, warum die Bankenbranche wettbewerbsrechtlich so wenig auffällig ist: Von den zwei grundsätzlichen Bedrohungen des Wettbewerbs – private Kollision und staatliche Beihilfen – spielt letztere außer in Deutschland nur in Einzelfällen eine Rolle, nämlich bei der Bewältigung von Schieflagen einzelner Institute. Der problematischste derartige Fall, der schließlich eine Intervention der EU-Kommission erforderte, war die Rettungsaktion der französischen Regierung für den Crédit Lyonnais Anfang der 90er Jahre.[1]

Deutschland ist, wie erwähnt, mit der jahrelangen Auseinandersetzung um die Sonderstellung öffentlich-rechtlicher Banken die unrühmliche Ausnahme eines strukturellen Beihilfeproblems. Nur dank der Beharrlichkeit der EU-Kommission konnten Wettbewerbs- und Konsumenteninteressen hier endlich mehr Geltung verschafft werden.

Private Kollusion und der Missbrauch marktbeherrschender Stellungen hingegen sind im Hinblick auf den Bankenmarkt, zumal den deutschen Markt, derzeit kaum relevant. Dies spiegelt in erster Linie die extrem geringe Marktkonzentration des deutschen Bankenmarktes wider. Plastischer ausgedrückt, diese ist so gering, dass selbst bei einer – völlig fiktiven – Fusion aller privaten Institute nicht GWB-relevante[2] Größenordnungen erreicht würden: Ein Gebilde bestehend aus Deutscher, Dresdner, Commerzbank und HVB hätte – gemessen an der inländischen Bilanzsumme – gerade einmal einen Marktanteil von 16%!

Das Problem der Bankenbranche ist gegenwärtig nicht, den Missbrauch marktbeherrschender Positionen zu verhindern. Aus meiner Sicht lautet die zentrale Herausforderung vielmehr: Wie können wir in Europa, in Deutschland Bedingungen schaffen, die es hiesigen Instituten erlauben, zukünftig im Wettbewerb mit den US-Finanzinstituten zu bestehen, die mit dem Vorteil eines

1 Ein Fall aus der jüngeren Vergangenheit war die Risikoabschirmung für die Bankgesellschaft Berlin durch das Land Berlin.

2 GWB = Gesetz gegen Wettbewerbsbeschränkungen

großen, einheitlichen Heimatmarkts im Rücken operieren?

Der internationale Wettbewerb im Bankensektor wird im Kampf um Marktanteile auf globaler Ebene entschieden. Die Kunden sind zunehmend selbst global aktiv und erwarten umfassende Dienstleistungen aus einer Hand. Zudem sind Skaleneffekte mittlerweile auch im Bankgewerbe von Bedeutung: Größe ist nicht alles, aber sie ist relevant. Viele, auch deutsche Institute scheiterten beim Versuch, im internationalen Wettbewerb Fuß zu fassen, weil sie die kritische Größe nicht erreichten. Die US-Institute haben hingegen dank des einheitlichen, großen Heimatmarktes die kritische Masse, um erfolgreich in andere Märkte expandieren zu können.

Konsolidierung im europäischen Bankensektor ist also dringend erforderlich. Sie vollzieht sich aber bisher weitgehend innerhalb der nationalen Grenzen. Für diese Entwicklung gibt es eine Reihe berechtigter kommerzieller Gründe wie das tendenziell höhere Potential für Synergieeffekte, beispielsweise durch die Zusammenlegung sich überlappender Zweigstellennetze. Zweifelsohne gilt auch, dass die meisten europäischen Banken zunächst einmal ihre Bilanzen ordnen, ihre Profitabilität wiederherstellen müssen, bevor sie (wieder) an Fusionen und Übernahmen denken können. Ich bin jedoch überzeugt, dass es im europäischen Finanzsektor zu gegebener Zeit eine zweite Konsolidierungswelle geben wird, dann mit grenzüberschreitenden Fusionen.

Einer grenzübergreifenden Konsolidierung stehen aber gegenwärtig auch einige regulatorische Gründe im Wege, wie z.B. abweichende Verbraucherschutzvorschriften, die ein grenzüberschreitend einheitliches Produktangebot unmöglich machen. Bedenklicher ist im Kontext der Wettbewerbsthematik aber ein ganz anderer Grund, nämlich die beunruhigende Tendenz zahlreicher nationaler Behörden, statt Wettbewerbspolitik Industriepolitik zu betreiben. Dabei sollten und sollen durch die Förderung einer zunächst rein nationalen Konsolidierung "national champions" geschaffen werden, die sich dann auf der Grundlage einer starken Position im jeweiligen Heimatmarkt auch im europäischen Wettbewerb durchsetzen sollen. Diese Strategie ist der falsche Weg: Sie ist wettbewerbsrechtlich bedenklich, weil sie in nationalen Märkten bedenkliche Konzentrationen schafft bzw. zu schaffen droht, und sie ist nicht zielführend, weil die Stärke solcher Institute nicht auf echter Wettbewerbsfähigkeit beruht.

Ziel sind gesunde, profitable Banken in Europa; Banken, die in ihrem Heimatmarkt Europa eine starke Basis haben. Dies heißt allerdings

nicht, europäische Banken zu Lasten der europäischen Konsumenten groß und gesund zu "päppeln". Die Wettbewerbshüter sollen keineswegs tatenlos oder gar schweigend zustimmend zusehen, wenn sich im Zuge der Konsolidierung marktbeherrschende Stellungen entwickeln. Die zu gewinnende Stärke europäischer Institute darf nicht auf Marktbeschränkungen, sondern muss im Gegenteil auf genuiner Wettbewerbskraft beruhen.

Aus genau diesem Grund brauchen wir die Vollendung des Finanzbinnenmarktes, um diesen Wettbewerbsdruck herzustellen. Gesetzgeber und Wettbewerbsbehörden müssen sicherstellen, dass sich konsolidierende Märkte weiter "contestable" bleiben bzw. dieses werden. Je weniger die nationalen Teilmärkte der EU de facto voneinander getrennt sind, desto geringer ist die Gefahr marktbeherrschender Stellungen. Anders ausgedrückt: Integrationspolitik ist die beste Wettbewerbspolitik! Dies löst auch das latente Wettbewerbsproblem in jenen, vor allem kleineren, EU-Staaten, in denen die nationale Konsolidierung bereits weit fortgeschritten ist und kritische Größenordnungen erreicht (insbesondere Schweden, Niederlande, Belgien, Finnland)[3].

Welche Linie wäre seitens der Wettbewerbsbehörden also vor dem Hintergrund der beschriebenen Wettbewerbssituation wünschenswert? Ich sehe vier Elemente:

- Erstens: Die Vollendung des EU-Finanzbinnenmarkts bleibt Grundvoraussetzung sowohl für die Wahrung des Wettbewerbs als auch für die Stärkung der europäischen Wettbewerbsfähigkeit. Aufgabe der Wettbewerbshüter ist, auf die Beseitigung nationaler staatlicher Barrieren gegen den Prozess der technischen Standardisierung zu drängen, da so Marktzugangsbarrieren verringert werden.

- Zweitens, die EU Wettbewerbshüter sollten dann energisch einschreiten, wenn nationale Behörden heimische Bankenmärkte abschotten bzw. Barrieren gegen ausländische Erwerber errichten. Leider hat die EU-Kommission bisher nur in einem Fall – nämlich 1999 bezüglich der Übernahme der portugiesischen Champalimaud-Gruppe – gegen protektionistische Maßnahmen einer nationalen Regierung interveniert. Mehr solcher Signale wären wünschenswert!

- Drittens, Banken müssen die Kosten senken. Ein Instrument dafür ist der gemeinsame Betrieb von Back-Office Aktivitä-

3 Marktanteil der G5: SE = 88%; NL = 82%; BE = 78%, SF = 80%

ten, wie z.B. Zahlungsverkehrs- und Abwicklungssystemen. Die Wettbewerbsbehörden sollten Kooperationen in solchen wettbewerbsfernen Unternehmensbereichen – wie in der Vergangenheit – weiter konstruktiv begleiten.

- Viertens, ein ceterum censeo für Deutschland: Die seit Jahren zu Recht beklagte Verzerrung des Marktes durch die öffentlich-rechtlichen Institute muss beseitigt werden. Es geht nicht an, dass ausgerechnet im größten europäischen Teilmarkt über ein Drittel des Marktes nicht für eine Konsolidierung zur Verfügung steht.

Fazit: Das Problem in der europäischen Bankenbranche sind gegenwärtig nicht etwa wettbewerbswidrige Marktstellungen, sondern die Verbesserung ihrer internationalen Wettbewerbsfähigkeit. Wir brauchen aber keine geschützten "national champions", sondern wettbewerbsfähige Institute, die in einem dynamischen europäischen Heimatmarkt verankert sind.

Dr Josef Ackermann
Spokesman of the Board and
Chairman of Group Executive
Committee Deutsche Bank AG

In comparison with other industries the banking sector, and other financial institutions as well, are rather inconspicuous when it comes to competition issues. This basically applies both to Germany and at European level.

There is a good reason why, in terms of competition law, the banking sector is such an inconspicuous one: Looking at the two fundamental threats to competition, private collusion and state subsidies, the latter, except for Germany, only play a role in individual cases, viz. in tackling difficulties faced by individual institutions. The most problematic case of this kind which eventually required an intervention by the European Commission was the French government's rescue operation for Crédit Lyonnais in the early 90s.[1] Due to the long-lasting dispute on the special position of public-sector banks Germany, as I said, is an inglorious exception in the shape of a structural subsidy problem. It was only thanks to the European Commission's persistence that the interests of competition and consumers could finally be enforced to a larger degree.

On the other hand, private collusion and abuse of dominant positions are currently hardly relevant at all with regard to the banking market, particularly in the German market. This is reflected above all by the extremely low level of market concentration in the German banking market. Concentration is so low that, to put it more vividly, even a (totally fictitious) merger of all private institutions would not achieve any levels relevant under the ARC[2]: In terms of the domestic balance-sheet total an entity comprising Deutsche Bank, Dresdner Bank, Commerzbank and HVB would have a market share of just about 16 per cent!

The problem currently faced by the banking sector is not the prevention of abuse of dominant positions. From my point of view the crucial challenge is rather the following issue: How can we create conditions in Europe, in Germany, which will enable our institutions in the future to hold their own in competition against US financial institutions which operate with the

1 A more recent case were the risk protection measures undertaken on behalf of Bankgesellschaft Berlin by the federal Land of Berlin.

2 ARC = Act against Restraints of Competition

backing of a large, uniform domestic market?

International competition in the banking sector will be decided by the struggle for market shares at global level. Customers are increasingly tending towards becoming globally active themselves and they expect comprehensive services from one source. Moreover economies of scale have meanwhile become important in the banking sector as well: Size is not all that matters, but it is a relevant factor. Many (also German) institutions have failed in the attempt to gain a foothold in international competition because they did not succeed in achieving critical size. Thanks to their large uniform domestic market the US institutions, on the other hand, have the critical size to enable them to successfully expand to other markets.

Consolidation is thus urgently required in the European banking sector. So far, however, it has only taken place within national boundaries. There are a number of well-justified commercial reasons for this development such as the potential for synergy effects which tends to be higher e.g. due to the merging of overlapping branch networks. Undoubtedly it is also true that most European banks will first have to put their balance sheets in order and to restore profitability before they can (once again) start to think about mergers and acquisitions. I am, however, convinced that in due course there will be a second wave of consolidations in the European financial sector which will then involve cross-border mergers.

Cross-border consolidation is currently also hindered by regulatory measures such as e.g. diverging consumer protection regulations which make a cross-border, uniform product range impossible. However, what raises more concerns within the context of competition issues is a quite different factor, viz. the alarming tendency of many national authorities to engage in industrial policy rather than competition policy. By promoting an initially purely national consolidation the aim of such policies was and still is to establish "national champions" which, based on their strong position in the domestic markets, are expected to assert themselves in European competition as well. This strategy is the wrong approach: From the point of view of competition law it raises concerns because it will lead or threaten to lead to problematic concentrations and it will not achieve its aim as the strength of such institutes is not based on genuine competitiveness.

The aim is to have sound, profitable banks in Europe; banks which are firmly based in their domestic market, Europe. This, however, does

not mean that European banks should be "fattened up" to become big and strong to the disadvantage of the European consumers. Competition watchdogs should by no means look on passively or even with tacit consent as dominant positions emerge in the course of consolidation. The strength to be achieved by European institutions must not be founded on market restrictions but, quite on the contrary, on genuine competitive strength.

Precisely for this reason we need the completion of the Single Market for financial services in order to produce this competitive pressure. Legislators and competition authorities must ensure that consolidating markets remain or become 'contestable'. The less national markets in the European Union are de facto separated from one another, the lesser the threat of dominant positions. In other words: Integration policy is the best competition policy! This will also solve the latent competition problem in those, mainly smaller EU Member states in which there has been considerable progress in national consolidation and in which critical dimensions have been achieved (particularly in Sweden, the Netherlands, Belgium, Finland).[3]

Against the background of the competition situation described, which approach would be desirable for the competition authorities to adopt? I can envisage four elements:

- Firstly: The completion of the single European market for financial services remains a fundamental precondition not only for safeguarding competition but also for strengthening European competitiveness. It is the competition watchdogs' task to push for the removal of national barriers to the technical standardisation process since this is a way to reduce barriers to market entry.

- Secondly: the European competition watchdogs should intervene energetically in cases where national authorities seal off domestic banking markets or erect barriers against foreign purchasers. Unfortunately the European Commission has so far intervened only once against protectionist measures taken by a national government, viz. in a 1999 case concerning the takeover of the Portuguese Champalimaud group. It would be desirable to see more of such signals.

- Thirdly, banks must reduce costs. One instrument to achieve this is the joint operation of back-office activities

3 G5 market share: S = 88 per cent, NL = 82 per cent, B = 78 per cent, FIN = 80 per cent

such as e.g. funds transfer systems and payment handling systems. The competition authorities should continue to constructively monitor cooperation in such sectors which are unrelated to competition, just as they did in the past.

- Fourthly, a ceterum censeo for Germany: The distortion of the market by public-sector institutions, which has rightly been bemoaned for years, must be brought to an end. It is an impossible situation that, of all markets, more than one third of the largest national market in the EU should not be available for consolidation.

Conclusion: The most pressing problem in the European banking sector is not by any means anti-competitive market positions, but how its international competitiveness can be improved. We do not need protected "national champions", but competitive institutions which are rooted in a dynamic European domestic market.

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Einleitung

In Zeiten wachsenden Zweifels an der Wertigkeit marktwirtschaftlicher Ordnungspolitik möchte ich gerne eingangs – in abgewandelter Form – Winston Churchill zitieren mit dem Satz: "Die Marktwirtschaft ist das schlechteste Wirtschaftssystem, allein ich kenne kein besseres!"

In der Tat ist die Marktwirtschaft – das hat sich auch und gerade nach dem Fall der Mauer 1989 gezeigt – das überlegene Wirtschaftssystem, denn es ist am besten in der Lage, Wirtschaftswachstum, Wohlstand und Beschäftigung zu generieren.

Konstituierendes Element der Marktwirtschaft ist natürlich in erster Linie der Wettbewerb. Er ist es, der Unternehmer und Unternehmen zu Höchstleistungen bei Niedrigstpreisen für ihre Kunden antreibt. Wettbewerb in unserer Gesellschaftsordnung ist also ein unbedingt schützenswertes Gut.

Natürlich gibt es Situationen, in denen Unternehmer versuchen, durch Preisabsprachen, Kartelle, monopolistische Tendenzen und ähnliches den Leistungswettbewerb auszuschalten oder einzuschränken. Dies zu verhindern und den Wettbewerb zu gewährleisten ist deshalb eine hoheitliche Aufgabe des Staates. Das deutsche Gesetz gegen Wettbewerbsbeschränkungen, unser Kartellamt, Wettbewerbskommissar Monti in Brüssel und andere erfüllen also eine in hohem Maße gesellschaftlich relevante Aufgabe zu unser aller Wohl.

Bei der Erfüllung ihrer Aufgabe müssen Wettbewerbsschützer jedoch zweierlei beachten, nämlich

- zum einen den relevanten Markt für die betroffenen Unternehmen
- und zum anderen die Dynamik von Politik, Wirtschaft, Technologie und anderen Faktoren, die den relevanten Markt immer wieder verändert.

Wenn unsere Wettbewerbsbehörden also ihrem Auftrag gerecht werden wollen, die Leistungsfähigkeit unserer Unternehmen zu maximieren und damit der Mehrung des volkswirtschaftlichen Nutzens zu dienen, müssen sie der Veränderungsdynamik unserer Wirtschaften und der unternehmerischen Umfelder ständig Rechnung tragen.

In der Regel ist die wirtschaftliche Veränderungsdynamik wesentlich schneller als die Anpassungsgeschwindigkeit von Wettbewerbsge-

setzen und wettbewerbsschützenden Institutionen in der politischen Praxis. Das führt zu einem bedeutenden ordnungspolitischen und damit letztlich auch volkswirtschaftlichen Problem: Je stärker nämlich die Geschwindigkeit der Anpassung von Wettbewerbsschutzgesetzen und -maßnahmen und die Geschwindigkeit der Wirtschaftsdynamik auseinander klaffen, desto weniger können die Kartellbehörden ihrem Auftrag gerecht werden: Statt durch mehr Wettbewerbsschutz die Wohlstandsmehrung der Gesellschaft und ihrer Bürger zu beschleunigen, wird diese dann ganz erheblich verlangsamt. Die ständige und zeitnahe Anpassung des Wettbewerbsschutzes an die Veränderungsdynamik der Wirtschaft ist deshalb ein Muss.

Lassen Sie mich dazu kurz sieben Thesen anführen, die aktuelle Veränderungen der Wirtschaft betreffen und für den Schutz des Wettbewerbs relevant erscheinen:

Sieben Thesen zur wettbewerbsschutzrelevanten Veränderungsdynamik unserer Wirtschaft

These 1:

Die Macht der autonomen Preisfestsetzung durch Unternehmen erodiert zunehmend. Den Unternehmen fällt es immer schwerer, ihre – auch rationalisierten – Stückkosten durch entsprechende Stückerlöse zu decken.

Für diese Entwicklung gibt es viele Gründe. Die wichtigsten davon sind:

1. Die Nachfragemacht nimmt vor allem in Industrie und Handel ständig zu. Das ist seit langem bekannt, bleibt aber in der Wettbewerbsrechtsprechung aus meiner Sicht immer noch ungenügend berücksichtigt.

2. Die technologisch und strukturell bedingten Überkapazitäten wachsen im Verhältnis zur relevanten Nachfrage und werden durch die Informationsasymmetrie von Anbietern und Nachfragern sogar noch verstärkt.

3. Die Marktanteile von Angeboten aus Niedriglohnländern wachsen stetig und bringen die bestehenden Anbieter in Industrieländern in Ertragsschwierigkeiten. Denken Sie nur an die 90 Milliarden Dollar Exportüberschuss, die die Volksrepublik China heute gegenüber den USA erwirtschaftet. Der dadurch ausgelöste globale Wandel der Wirtschaftsstrukturen ist natürlich welt- und volkswirtschaftlich wünschenswert, aber auch mit erheblichen Anpassungskosten verbunden.

4. Neue Technologien, insbesondere Informationstechnologien, führen

zu Produktivitätssprüngen und damit bei funktionierendem Wettbewerb zu sinkenden Preisen.

All diese Veränderungen lösen deflatorische Tendenzen aus und zwingen Unternehmen zu massiven Strukturveränderungen – also etwa zu mehr Konzentration, zu Kapazitätsstilllegungen, Standortverlagerungen oder sogar zur Existenzaufgabe.

Wirtschaftliche Strukturveränderungen stellen einen natürlichen Transformationsprozess dar, der zwangsläufig die Wettbewerbsintensität berührt und den relevanten Markt verändert. Er sollte jedoch hierzulande von den Kartellbehörden nicht behindert werden.

These 2:

Größere Märkte erfordern größere Unternehmen.

Dies gilt für die EU – erst recht für die erweiterte – und natürlich auch für den globalen Markt, wo immer dieser der relevante Markt ist.

Durch neue Geschäftsmodelle und Veränderungen in Nachfrage- und Angebotsstrukturen verändern sich die geografisch relevanten Märkte ständig. Darauf müssen Unternehmen reagieren – durch Zukäufe, Desinvestitionen, Fusionen und durch laufende Refokussierung ihres Geschäftsportfolios – immer mit dem Ziel, ihre Wettbewerbsfähigkeit zu erhalten oder auszubauen.

Bei diesem nötigen Anpassungsprozess sollten sie durch die Wettbewerbsschützer nicht behindert werden. Dies gilt vor allem in der EU, die pro Branche immer noch bis zu 10 Mal mehr und damit im Durchschnitt deutlich kleinere Unternehmen hat als die USA.

Natürlich bleibt auch in größeren Märkten die Aufgabe bestehen, den Wettbewerb zu schützen. Aber sie verlagert sich mehr und mehr von den nationalen Kartellbehörden auf die EU-Ebene und von da auf die globale. Leider erschweren Zuständigkeitsstreits vielfach diesen Verlagerungsprozess – zu Lasten der Unternehmen und der Wirtschaft.

Auch ist die Frage des Wettbewerbsschutzes auf globalen Märkten nach wie vor sowohl institutionell als auch gesetzlich unbeantwortet geblieben. Genug Raum also für eine Diskussion, zu der ich – in einigen Minuten – mit meiner These 7 beitragen möchte.

These 3:

Technologie- und Innovationswettbewerb erfordern ebenfalls neue Größenordnungen von Unternehmen und eine neue Interpretation von relevanten Märkten und Marktanteilen.

Das klassische Beispiel für neue Größenordnungen im Innovationswettbewerb ist die Pharmaindustrie. Wer in dieser Industrie nicht in der Lage ist, pro neu zu entwickelndem Wirkstoff 500 Millionen Dollar in Forschung und Entwicklung zu investieren, hat wenig Aussicht, in der Topliga mitzuspielen. Er kann maximal als Nischenplayer überleben. Ähnliches gilt für die Mikroelektronik, in zunehmendem Maße für die Softwareindustrie und schon lange für alte Industrien wie die Automobilindustrie.

Außerdem haben sich wettbewerbsrelevante Märkte und Marktanteile durch neue Technologien vielfach sehr stark relativiert. Auch hier ein bekanntes Beispiel: Microsoft hat mit seinem Betriebssystem Windows einen Anteil am PC-Markt von fast 90 Prozent. In dem Maße jedoch, in dem die PC-Technologie durch die Internet-Technologie und das World Wide Web sowie die Programmiersprache Java abgelöst wird, verfällt der Wert des Marktanteils von Microsoft im relativ schrumpfenden PC-Markt. Es ist also völlig rational und nicht wettbewerbsbehindernd, wenn Microsoft versucht, seine technologische und finanzielle Stärke sowie seine Kundenbasis dafür einzusetzen, um in der nächsten Technologie-Generation ebenfalls eine Spitzenrolle zu spielen. Je schneller sich also Technologien in ihrer Marktbedeutung ablösen und substituieren, umso weniger kann Wettbewerbsintensität an traditionellen Marktanteilsgrößen, die stabile Märkte voraussetzen, gemessen werden.

An dieser Stelle kommen auf die Wettbewerbsschützer völlig neue Aufgaben zu: Sie müssen ihre Begriffe und ihr Handwerkszeug neu definieren, wenn sie nicht den ökonomischen und technologischen Fortschritt und damit die Wettbewerbsfähigkeit von Unternehmen, aber auch Wachstum und Wohlstand von Volkswirtschaften behindern wollen.

These 4

Der Staat als Marktteilnehmer spielt vor allem in Kontinentaleuropa immer noch eine große Rolle,

- sei es als direkter Teilnehmer am Wirtschaftsgeschehen durch staatseigene Unternehmen,
- sei es durch Interventionen im Wettbewerb,
- sei es aber auch durch sogenannte Industriepolitik zur Rettung sterbender Unternehmen und Branchen oder zur Förderung von Zukunftsindustrien.

Wo immer der Staat ins Wirtschaftsgeschehen eingreift, verzerrt er den Wettbewerb zu Lasten von

privaten oder ihm nicht bevorzugten Anbietern. Dies geschieht u.a.

- durch Preis-Dumping über nicht wettbewerbskonforme Kostenvorteile staatlicher Anbieter, die deren natürlichen Effizienznachteil überkompensieren
- durch Monopol- und Teilmonopolgewährungen in regulierten Märkten
- durch die Durchsetzung nicht unternehmerischer oder wirtschaftlicher Ziele wie Beschäftigungsgarantien, Einhaltung von Tarifverträgen, aber auch nicht zuletzt industriepolitischer Maßnahmen
- und durch viele weitere derartige Eingriffe, die uns allen wohl bekannt sind.

All diese direkten und indirekten Eingriffe des Staates ins Wirtschaftsgeschehen behindern oder eliminieren den freien Wettbewerb und sind ordnungspolitisch abzulehnen. Denn sie prolongieren betriebswirtschaftliche Effizienznachteile, erhalten nicht mehr lebensfähige Wirtschaftsstrukturen und verursachen erhebliche volkswirtschaftliche Kosten mit der Folge signifikanter Wohlstandseinbußen.

Gerade in diesem Zusammenhang sei das wohltätige Wirken Brüssels, insbesondere von Herrn Monti und seinen Vorgängern genannt, dem wir die Deregulierung vieler Märkte und die Privatisierung vieler staatseigener Unternehmen und Beteiligungen verdanken. Hier sind die nationalen Kartellbehörden oft überfordert, weil sie vielleicht doch zu sehr unter dem Einfluss nationaler Regierungen stehen oder von diesen wenigstens – wie jüngste Ministererlaubnisse zeigen – ausgehebelt werden können.

These 5:

Die Deregulierung von Märkten und die Privatisierung von Unternehmen schafft neue Herausforderungen für die Wettbewerbsschützer.

Durch die Deregulierung von Märkten, wie wir sie in Europa auf den Finanzmärkten, auf den Transportmärkten, auf den Telekom-Märkten und zuletzt auf den Energiemärkten erleben und erlebt haben, entstehen für Unternehmen und Wettbewerbshüter gleichermaßen neue relevante Märkte, an die sie sich anpassen müssen.

Unternehmen refokussieren in der Regel ihr Portfolio auf das neu deregulierte Kerngeschäft, konsolidieren sich zu neuen wettbewerbsfähigen Unternehmensgrößen und sind dadurch oftmals in der Lage, erfolgreich zu internationalisieren. So werden aus regionalen Märkten na-

tionale, europäische oder gar globale Märkte.

Wenn sich in dieser Weise die relevanten Märkte erweitern und verändern, müssen auch die Kartellbehörden eine neue Bewertung der Politik dieser Unternehmen vornehmen.

In jedem Fall aber erfordert die Anpassung an neue deregulierte Märkte Zeit, und in dieser Zeit sind die Unternehmen nicht nur auf ihre eigenen Fähigkeiten, sondern auch auf eine wohlwollende Begleitung durch die Wettbewerbsschützer angewiesen. Zu frühes Eingreifen durch die Kartellbehörden kann hier die Entwicklung neuer effizienter Unternehmensstrukturen und neuer relevanter Märkte behindern. Manchmal kann es also sinnvoll sein, von relativ raschen wettbewerbspolitischen Eingriffen für eine gewisse Zeit Abstand zu nehmen.

Lassen Sie mich an dieser Stelle zwei praktische Beispiele bringen:

Erstens, zum relevanten Markt bei Strom und Telekom: Wer weiß heute, was der relevante regionale Markt für Stromanbieter ist und einmal sein wird, und wer weiß dies genau von den Telekom-Märkten? Sicher gibt es einen globalen Mobilfunkanbieter, nämlich Vodafone, daneben aber auch nach wie vor viele Unternehmen, deren Handeln sich auf nationale bzw. auf einige internationale Märkte beschränkt. In der klassischen Festnetz-Telekommunikation war man ebenfalls davon ausgegangen, dass der relevante Markt der globale Markt sein würde. Derzeit sieht es allerdings eher so aus, also würden sich die Anbieter auf ihre nationalen Märkte zurück orientieren und die globalen Kommunikationsbedürfnisse ihrer Kunden über ein Allianzmodell wie bei den Airlines bedienen. Ich glaube nicht, dass die Entwicklung dieser Märkte heute schon genau vorhersehbar ist – auch nicht von den Wettbewerbsschützern.

Zweitens, zum Problem der natürlichen Monopole: Bei der Regulierung von sogenannten natürlichen Monopolen, also etwa den Durchleitungsrechten bei Strom und Gas oder bei der Preisfestsetzung von privatisierten Exmonopolisten, spielen die Wettbewerbshüter eine wichtige Rolle.

Aus meiner Sicht wäre es richtig, nicht für jeden Markt eine gesonderte Regulierungsbehörde zu schaffen – diese ist nämlich stets in der Versuchung, den Incumbant entweder besonders gut oder besonders schlecht zu behandeln –, sondern die Regulierungsaufgaben den bestehenden nationalen und europäischen Wettbewerbsbehörden zu übertragen, die auch solche neuen Märkte nach gleichen ordnungspolitischen Grundsätzen behandeln würden.

These 6

Innovation und neue Geschäftsfelder verändern die relevanten Märkte inhaltlich wie regional.

Beispielsweise im stationären Einzelhandel gilt nach wie vor völlig zurecht: Der lokale Markt ist der relevante Markt. Aufgrund seiner geringen Marktanteile hat auch der Versandhandel diese Interpretation nicht aufweichen können. Was aber passiert, wenn der internetbasierte E-Commerce weiter mit extrem hohen Wachstumsraten zunimmt? Ist dann der relevante Markt beim stationären Einzelhandel, der sich gegen Amazon.com zu behaupten hat, noch der lokale oder regionale oder nicht jetzt auch der nationale oder globale? Und welche Regeln gelten dann – die deutsche Preisbindung der zweiten Hand im Buchhandel oder europäisches Wettbewerbsrecht oder das Wettbewerbsrecht des amerikanischen Hauptsitzes der Gesellschaft?

Auch in solchen Fällen ist für einen adäquaten Wettbewerbsschutz die Neudefinition von Märkten notwendig. Allerdings ist es wiederum für die Wettbewerbshüter schwer, die richtigen Entscheidungen zu treffen, da die Marktentwicklungen nicht ohne Weiteres absehbar sind und zudem viele Rechtskreise berührt werden. Das Internet und neue Kommunikationstechnologien werden hier noch manches Kopfzerbrechen verursachen.

These 7:

In globalen Märkten sollten global tätige Unternehmen einer globalen Wettbewerbsaufsicht unterliegen.

Ich denke hierbei allerdings nicht an eine neue Superbehörde globalen Ausmaßes, sondern vielmehr an die verstärkte Kooperation der bestehenden Antitrust-Behörden auf nationaler oder supranationaler Ebene – möglicherweise bei Angleichung ihrer Rechtssysteme.

In diesem Zusammenhang ist auch die Hilfe gegenüber solchen Ländern und Regionen von Bedeutung, die nicht über angemessene Institutionen für den Schutz des Wettbewerbs verfügen, also beispielsweise viele der asiatischen Märkte. In meinen Augen könnte sich hier ein großes Aktionsfeld für die Wettbewerbsschützer, nicht zuletzt für den Präsidenten des Deutschen Kartellamts, Herrn Dr. Böge, und seine Kollegen auftun. Denn es mag Europäern wie Amerikanern nicht gleichgültig sein, welches Wettbewerbsrecht auf diesen neuen Emerging Markets Anwendung findet, das deutsche oder das amerikanische.

Schlussbemerkung:

Soweit sieben Thesen, denen sich natürlich noch viele andere Fragen, die wir heute Nachmittag erörtern werden, hinzufügen ließen.

Beenden möchte ich mein Statement mit der Bekräftigung meiner eingangs gemachten Aussage, dass Wettbewerb der konstituierende Faktor unserer Marktwirtschaft ist. Er fördert die Leistungsfähigkeit der einzelnen Unternehmen und unserer Volkswirtschaften zugunsten aller Marktteilnehmer – und damit letztlich den Wohlstand unserer Bürger.

Richtig verstanden fördert Wettbewerb aber auch den wirtschaftlichen Strukturwandel, und zwar sowohl einzelwirtschaftlich und nationalökonomisch als auch über die nationalen Horizonte hinaus in großen Wirtschaftsräumen und auf globaler Ebene.

Nimmt die Geschwindigkeit des Strukturwandels immer mehr zu – und das tut sie –, so ergeben sich zusätzliche Aufgaben für unsere Wettbewerbsschützer. Denn der Staat wird stets versuchen, die kurzfristigen und wählerrelevanten gesellschaftlichen Anpassungskosten und -lasten dieses Strukturwandels durch Intervention – d.h. durch Unterbinden von Wettbewerb – zu steuern und niedrig zu halten. Wir alle wissen, dass dies letztlich zu Lasten des mittel- und längerfristigen wirtschaftlichen Wohlstands der Welt und ihrer Bürger geht.

Um den neuen Aufgaben des Wettbewerbsschutzes gerecht werden zu können, gilt es nicht zuletzt auch, das Verhältnis von Kartellbehörden und Staat neu zu definieren – etwa durch einen der Europäischen Zentralbank ähnlichen unabhängigen Status der Wettbewerbsbehörden gegenüber dem Staat.

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Introduction

At a time when there are growing doubts about the value of free-market regulatory policy, let me start with a paraphrased quote by Winston Churchill: "The market economy is the worst economic system, but I cannot think of a better one!" Since 1990, the truth of this statement has been plain for all to see.

The prime constituent of the market economy is of course competition. It is competition that drives entrepreneurs and enterprises to provide maximum performance at minimum prices for their customers. In our social system, competition is thus a value that is definitely worth protecting.

There are of course situations where entrepreneurs try to eliminate or restrict productive competition through price agreements, cartels, monopolistic tendencies and the like. Preventing this and ensuring competition is thus a sovereign task of the state. This means that Commissioner Monti and President Böge fulfil a function of immense social relevance for the benefit of us all.

In fulfilling this role, however, competition watchdogs have to consider two things:

- firstly, the relevant market for the companies concerned
- and secondly, the dynamics of politics, the economy, technology and other factors, which keep changing the relevant market.

Generally, the dynamics of economic change are much faster than the speed at which competition laws and institutions protecting competition in political practice can adapt to such changes. This leads to a crucial regulatory and therefore, ultimately, economic problem: The greater the gap between the speed at which competition laws and measures can adapt and the speed of economic dynamics, the less the competition authorities are in a position to adequately fulfil their task. Instead of accelerating the increase in the prosperity of society and its citizens through more protection of competition, it is considerably slowed down. Consequently, it is essential that the protection of competition be continuously and promptly adapted to the dynamics of economic change.

Let me briefly outline seven theses which deal with current economic changes and seem relevant to the protection of competition.

Seven theses on the dynamics of economic change relevant to the protection of competition

Thesis no. 1:

The power of autonomous price-setting by companies is increasingly being eroded. It is becoming increasingly difficult for them to yield enough earnings per unit to cover their costs per unit – even if rationalised.

There are many reasons for this development. The most important ones are:

1. Buying power is constantly increasing, particularly in trade and industry. This has been known for a long time but in my opinion is still not sufficiently taken into account in court rulings on competition matters.

2. Technological factors necessitate ever greater minimum production capacities and often result in excess capacities in relation to the relevant demand.

3. The market shares of products from low-wage countries are growing steadily, thus causing revenue difficulties to existing suppliers in industrial countries. We need only think of the People's Republic of China's current 90 billion dollar export surplus in relation with the USA. From a global and national economic point of view, the global change of economic structures resulting from this is of course desirable but also involves substantial adaptation costs.

4. New technologies, in particular information technologies, lead to upsurges in productivity and thus, if effective competition is in place, to decreasing prices.

All of these changes trigger deflationary price tendencies and force companies to carry out massive structural changes such as greater consolidation, capacity shutdowns, changes of location or even closure of businesses.

These kinds of economic structural changes are natural transformation processes that inevitably affect the intensity of competition and the relevant market. However, this process should not be impeded in Germany by the competition authorities.

Thesis no. 2:

Larger markets require larger companies.

This applies to the EU – above all after the enlargement – and of course also to the global market wherever this is the relevant market.

Geographic markets are constantly changing as a result of new business models, technologies and changes in supply and demand structures. Companies have to react to this – by international acquisitions, divestment, mergers and by constantly refocusing their business portfolios – always with a view to maintaining or extending their competitiveness.

In this necessary process of adaptation, they should not be hindered by competition watchdogs. This applies above all in the EU where there are still up to 10 times more companies in each sector than in the USA and where companies are thus considerably smaller on average.

The task of protecting competition remains of course also in larger markets. However, it is increasingly shifting from national competition authorities to the EU and subsequently to the global level. Unfortunately, this shifting process is often made difficult by disputes over jurisdiction, at the expense of companies and the economy.

In addition, the issue of the protection of competition in global markets is still unresolved, both in legal and institutional terms. So there is enough room for a discussion to which I would like to contribute with my thesis no. 7.

Thesis no. 3:

Competition in the field of technology and innovation also requires companies to take on new dimensions and it calls for a new interpretation of relevant markets and market shares.

The classic example of new dimensions in innovation competition is the pharmaceutical industry. Companies that are unable to invest 500 million dollars in research and development for each new active substance to be developed have little chance of playing in the top league. Such companies can at most survive as niche players. This applies similarly to microelectronics, increasingly to the software industry and has applied for a long time to old industries such as the automotive sector.

Moreover, relevant markets and market shares have in many cases been put into perspective by new technologies. Let me give you another prominent example. With its Windows operating system, Microsoft holds a share of nearly 90 per cent in the PC market. In the PC market, shrinking in relative terms, however, the value of Microsoft's market share is falling proportionally to the extent that PC technology is superseded by Internet technology, the World Wide Web and the Java programming language. It is therefore absolutely rational and

not anti-competitive that Microsoft is trying to employ its technological and financial power as well as its customer base to play a top role in the next technology generation as well. This means that the faster technologies are superseded and replaced in terms of market significance, the less the intensity of competition can be measured by traditional market share sizes which presuppose stable markets.

In this respect, competition watchdogs will be faced with a completely new challenge: They will have to redefine their terms and instruments if they do not want to impair economic and technological progress and thus companies' competitiveness as well as the growth and prosperity of national economies.

Thesis no. 4:

The state as a market participant still plays an important role, particularly in continental Europe.

This is true in many ways, be it

- as a direct participant in the economic process through state-owned enterprises,
- through intervention in competition,
- through so-called industrial policy to save dying companies and sectors or promote industries of the future,
- and many other areas.

Wherever the state intervenes in the economic process, it distorts competition at the expense of private suppliers or suppliers it does not favour. This happens, for example, by means of

- price-dumping through public suppliers having cost advantages which are not in line with the principles of competition and overcompensate for their natural efficiency disadvantage,
- allowing monopolies and partial monopolies in regulated markets,
- enforcing non-entrepreneurial or non-economic goals such as employment guarantees, observance of collective wage agreements and, not least, industrial policy measures
- and many more similar interventions which are probably familiar to all of us.

All of these direct and indirect government interventions in the economic process impair or eliminate free competition and must be re-

jected from a regulatory point of view. For they prolong efficiency disadvantages in business management, maintain economic structures that are no longer viable and cause substantial economic costs resulting in a significant loss of prosperity.

In this connection, let me particularly mention the beneficial efforts of Brussels, in particular of Mr Monti and his predecessors, to whom we owe the deregulation of many markets and the privatisation of many state-owned companies and shareholdings. In this area, national competition authorities tend to be overtaxed, maybe because they are too much under the influence of national governments or can at any rate be outmanoeuvred by them, as recent ministerial authorisations have shown.

Thesis no. 5:

The deregulation of markets and the privatisation of companies is posing new challenges to competition watchdogs.

The deregulation of markets is creating new relevant markets for both companies and competition watchdogs.

As a rule companies refocus their portfolios on the newly deregulated core business, consolidate into new, competitive company sizes and many of them are thus able to internationalise successfully. In this way, regional markets become national, European or even global markets.

If relevant markets are extending and changing in this way, competition authorities too will have to re-evaluate these companies' policies.

In any case, adapting to new deregulated markets takes time, and during that time companies not only have to rely on their own abilities but also on the benevolence of the competition watchdogs. Premature interventions by the competition authorities can impede the development of new and efficient company structures and new relevant markets. It can thus sometimes make sense to refrain from relatively swift competition policy interventions for a certain period of time.

Let me give you two practical examples:

Firstly, the relevant market in the electricity and telecoms sectors: Who knows today what the relevant regional market for electricity providers is and will be and what exactly the relevant regional telecoms markets are and will be? There is certainly one global mobile phone provider, Vodafone, but there are still many other companies whose activities are limited to national or some international markets. In the

field of traditional fixed-network telecommunications, it was also assumed that the relevant market would be the global market. At the moment, however, it rather seems that providers tend to refocus on their national markets and satisfy their customers' global communication needs through an alliance model as practised by airlines. I do not believe that we are in a position today to precisely predict the development of these markets – and nor are the competition watchdogs.

Secondly, the problem of natural monopolies: Competition watchdogs play an important role in the regulation of so-called natural monopolies, e.g. with regard to transmission rights in the electricity and gas sectors or price-setting by privatised ex-monopolists.

In my opinion it would be appropriate not to create a separate regulator for each market (because it would always be tempted to either particularly favour or disfavour the incumbent) but to transfer regulatory tasks to the existing national and European competition authorities, which would treat such new markets under the same regulatory policy principles.

Thesis no. 6:

Innovation and new business models change relevant markets in terms of both content and regions.

In the stationary retail trade, for example, the following still applies and quite rightly so: The relevant market is the local market. Due to its low market share, even the mail order trade has not been able to weaken this interpretation. But what happens if Internet-based e-commerce continues to expand at extreme growth rates? Will the relevant market for the stationary retail trade, which has to be able to survive against Amazon.com, still be the local or regional market or will it not also be the national or global market? And what rules will apply then? The German resale price maintenance in the book trade or European competition law or the competition law applicable at the company's American headquarters?

In such cases it is also necessary to redefine markets in order to adequately protect competition. For competition watchdogs, in turn, it is difficult to make the right decisions since market developments are difficult to predict and many jurisdictions are affected. The Internet and new communication technologies will cause quite a few headaches in this area.

Thesis no. 7:

In global markets, globally operating companies should be subject to global competition control.

However, I am not thinking of a new global-scale super-authority here, but rather of intensifying cooperation between existing antitrust authorities at national or supranational level, possibly while harmonising their legal systems.

What is also significant in this context is to provide assistance to countries and regions that have no appropriate institutions for protecting competition, as is the case in many Asian markets. In my opinion, this could turn out to be a large area of activity for competition watchdogs, not least for the President of the German Bundeskartellamt, Dr Böge, and his colleagues. For neither Europeans nor Americans may be indifferent as to which competition law, the German or the American one, is applied to these new emerging markets.

Final remarks

These were my seven theses. Of course many other questions could be added, some of which will be discussed this afternoon.

Let me finish my speech by reaffirming the statement I made at the beginning, that competition is the constituent factor in our market economy. It promotes the efficiency of individual companies and our national economies for the benefit of all market participants and thus, ultimately, the prosperity of our citizens.

If correctly understood, competition also promotes economic structural change, both in terms of individual economic units and the national economy as well as beyond the national horizon in large economic areas and at the global level.

If the speed of structural change is ever increasing, which it is, this poses additional challenges for our competition watchdogs. For the government will always try to control and keep down the short-term social adaptation costs and burdens of this structural change, relevant to voters, by means of intervention, i.e. by preventing competition. We all know that this will ultimately be to the detriment of the medium and long-term economic prosperity of the world and its citizens.

In order to be able to fulfil the new tasks in the protection of competition, it is not least necessary to redefine the relationship between the competition authorities and the state, for example by giving the competition authorities an independent status vis-à-vis the state, similar to that of the European Central Bank.

If the authors of economic policy manage to implement the required changes quickly enough, despite the narrow line between entrepreneurial freedom and protection of competition, Churchill would have no need to worry that the market economy was the worst kind of economic system.

Dr.-Ing. Burckhard Bergmann
Vorsitzender des Vorstandes
der Ruhrgas Aktiengesellschaft

Das mir gestellte Thema lautet „Unternehmerische Freiheit und Schutz des Wettbewerbs – ein schmaler Grat“.

Zunächst zur unternehmerischen Freiheit:

Ebenso wie das grenzenlose Gebrauchmachen von Freiheit durch eine natürliche Person zugleich die Unfreiheit anderer natürlicher Personen bedeutet, so führt die schrankenlose Wahrnehmung unternehmerischer Freiheit zur Unfreiheit anderer Unternehmen.

Würden z.B. zwei im Wettbewerb stehende Unternehmen eine geographische Marktaufteilung vereinbaren, so bedeutete dies zwar, dass sie insoweit von ihrer unternehmerischen Freiheit Gebrauch machten. Folge wäre aber zugleich, dass die Freiheit der Nachfrager in den von der Marktaufteilung betroffenen Märkten beschränkt würde.

Daraus folgt, dass es eine Antinomie zwischen völliger unternehmerischer Freiheit und dem Schutz des Wettbewerbs gibt.

Der Schutz des Wettbewerbs erfordert eine Beschränkung unternehmerischer Freiheit.

Fraglich ist allerdings, wie weit diese Beschränkung gehen muss, um die Ziele der sozialen Marktwirtschaft zu erreichen.

Konkret stellt sich z.B. die Frage, inwieweit und unter welchen Umständen horizontale oder vertikale Wettbewerbsbeschränkungen im Interesse eines funktionierenden Wettbewerbs zu verbieten sind.

Bekanntlich sieht das Eckpunktepapier des BMWA zur 7. GWB-Novelle vor, dass das deutsche Kartellrecht dem europäischen Kartellrecht angepasst wird, d.h. die bisherige grundsätzlich unterschiedliche Behandlung von horizontalen und vertikalen wettbewerbsbeschränkenden Vereinbarungen wird aufgegeben. Wenn die Inhalte des Eckpunktepapiers realisiert werden, wird es künftig Sache der Unternehmen - und nicht wie bisher der Kartellbehörden - sein, zu prüfen, ob die Voraussetzungen für eine gesetzliche Freistellung horizontaler oder vertikaler wettbewerbsbeschränkender Vereinbarungen vorliegen. Damit wird sicherlich zu Gunsten der Unternehmen ein höheres Maß an Flexibilität bei der Handhabung solcher Vereinbarungen erreicht, dies wird aber mit einem erheblichen Verlust an Rechtssicherheit erkauft.

Ich möchte nun an wenigen konkreten Beispielen verdeutlichen, dass es spiegelbildlich zur Begrenzung unternehmerischer Freiheit auch eine

Begrenzung der Begrenzung geben muss. In diesem Zusammenhang möchte ich Art. 3 lit. g) des EG-Vertrages zitieren. Diese Bestimmung lautet:

„Die Tätigkeit der Gemeinschaft im Sinne des Art. 2 umfasst nach Maßgabe dieses Vertrags und der darin vorgesehenen Zeitfolge: ein System, das den Wettbewerb innerhalb des Binnenmarktes vor Verfälschungen schützt."

Trotz dieser Kernvorschrift des EG-Vertrages treffen Unternehmen auf gesetzliche oder kartellbehördliche Grenzen, die zu fehlender Chancengleichheit – man könnte auch sagen zu einer Wettbewerbsverfälschung - innerhalb des Binnenmarktes führen. Dazu einige Beispiele:

Die vertikale Integration der Gaswirtschaften ist in den anderen EU-Mitgliedsstaaten wesentlich stärker ausgeprägt als in Deutschland. Dabei muß man nicht einmal unbedingt zu unserem Nachbarn Frankreich schauen. Dies liegt nicht zuletzt daran, dass wir in Deutschland ungefähr 700 Stadtwerke haben, die Erdgas vermarkten. Diese Stadtwerke sind noch in hohem Maße in kommunaler Hand. Die Finanzmisere, aber auch die Sorge, den zunehmenden Wettbewerb nicht richtig managen zu können, veranlasst eine Vielzahl von Städten, ihre Beteiligung an den Stadtwerken ganz oder teilweise aufzugeben.

In den vergangenen 10 Jahren hat das Bundeskartellamt bei Ferngasunternehmen, die solche Stadtwerke beliefern, eine Beteiligung in Höhe von 20 % ohne Präsenzrechte und Sperrechte als fusionskontrollfrei akzeptiert. Man mag nun darüber streiten, ob die Entwicklung des brancheninternen Wettbewerbs in der Gaswirtschaft in den letzten Jahren schnell und umfangreich genug erfolgt ist. Es gibt aber keinen Zweifel, dass hier erhebliche Fortschritte erzielt worden sind. Exakt konträr dazu verschärft aber das Bundeskartellamt ohne Änderung irgendeiner gesetzlichen Bestimmung die Hürden für die Beteiligung von Vorlieferanten an Stadtwerken und schafft noch eine zusätzliche Unsicherheit dadurch, dass es seine neuen Kriterien nicht einmal ausreichend präzisiert.

Grenzen dieser Art bestehen für ausländische Energieversorgungsunternehmen nicht, weil eben das Bundeskartellamt eine viel zu enge regionale oder zumindest nationale räumliche Marktabgrenzung vornimmt. Eine Ruhrgas darf sich deswegen an einem deutschen Stadtwerk nicht substanziell beteiligen, weil Ruhrgas z.B. derzeit Vorlieferant dieses Stadtwerks ist. Eine Gaz de France, von einem geschützten Heimatmarkt aus operieriend, kann demgegenüber das ganze Stadtwerk übernehmen. Dieser unerfreuliche Zustand wird dadurch gesteigert, dass GdF später auch die Beliefe-

rung übernehmen kann. Dies ist auch faktisch möglich, denn Ruhrgas ist zur Durchleitung dieser Mengen verpflichtet und augenscheinlich auch vor dem Hintergrund der Versorgungsvorgeschichte physisch in der Lage.

Zu alle dem kommt hinzu, dass deutsche Unternehmen ähnliche ungehinderte Betätigungsmöglichkeiten im Ausland, z.B. in Frankreich, nicht haben. In Frankreich verfügt Gaz de France über ein quasi-Monopol mit beinahe totaler vertikaler Integration. Ferner gibt es dort nur wenige Stadtwerke, so dass – aus der Sicht einer Ferngasgesellschaft - eine indirekte Belieferung des HuK-Sektors, wie sie in Deutschland durch Belieferung von Stadtwerken möglich ist, dort faktisch nicht realisierbar ist, zumindest nicht vor einem legal unbundling der Distribution, die frühestens 2007 kommen wird.

In anderen EU-Mitgliedstaaten ist die vertikale Integration der großen Gasversorgungsunternehmen ebenfalls ausgeprägter als in Deutschland. Und dies sage ich nach dem E.ON-Ruhrgas-Zusammenschluss.

In der Bilanz werden die Städte in eine ordnungspolitische Sackgasse getrieben, d.h. sie können ihre Stadtwerksbeteiligung praktisch nicht verkaufen oder müssen ins Ausland verkaufen. Den Ferngasgesellschaften werden die Daumenschrauben fester angezogen trotz jetzt verbesserter Wettbewerbsbedingungen. Und im internationalen Wettbewerbsumfeld sind sie gerade durch die sehr restriktive Haltung des Bundeskartellamtes wesentlich schlechter gestellt als ihre ausländischen Wettbewerber.

Meine Damen und Herren, vermutlich erwarten Sie von mir an dieser Stelle einige Sätze zur Übernahme der Ruhrgas AG durch die E.ON AG, die ein Akt unternehmerischer Freiheit war, der auf kartellbehördlichen Widerstand stieß. Ein wichtiges Ziel der Fusion war die Verminderung von Wettbewerbsnachteilen der Ruhrgas AG gegenüber ausländischen Unternehmen auf den internationalen Gasbeschaffungsmärkten, aber auch auf dem deutschen Gasabsatzmarkt, auf dem ausländische Anbieter heute mit zum Teil überlegener Finanzkraft, geschützten Heimatmärkten und einem hohen Maß an vertikaler Integration auftreten und künftig noch verstärkter auftreten werden.

Wenn der Wettbewerb geschützt werden soll, ist es wichtig, bei der Bewertung eines Beteiligungsvorhabens nicht nur einen Teilaspekt – z.B. die absatzfördernde Wirkung einer teilweisen vertikalen Integration – im Auge zu haben, sondern die langfristig zu erwartende Entwicklung des Wettbewerbs auf allen betroffenen Märkten zu betrachten. Es kann sein, dass die

langfristige Erhaltung des Wettbewerbs auch einmal begrenzte wettbewerbliche Opfer fordert.

Meine Damen und Herren, lassen Sie mich zum Schluss zur Frage des Verhältnisses zwischen unternehmerischer Freiheit einerseits und Schutz des Wettbewerbs andererseits noch kurz einen Aspekt ansprechen, in dem es vermutlich keinen Dissens zwischen uns und dem Bundeskartellamt gibt. Faktum ist, dass die Bundesregierung in Brüssel nicht hat vermeiden können, dass auch Deutschland eine Behörde einsetzen will, die die Netzzugangsbedingungen bestimmt.

Damit werden zukünftig Verbändevereinbarungen, die sich bisher in der Praxis durchaus bewährt haben, zumindest relativiert. Hinzu kommt, dass auch andere Interessenvertretungen an den Verhandlungen zur Verbändevereinbarung beteiligt werden wollen, was diese ohnehin sehr schweren Verhandlungen nicht gerade leichter machen würde. Und schließlich gibt es auch Interessenvertreter, die meinen, dass es sich bei Verbändevereinbarungen um Kartelle handelt, die unzulässig seien.

Die Frage, vor der wir stehen, ist, ob zukünftig jeder einzelne Verband und zusätzlich auch noch die großen Unternehmen individuelle Lobbyarbeit bei der Behörde leisten, die für die Genehmigung von Netzzugangsbedingungen zuständig wird, was zu riesigen Anhörungen und möglicherweise auch zu mancher Fehlentscheidung führen wird. Oder ob wir es weiterhin schaffen, unter den Marktbeteiligten, nämlich der erdgasverbrauchenden Industrie und der Gaswirtschaft, Lösungen für die anstehenden Fragen zumindest in einem solchen Umfang vorzubereiten, dass sie anschließend von der Behörde als verbindlich genehmigt werden können.

Ich bin unverändert zutiefst überzeugt, dass es ordnungspolitisch und gerade auch vor dem Hintergrund der deutschen pluralistischen Verhältnisse richtig ist, den Weg der Verbändevereinbarungen soweit wie möglich weiterzugehen. Ich habe allerdings den Eindruck, dass wir deshalb in einer außerordentlich schwierigen, wenn nicht unlösbaren Situation sind, weil von der Gaswirtschaft verlangt wird, was sie, zumindest vor dem Hintergrund der deutschen Verhältnisse, nicht liefern kann.

Lassen Sie mich als Beispiel die Situation der deutschen Ferngaswirtschaft erwähnen. Wir haben nun einmal in Deutschland den Vorzug, eine Reihe von Ferngasgesellschaften zu haben, während es in den meisten großen europäischen Gaswirtschaften nur eine einzige Ferngasgesellschaft gibt. Dies führt in Deutschland dazu, dass wir einen

effektiven Transportwettbewerb haben. Vor diesem Hintergrund müssen die einzelnen Ferngasunternehmen in der Lage sein, in diesem Wettbewerb ihre Transportkonditionen in Struktur und Höhe so zu gestalten, dass sie sich in diesem Wettbewerb bestmöglich bewähren.

Dass die Ferngasunternehmen keine überhöhten Tarife fordern, wird in Deutschland mithin dadurch gewährleistet, dass es Wettbewerb auf der Ferngasstufe gibt und überdies der freie Leitungsbau in der Gaswirtschaft funktioniert. Schließlich hat sich die deutsche Ferngaswirtschaft bereit erklärt, sich einem internationalen Bench-Marking zu stellen. Es wäre also aberwitzig, wenn on top noch eine weitere Begrenzung eingeführt würde, die kostenorientiert ist. Bekanntlich lässt sich nichts leichter produzieren als Kosten. Effizienzanreize werden aber nicht wirklich durch eine Kostenkontrolle, sondern durch eine wettbewerbliche Kontrolle geschaffen. Mehr als wettbewerbsfähige Preise können in einem marktwirtschaftlichen System sinnvollerweise nicht verlangt werden.

Erkannt worden ist inzwischen, so hoffe ich, dass eine anfängliche Regulierung das Risiko einer sich perpetuierenden Fortentwicklung beinhaltet, wozu auf europäischer Ebene bereits die notwendigen Gremien geschaffen werden. Auf der anderen Seite wird aber auch zunehmend deutlich, dass, wie leicht- oder schwergewichtig die Regulierung auch enden mag, die Investitionsbereitschaft und Funktionsfähigkeit der Gaswirtschaft oberstes Ziel bleiben muß. Insofern läuft auch manche Diskussion über Kalkulationsgrundsätze für Tarife an den eigentlich notwendigen kapitalmarktorientierten Kriterien vorbei.

Damit genug zur Einstimmung zu den wettbewerbsrechtlichen Problemen der Gaswirtschaft, die im übrigen, zwar nicht 1:1, aber doch in hohem Maße, für die Stromwirtschaft gelten.

Dr.-Ing. Burckhard Bergmann
Chairman of the Executive Board
Ruhrgas Aktiengesellschaft

The theme I have been asked to speak on is "The narrow line between entrepreneurial freedom and protection of competition".

Firstly, entrepreneurial freedom:

In the same way that the unrestricted use of freedom by one natural person means the lack of freedom of others, the unrestricted exercise of entrepreneurial freedom results in the lack of freedom of other companies.

For example, if two companies competing with another were to agree to divide up a market geographically, this would mean that they would be making use of their entrepreneurial freedom.

At the same time, however, this would result in a restriction of the freedom of the demand side in the markets affected by such a division.

It follows on from this that there is an antinomy between absolute entrepreneurial freedom and the protection of competition.

The protection of competition requires a limitation of entrepreneurial freedom.

The extent to which this should be limited to achieve the objectives of a social market economy, however, is questionable.

One question which specifically needs to be asked, for example, is to what extent and under what circumstances should horizontal or vertical restraints of competition be prohibited in the interest of effective competition.

As is generally known, the Federal Ministry of Economics and Labour's key elements paper on the 7th Amendment of the ARC calls for an adaptation of German competition law to European competition law, i.e. an abandonment of the different treatment of horizontal and vertical anti-competitive agreements. Should the content of this key elements paper be realized, it will in future be the responsibility of companies (and not as previously the competition authorities) to examine whether the conditions for a legal exemption of horizontal or vertical anti-competitive agreements are fulfilled. This would certainly provide companies with a greater amount of flexibility to deal with such agreements but would also involve a significant loss in legal certainty.

I would now like to illustrate in a few concrete examples that in the same way that entrepreneurial freedom is restricted, the restriction it-

self should be limited. In this connection I would like to quote Art. 3 lit. g) of the EC Treaty. This provision states:

"For the purposes set out in Art. 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: a system which ensures that competition in the international market is not distorted."

In spite of this key provision in the Treaty companies come up against legal restrictions or restrictions set by competition authorities which lead to unequal opportunities – one could go so far as to say to distortion of competition – within the internal market. Let me give a few examples:

Vertical integration in the gas industry is substantially more pronounced in other EU member states than in Germany. One does not necessarily have to look to our neighbour France for evidence of this. This is not least due to the fact that in Germany we have around 700 municipal utilities marketing natural gas. These municipal utilities are still to a greater degree in local authority control. The miserable financial situation and also the fear that they cannot properly manage the increasing competition are causing a multitude of municipalities to partly or wholly give up their participation in municipal utilities.

In the past 10 years the Bundeskartellamt has accepted a participation of up to 20 per cent in the case of gas transmission companies supplying such municipal utilities without presence and blocking rights as not subject to merger control. One could argue whether sector-specific competition in the gas sector has developed quickly enough and to an adequate degree over the last few years. However, there is no doubt that considerable progress has been achieved. In exact contrast to this, however, the Bundeskartellamt is increasing obstacles for the participation of suppliers in municipal utilities without there being any change to existing legal provisions, and it is creating even more uncertainty by not even stating precisely its new criteria.

Restrictions such as these do not exist for foreign energy providers because the Bundeskartellamt's approach to define regional or national geographic markets is far too narrow. A company such as Ruhrgas cannot for this reason hold a substantial stake in a German municipal utility because, for example, it is currently a supplier for this public utility. Gaz de France, operating from a protected domestic market, can, on the other hand, take over the whole municipal utility. This unfortunate situation is accentuated

by the fact that GdF can also take over the supply at a later stage. This is also practically possible because Ruhrgas is obliged to transmit these quantities and evidently from the supply background is also physically in a position to do so.

Added to this is the fact that German companies do not have similar unhindered possibilities of operation abroad, e.g. in France. In France Gaz de France has a quasi-monopoly position with almost total vertical integration. Moreover, there are less municipal utilities in France with the result that, from the perspective of a gas transmission company, the indirect supply of the residential and commercial sector, as is possible in Germany through the supply of municipal utilities, is practically not possible, at least not before a legal unbundling of distribution, which will only come about in 2007.

In other EU member states the vertical integration of major gas providers is also more pronounced than in Germany. And I say this even after the E.ON-Ruhrgas merger.

As a result of this municipalities are being forced into a regulatory policy dead end, i.e. they practically cannot sell their stakes in municipal utilities or must sell them abroad. The thumbscrews on gas transmission companies are being tightened in spite of an improvement in conditions of competition. And due primarily to the very restrictive stand taken by the Bundeskartellamt they find themselves in a considerably worse position in the international competition environment than their foreign competitors.

Ladies and Gentlemen, you probably expect me to say a few words at this point on Ruhrgas AG's takeover by E.ON AG, which was an act of entrepreneurial freedom which came up against resistance by a competition authority. One important aim of the merger was to reduce Ruhrgas AG's competitive disadvantages vis à vis foreign companies in the international gas supply markets and even in the German gas sales market, where foreign providers with in some cases superior financial power, protected domestic markets and a high degree of vertical integration are already active and will become increasingly so in future.

If competition is to be protected it is important in evaluating a planned acquisition not only to focus on one single aspect, e.g. the effect of a partial vertical integration in terms of increasing sales but to consider how competition in all the markets concerned is expected to develop in the long-term. It might be that to maintain competition in the long term small sacrifices in competition are required.

Ladies and Gentlemen, let me sum up on the relation between entrepreneurial freedom on the one hand and the protection of competition on the other by mentioning one aspect, in which there seems to be no difference of opinion between us and the Bundeskartellamt. The fact is that in Brussels the German Government was not able to prevent plans to set up an authority in Germany, too, to determine network access conditions.

This will in future at least relativise Associations' Agreements, which up to now have proved successful in practice. Added to this is the fact that other interest groups wish to be involved in negotiations on the Associations' Agreement, which is not exactly likely to make what are already very difficult negotiations any easier. And finally there are also interest groups which think that Associations' Agreements are cartels which are illegal.

The question we are faced with is whether in future each individual association and even the major companies will lobby the authority which will be responsible for approving network access conditions, which will lead to massive hearings and possibly even to the one or other wrong decision. Or whether we will still manage to work out solutions to the outstanding questions among the market participants, i.e. the gas-consuming industry and the gas industry, at least to such a degree as they can then be approved as binding by the authority.

I remain firmly convinced that from a regulatory policy viewpoint and particularly in the light of the pluralistic circumstances in Germany it is right to continue as far as possible along the Associations' Agreements path. However, I also have the impression that we are in such an extremely difficult, if not insoluble situation because the gas industry is being asked to deliver something it cannot, at least under the conditions existing in Germany.

Let me give you the situation in the German gas transmission sector as one example. Here in Germany we have the advantage of having a number of gas transmission companies, whereas in most large European gas industries there is only one gas transmission company. As a result we have effective competition in the transport sector. In the light of this, the individual gas transmission companies must be in a position to set their transport conditions both in terms of structure and cost levels in such a way as to prove themselves as successful as possible within this competition.

The fact that there is competition in the gas transmission sector in Germany and moreover that the free construction of pipelines in the

gas industry functions well helps to ensure that the gas transmission companies do not charge excessive transportation fees. Finally, the German gas transmission sector has stated its willingness to subject itself to international bench-marking. Therefore to introduce another, cost-oriented restriction on top would be ludicrous. (It is a well known fact that nothing is easier to produce than costs). Efficiency incentives are not really created by cost control but rather by competition control. Nothing more than competitive prices can be sensibly expected from a market economy system.

It has meanwhile been realized, I hope, that regulation in its initial stages involves the risk of a self-perpetuating development for which the necessary bodies are already being created at European level. On the other hand it is also becoming increasingly clear that, however light or stiff regulation turns out to be, the propensity to invest and the efficiency of the gas sector have to remain the prime objectives. In so far the one or other discussion on the calculation basis for fees misses the point as regards the really necessary capital market-oriented criteria.

But enough for now on the competition law problems in the gas sector, which, by the way, apply likewise not one hundred percent but to a large extent to the electricity sector.

Finn Lauritzen
Director General,
Danish Competition Authority

1. Introduction

I want to thank for the opportunity to address this distinguished audience, which has grown considerably in size since the modest beginning many years ago in Berlin.

The topic is pertinent. Competition policy has won a place at the top of policy agendas in all industrialised countries in the world, and a number of developing countries also. Only ten years ago many European countries, including my own, Denmark, had much weaker systems than today based on the old control principle, and many policymakers agreed that this was sufficient. In Denmark it was even considered to close down the Competition Authority because it was believed that the Single Market in EU would increase competition so much that no national competition authorities were needed.

This discussion is history. Nobody today wants to get rid of competition authorities. This does not mean, however, that we should be complacent. One criticism we often hear is that we intervene too much.

Like in football, a referee is necessary. But the referee goes too far if he dominates the scene and uses the whistle too much.

With the victories that competition policy has won it is relevant to ask if and when we go too far: When are authorities officious, too eager, interfering to much and thereby limiting entrepreneurial freedom, eventually curbing prosperity and growth?

This discussion is relevant in many areas. Firstly all EU member states are now in the process of implementing the EU reform adopted last year under the Danish presidency. But how should we design the cooperative structure of the new system? How shall we allocate cases? How do we ensure a similar eagerness on part of authorities throughout Europe?

Secondly, how should national legislation be architectured? What room is there for national regulation which is more strict than EU law?

2. The three global systems

As background for the discussion let me begin with a transatlantic comparison.

The American model has the strongest history. Both in Canada and in US antitrust legislation based on the prohibition principle was introduced already in the late 19th cen-

tury. It is based on court decisions – the authorities can issue very few administrative orders. It therefore ensures strict judicial control. It is also centralised: the resources devoted to antitrust in the individual states are limited.

Finally, sentences are severe: fines are high and imprisonment occurs. Until now, we have not had one common European model. But as the bird Phoenix it has now grown from the ashes. It is based on decisions taken by administrative bodies – be they collective, for instance in the form of councils or committees – or hierarchical in systems led by a head who can delegate decisions. Decisions are subject to appeal, eventually to courts. Sanctions can be imposed administratively or as criminal sanctions. And the system is decentralised, meaning that a substantial part of decisions are made and resources are used on a national level.

Which system is best? One of my messages today is that we will have to wait and see before we can answer that question. It depends on the way we will implement the European system in the coming 1-2 years. This is why we now sit in a number of working groups to discuss various questions. But I hope and think, that the European system will be efficient. Decisions blocking behaviour detrimental to competition can be taken with less delay than in the American, court-based system and still with high legal certainty. The European system will use more resources in the form of administrative case-handlers but less in fees to attorneys or lawyers. And the decentralised approach will mean that decisions are taken by people close to the affected markets.

There is a risk, however, that the European system will produce too many decisions, thereby jeopardising entrepreneurial freedom. How can we control that risk?

3. Different ways to limit entrepreneurial freedom

There are many ways to limit entrepreneurial freedom.

Let us first look at agreements and practices – having in mind that the distinction between agreements and unilateral conduct is not always clear.

First of all, technical co-operation seldom raises problems. Here, competition authorities are normally liberal.

Another matter is when industrial organisations cooperate with innocent activities like formulating industrial policy viewpoints or building social networks – while they, at the same time, set up entry barriers

in order to prevent newcomers from entering existing markets. This occurs in professional services or trade associations in many countries. This is, as I see it, not entrepreneurial freedom.

A third category is when a supplier and a purchaser agree on a very long, mutually binding contract, lasting maybe 20 years. Normally, this is not a problem. If neither company is dominant then this is up to the parties involved. It is often bad business to enter such long contracts, but it is not the duty of competition authorities to prevent anybody from doing bad business. Another question, however, is if one of the parties is dominant. Then long, binding contracts can foreclose markets. Examples of this are known in the natural gas sector. Recently, the Danish Competition Authority together with the EU Commission succeeded in forcing the Danish state-owned gas incumbent, DONG, to shorten its very long take-or-pay contracts with Shell, Texaco and Mærsk and to open up part of the contracts to third parties.

A fourth, very difficult category of cases concerns distribution agreements. This is an area where all competition authorities I know are often in doubt. If the supplier and the retail chain have market shares below 30 % there is no problem. But how shall we deal with cases where strong suppliers want to enter selective distribution agreements? The fact that such agreements are outside the block exemption does not mean that they should necessarily be blocked.

A good example which has been discussed in Denmark is B&O, the Danish hifi producer whose equipment is not unique technically but has an outstanding design. B&O strongly want to uphold a selective distribution system. A few years ago the Danish Competition Authority defined a relevant product market consisting of "high-end television of superior design". The result was an obligation to deliver to all qualified retail dealers.

Last year we revised our decision after analyses had shown that overlapping chains of substitutable televisions could be established. Punishing B&O for their investments in branding and design by defining markets narrowly was perhaps not the wisest thing to do. In technical terms, supply substitution comprised the possibility that competitors via investment in design and branding could enter the same market as B&O. By defining markets more broadly we left a little more entrepreneurial freedom to the market.

I think that similar examples can be found in EU and in German competition history as well. This is an often heard criticism put forward by the industry.

Turning to unilateral conduct other examples can be found. How much should we interfere in the price-setting of strong, dominant firms? Should we interfere against very high prices, against low, predatory prices, and against loyalty discounts and rebates?

This is an area where especially Northern European authorities are more active than for instance in North America. And national authorities are more active than the EU Commission.

Practice in US is more lenient. Unilateral conduct of strong companies is normally only considered to be a problem if market shares are considerably above 70 %. And predation is only considered to be an offence under certain conditions, including that the authorities can demonstrate that recoupment is probable if the predator wins the entire market.

Again, my opinion is that dominant companies conduct which lock out weak or potential competitors has not much to do with entrepreneurial freedom. So I do not think European authorities are too keen in this area.

As the last point a few words about mergers. Frankly I think that Europe can learn from the methods used by US. Personally, I would favour use of SLC instead of dominance. The proposed merger regulation is therefore a step in the right direction.

In principle, the crucial test should be whether the authorities assess whether a merger will lead to an increase or a decline in total consumer surplus in affected markets. If an efficiency enhancing merger increases consumer surplus, it might be accepted even though dominance is strengthened in the short to medium term.

4. An overall assessment – how should we proceed?

All in all, I think we are in the process of establishing an efficient European competition enforcement system.

The administrative enforcement makes our system relatively efficient. It requires us to take up more cases ensuring the rights of small and medium-sized companies. And the decentralised approach ensures that countries with decades of useful competition history will not have to throw their practice overboard.

I know very well that Germany was not enthusiastic about the European competition reform. This is understandable. Germany has an impressive competition record dat-

ing almost 50 years back. It is therefore only natural that Bundeskartellamt should still be considered to be one of the most important European competition institutions.

But I hope that you will not only live with the reform but also live well.

The total case handling costs of the European system in courts as well as in authorities hardly exceeds the similar costs of the American system.

The macroeconomic implications are very difficult to assess. In a preliminary study which the Danish Competition Authority published last year, and which we based both on macro- and microeconomic indicators as well as on OECD data for regulatory aspects, US were found to be a little more "competition oriented" than EU, including Germany and Denmark.

This has, however, probably not much to do with competition policy and competition authorities, but more with the fact that we have not yet succeeded in making the Single European Market effective yet. We still have a high number of national standards in for instance construction and services that the Americans have abolished. Here I see an important increased role for European competition authorities, namely advocacy.

The line between entrepreneurial freedom and protection of competition is narrow. I think we normally balance our way along this line. But we must be alert that we don't define markets too narrowly in order to be able to act in the cases presented before us. The solution to this problem is to develop better econometric and statistical methods so that the role of the market delineations will diminish in the future. And, secondly, there is room for improved use of economics in European merger cases. Apart from that, my conclusion is that European competition authorities are not too keen. We contribute to growth and prosperity.

Competition index

	Index on effective competition	Index on public services exposed to competition	Total index
Luxembourg	73	64	71
Iceland	78	48	70
Netherlands	75	55	70
Australia	69	70	69
Belgium	66	73	68
Portugal	69	61	67
New Zealand	60	82	66
USA	70	51	65
Germany	65	65	65
Ireland	59	78	63
Italy	67	53	63
EU15	63	59	62
Austria	66	48	61
Spain	63	54	61
Sweden	55	74	60

UK	62	54	60
Czech Republic	60	54	59
France	58	59	59
Canada	66	36	58
Denmark	58	52	57
Finland	57	50	55
Norway	57	48	54
Hungary	59	37	54
Greece	44	65	49
Mexico	51	37	47
Poland	47	34	44
Switzerland	43	34	41

PODIUMSDISKUSSION II

Wettbewerbsrecht als Ordnungsfaktor einer globalisierten Marktwirtschaft

PANEL DISCUSSION II

Competition law as a regulative factor in the globalised market economy

Prof. Dr. Wernhard Möschel
Universität Tübingen

Ich habe das Vergnügen, das heutige Panel zum Thema "Wettbewerbsrecht als Ordnungsfaktor einer globalisierten Marktwirtschaft" zu moderieren. Ich bin gebeten worden, einige einführende Bemerkungen zum Thema zu machen. Dies werden eher Fragen als Antworten sein.

I.

Wettbewerbsrecht als Ordnungsfaktor einer Marktwirtschaft ist eine sehr alte Fragestellung. Sie ist nachgerade tautologisch. Das Erkenntnisinteresse des Themas liegt offenbar im Adjektiv zur Marktwirtschaft, einer globalisierten nämlich.

Angesprochen ist damit ein Spannungsverhältnis zwischen einer vielfach globalisierten Wirtschaft und einem regelmäßig nationalen Wettbewerbsrecht. Ein solches Spannungsverhältnis beobachten wir in zahlreichen Zusammenhängen. Ich erwähne beispielsweise die Bankenaufsicht und die Versicherungsaufsicht. Auch im Wettbewerbsrecht reichen die Wurzeln der Diskussion weit zurück. Stichworte sind:

- Die Havanna-Charta aus der Zeit nach dem Zweiten Weltkrieg,
- das in vielen Rechtsordnungen praktizierte Auswirkungsprinzip, namentlich in den USA,
- dadurch ausgelöste Abwehrgesetzgebungen (blocking statutes),
- Versuche der Harmonisierung oder der Kooperation, z.B. auf der Ebene des GATT oder heute der WTO,
- die Schaffung einer Diskussionsplattform der Kartellbehörden, das International Competition Network (ICN).

II.

Die Frage ist aktuell geworden durch einige jüngere Sachverhalte wie

- die Fusion von Boeing/McDonnell-Douglas mit einer gleichzeitigen Prüfung in Brüssel und Washington, oder
- die divergierenden Entscheidungen der Europäischen und der US-amerikanischen Antitrustbehörden im Fall General Electric/Honeywell,
- Kumulierte Sanktionen, Mehrfachbestrafungen in Kartellverfahren, wie sie z.B. im Vitamin-Kartell auftreten.

III.

Es kommen verschiedene Wege zur Lösung des genannten Spannungsverhältnisses in Betracht.

1. Harmonisierung des materiellen Rechts

   Hier gibt es verschiedene Varianten
   (1) Zentralisierung des Rechts
   - Schaffung von international law,
   - seine Durchsetzung zentral/dezentral oder in Zwischenformen.

   (2) Multilaterale Abkommen
   Diese führen zu einer Vereinheitlichung der unverändert national bleibenden Rechte. Zu denken ist an
   - Mindeststandards,
   - einen common approach,
   - soft law (etwa unverbindliche Empfehlungen),
   - Diskussionsforen nach Art des ICN.

2. Harmonisierung der Verfahrensregeln
   Zu denken ist etwa an Formblätter, an Fristen innerhalb der Fusionskontrolle.

3. Quer zu beiden Ansätzen steht die Praxis der Kooperation bei im Übrigen selbständig bleibenden Rechtsordnungen, ggf. in Anwendung eines Auswirkungsprinzips.

   Hierher gehören:
   - Kooperationen in der Ermittlung (joint case teams),
   - der Abbau von Hindernissen beim Austausch von Informationen,
   - eine negative und eine positive international comity.

IV.

Orientierungspunkte liefern zwei konzeptionelle Ansätze.

1. Wohlfahrtstheoretische Überlegungen
   - Gibt es externe Effekte im Sinne eines race to the bottom? Verhindert das nicht bereits ein Auswirkungsprinzip?
   - Inwiefern ist die Schaffung eines level playing field sinnvoll, eine Gleichheit der Spielregeln?
   - Welches Gewicht hat die Senkung von Transaktionskosten?
   - Ist das richtige Recht, welches aus dem Wettbewerb der Rechtsordnungen entstehen mag, nicht wichtiger als das billigere Recht?

2. Politökonomische Überlegungen
   - Gibt es praktische Grenzen für die Durchsetzung des Auswirkungsprinzips?

- Spielen Unvollkommenheiten des politischen Prozesses mit herein (Beihilfen, sonstige Staatseinflüsse)?

V.

Abwägungskriterien

Entsteht die Notwendigkeit, zwischen verschiedenen Lösungsoptionen unter Bedingungen nur begrenzter Kenntnis abzuwägen, so mag man sich an diesen Kriterien orientieren:

- Besteht ein Bedarf z.B. nach materieller Harmonisierung?

- Gibt es ein Risiko der Verwässerung von Standards, besteht gar die Gefahr einer Erstarrung?

- Wie realistisch ist die Durchsetzbarkeit einzelner Lösungsvorschläge?

- Gibt es jeweils bessere Optionen, welche die Problematik ggf. lösen können, z.B. die internationale Kooperation von Kartellbehörden?

Prof. Dr. Wernhard Möschel
University Tübingen

I have the pleasure of leading today's panel discussion on the theme "Competition law as a regulative factor in the globalised market economy". I have been asked to make a few introductory remarks on the theme. These will be questions rather than answers.

I.

Competition law as a regulative factor in a market economy is quite an old issue. It is almost tautological. Obviously the cognitive interest in this issue focuses on the adjective 'globalised'.

This addresses the conflict between an economy which is globalised in many ways, and competition law which, as a rule, is national law. We observe such conflicts in many different contexts. I could mention e.g. the control of the banking and insurance sectors. With regard to competition law the origins of this discussion also date back a long time. Keywords are:

- the Havanna Charter from the time after the Second World War.
- the principle of effect practised in many jurisdictions, particularly in the United States,
- blocking statutes triggered off by this principle,
- attempts at harmonisation or cooperation, e.g. at GATT level or, nowadays, at WTO level,
- the creation of a discussion platform for the competition authorities, the International Competition Network (ICN).

II.

The theme has become a topical issue as a result of a number of recent cases such as

- the Boeing/McDonnell-Douglas merger with a simultaneous examination in Brussels and in Washington, or
- the diverging decisions by the European and US antitrust authorities in the General Electric/Honeywell case,
- cumulative sanctions, multiple sanctions imposed in cartel proceedings as occurred e.g. in the vitamin cartel case.

III.

Various ways to solve this conflict may be taken into consideration.

1. Harmonisation of substantive law
   There are several options in this area:
   (1) centralisation of the law
   - creation of an international law,
   - centralised/decentralised law enforcement or cross-over solutions.

   (2) Multilateral agreements
   These agreements lead to a standardisation of the laws which still remain national laws. Possibilities are:
   - minimum standards,
   - a common approach,
   - soft law (e.g. non-binding recommendations),
   - discussion fora similar to the ICN.

2. Harmonisation of the Procedural Rules

We could consider e.g. form sheets and time limits in merger control.

3. Diagonally to both approaches there is the practice of cooperation between jurisdictions which otherwise remain independent, possibly by applying a principle of effect.

This includes:
- cooperation in investigations (joint case teams),
- removal of barriers in the exchange of information,
- negative and positive international comity.

IV.

Two conceptual approaches provide points for orientation:

1. Welfare theoretical considerations
   - Are there any external effects in the sense of a race to the bottom? Does this not already prevent a principle of effect?
   - To what extent would it be useful to create a level playing field, equal rules?
   - How important is the reduction of transaction costs?
   - Is not the right law, which may result from the competition of jurisdictions, more important than a cheaper one?

2. Political-economic considerations
   - Are there practical limits to the enforcement of the principle of effect?
   - Do imperfections of the political process also play a role (subsidies, other influences by the state)?

V.

Criteria for weighing up the options

- If it becomes necessary to weigh up between different solutions where there is only limited knowledge of the facts, the following criteria may provide guidance:

- Is there a demand e.g. for substantive harmonisation?

- Is there a risk of standards being watered down or even the danger of stagnation?

- How realistic is the enforceability of individual proposals for solutions?

- Are there better options which might possibly solve the problem, e.g. the international cooperation of competition authorities?

Philip Lowe
Director General for Competition,
European Commission

When we discuss the challenges posed by the international dimension of competition policy, then we need to address two key issues:

- which are the challenges, and where do they originate from? and
- which are the policy responses from the European Commission?

I do not want to dwell much on the forces that are effectively driving this trend. We are all aware of the changes that globlization has brought to the economies of the world.

Suffice it to mention the three key elements that I see at the origins of globalization:

First of all, a number of technological breakthroughs have substantially eased the way in which goods and in particular services can cross large distances. For example, the cost of shipping large amounts of digitised information around the globe is today negligible.

Second, several rounds of trade liberalization have significantly reduced or even eliminated many inter-state barriers to trade. This applies to both tariff barriers, and increasingly also to non-tariff barriers.

Last but not least, an increasing number of markets are being opened up. This is certainly the case in our home markets in the EU – just think of the utilities. However, on a much more dramatic scale in many markets outside the present Community. In the wake of the fall of the Berlin Wall, many economies around the world are being opened up, deregulated, and former state monopolies are being privatised. In many instances, this has only created 'markets' properly speaking. And in order to safeguard the benefits that these markets were expected to generate, the introduction of market mechanisms needed to be flanked by the introduction of a competition policy. And there we are today, with some 90 or so competition regimes around the world. Just a few weeks ago, for example, India adopted a competition regime, and also China has made reforms in this area recently.

With the new opportunities opening up before their eyes, companies increasingly become active abroad. In doing so, they easily transcend the boundaries of a given jurisdiction. However, the reach of competition authorities does not. We are still national, or, as with the Commission, regional. This inevitably

creates challenging issues of governance that we need to address.

For example, we cannot search ourselves for evidence against international cartels when this evidence is located outside the EU. Another example relates to the review of multi-jurisdictional mergers: we have to ensure that the remedies proposed by the competition authorities are mutually compatible, and that their combined effects do not frustrate each other.

So what are our policy responses to these challenges? – From a theoretical point of view there are, as far as I can see, three possible answers:

- first of all, one could think of a centralised enforcement on an international level. People often think of a hypothetical international competition authority in this context.

- Secondly, one could envisage that several agencies involved in a given case cooperate and act jointly, based on a consensus about the right policy. Effectively, this would require some sort of network of agencies.

- Thirdly, I believe that for many cases - and especially those that are not 'global' in the true sense of the word – a regional solution could be envisaged.

I would like to say a few words on each of these theoretical models.

Let me begin with the centralised model. To say it right from the start: an international competition authority is not on our agenda. Not only would I see, for the foreseeable future, insurmountable difficulties in political terms. I would also question that it would be the most efficient solution. [And this is without even mentioning the host of complex technical issues that we have not even started to discuss. – e.g.: (i) would the necessary international treaty directly create rights and obligations for private undertakings? (ii) how would cases be allocated between the central body, and remaining national/regional authorities?].

This being said, there are however currently some tendencies that – very modestly - go in a somewhat comparable direction. I am referring here to the developments at the level of the WTO. The Doha Development Agenda set on track a series of discussions on the merit and feasibility of a multilateral competition agreement. We have been a long time supporter of such agreement, and we hope that the forthcoming WTO Ministerial in Cancun will decide to open formal negotiations on such a framework.

If these discussions were eventually to succeed, such a multilateral agree-

ment would indeed for the first time create a set of binding international standards in the competition field. As for enforcement, the EU and many others however strongly believe that the rather cumbersome WTO dispute settling mechanism should only be applied to one jurisdiction's competition legislation; it has no role to play in the review of individual cases.

As encouraging as these trends are, we however also need to recognise that the mandate from Doha is rather limited in terms of the scope of issues under discussion. Apart from such subject as the modalities of co-operation and capacity building, the only substantive anti-trust issues under discussion are the 3 core principles (non-discrimination, transparency, procedural fairness), as well as the prohibition of hard core cartels. So whatever the outcome of Cancun - a multilateral agreement on competition would in itself not be sufficient to address all issues that globalisation is putting onto our agenda.

Secondly, I would like to comment upon how co-operation between enforcement agencies can go already a long way in addressing these challenges posed by globalisation. As you know, in the Community we are currently undertaking a decisive movement towards a more decentralised enforcement of our anti-trust rules. We believe that the most efficient system of enforcement is one where the authorities best placed to deal with a certain case should be the ones responsible for handling it. In a future common market of 25 or more member states, an exclusive reliance on central enforcement does not any more look like an adequate framework. That is why we are creating the European Competition Network. In order to avoid distortions of competition from one jurisdiction to the next, however, it is imperative we all rely on one common substantive standard.

Now turning to the international level, it has indeed to some extent been a similar rationale that has lead us to create the International Competition Network, some 20 months ago. As far as anti-trust issues are concerned, we are currently concentrating on multi-jurisdictional mergers. The idea is to develop best practices in this field that we invite all ICN Members – already 79 agencies have joined the ICN – to implement these in their domestic regimes. If this succeeds - and I am very positive in this respect – this should lead over time to substantive convergence. This convergence should both greatly facilitate our co-operation between agencies, and also significantly ease the regulatory burden created by the requirements of multiple filings. As for as I can see, this soft-law approach has been by

far the most successful, even if we have to be a little patient with full implementation at the domestic level. Let me just mention here in passing that the Commission, as part of last year's merger review, has already taken active steps to bring our merger regulation fully into line with the ICN standards.

Looking at where we are with the ICN at this moment, I think that it is fair to say that a lot has been accomplished in a remarkably short period of time. In my view the ICN is delivering on its pledge to bring added value to the practical work of agencies. More concretely, I hope that by the time the forthcoming Second ICN Annual Conference in Mérida is completed, we will have adopted a total of 7 very detailed "Recommended Practices" in the field of international merger control, in addition to the set of "Guiding Principles" that were already approved by ICN Members at last year's Naples Conference.

In this context, it may be useful to make one additional point. An effective co-operation of agencies presupposes that effective agencies exist in many parts of the world. This is not yet the case everywhere, although many countries are currently undertaking great efforts to build up such capacities. In order to support this capacity building process, the ICN last year decided to set up a new working group, and asked me to co-chair that project. We are currently looking into which challenges typically need to be addressed when setting up competition authorities in developing and transition economies. We are also discussing how best to support this process from the outside with technical assistance.

Finally, let me turn to the issue of regional integration. This is an interesting aspect for a number of reasons.

First of all, we have to admit that not all transactions that the press easily labels as 'global' are really global in the true sense of the term. More often than not, their effects will rather be concentrated on one or two continents. Regional entities, acting alone or in co-operation, will often be well-placed to deal with these transactions appropriately.

Secondly, regional competition bodies are currently mushrooming around the world. Ten years ago, the Commission was alone in this field. Today, we not only have the EFTA Surveillance Authority, but efforts are underway in such diverse places as the Andean Community, the Caribbean Community, the Common Market for Southern and Eastern Africa and the MERCOSUR to set up regional enforcement agencies. It is probably a little known fact that the Commission,

through its development assistance, is supporting most these bodies with finance and expertise. Who knows, one day other regions may decide to follow suit. Looking a bit further ahead, we may even see the creation of a Free Trade Agreement of the Americas, spanning the whole American continent.

These regional authorities, once functioning, play a double function. One the one hand, they will be able control themselves transactions that are transnational, but still regional in scope. On the other hand, they will make cooperation between the various regions of the world much easier, since they provide a one stop shop for anti-trust enforcement in several jurisdictions. Maybe one day in the future we will see something resembling a patchwork of regional authorities.

Finally, it is interesting to note that the discussions about setting up a regional authority with an appropriate legal framework in themselves contribute to the gradual emergence of convergence.

To conclude, I think that the winning formula will not be one of "either – or" between the approaches highlighted above. In my view, the best policy mix that we can offer is one combining regional, decentralised and centralised approaches. This is indeed what we have been modestly trying to achieve over the last couple of years.

Dr. Otto Graf Lambsdorff

Bundesminister für Wirtschaft a. D.

Das Phänomen globalisierender Unternehmen und zusammenwachsender nationaler Wirtschaften lässt manchen von einem Welt-Wettbewerbsgesetz mit einer Super-Kartellrechtsbehörde träumen.

Dafür aber, wie wir alle wissen, fehlen nicht zuletzt die politischen Voraussetzungen.

Aus Sicht weltweit operierender Unternehmen bedeutet das:

Vorausschaubare und möglichst einheitliche kartellrechtliche Bedingungen wird es bis auf Weiteres nur über eine Angleichung der nationalen Rechte und klare Abgrenzung behördlicher und gerichtlicher Zuständigkeiten geben.

Nicht anders stellt sich die Lage aus Sicht der Wettbewerbsbehörden dar.

Sie müssen ihre internationale Zusammenarbeit ausweiten und verbessern, um die gestiegenen Gefahren internationalen wettbewerbswidrigen Verhaltens in den Griff zu bekommen.

Das ist nicht leicht.

Denn internationales, die Zuständigkeit mehrerer Staaten berührendes Unternehmenshandeln kann erfahrungsgemäß zu Regelungskonflikten führen.

Diese zu vermeiden bzw. zu lösen verlangt von Staaten Zurückhaltung und Abstimmung beim Setzen nationaler Normen.

Von den nationalen Gerichten wird die Einhaltung der von ihren Gesetzen vorgegebenen Zuständigkeitsgrenzen verlangt.

Versucht dagegen ein Staat seine Regelungszuständigkeit außerhalb seines Territoriums exzessiv zu beanspruchen, stört er – auch zum Schaden seiner Unternehmen – die Rechtssicherheit und erschwert die internationale Zusammenarbeit der Kartellbehörden.

Diese Gefahr droht durch die jüngste Variante der „effects doctrine“ dem Einfallstor der extraterritorialen Anwendung amerikanischer Antitrustgesetze.

Nach bisheriger Praxis, sowohl der EU- wie der US-Behörden und -Gerichte, mussten Auslandssachverhalte immer einen direkten, wenn auch minimalen Nexus zum Staat des Regulierers aufweisen.

Ein solcher ist etwa gegeben, wenn ein im Ausland vereinbartes Preiskartell auch für den amerikanischen Markt gilt und dortige Betroffene schädigt.

In den USA bahnt sich jetzt ein neuer, gefährlicher Trend an, der kürzlich in der Empagran Entscheidung des Washingtoner Berufungsgerichts kulminierte.

Nach diesem Trend bejahen US-Gerichte ihre Zuständigkeit nun sogar, wenn der vom Kläger geltend gemachte Schaden nicht selbst durch die Auswirkungen auf den amerikanischen Markt verursacht worden ist.

Hintergrund der Empagran-Entscheidung ist eine Sammelklage nichtamerikanischer Unternehmen der Tierfutterbranche gegen ausländische, darunter sieben europäische, Unternehmen der Chemie- und Pharmaindustrie.

Diese Klage ist sozusagen das Nachspiel des internationalen Vitaminkartells.

Sollten die Kläger mit der Klage Erfolg haben, drohen den europäischen Unternehmen zusätzlich zu den schon von der EU-Kommission und dem US-Justizministerium verhängten Geldbußen in Höhe von 855 Millionen Euro und 900 Millionen Dollar und dem in privaten Vergleichen gezahlten Schadensersatz von hunderten Millionen Dollar nochmals die in den USA üblichen und von den ausländischen Klägern angestrebten dreifachen Schadensersatzsummen im Rahmen der sogenannten "punitive" oder "treble damages".

Die klagenden Unternehmen mit Sitz unter anderem in Ecuador, Panama, Indonesien und der Ukraine hatten von den Beklagten Vitamine im Ausland zu Kartellpreisen gekauft und dadurch einen Schaden erlitten.

In seiner Januarentscheidung bejahte das Washingtoner Gericht – der DC Circuit – die Frage seiner Zuständigkeit aufgrund des "Foreign Trade Antitrust Improvement Act of 1982".

Nach diesem Gesetz sind amerikanische Gerichte für Klagen gegen extraterritoriale Kartelle unter zwei Voraussetzungen zuständig:

Erstens muss die angegriffene Handlung direkte, erhebliche und vorhersehbare Auswirkungen auf den amerikanischen Markt haben.

Zweitens müssen gerade diese Auswirkungen zu einem Schadensersatzanspruch nach den amerikanischen Kartellgesetzen geführt haben.

In dieser zweiten Bedingung liegt die Kernfrage des Empagran-Falles – und, so füge ich hinzu, des Extraterritorialitätsproblems –:

Muss es sich bei diesem Schadensersatzanspruch um den Anspruch des Klägers handeln oder reicht es aus, wenn der Kläger sich zur Begründung der Zuständigkeit des Gerichts auf den durch die Auswir-

kungen des Kartells verursachten Schaden eines Dritten, also zum Beispiel eines nichtklagenden Amerikaners, bezieht.

Das Gericht bejahte seine Zuständigkeit, obwohl der Kläger gerade nicht durch die Auswirkungen des Preiskartells auf den amerikanischen Markt geschädigt worden ist, da er ja die Vitamine im Ausland gekauft hatte.

So viel zum juristischen Hintergrund.

Als deutscher Jurist möchte ich mich nicht näher mit der Richtigkeit dieser Auslegung im Rahmen der amerikanischen Gesetze befassen.

Mir geht es vielmehr um die möglichen Auswirkungen dieser Entscheidung auf die internationale Kartellrechtsentwicklung und die internationale Wirtschaft.

Die Empagran-Entscheidung ist kein Einzelfall.

Andere Entscheidungen oder anhängige Verfahren in den USA betreffen zum Beispiel die Klage eines norwegischen Ölunternehmens gegen die ausländischen Betreiber großer Frachtschiffe in der Nordsee (Statoil) und Klagen ausländischer Auktionäre gegen die Londoner Auktionshäuser Christie's und Sotheby's (Kruman v. Christie's).

Interessant ist zunächst und aus meiner Sicht ein hoffnungsvolles Zeichen, dass die US-Administration – Justizministerium und Federal Trade Commission – in einer Stellungnahme an das Gericht die Entscheidung für falsch erklärt hat.

In ihrem „amicus curiae brief" wirft die Administration dem Gericht u. a. eine fehlerhafte Auslegung des Gesetzes und seiner Entstehungsgeschichte vor.

Sie gibt weiter dem Gericht zu verstehen, die amerikanischen Antitrustgesetze seien geschaffen, um amerikanische Verbraucher zu schützten und nicht die Wettbewerbsbedingungen in ausländischen Staaten zu regulieren.

Hier trifft aus ausländischer Sicht die Administration den Kern.

Denn man stelle sich einmal die amerikanische Reaktion im Folgenden, dem Empagran-Fall nachgebildeten und sich vor einem ausländischen Gericht abspielenden Szenario vor:

Ein ecuadorianischer Kläger kauft von einem amerikanischen Hersteller in Ecuador ein aufgrund eines Preiskartells überteuertes Produkt und macht die Schadensersatzklage gegen den amerikanischen Hersteller vor einem deutschen Gericht mit der Begründung anhängig, das Preiskartell habe auch gegen deut-

sches Kartellrecht verstoßen und andere – deutsche – Käufer seien auch durch das Kartell geschädigt worden.

Ein deutsches, aber auch jedes andere europäische Gericht würde hier offensichtlich seine Zuständigkeit verneinen.

Jede andere Entscheidung würde zu Recht den Protest der US–Unternehmen und Regierungsstellen hervorrufen.

Ich möchte im Folgenden die vier wichtigsten Auswirkungen der Empagran-Entscheidung im Einzelnen darlegen und verdeutlichen, wohin uns der neue Trend in der US-Rechtsprechung führen könnte, wenn er nicht durch eine höchstrichterliche Entscheidung im Ansatz gestoppt wird.

Erstens ist die wichtigste Konsequenz sicherlich die extraterritoriale Ausdehnung der amerikanischen Kartellgesetze jenseits bislang international anerkannter Maßstäbe.

Das Berufungsgericht hat die Ausdehnung seiner Zuständigkeit unter anderem mit der Notwendigkeit erfolgreicher Abschreckung von Kartellsündern begründet.

Dabei stützt es sich auf die Annahme, internationale Preisabsprachen, die sich auch auf den amerikanischen Markt auswirken, könnten nur durch die Anwendung und Durchsetzung der US-Kartellgesetze verhindert werden.

Völlig außer Acht lässt das Gericht in diesem Zusammenhang, dass auch außerhalb der USA Kartellbehörden strikt gegen Preiskartelle vorgehen und ihre nationalen Kartellgesetze rigoros durchsetzen.

Die vom Gericht indirekt als unzulänglich herangezogenen ausländischen Zustände beziehen sich auf die 70er Jahre.

Damals hatten außer den USA gerade 20 Länder Kartellgesetze, im Jahr 2001 waren es ca. 100 Länder.

Diese drastischen Änderungen wurden anscheinend vom Washingtoner Gericht nicht zur Kenntnis genommen.

Zweitens gefährdet die Empagran-Entscheidung durch einseitige Ausdehnung nationaler Gesetze die internationale Zusammenarbeit im Kampf gegen Kartelle.

In der Vergangenheit haben die europäischen und amerikanischen Kartellbehörden große Fortschritte bei ihrem gemeinsamen Kampf gegen Preiskartelle gemacht.

Die Sichtweise mancher amerikanischer Gerichte, wonach die effektive Bekämpfung internationaler Kartelle ausschließlich auf der Grundlage

amerikanischer Gesetze stattfinden kann, ist daher einseitig und kontraproduktiv.

Die negativen Auswirkungen, die eine derartig beeinträchtigte Kooperation im Rahmen der Kartellbekämpfung auf den internationalen Wettbewerb haben könnte, liegen auf der Hand.

Drittens wirkt sich die Entscheidung auch auf die pragmatische Kartellbekämpfung im Rahmen der EU–Bonusregelung aus.

Die Neufassung der Bonusregelung vor einem Jahr wurde von den amerikanischen Kartellbehörden ausdrücklich begrüßt.

Die Empagran–Entscheidung gefährdet nun den Erfolg dieser Bonusregelung in Europa.

Denn der Anreiz zur Selbstanzeige wird gemindert, wenn die Unternehmen private Sammelklagen in den USA von Klägern aus aller Welt befürchten müssen.

Aufgrund der Empagran-Entscheidung würde die Anzahl potentieller Kläger im Fall eines internationalen Kartells mit Auswirkung auf die USA drastisch und nicht eingrenzbar ansteigen.

Theoretisch könnte jeder Ausländer, der das Produkt irgendwo im Ausland gekauft hat, vor die amerikanischen Gerichte ziehen und auf dreifachen Schadensersatz klagen.

Viertens sind die Auswirkungen auf die Rechtssicherheit zu bedenken.

Dies gilt natürlich besonders für international tätige Unternehmen, die vielen unterschiedlichen Rechtssystemen ausgesetzt sind.

Rechtssicherheit beinhaltet unter anderem die Vorhersehbarkeit, vor welchem Gericht ein Unternehmen mit welchem Klageverfahren überzogen werden kann.

Die Empagran-Entscheidung fördert jedoch eine Entwicklung zur Beliebigkeit der Wahl des internationalen Gerichtsstandes und führt damit zur Rechtsunsicherheit.

Der DC Circuit eröffnet ausländischen Privatklägern mit seiner Entscheidung die Möglichkeit des “global forum shopping” - die nachträgliche (und einträgliche) Suche eines Klägers nach dem klägerfreundlichsten und nicht dem tatsächlich zuständigen Gericht.

Nicht nur im Bereich des Kartellrechts haben wir in den letzten Jahren den Trend verzeichnen können, dass Kläger mit Vorliebe das amerikanische Justizsystem in Anspruch nehmen.

Dreifacher Schadensersatz und andere Formen der sogenannten “punitive

damages" sowie die prozessrechtliche Konstruktion der Sammelklage ziehen Kläger fast magisch an.

Der britische Lordrichter Denning formulierte dies 1983 in einer Gerichtsentscheidung so:

"As a moth is drawn to the light, so is a litigant drawn to the United States.

If he can only get his case into their courts he stands to win a fortune."

Die Ausdehnung der eigenen Zuständigkeit des DC Circuit auf Kläger aus aller Welt vergrößert um ein Vielfaches das Risiko, in den USA mit Klagen ohne direkten USA-Bezug überzogen zu werden.

Natürlich sollen Kartellsünder nicht vor gerechter Strafe und auch Schadensersatzansprüchen privater Geschädigter verschont werden.

Die Rechtssicherheit und der globale Wettbewerb werden jedoch nicht dadurch gestärkt, dass von nun an sämtliche Privatklagen in internationalen Kartellrechtsfällen vor amerikanischen Gerichten verhandelt werden.

Mein Anliegen als Panelist heute ist es daher, die Aufmerksamkeit der Kartellrechtsgemeinde in Europa auf diese neue Entwicklung der amerikanischen Rechtsprechung zu lenken. Amerikanische Kollegen und Juristen scheinen sich einig zu sein, dass der Empagran-Fall seinen Weg zum Supreme Court finden wird und das oberste Gericht am Ende entscheidet.

Sollte der Supreme Court die Empagran-Entscheidung entgegen den auch von den amerikanischen Kartellbehörden vorgebrachten Argumenten bestätigen, würde dies den wettbewerbsrechtlichen Rahmen globalen Wirtschaftens zum Schaden von Unternehmen und öffentlichen Interessen aus den genannten Gründen schwächen.

Europäische Unternehmen und die Kartellbehörden der EU wie der Mitgliedsstaaten sollten sich daher die Konsequenzen dieser neuen amerikanischen Rechtsprechung vor Augen führen.

Das amerikanische Justizsystem gibt interessierten Parteien die Möglichkeit, Stellungnahmen zu anhängigen Fällen in Form sogenannter "amicus curiae briefs" abzugeben.

Auch eine Bitte um Unterstützung an die amerikanischen Partnerbehörden wird vor dem Hintergrund der Empagran-kritischen Stellungnahmen bei den US-Kartellbehörden offene Ohren finden.

Das Thema extraterritorialer Anwendung US-amerikanischer Kartellgesetze ist wie gesagt nicht neu.

Es scheint die internationale Kartellrechtsgemeinde in regelmäßig wiederkehrenden Abständen zu bewegen.

Wir dürfen dem aktuellen Trend jedoch nicht wie einem altbekannten und unabänderlichen Übel mit einem Schulterzucken begegnen.

Tatsache ist, dass sich der DC Circuit, sollte er mit dieser Rechtsprechung als Trendsetter Erfolg haben, als "Weltgericht" für internationale Preiskartelle aufschwingen könnte.

Als Europäer, Marktwirtschaftler und überzeugte Atlantiker dürfen wir es so weit nicht kommen lassen.

Bei allem Respekt vor der amerikanischen Antitrust-Rechtsprechung muss gelten, dass die Bekämpfung internationaler Preiskartelle unser aller Anliegen ist.

Ein wie auch immer gut gemeinter Aktivismus einzelner US-Gerichte kann diesem Anliegen schaden.

Dr. Otto Graf Lambsdorff
Former Federal Minister of Economics

The phenomenon of globalising companies and merging national economies makes many a person dream of a global competition law and a super competition authority.

But, as we all know, the preconditions for this, particularly the political ones, do not exist.

From the viewpoint of globally operating companies this means that for the time being predictable and maximally uniform competition law conditions can only be achieved through the harmonisation of national laws and a clear delimitation of the jurisdiction of courts and authorities.

From the competition authorities' point of view the situation is exactly the same.

They have to extend and improve their international cooperation in order to tackle the increased threat of international anti-competitive practices.

This is not easy.

Experience has shown that business activity affecting the jurisdiction of several countries may lead to conflicts of regulation.

In order to prevent or resolve this problem countries need to be cautious and coordinate with each other in setting national standards.

National courts are required to observe the limits of jurisdiction set by their national laws.

If, however, a country tries to excessively claim regulatory jurisdiction outside its territory, it interferes with legal security - also to the detriment of its companies – and makes international cooperation between competition authorities difficult.

Such a danger is posed by the most recent variant of the "effects doctrine", the gateway for the extraterritorial application of American antitrust laws.

So far, under the practice of both EU and US authorities and courts, out-of-state cases have always had to bear a direct, if only minimal nexus to the regulator's country.

This is the case, for example, if a price cartel concluded abroad is also effective in the American market and harms parties there.

In the USA a new dangerous trend is currently emerging which recently culminated in the Empagran decision by the Washington Court of Appeals.

Under this trend US courts now even find they have jurisdiction if the damages claimed by the plaintiff are not as such caused by the effects on the American market.

The background of the Empagran decision is a class action filed by non-American companies from the animal feed sector against foreign companies in the chemical and pharmaceutical sectors, seven of them European.

This lawsuit is, as it were, the repercussion of the international vitamin cartel.

Should the plaintiffs be successful with their lawsuit the European companies concerned will face so-called punitive or treble damages amounting to three times the actual damages caused, which is the common penalty in the USA and which has actually been sued for by the foreign plaintiffs – on top of the fines imposed by the EU Commission and the US Department of Justice amounting to 855 million euros and 900 million dollars, respectively, and the hundreds of millions of dollars of damages paid in private settlements.

The suing companies with headquarters for example in Ecuador, Panama, Indonesia and Ukraine, had purchased vitamins from the defendants abroad at cartel prices and had thus suffered damages.

In its January decision the Washington DC Circuit Court found that it had jurisdiction under the "Foreign Trade Antitrust Improvement Act of 1982".

Under this law American courts have jurisdiction in lawsuits against extraterritorial cartels under two conditions:

Firstly, the challenged conduct must have direct, substantial and predictable effects on the American market.

Secondly, a claim for damages under American antitrust law must have resulted from precisely these effects.

It is this second condition which raises the core question of the Empagran case, and, I should like to add, the extraterritoriality problem:

Does the claim for damages have to be the plaintiff's claim or is it sufficient if the plaintiff, in order to establish the court's jurisdiction, refers to the damage caused to a third party by the effects of the cartel, for example a non-suing American.

The court found that it had jurisdiction although the damage caused to the plaintiff was precisely not a result of the price cartel's effects on the American market, since after all he bought the vitamins abroad.

So much for the legal background.

Being a German lawyer I do not want to go into whether this interpretation is correct under American law.

I would rather deal with the possible effects of this decision on the international development of competition law and the international economy.

The Empagran decision is not an isolated case.

Other decisions or pending proceedings in the USA relate for example to the complaint filed by a Norwegian oil company against foreign operators of cargo ships in the North Sea (Statoil), and complaints filed by foreign auctioneers against the London auction houses Christie's and Sotheby's (Kruman v. Christie's).

An interesting fact and in my view a promising sign is that in an opinion addressed to the court the US administration (the Department of Justice and the Federal Trade Commission) held that the decision was incorrect.

In its "amicus curiae brief" the administration accuses the court, among other things, of having misinterpreted the law and the history of its origins.

Moreover it makes it clear to the court that the American antitrust laws were created in order to protect American consumers and not to regulate competition conditions in foreign countries.

From a non-American point of view the administration hits the core of the matter here.

Just imagine the American reaction to the following scenario modelled on the Empagran case and taking place before a foreign court:

An Ecuadorian plaintiff, having bought a product from an American manufacturer in Ecuador, which was overpriced due to a price cartel, brings an action for damages against the said American manufacturer before a German court on the grounds that the price cartel also violated German cartel law and that it also caused damage to other – German – customers.

A German court like any other European court would obviously deny jurisdiction in this case.

Any other decision would, quite rightly, cause protests by US companies and US government agencies.

In the following I would like to outline the four most significant effects of the Empagran decision and explain where this new trend in US jurisdiction could lead us if it is not stopped in the initial stages by a Supreme Court decision.

The most significant consequence is no doubt the extraterritorial extension of American antitrust laws beyond so far internationally recognized standards.

The court of appeal based the extension of its jurisdiction inter alia on the ground that this was necessary in order to successfully deter cartel offenders.

Its argumentation is based on the assumption that international price agreements which also affect the American market can only be prevented by applying and enforcing US antitrust laws.

Here, the court totally disregards the fact that competition authorities outside the USA also take severe action against price cartels and rigorously enforce their national cartel laws.

The court's indirect assertion that the conditions abroad were inadequate refer to the situation in the seventies.

At that time, only 20 countries besides the USA had cartel laws, compared to nearly 100 countries in 2001.

The Washington court apparently ignored these drastic changes.

Secondly, by unilaterally extending national laws to other countries the Empagran decision jeopardises international cooperation in the fight against cartels.

In the past European and American competition authorities made considerable progress in jointly fighting price cartels.

The view taken by some American courts that effectively combating international cartels is only possible on the basis of American laws is therefore one-sided and counterproductive.

The negative effects on international competition that may result from cooperation in the fight against cartels being impaired in this way are obvious.

Thirdly, the decision also affects the pragmatic combating of cartels within the framework of the EU leniency programme.

Last year's revision of the leniency programme was explicitly welcomed by the US antitrust authorities.

Now the Empagran decision is jeopardising the success of this leniency programme in Europe.

The incentive for companies to voluntarily come forward and report themselves to the authorities is reduced if they have to fear private class actions in the USA by plaintiffs from all over the world.

As a result of the Empagran decision the number of potential plaintiffs in the case of an international cartel affecting the USA would increase drastically and uncontrollably.

Theoretically any foreigner who bought a product anywhere abroad could go to American courts and bring an action for treble damages.

Fourthly, the effects on legal security need to be taken into consideration.

Of course this applies particularly to internationally operating companies which are exposed to different legal systems.

Among other things legal security includes the predictability as to which direct actions can be brought against a company before which court.

The Empagran decision, however, encourages a trend by which the choice of international jurisdiction becomes arbitrary, thus leading to legal insecurity.

With its decision the DC Circuit opens up the possibility of "global forum shopping" for private plaintiffs, i.e. to search retroactively (and profitably) for the most plaintiff-friendly rather than the actually competent court.

In recent years the trend by which plaintiffs particularly prefer to avail themselves of the US justice system has been observed not only in the area of cartel law.

Treble damages and other forms of punitive damages as well as the procedural construction of the class action attract plaintiffs almost magically.

In a court decision of 1983 the British Lord Justice Denning put this as follows:

"As a moth is drawn to the light, so is a litigant drawn to the United States.

If he can only get his case into their courts he stands to win a fortune."

The extension of the DC Circuit's own jurisdiction to plaintiffs from all over the world increases by many times the risk of being sued in the USA in cases not bearing a direct relation to the USA.

Of course cartel offenders should not be spared just punishment and claims for damages suffered by private parties.

However, legal security and global competition will not be improved if from now on all private actions in international cartel cases are dealt with by American courts.

Therefore my intent as a panelist today is to draw the attention of the competition law community in Europe to this new development in US jurisdiction. American colleagues and lawyers seem to agree that the Empagran case will go to the Supreme Court which will eventually take a decision.

Should the Supreme Court confirm the Empagran decision contrary to the arguments also put forward by the American antitrust authorities, this would weaken the competition law framework for global economic activity to the detriment of companies and public interests for the reasons given above.

European companies as well as the competition authorities of the EU and its Member States should therefore be aware of the consequences of this new American jurisdiction.

The American justice system gives interested parties the possibility to issue opinions on pending cases in the form of so-called "amicus curiae briefs".

Against the background of the critical views on the Empagran decision, a request for support directed at the American partner authorities would also fall on sympathetic ears with the US antitrust authorities.

As I have said, the issue of the extraterritorial application of US antitrust laws is not new.

It seems to preoccupy the international competition law community at regular intervals.

However, we must not respond by shrugging off this current trend, as if it were a well-known and irreversible evil.

The fact of the matter is that the DC Circuit, should its jurisdiction prove to be a trendsetter, could establish itself as "global court" for international price cartels.

As Europeans, market economists and convinced Atlanticists we must not allow this to happen.

With all due respect for American antitrust jurisdiction, the fight against international price cartels must be a concern for all of us.

Activism by individual US courts can be harmful to this end, as well-meant as it may be.

Bo Vesterdorf
President of the Court of First Instance of the European Communities

Introduction

It is a great pleasure for me to have been invited to Bonn by the Bundeskartellamt to speak at this important conference.

Being a judge and at the same time President of the Court of First Instance of the European Communities ("CFI"), I do not need to underline that I, as little as the Court that I preside, do not engage in politics in general nor in competition politics in particular: we do not regulate anything but strive correctly to apply the various constituent EU treaties and the legislation adopted by the Community legislator.

On today's topic I should like to begin with a perhaps rather obvious remark. Many members of the Community Courts in Luxembourg would, I feel, share my view that from our work it is clear that the times we live in are becoming more and more complicated, even without the assistance of the legislator, simply due to the general political situation in a national, European and global context. This is no doubt due in large measure to the increasingly globalized and complex nature of economies and to the steadily growing demands being made in all respects from citizens.

In the two Community Courts we are experiencing the consequences of this development in several ways. First, there seems to be a constantly growing tendency to legalize everything; in other words to put before the judges problems which should be solved by politicians but which, precisely because of their controversial political character, are often left unsolved at the political level. This is a regrettable tendency also seen in our Member States. Second, a steadily growing number of cases are being lodged each year and, thirdly but not least, we are discerning a growing complexity in an ever larger number of those cases. On top of that, the growing economic importance of many of these cases, in form either of the economic implications of our judgments for the undertakings involved therein or of the size of the sanctions imposed on such undertaking is apparent. These developments may be found in particular in two areas of Community law; "pure" competition cases and state aid cases. In the following remarks, I shall only address what I call "pure" competition cases, i.e. cases concerning the application of Articles 81 EC and 82 EC and the Community's merger-control regulation.

Competition law and the globalized market economy

The question that I would like to address is to what extent, if any, the Community judges *qua* judges participate in applying competition law as a regulative factor in the globalized market economy. The answer to this question depends on the answer to two ancillary questions: namely, (A) what is the review competence enjoyed by the Community courts under the Treaty and (B) how have these competences been and how are they being interpreted by the two courts. The answer further depends upon another factor, namely, (C) the efficacy of the judicial control exercised by those courts; by efficacy I do not only mean thoroughness but also rapidity.

The answers to these questions are of major importance for economic operators not only within the European Union but also for those operating on the global market. They are central for the efficacy of judicial control.

Let me now turn to the issues raised by these questions.

A Competences under the EC Treaty

Under Article 230 EC the legal control that the two Community courts may exercise is limited to a control of the legality of the measure adopted by a Community institution. We have jurisdiction in actions brought by a Member State, the European Parliament, the Council, the Commission or by an individual, e.g. an undertaking, on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to the application of the Treaty, or grounds of misuse of powers.

The reference to any rule of law covers under our case-law not only secondary Community legislation but also, and very importantly, a number of fundamental rights and general principles, such as the principles of proportionality, legal certainty and non-discrimination, as well as the right to an effective judicial remedy.

In relation to competition cases coming before us, this means in practice a classical judicial control without restraint as regards pleas in law claiming lack of competence, infringement of essential procedural requirements and misuse of powers. However, this is not quite so regarding the two remaining possi-

ble pleas in law, namely infringement of the Treaty or of secondary law, in other words the substantive questions raised by a competition case.

This leads me to the second issue.

B How these competences have been and are being interpreted by the two Courts

In this respect, let me approach the subject from a practical angle. When undertakings bring their competition cases before the CFI asking for the annulment of a Commission decision adversely affecting them, the applicants normally claim, regarding the substance, that the Commission has got:

1. the facts wrong:

2. the law wrong;

3. has got both of these two elements wrong and/or;

4. in any event, should not have imposed any fine or at least not such a big fine on them.

The critical question is how closely will/ought the CFI examine such pleas in law?

As regards the facts, it is necessary to distinguish Commission decisions applying Articles 81 EC and 82 EC from its merger-control decisions. In the Article 81 EC and 82 EC cases, the question whether the Commission has got the facts right concerns past events, while in the merger cases a significant part of the analysis is necessarily concerned with what is likely to happen in the future as a consequence of the merger; i.e. how will the merger affect the competition in the market or markets concerned.[1]

In the non-merger-control cases, we have to examine whether the Commission has proven to the required degree the facts which it claims constitute an infringement of either Article 81(1) EC or 82 EC. In this respect, it follows from the case-law that the CFI examines this aspect of the case without restraint. I am confident you will agree with me that the CFI, which as a court charged with finding facts and law is alone responsible for this part of the judicial review, properly undertakes in these cases a close examination of the facts. This should not

1 The Court of Justice has itself indicated that the prospective nature of the analysis must be borne in mind when considering the Commission's margin of discretion regarding economic assessments; see Joined Cases C-68/94 and C-30/95 France a.o. v. Commission [1998] ECR I-1375, paras. 221 to 224.

come as a surprise to anybody. After all, such cases are of great significance for the undertakings involved and clearly of at least a quasi-penal character whenever pecuniary sanctions are imposed. Indeed, and notwithstanding the wording of Article 15(4) of Regulation No 17 (see also Article 23(5) of its successor, Council Regulation No 1/2003[2]), they are, in my opinion, really of a criminal character given their deterrent and at least partially punitive purpose.[3] This point of view, I feel, was implicitly confirmed by the Court of Justice in its judgment on appeal in the Hercules (polypropylene) case.[4] Before one exercises a power to confirm potentially very significant fines, imposed albeit normally only on undertakings and not on individuals, the least one should be certain of is that the facts have been adequately proven; in other words, that the Commission has, to a sufficient degree of probability, correctly established the material facts.

In merger litigation the situation is, as I have already indicated, somewhat different because the decisions in these cases must rely not only on present facts but also on an appreciation of the likely future factual ramifications of the merger in question. Thus, in any merger case, the Commission, before it can take its decision to approve a merger following its notification or to move to a full second-stage examination thereof, will need to know and base its appreciation of that merger, and of its potential effects on competition, on already existing material facts, such as the present position and market shares of the undertakings in question on

2 Council Regulation No 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty and amending Regulations 19/65/EEC, (EEC) No 1017/68, (EEC) No 2988/86, (EEC) No 3975/87, (EEC) No 3976/87, (EEC) No 1534/91 and (EEC) No 479/92, OJ 2003, L 1, p. 1. I note that this view is also taken by Wouter Wils in his forthcoming article "The Principle of 'Ne Bis in Idem' In EC Antitrust Enforcement: A Legal and Economic Analysis", to be published presently in (2003) 26 World Competition.

3 See, in this respect, the view I expressed, acting as Advocate General, in the joint Opinion I gave in the Polypropylene cartel cases; see Case T–1/89 Rhône-Poulenc v. Commission [1991] ECR II-867, p. 991.

4 See Case C-51/92 P Hercules Chemicals v. Commission [1999] ECR p. I-4235, and the view expressed by Advocate General Darmon in the Woodpulp cases; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v. Commission [1993] I-1575, at para. 451.

one or more precisely defined and analysed relevant product or service markets and the present position and market shares of competing undertakings. It must then, having ascertained such core facts, evaluate the likely effects of the merger on the competitive situation on the market(s) concerned. This is a prospective analysis which requires the Commission to conclude, in application of the criteria set down in the merger regulation, either that the merger will create or reinforce a dominant position and have significant negative effects on that market(s), or that it will not have any such effects.

How then does the CFI proceed in respect of these two different kinds of examination? As regards the first one, i.e. present situation of the undertakings, the CFI will, as it appears clearly from the case-law (for example, Gencor[5] and Airtours[6]), examine closely, and without restraint, whether the Commission has got these facts right. This for the very simple reason that, if, for example, the Commission has found that the acquiring undertaking has a share of, let us say, some 38.5% of the concerned product/service market and the acquired undertaking has 15.7% thereof and that, for that reason, a dominant position would be created by the merger, it could be of decisive importance if the applicants arrive at convincing the CFI that the latter company did not hold 15.7% but in fact say only 7.1%. The CFI would and should examine such an argument very closely.

As regards, however, the second part of the assessment, namely the examination of what will be the likely effects of the merger on the competitive situation on the market, the CFI has stated that, as long as the facts regarding the existing situation have been proved satisfactorily, the Commission enjoys a large margin of appreciation regarding its analysis of the immediate or future effects of the merger in question. The CFI will, therefore, only annul the Commission's decision if the latter has made a manifest error of appreciation. This principle has been clearly and unequivocally stated and, I suggest, correctly applied by the CFI in recent cases such as Airtours, the main Schneider case,[7] the main Tetra Laval

5 Case T-102/96 Gencor v. Commission [1999] ECR II-753.

6 Case T-342/99 Airtours v. Commission [2002] ECR II-2585.

7 Case T-310/01 and T-77/02 Schneider Electric v Commission [2002] ECR II-4071. The issue of the Commission's margin of appreciation in determining the extent to which the restoration of effective conditions of competition required the complete separation of the undertakings in question was considered

case,[8] as well as in the BaByliss[9] and Philips cases.[10] It remains to be seen whether the Court of Justice confirms the Tetra Laval judgment which, while confirming most of the underlying thesis of the Commission's approach, found essentially, like in Kali and Salz and the Airtours judgment, various flaws by the Commission in the application of its theory to the facts of the case, but which, unlike Airtours, is now under appeal.[11] In the said main appeal (i.e. that regarding the judgment dealing with the prohibition decision), the Commission claims, inter alia, that the CFI, although ostensibly accepting the principle of allowing a margin of appreciation for the Commission as regards its economic assessments, has nevertheless in practice failed to respect that margin; in so doing, it has, instead, allegedly raised the level of proof required. The Commission contends that the test effectively applied is no longer whether the applicants have proved the Commission to have committed a manifest error of appreciation but whether they have cast sufficient doubts as to the convincing nature of the Commission's case. In effect, the Commission contends that the CFI has effectively substituted its own appreciation for that of the Commission regarding the likely effects of the merger on competition on the markets concerned.[12]

I shall not comment further on those cases given that they are under appeal and I have naturally no involvement whatsoever in the hearing of those appeals.

Let me now turn to the question of whether the defending institution,

in the related Case T-77/02 Schneider Electric v. Commission [2002] ECR II-4201 as the annulment of the contested divestiture decision in that case resulted directly from the annulment of the prohibition decision upon which it was based. This issue was also raised in the second Tetra Laval case (Case T-80/02 Tetra Laval v. Commission [2002] ECR II-4519. In the latter case, the CFI stated expressly (para. 36) that "... the separation of the undertakings involved in a concentration is the logical consequence of the decision declaring the concentration incompatible with the common market".

8 Case T-5/02 Tetra Laval v. Commission [2002] ECR II-4381.

9 Case T-114/02 Babyliss v. Commission [2003] ECR II-nyr (judgment of 3 April 2003).

10 Case T-119/02 Philips v. Commission [2003] ECR II-nyr (judgment of 3 April 2003).

11 See Case C-12/03 P Commission v. Tetra Laval (lodged on 14 January 2003, pending) and the appeal C-13/03 P in respect of Case T-80/02, cited n. 8 above, lodged on the same day.

12 For a more detailed summary of the pleas in law advanced by the Commission in its appeals, see the notice regarding the appeals published at OJ 2003 C 70, pp. 3 and 5, respectively.

in these cases the Commission, has got the law right. In this respect, we have to distinguish the interpretation of the law from its application to a certain set of facts.

As regards, first, the interpretation of the law, be it of written rules of law, case-law, or unwritten rules of law, such as certain principles of a fundamental character, it goes almost without saying that it is our prerogative as judges to review the defendant institution's interpretation. We must exercise this function without restraint and, in my opinion, the CFI clearly does so.

However, the application of the law to a certain set of facts is another thing. If the applicable rules leave no margin of appreciation the result is given and we must apply the rule without leaving any special leeway to the defendant. Very often, however, once the facts are established and the rules of law correctly interpreted, those rules leave the institution with a certain, sometimes large, margin of appreciation which we must, and I think (hope), always respect. In other words, the CFI will only annul if the defendant institution has committed a manifest error of appreciation.

Let me take a practical example. Suppose the Commission has found that an expected increase in a certain activity will influence competition in a significant and negative way. In this type of case, if the increase comprised a 10% increase, the CFI would probably, in general, not question such an appreciation of the increase. If, however, the increase is only one half of a percent, we would probably, in most cases, find that the Commission has made a manifest error of appreciation.

Let me then, finally, turn to the two Courts' role regarding the fines. According to Regulation No 17 and its successor (Regulation No 1/2003 which enters into force on 1 May 2004), the CFI has full (plenary) jurisdiction in this respect. In other words, it "may cancel, reduce or increase"[13] the amount of the fines imposed; it is plainly therefore not just charged with verifying the legality of the Commission's imposition of a fine but has unlimited jurisdiction in reviewing the amount of that fine(s). As the Court of Justice ("Court") stated recently in its judgment in PVC II: "More than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the Community judicature authorises it to vary the contested measure, even without annulling it, by taking into account all of the factual circum-

13 See Art. 17 of Regulation No 17 and Art. 31 of Regulation No 1/2003.

stances, so as to amend, for example, the amount of the fine".[14] The only limitations on the CFI's jurisdiction, in this respect, are, according to the Court of Justice, essentially that the CFI, first, must indicate the reasons why it has decided to modify the fine imposed by the Commission and second, if several undertakings are involved in the same case, it must take care not to discriminate between these undertakings when exercising its jurisdiction to alter the fines imposed and it too, like the Commission, must respect the principle of proportionality. In its judgment in Hercules, the Court of Justice stated that it is not for it on appeal, "when deciding questions of law in the context of an appeal, to substitute, on grounds of fairness, its own appraisal for that of the Court of First Instance adjudicating, in the exercise of its unlimited jurisdiction, on the amount of a fine imposed on an undertaking by reason of its infringement of Community law [...]".[15] The matter was put clearly by Advocate General Fennelly in his Opinion in Compagnie Maritime Belge a.o. v. Commission; where he opined that the Court of Justice should limit its review to considering "any identifiable error of law in the contested judgment" and, in so doing, "should satisfy itself that the Court of First Instance has adopted the role of unlimited review assigned to it by the Treaty and given adequate consideration to all the points of fact and law raised in contesting the fines".[16]

It should be recalled that the Commission itself may appeal the CFI's assessment of a fine to the Court of Justice. It may even do so, by way of a cross appeal, in the context of an appeal brought by the applicant before the CFI. Thus, the Court may be faced with a plea alleging that the fine should be further reduced and a cross plea from the Commission to the effect that the original fine should not have been reduced (see the pending Volkswagen v. Commission case).[17] In that case the Commission complains that the CFI erred in law in reducing the amount of the fine in respect of a

14 See Joined Cases C-238/99 P, C-245/99 P, C-250/99 P and C-254/99 P, Limburgse Vinyl Maatschappij and Others v. Commission [2002] ECR I-8375, para. 692.

15 Case C-51/99 P, cited n. 4 above, para.109; see also PVC II; para. 614. Earlier in Case C-219/95 P Ferriere Nord v. Commission [1997] ECR I-4411, it stated that the Court has "jurisdiction to consider whether the Court of First Instance has responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine abolished or reduced" (para. 31).

16 Joined Cases C-395/96 and C-396/96 P, [2000] ECR I-1365; see the Opinion of 29 October 1998, at paras. 183 and 184.

17 Case C-338/00 P.

certain period on the apparent basis that the anti-competitive agreement in question was notified, albeit in an irregular form. Advocate General Ruiz-Jarabo Colomer has recommended that, although the impugned passage of the judgment is "somewhat lacking in precision", it may nevertheless be inferred "that the Court of First Instance proceeded on the basis that the communication of 1988 served to show that the [rule of the agreement at issue] was not in itself sufficiently serious to merit sanction [and that] [b]e that as it may, the lack of precision in this instance must operate for the benefit of the accused undertaking".[18]

The power of full jurisdiction has been used very sparingly by the CFI. We have, indeed, only a very few times fully exercised the power. In several of the "Cartonboard" cases the CFI found that part (regarding market collusion) of an alleged violation of competition law by certain of the participants in the cartel had not been proved satisfactorily by the Commission.[19] This type of error by the Commission may often lead the CFI to reduce the fine in relative terms. However, in those cases, the CFI decided not to reduce the fine stating that the proven part of the participation in the cartel was serious enough to justify maintaining the level of the fine imposed by the Commission.[20] In fact, the CFI therefore effectively increased the fine for the proven part of the violation. In another case, which is representative of the other end of the scale, the CFI decided to annul the fine even though the Commission was found to have proved all of the alleged violation.[21]

Even though it has been repeatedly stated in the case-law of the Community judicature that it is for the Commission, as an integral part of its competition policy, to decide the general level of fines it wishes to impose, and even though the Community Courts have, in practice, almost invariably accepted the limitation on their own jurisdiction inherent in this approach (see, for example, the CFI's judgments, all now under appeal, in the cases

18 See para. 101 of his Opinion of 17 October 2002.

19 See, e.g., Case T-295/94 Buchmann v. Commission [1998] ECR II-813. In other cases, the CFI, having overruled the Commission's findings as to the extent and/or duration of an undertaking's participation in the cartel at issue, exercised its full jurisdiction to reduce the fine imposed; see e.g. Case T-334/94 Sarrió v. Commission [1998] ECR II-1439, especially para. 411. On appeal, the Court of Justice further reduced the fine; see Case C-291/98 P Sarrió v. Commission [2000] ECR I-9991.

20 See Buchmann, paras. 178-180.

21 Case T-86/95 Compagnie Générale Maritime v. Commission [2002] ECR II-1011.

concerning the alleged "Pre-insulated Pipe Cartel" cartel[22] as regards the 1998 Commission Guidelines on the Method of Setting Fines),[23] this area remains one where the CFI could, if it so wished, exercise a more active influence on the competition policy being applied in individual cases, either by more readily lowering the general level of fines imposed or, indeed, by raising it. We have, at least so far, refrained from doing so. If the CFI were to do so, it would be, however, in the interests of legal certainty for all parties concerned, including, of course, the Commission, important to endeavour to maintain as consistent an approach as possible. The most appropriate forum for the CFI to consider such a new approach would be, it seems to me, in its forthcoming new "grand chamber" formation. Thus, in an appropriate case, that formation may provide the fitting forum for debating the appropriateness of adopting a more activist approach regarding the level of fines. In stating this view, however, I would recognize that the overall reluctance to date significantly to interfere with the fines imposed by the Commission does in itself constitute a form of negative exercise of the full jurisdiction power.

In the context of a discussion regarding globalization, of particular import is naturally the question of the scope of the principle of ne bis in idem. Both Article 4 of Protocol No 7 to the European Convention on Human Rights and Article 50 of the Charter of Fundamental Rights of the European Union recognize the applicability of the principle in criminal proceedings. Given the at least quasi-penal nature of the fines that may be imposed in competition infringements proceedings, the Court of Justice in PVC II has now clearly accepted that the principle is mutatis mutandis applicable: hence, it precludes "in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision".[24] In PVC II the Court also confirmed the right of the Commission to resume an infringement proceeding where its earlier decision in respect of the alleged violation at issue was an-

22 See, e.g., Case T-9/99 HFB a.o, v. Commission [2002] ECR II-1487 (on appeal, Case C-202/02 P).

23 OJ 1998 C 9, p. 3.

24 See Joined Cases C-238/99 P, C-245/99 P, C-250/99 P and C-254/99 P, Limburgse Vinyl Maatschappij and Others v. Commission, cited n. 14 above, para. 59.

nulled for procedural grounds (in that case, because the decision had not properly been authenticated by the college of Commissioners); such an annulment did not amount to an "'acquittal' within the meaning given to that expression in penal matters", so that "[i]n such a case the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them".[25] It would seem, however, to flow from PVC II that the principle would preclude the Commission from resuming an investigation upon finding direct evidence of a cartel where a first decision in respect of that alleged cartel was annulled due to the insufficiency of the indirect evidence relied upon in the absence of direct evidence of collusive behaviour.

Turning to the issue of multiple geographic prosecutions, as such, it is important to recall that in the seminal Wilhelm case the Court rejected the argument that double proceedings under national and Community competition law in respect of alleged anti-competitive behaviour would infringe the principle of ne bis in idem. [26] This interpretation was justified (paragraph 3) on the basis of the difference between the two laws ("Community and national competition law on cartels consider cartels from different points of view") and particularly on the fact that Community competition law focuses on trade between Member States, while "each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context". The Court does not appear, therefore, unlike Advocate General Roemer in his Opinion in that case, to have precluded the possible application of the principle to the relationship between Community and national competition laws.[27] Following its Advocate General, the Court also observed (paragraph 11) that "a general requirement of natural justice [...] demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed".[28]

25 Ibid., para. 62.

26 Case 14/68 Wilhelm v. Bundelskartellamt [1969] ECR 3, at paras. 3 and 11.

27 The learned AG opined that the principle could only apply within the "framework of a particular legal system" and this was not the case with the interrelationship between Community law and national, "so long as the Communities do not constitute a federal legal order" ([1969] ECR 1, at p. 25).

28 AG Roemer had suggested that reasons of fairness would dictate that the Commission take account of sanctions imposed by national regulatory authorities and this was supported, by analogy, with Art. 90 CS, pursuant to which the Commission had to take account of any decision adopted at national level when de-

However, in the meantime, the European Court of Human Rights has judged that the principle of ne bis in idem is infringed not only where a person is tried twice for what is nominally the same offence but also where he is prosecuted twice for two offences whose essential elements overlap.[29] Such caselaw must, it seems to me, on the basis of the recent Roquette decision, be taken into account when interpreting the scope of the principle's contemporary application in Community competition law.[30] Indeed, Advocate General Ruiz-Jarabo Colomer would appear to have recognised in his recent opinion of 11 February 2003 in respect of the appeal brought against the CFI's judgment in the Italcementi cement-cartel case that, in the light of such developments, the Wilhelm approach may need to be reconsidered.[31] According to the learned Advocate General, "[t]he classic formulation of the ne bis in idem principle requires that three identical circumstances should be present: the same facts, the same offender and the same legal principle – the same value – to be protected"[32] In other words, "[t]he decisive factor is not whether the right to impose a penalty is exercised under one legal system or under several legal systems, but that, in order to know whether an act may be punished more than once, the person exercising the power to impose the penalty, must ascertain whether, with the various penalties, the same legal principles are being protected or whether, on the contrary, the values which are being protected are different".[33]

In Italcementi, the Advocate General has concluded that the difference between Italian competition law and Community competition law are now minimal, given that the 1990 Italian legislation effectively transcribes the latter (substituting "Italian market" for "Community market"). In his view, "[t]he test of the territorial extent for the unlawful conduct is not substantive, but adjectival, since it does not affect

termining a penalty to be imposed under Community law ([1969] ECR 1, at p. 26).

29 Franz Fischer v. Austria, judgment of 29 May 2001, Application No 37950/97.

30 See Case C-94/00 Roquette Frères [2002] ECR I-9011.

31 Case C-213/00 P Italcementi v Commission (judgment pending).

32 Ibid., para. 89. See also para 56 of his Opinion in Joined Cases C-187/01 and C-385/01 Gözüto and Brügge, [2003] ECR I-nyr (the issue of the general scope of the ne bis in idem principle, i.e. the conditions governing its applicability, was not addressed in the judgment of the full Court of 11 February 2003). Nevertheless, it is submitted that the underlying tenor of the judgment is far from adverse to a broad potential interpretation of that scope.

33 Ibid.,Opinion in Gözüto and Brügge, para. 56

the nature of the infringement, but only its intensity": in other words the two sets of rules may be regarded as pursuing the same legal value or objective for the purposes of the application of the ne bis in idem principle.[34] If the Court endorsed this view, a major obstacle to the potential application of the principle would be removed, given that nearly all national competition laws are now based, at least in large part, on the text of Articles 81 EC and 82 EC. Where differences of a substantive nature remain, the principle of ne bis in idem would be inapplicable but the regulator undertaking the second investigation would, of course, be obliged, for reasons of natural justice/equity, to take account of any sanction imposed following the first investigation.

The issue of parallel investigations by the Commission and national competition authorities will not be eliminated by the entry into force in May 2003 of Regulation No 1/2003,

Article 3 thereof, which is concerned with the "relationship between Articles 81 EC and 82 ECand national competition laws", provides:

"1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings."

Furthermore, Article 3(1) and (2) of the Regulation are expressly stated (see Article 3(3)) to be inapplicable where national competition authori-

34 Cited n. 32 above, para. 94.

ties and courts apply national merger control law. Finally, they do not "preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty". It is, thus, clear that there will remain a not insignificant number of areas in which the national authorities may apply national competition law (or related laws) in such a way that it will not be possible to say that they are pursuing the same objective as Articles 81 EC or 82 EC. The principle of ne bis in idem will therefore remain inapplicable (see notably recital 9 in the preamble to the Regulation pursuant to which it is envisaged that national competition authorities and courts may continue to apply national legislation which "pursues predominantly an objective different from that of protecting competition on the market").

Where, however, the application of national competition law coincides with that of Articles 81 EC and 82 EC, it is clear from Article 11(6) of Regulation No 1/2003, in particular, that the conduct of simultaneous proceedings by the Commission and national competition authorities, which involve or have as their potential object the imposition of fines or penalty payments pursuant to Articles 81(1) EC and 82 EC will be precluded. On the other hand, not formally precluded will be the initiation of a second investigation by the Commission once the national authority has completed a first one. I would foresee no problem from the perspective of the principle of ne bis in idem with such an investigation provided that at least one of the three circumstances identified, I believe correctly, by Advocate General Ruiz-Jarabo Colomer as being essential for its application, is absent. Thus, it may be, as the learned Advocate General concludes in Italcementi, that the facts investigated by the Commission may differ from those pursued by the national authorities in their investigation.[35] On the basis of the natural justice/equity consideration the recognition of which underlies the Court's (and Advocate General's) approach in Wilhelm, the Commission would be obliged to take account of the sanction imposed by the national authority if it were to consider the imposition of a sanction appropriate at the end of its investigation.

Finally, on this issue, as regards parallel investigations by national competition authorities, it is noteworthy that, under Article 13(1) of Regulation No 1/2003, two national competition authorities may not act "against the same agreement, decision of an association or concerted

35 See Case C-213/00 P, cited n. 32 above, at paras. 98 to 104.

practice", since "the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint". Although this does not exclude a subsequent investigation by a second national competition authority, it is arguable that, where all three of the conditions identified by Advocate General Ruiz-Jarabo Colomer are present in a case, such a second authority would, on the logic of his approach to the principle of ne bis in idem, be precluded from investigating an alleged infringement of Article 81(1) EC or 82 EC, at least where a sanction has already been imposed by a first national authority or by a national court in that Member State. Such a conclusion would not necessarily be particularly welcome. Even though an effect on trade between Member States is of course necessary for Article 81(1) EC or 82 EC to be applicable, it may, none the less, be the case that the first national authority or court has not sufficiently taken account of the Community-wide dimension to the infringement when fixing the amount of any fine imposed. As Wils, to my mind cogently, argues in his recent article, it would make little economic sense absolutely to preclude other national authorities from seeking adequately to penalise the infringing undertakings for the effects of the infringement which manifested themselves on the territories for which they have geographic competence in circumstances where the sanction imposed following a first investigation was really only directed at penalising the effects of the anti-competitive behaviour that were felt on the market for which the authorities of that Member State were responsible. Indeed, it may be queried whether national authorities will really ever be (even in the era of enhanced cooperation heralded by Regulation No 1/2003 and the establishment of the European Competition Network in October 2002) in a position adequately to assess the full ramifications of the effects of collusive or abusive behaviour whose geographical scope is clearly not limited to their own (and/or neighbouring territories).[36] Should such economic criteria be entirely excluded when considering the scope of applicability of the ne bis in idem principle in these circumstances?

The issue of the extent to which the Commission (or national competition authorities applying Community competition rules) should take account of fines or penalties imposed by third-country authorities in its own decision(s) regarding the effects within the Community of conduct that it also finds to be anti-competitive is separate. Whatever about the identity of the facts

36 Cited n. 3 above.

and/or the offender(s), serious questions arise, in the absence of global harmonization of the substance of competition/anti-trust laws, as to whether it is possible to talk about "the same legal principle – the same value – to be protected" in this context. The reasoning underlying the Wilhelm judgment would seem to be applicable by analogy. Nevertheless, as the issue, at least as far as I understand, concerning the appropriate level of the fines to impose for the effects within the Community of a cartel applied internationally, is before the CFI (fourth chamber) in the "amino acids" ("Lysine") cases, in which judgments will be delivered on 9 July 2003, further comment from me at this stage would not be apt.[37] It would, in particular, be inappropriate for now to comment on those cases themselves.

C Efficacy of judicial control

As I mentioned in my introductory remarks, the extent to which the two Community Courts play a certain regulative role in respect of competition law depends largely on the efficacy of judicial control. And by efficacy I mean both thoroughness and rapidity. As regards thoroughness, I believe the CFI has demonstrated, even in its relatively short history, the careful way in which it performs its review-of-legality function in respect of Commission competition decisions.

The real problem, however, is the rapidity, or lack of the same, with which the CFI examines and decides cases. A normal action against an Article 81 EC or 82 EC Commission decision will on average take some 24 to 30 months to adjudge. An average cartel case will take between 36 and 60 months to deal with depending on the number of participating companies challenging the Commission decision. A normal merger case not benefiting from the expedited procedure will also take 24 to 30 months to decide.

Regarding the Article 81 EC and 82 EC cases, it is quite often said that such a 24 to 30-month period, although slow, presents no major problems for litigants. It is generally as fast if not faster than the average comparable case would take before most national courts. The same may be said as regards the cartel cases. Although these views may be accurate, it must be recalled that there is often and, in cartel cases almost always, an ap-

37 See Case T-220/00 Cheil Jedang v. Commission, Case T-223/00 Kyowa Hakko Kogyo v. Commission, Case T-224/00 Archer Daniels Midland and Archer Daniels Midlands Ingredients v. Commission, and Case T-230/00 Daesang and Sewon v. Commission.

peal(s) to the Court of Justice. Experience has shown that the latter may take almost as long to adjudge such generally complex appellate cases, albeit limited to points of law, as the CFI takes to deal with the case(s) at first instance. This means that for the parties obtaining the final answer will often be up to four to five years in the pipeline in non-cartel cases and five to eight years in cartel cases. In the meantime, any fines imposed will have to be paid and some blame will inevitably be fixed on the implicated undertaking(s) and its(their) management, even though in a number of cases the undertaking(s) may later be found to have been innocent, at least in part, of the alleged competition-law violations. Furthermore, other undertakings not parties to but interested in the outcome of the case (and the CFI itself where an appeal is lodged with the Court of Justice) will have to wait quite a long time before knowing the final answer to what may be important legal questions for other pending cases. In the meantime, the CFI may continue, in other cases, incorrectly to apply certain of the rules of law at issue.

These problems with which we are all familiar from procedures before national courts, while bothersome enough in Article 81 EC and 82 EC cases, are of critical import in merger cases. It really is no comfort to undertakings that judicial control is thorough in merger cases if that control takes so long that the proposed merger has, in the meantime, become devoid of any commercial interest because of wholly changed market situations. This will very often be the case if a final and favourable judgment for an applicant is handed down two to three years after the introduction of the case before the CFI.

This is the very reason why the CFI proposed and received the Council's approbation for the introduction of an amendment to our rules of procedure allowing us to adjudge particularly urgent cases, such as certain merger cases, pursuant to an expedited (colloquially known as fast-track) procedure. As you will know the judgments in the recent Schneider and the Tetra Laval cases were rendered some ten months after the cases were brought before the CFI, while those brought in BaByliss and Philips were given in just under a year. The Tetra Laval judgments, which were favourable to Tetra, have now been appealed to the Court of Justice which will probably decide them within the normal time limits governing appeals, namely within two to three years.[38] Since in implementation of

38 I am informed that no application for an expedited procedure, pursuant to Article 62a of the Rules of Procedure of the Court of Justice, was lodged with the

the judgments the Commission, having recommenced the procedure before it thereby (in my view correctly) requiring Tetra Laval to re-notify the merger, concluded its fresh investigation of the amended merger by approving it (subject to an additional condition which was accepted by the notifying parties), if the Commission were to loose its appeals, the commercial interest of that merger, which has now been implemented, for those parties will have been preserved. Altogether more uncertain, is what will happen if the Court of Justice upholds the appeal, as the Commission indicated publicly at the time of adopting the second decision that it reserved its right to review that new decision in the event of its succeeding before the Court of Justice in its appeals against the CFI judgments annulling its initial decisions concerning the merger (i.e. the prohibition decision of 30 October 2001 and the subsequent divestiture decision of 30 January 2002 requiring Tetra Laval to divest itself of its shareholding in Sidel).[39]

The problem with the expedited procedure is that it means putting aside for some time other cases to the detriment of the parties in those cases so as to deal expeditiously with the case where the procedure is to apply. However, and as importantly, dealing with all but a straightforward case by this procedure inevitably puts such a strain on the chamber and the judge-rapporteur in question (not to mention all of the supporting services but particularly the CFI's registry and the institution's translation services), because of its very particular and different procedures, that we simply cannot, in any way, provide guarantees to applicants seeking, even in merger cases, the application of the procedure. It must further be admitted that, even if the CFI were to be able to provide such guarantees, even ten months may not always be sufficiently fast for the judicial control thereby exercised to be of commercial value to the merging parties or to competitors desirous of challenging the Commission's decision.

I have already argued in other fora and I will repeat it here today that the solution to the problems that I

Court by either the appellant with its appeals of 14 January 2003, or by respondent when submitting its replies on 27 March 2003.

39 See IP/03/36 of 13 January 2003 where the Commission states: "Today's clearance decision which takes account of the judgment of the CFI could be affected by the outcome of the Commission's appeal and an eventual re-examination of the Commission's earlier decision by the Court of Justice or by the CFI, in the event that the matter would be referred back to it by the Court of Justice".

have just mentioned cannot be solved within the framework of the existing two-level, Community-court system.[40] The CFI is a court of general jurisdiction, the scope of which has been significantly expanded by the Treaty of Nice, which entered into force on 1 February 2003. A draft Council decision already to extend the CFI's present jurisdiction so as to cover cases introduced directly by Member States in any area of Community law against the Commission (a potential competence in fact conferred by the Treaty of Maastricht back in 1991) is now at an advanced stage of discussion. Further transfers of first-instance, direct-action competence may follow in the short to medium term. This means that one cannot expect CFI judges, even if they were so to be agreeable (which frankly for the most part I doubt), to specialize in competition cases, that is to say beyond the degree of familiarity which follows from deciding a relatively high number of such cases, albeit at irregular intervals in between deciding other sorts of cases. Furthermore the Court of Justice is the de facto supreme and constitutional court for European Community/Union law and, as such, should not have to deal with cases which, although often factually very complex, constitute, legally speaking, quite ordinary cases frequently requiring the application of well known rules of law in accordance with well established case-law. I am fortified in this conclusion by the fact that on perusing the judgments and orders given on appeal by the Court of Justice in "pure" competition cases, I note that most were decided by chambers and not by the plenary formation. The Court of Justice should be allowed to concentrate its resources on the most important questions of EU law in order to ensure, as best as possible with its limited resources, the unity and consistency in the interpretation and application of that law. Having to hear appeals in virtually all cartel cases and in many other competition cases poses, in my personal opinion, a very significant workload of what may be regarded as being of a somewhat inappropriate character for a supreme and constitutional court.

The solution to the problems of sufficiently efficient and rapid judicial control in the area of competition law could therefore, I believe, be sought by the establishment of a separate new specialized "Competition Court of the European Union". The EC Treaty, as amended by the

40 See, e.g. the speech given as the 2002 annual address to the United Kingdom Association for European Law, at King's College, London, on 22 November 2002, a slightly revised form of which will presently be published as Vesterdorf "The Community court system ten years from now and beyond: challenges and possibilities" (2003) 28 ELRev. 303.

Treaty of Nice, now allows (Article 225a EC) precisely for that. Upon proposal by the Court of Justice, or by the Commission, the Council can, by unanimous vote, decide to establish what the Treaty of Nice calls "judicial panels", in other words, specialized courts, to deal at first instance with cases in specific areas of Community law.

The Commission will soon be proposing formally to establish a staff court, a "judicial panel" which will reduce the work load of the CFI to which it will be attached and for which the CFI will become the appeal judge. Furthermore, such cases will no longer in principle come before the Court of Justice, save where the latter, on its own initiative, acting on foot of a proposal from its First Advocate General, decides exceptionally to "review" an appellate judgment of the CFI. Another such specialized court is in the pipeline for the new Community patent.

I would advocate, in this context, that serious consideration be given to the establishment of a "Competition Court of the European Union" as soon as possible, but subject to the proviso that it can also be agreed that preliminary-reference jurisdiction in pure competition cases be, at the same time, transferred to the CFI. It is only by being required regularly to deal with competition law issues by virtue of answering Article 234 EC references (as is the case for the Court of Justice at present) that the CFI could hope to maintain the degree of familiarity with competition law that would be necessary to enable it competently to exercise appellate jurisdiction in competition cases vis-à-vis such a new competition court and thus assure a high degree of unity and consistency in the application by that court and by national courts of Community competition law (as the Court of Justice does at present regarding the CFI and the national courts).[41] Such a new court could have rules of procedure tailor-made to deal in an efficient way with Article 81 EC and 82 EC cases and, especially, with merger cases. The judges could, from the beginning, be chosen for their known expertise in this area of law and they would rapidly be in a position to gain further expertise because they will only be dealing with competition law cases.

41 Where exceptionally the judgment of the CFI itself potentially poses a serious threat to the unity and consistency of Community law, the Court of Justice will, of course, acting on a proposal from its first Advocate General, be empowered to re-examine any such judgment (see Arts 225(2) and (3) EC, as amended by the Treaty of Nice, and Art. 62 of the new Statute of the Court of Justice).

I would stress the importance of considering relatively soon such a reform of the system. With the 2004 enlargement now less than a year away, the steadily growing number of cases in all areas of Community law already being generated for the Community judicature from among the present Member States and the CFI's forthcoming new role as court of appeal in certain areas of law, it will plainly be impossible for us (and, I believe, also for the Court of Justice) to guarantee, if the present system is maintained, not only thoroughness but also sufficient expedition in the exercise of our judicial-review functions, even though both of these requirements are especially important in the area of competition law. This will, a fortiori, be the case, I believe, when the full implications of decentralization of Community competition law begin to become a reality after the entry into force in May 2004 of Regulation No 1/2003.

Let me finish by stressing that, in my view, the increasingly global character of activity in this area of law does nothing but further increase the necessity of modifying the present system. When a considerable number of cases before the Commission and the CFI involve situations where some or all of the undertakings concerned are established outside the Union, which is often and will increasingly become the case, there is a need to be able, at Union level, to decide our legal problems both correctly and quickly, so as to avoid such companies, which practically always also do business within the EU, from having frequently to encounter protracted uncertainty as to their legal rights and obligations in situations where some of their economic activity or merger proposals are permitted where they have their seats but prohibited inside the Union, or vice versa. The CFI has, as you are no doubt well aware, on a number of occasions had to decide cases where none of the applicants has had its seat within the EU but was nevertheless doing business there. We have cases where, for example, the US authorities have given the green light to proposed mergers which have been prohibited by the Commission and where annulment actions have subsequently been lodged before the CFI in respect of the Commission's decision. This is most notably the case in GE and Honeywell,[42] which concern the Commission's decision of 3 July 2001 (Case No COMP/M.2220 General Electric/Honeywell) and where the undertakings in question are now anxiously awaiting the CFI judgments. In the Tetra Laval

42 See Case T-209/01 Honeywell International v. Commission (pending) and Case T-210/01 General Electric v. Commission (pending).

case, where the undertakings involved also operated globally, the merger in question was approved by all third-country regulatory authorities including the US authorities. The wait therefore is now for the Court of Justice to adjudge the Commission's appeal against the CFI's annulment of the Commission's initial decision to block the deal. One needs to make sure that such cases are solved as rapidly as possible so that, first, the affected industry and more particularly the undertakings directly involved can obtain legal certainty with sufficient expedition from the Community judicature for the Community's judicial-review process to have "real" value for them and, second and more generally, so that Europe can remain as attractive a place as possible for such undertakings to do business.

The risk of diverging final judgments on the substance particularly as regards major merger deals is one of the important impediments to the further development of a globalized market economy. This risk can only to a certain degree be avoided by enhanced co-ordination and co-operation between enforcement agencies. Development of soft law by and self-convergence between competition/anti-trust regulators is undoubtedly useful. In this connection the "International Competition Network" that has been developed in recent years clearly has an important role to play. It should, however, not be forgotten that soft law is not hard law. It is not even law and we the judges of the Community judicature can only apply Community law (Article 220 EC). In order to avoid as much as possible the occurrence of diverging court decisions affecting the same business enterprises, it seems to me that one needs to draw up new hard laws harmonising as much as is politically feasible the substantive rules of competition law and on as global a scale as possible.

In any event, one issue appears clear, global problems ultimately require global solutions, however politically difficult the achievement of the latter may seem.

Marie-Dominique Hagelsteen
Présidente du Conseil de la Concurrence

Si j'ai bien compris nous sommes à la recherche de la définition des possibilités et des limites que donne aujourd'hui le droit de la concurrence pour réguler une économie de marché globalisée, ou qui se globalise.

Je crois qu'il faut d'abord acter que personne ne peut plus contester aujourd'hui que la globalisation et la mondialisation de l'économie de marché est un fait qui s'impose à nous, que l'on soit favorable ou pas à cette évolution.

Ce constat étant fait, quelle est sa conséquence pour la bonne régulation concurrentielle des marchés? Quels sont les enjeux? Quels sont les effets? Quelles sont les réactions possibles?

Sur ce sujet, il me semble que l'on peut raisonner en trois points.

1) Oui, le droit de la concurrence est clairement une force régulatrice dans une économie de marché globalisée.

2) Mais, il rencontre aussi beaucoup d'obstacles sur son chemin et je citerai des exemples rencontrés par le Conseil de la concurrence en France.

3) Mais, il semble qu'aujourd'hui quelques perspectives de solution se dessinent.

I – Oui, clairement, le droit de la concurrence est, ou plutôt devrait être, une force régulatrice, dans une économie de marché globalisée.

Plusieurs raisons à cela :

1) Par définition, le droit quel qu'il soit, exerce une fonction de régulation, qu'il s'agisse de relations entre des personnes, des entreprises ou des Etats puisqu'il tend à définir clairement les devoirs et les obligations de chacun.

Le droit est aussi un instrument de gestion de la complexité, puisqu'il est habitué à intégrer des paramètres différents et à combiner des normes différentes.

Enfin, le droit est un facteur de la sécurité et de la transparence des échanges et des transactions.

Il me paraît donc clair que le bon fonctionnement d'une économie de marché globalisée appelle le droit, non pas pour réglementer ce marché, mais seulement et essentiellement pour garantir son bon fonctionnement.

2) Et le droit de la concurrence est certainement celui qui peut s'appliquer le plus facilement à l'économie de marché globalisée et internatio-

nalisée, puisque s'agissant d'un droit économique, il repose sur des analyses économiques qui, en principe, sont universelles dès lors que l'on raisonne dans le cadre d'une économie de marché.

Partout, dans le monde, ce droit est fait, pour sa substance essentielle, des mêmes concepts –la définition des cartels, des abus de position dominante, des concentrations– et plus largement des mêmes méthodes d'analyse, voire parfois des mêmes procédures : par exemple, l'importance des sanctions ou le développement aujourd'hui des procédures de leniency. Et, il est vrai, que les autorités de concurrence, lorsqu'elles se rencontrent, comme nous le faisons aujourd'hui, n'ont aucune difficulté à échanger entre elles, car très largement elles parlent des mêmes choses et elles parlent le même langage.

Il devrait donc être très facile d'utiliser le droit de la concurrence comme une force régulatrice de l'économie de marché globalisée puisque apparemment il devrait être très aisé pour les autorités de concurrence de travailler entre elles sur des dossiers dont les implications traversent les frontières.

Car, ce n'est bien évidemment qu'à cette seule condition que le droit de la concurrence peut réguler des pratiques et des transactions qui, elles, ne connaissent pas les frontières.

II – Mais, de fait, notre expérience vécue, à nous autorités de concurrence, est légèrement différente et nous expérimentons, tous, les insuffisances du droit de la concurrence pour assurer la bonne régulation de l'économie globalisée.

2-1 – D'abord, il faut rester modeste et constater d'une part, que le droit de la concurrence n'est pas la seule force régulatrice de marché qui s'internationalise : il y a d'autres domaines d'action tout aussi importants pour le bon fonctionnement des marchés mondiaux : la discipline des marchés financiers, l'harmonisation des normes comptables, la lutte contre l'évasion fiscale internationale et le blanchiment d'argent.

Il faut constater aussi, d'autre part, que le droit de la concurrence a ses propres limites, même dans le strict cadre national. Nous connaissons tous des secteurs économiques dans lesquels, depuis de nombreuses années, les pratiques anticoncurrentielles se répètent, alors même que de très lourdes sanctions ont été prononcées par les autorités de la concurrence.

2-2 – Mais par delà ces insuffisances générales, nous savons bien qu'il existe des facteurs intrinsèques qui viennent limiter la pertinence du droit de la concurrence pour réguler une économie de marché globalisée.

Même si le droit de la concurrence repose partout dans le monde sur les mêmes concepts de fond, il existe aujourd'hui des différences énormes en ce qui concerne le droit des procédures, les pouvoirs reconnus aux autorités de concurrence, et même l'environnement juridique général de chaque autorité. Ces différences font clairement obstacle à une mise en œuvre unifiée du droit de la concurrence par delà les frontières, seule efficace pour réguler les pratiques des entreprises qui se sont internationalisées.

Je voudrais citer ici deux exemples rencontrés récemment par le Conseil de la concurrence.

Chacun sait que nos compétences sont, en règle générale, dominées par la théorie des effets et que nous ne pouvons pas, en principe, appréhender des pratiques qui ont lieu sur notre territoire mais dont les effets se situent sur les autres marchés. Or, nous avons rencontré un cas de restrictions à des pratiques d'exportations parallèles en matière pharmaceutique, pratiques qui avaient lieu en France, où donc pouvaient se trouver réunies les preuves et être appliquée efficacement une sanction, mais qui affectaient essentiellement le marché de pays européens voisins.

En l'absence d'instrument de coopération juridique existant entre nos pays, nous avons décidé de conserver et de traiter ce dossier sur le terrain du seul droit communautaire qui nous a semblé pouvoir nous donner une habilitation suffisante même si nous rencontrerons certainement des difficultés dans ce dossier pour apprécier exactement les effets des pratiques que nous avons constatées.

Un autre exemple peut être choisi en matière de concentration.

Malgré le caractère largement communautaire du sujet, nous rencontrons de plus en plus souvent des opérations qui mettent en cause des entreprises dont aucune n'est française, ni même n'a de filiale en France, mais dont l'activité affecte le marché français. Dans ce cas, il est évident que la recherche d'informations sur ces entreprises et leur activité est plus difficile pour une autorité nationale de concurrence.

Nous avons aussi connu d'autres cas dans lesquels le projet de concentration affectant plusieurs marchés nationaux, il y avait eu une plurinotification auprès de plusieurs autorités de concurrence, chacune se prononçant séparément et pour son seul marché. La difficulté est alors bien évidemment d'arriver à une position cohérente.

Inversement, et dans un autre cas, nous avons rencontré une concentration qui quoiqu' affectant l'ensemble des pays situés sur l'arc alpin

(l'Autriche, l'Allemagne, la Suisse, l'Italie et la France) n'a été examinée que par les autorités françaises. Il s'agissait du rachat par une société italienne du seul fabricant français de remontées mécaniques pour le ski, seuls deux autres opérateurs, un autrichien et un suisse, restant sur le marché. Ce dossier n'avait pas de dimension communautaire ; il a été soumis aux seules autorités de concurrence françaises. Il avait finalement pour conséquence de faire passer de quatre à trois le nombre de fabricants de ces remontées en Europe, et peut-être même dans le monde entier.

Malgré ce renforcement d'un oligopole sur un marché typiquement européen, nous n'avons pas trouvé sur le marché français de raisons valables de nous opposer à cette opération. Elle a donc été autorisée par les autorités françaises. Elle intéressait certainement les autres pays alpins qui, apparemment, n'ont pas été saisis. C'était donc une lourde responsabilité pour nous et, si depuis deux ou trois ans, les prix des remontées mécaniques ont augmenté dans les Alpes, je crains que nous en soyons responsables et je m'en excuse auprès des skieurs qui sont présents dans cette salle.

Dans une telle affaire, un système d'examen conjoint par les autorités de concurrence des trois ou quatre pays concernés ou par l'autorité communautaire aurait certainement été préférable, mais aucun moyen juridique ne le permettait.

III – Pour permettre au droit de la concurrence d'être une vraie force régulatrice dans une économie de marché, il faut donc explorer un certain nombre de pistes.

Bien entendu, personne ne peut croire aujourd'hui à l'existence d'une solution unique de type mondial qui régulerait la concurrence pour le monde entier.

D'autres voies me paraissent beaucoup plus fructueuses.

– La première consiste à développer la communauté professionnelle des personnes qui dans le monde, s'intéressent ou ont à appliquer le droit de la concurrence. Il faut que ces personnes (avocats, économistes, juristes, magistrats, responsables d'autorités) se connaissent, apprennent à parler le même langage et échangent sur les problèmes qu'elles rencontrent comme nous le faisons aujourd'hui grâce à l'excellente initiative du Bundeskartellamt.

– Il faut, en deuxième lieu, faciliter une convergence plus grande des droits de la concurrence pour assurer une meilleure cohérence des analyses et des décisions.

Des instances comme l'OCDE, la CNUCED, l'OMC ou l'ICN sont des fora particulièrement appropriés pour

mettre les droits et les pratiques en concurrence et faire émerger les meilleures règles et les meilleures pratiques pour tous. Ils constituent peu à peu le cadre de référence auquel nous nous reporterons tous.

Enfin, la convergence des droits ne sera jamais suffisante pour résoudre un problème de concurrence qui s'étend à plusieurs territoires et concerne donc plusieurs autorités. Des solutions sont à trouver dans la possibilité de véritables coopérations.

A cet égard.

- En tant qu'autorité de concurrence d'un pays appartenant à la Communauté Européenne, j'attends beaucoup du cadre régional, et notamment de la réforme du règlement 17, même si là aussi, il me semble qu'il reste encore aujourd'hui beaucoup de difficultés pratiques à surmonter.

- Mais plus largement, il est bon aussi que de véritables coopérations bilatérales se développent afin de pouvoir faire face à ces problèmes nouveaux que nous apporte la globalisation de l'économie.

Au total, je crois que l'on peut faire un bilan raisonnablement optimiste de la capacité du droit de la concurrence à réguler une économie de marché globalisée.

L'économie et le développement international des entreprises sont certainement aujourd'hui en avance sur la capacité de régulation du droit de la concurrence au niveau mondial.

Mais des initiatives fortes existent et se développent à l'échelon régional ou à l'échelon mondial et, à terme, elles porteront certainement leurs fruits.

Toutefois, la condition essentielle de la réussite de ces initiatives me paraît rester la création et le développement d'une communauté nombreuse et vivante des personnes qui ont en charge dans le monde entier l'application du droit de la concurrence.

Et c'est bien, me semble-t-il, ce que nous avons fait depuis deux jours.

Marie-Dominique Hagelsteen
President of the Conseil de la Concurrence

If I understand correctly we are looking to define the possibilities and limits of competition law in regulating the globalised or globalising market economy.

I think first of all it should be noted that globalisation in general as well as the globalising market economy are undeniable facts today, developments which are imposing themselves on us whether we like it or not.

Now, what does this mean for an adequate competitive regulation of markets? What are the objectives? What are the effects? What are the possible reactions?

I think the following three conclusions can be drawn on this issue:

1) Yes, competition law undoubtedly is a regulatory force in a globalised market economy.

2) However it also faces a great deal of obstacles on its way. I am going to outline some examples experienced by the Conseil de la concurrence in France.

3) Nevertheless some solutions seem to be emerging on the horizon.

I – Yes, without a doubt competition law is, or rather should be, a regulatory force in a globalised market economy.

There are several reasons for this:

1) Any law by definition exercises a regulatory function, whether it concerns relations between persons, companies or countries, since it clearly defines each party's duties and obligations.

The law is also an instrument for complexity management since it can integrate different parameters and combine different rules.

Finally the law is a factor which brings security and transparency to trade and business transactions.

It is thus clear to me that the law is a necessary prerequisite, not for regulating a globalised market economy, but solely and essentially for ensuring its well-functioning.

2) And competition law certainly is the one most readily applicable to a globalised and nationalised market economy since, being an economic law, it is based on economic analyses which in principle are universal as far as a market economy is concerned.

All over the world competition law is comprised of the same concepts in its essential substance - defini-

tion of cartels, abuses of dominant positions, concentrations – and, in a broader sense, of the same methods of analysis, sometimes even the same procedures: for example, the level of sanctions or currently the development of leniency programmes. And indeed, when competition authorities get together, as we are today, they have no difficulty whatsoever to communicate with each other since essentially they talk about the same things and speak the same language.

Consequently it should be very easy to employ competition law as a regulatory force in the globalised market economy since competition authorities apparently would not have any difficulty to cooperate on cases with cross-border effects.

And after all this is quite obviously the only way for competition law to be able to regulate practices and transactions which, for their part, do not know borders.

II – Actually, however, we, the competition authorities, make rather different experiences and we all deal with the insufficiencies of competition law in ensuring adequate regulation of the globalised economy.

2-1 – I think first of all it seems appropriate to show some modesty and note firstly that competition is not the only regulatory force in an internationalising market. There are other fields of action which are equally important for the well-functioning of global markets: the discipline of the financial markets, the harmonisation of accounting rules, the fight against international tax evasion and money laundering.

Secondly it should be noted that competition law has its own limits, even at the strictly national level. We are all aware of sectors where anticompetitive practices have been recurring for years, despite very heavy sanctions imposed by the competition authorities.

2-2 – But apart from these general insufficiencies there are of course intrinsic factors limiting the relevance of competition law in regulating a globalised market economy.

Even if competition law is based on the same basic concepts all over the world, there are huge differences today regarding procedural law, the powers granted to competition authorities and even their general legal environment. These differences clearly stand in the way of a uniform implementation of competition law beyond national borders, which is the only effective approach to regulating internationalised business practices.

I would like to cite two cases recently examined by the Conseil de la concurrence.

We all know that our competencies are generally governed by the effects theory. Thus we cannot in principle take action against practices which, although committed on our domestic territory, only affect foreign markets. For instance, we had to deal with a case of practices restricting parallel exportations in the pharmaceutical sector. These practices took place in France, where consequently the relevant evidence was to be found and a sanction could be effectively imposed. However, they essentially affected markets in neighbouring European countries.

As there was no instrument for legal cooperation between our countries we decided to handle the case ourselves but exclusively under Community law which we believed sufficiently empowered us to do so, even though we did encounter some difficulties in exactly evaluating the effects of the practises we had established.

Another example can be chosen in the area of mergers.

Although this subject mainly has a Community dimension we are faced more and more often with operations involving companies none of which are French and which do not even have subsidiaries in France, but whose activities affect the French market. In this case it is quite clear that it is more difficult for a national competition authority to gather information on such companies and their activities.

We have also seen other cases in which multiple notifications were submitted to several competition authorities as the planned concentration affected several national markets, and in which each authority made a separate decision only in respect of its own market. Obviously the difficulty lies in reaching a coherent position.

Conversely, we have seen in another case that a concentration which affected the whole of the Alpine States (Austria, Germany, Switzerland, Italy and France) was only examined by the French authorities. This case dealt with the takeover of the only French manufacturer of mechanical ski lifts by an Italian company which only left two other manufacturers, one Austrian and one Swiss firm, on the market. The case did not have Community dimension; it was solely submitted to the French competition authorities. As a final consequence the number of manufacturers of mechanical ski lifts was reduced from four to three in Europe, and maybe even worldwide.

Although an oligopoly was thus strengthened in a typically European market we did not find valid reasons in the French market for

opposing this operation. It was therefore cleared by the French authorities. Although this operation would surely have been of interest to the other Alpine countries, they were apparently not involved. So in this case we had a high responsibility, and if the prices of mechanical ski lifts in the Alps have risen in the last two or three years, I am afraid we are responsible for this and I have to apologise to the skiers who are present here.

In such a case a joint examination system by the competition authorities of the three or four countries concerned would certainly have been preferable, but there were no legal means providing for such a procedure.

III – In order to allow competition law to play the role of a genuine regulatory force in a market economy a number of approaches should be explored.

Of course nobody can assume today that there is one universal solution for a worldwide regulation of competition.

In my opinion other approaches appear to be much more promising.

The first approach consists of developing the professional community of those worldwide who deal with or apply competition law. It is necessary for these persons (lawyers, economists, jurists, judges, members of authorities) to know each other, to learn to speak the same language and to exchange their experiences of problems faced in practice, just as we are doing today thanks to the excellent initiative taken by the Bundeskartellamt.

– Secondly, we must promote greater convergence of competition laws in order to ensure improved coherence of analyses and decisions.

Organisations such as the OECD, UNCTAD, WTO and ICN are particularly suitable forums for putting laws and practices in competition with each other and for allowing the best rules and practices for all of us to emerge. These could gradually form a framework all of us could refer to.

However, the convergence of the different laws will never be sufficient to solve competition problems affecting several territories and thus concerning several authorities. Solutions should be found in the possibility of establishing effective cooperation.

In this context:

- As a competition authority of a member country of the European Community, we are setting great hopes in the regional framework and particularly in the review of Regulation 17,

although, in this area as well, there appear to be many difficulties we still have to overcome in practice.

- Furthermore, however, it would also be favourable to develop genuine bilateral cooperation in order to be able to face the new problems caused by the globalisation of the economy.

On the whole I think we can conclude on a fairly optimistic note regarding the ability of competition to regulate a globalised market economy.

Surely, the economy and the international development of companies are presently still ahead of the regulatory ability of competition law at the global level.

But a number of powerful initiatives are already emerging at the regional or global level which, in time, will certainly bear fruit.

Nonetheless the key condition for these to be successful still seems to be the creation and development of a large and lively community of those in the whole world who are in charge of applying competition law.

And I think this is exactly what we have been doing for the past two days.

David Lewis
Chairperson
Competition Tribunal South Africa

1. I can't imagine what possible value could be added by the 8th member of such a distinguished panel. Let me, though, try and reflect, on the theme of this conference and of this panel in particular from the perspective of a developing country that is a relatively recent arrival to the world of competition law.

2. From one perspective the period since the late 'eighties has to be viewed as a golden age for competition law. Dozens of countries that had formerly resisted a role for the market have now wholeheartedly embraced this mechanism. It was ultimately this embracing of the market that underpinned the proliferation of national competition authorities throughout the transition and developing economies. I can't recall the precise figure but whereas some dozen countries had functioning competition statutes at the beginning of the 1990s by the end of the decade this had mushroomed to over 90 and still growing.

3. And, of course, it was not only domestic trade that was in the process of liberalisation. International trade barriers were also in the process of being dismantled freeing up to a substantial extent flows of cross-border trade and investment. For many, these two developments – the establishment of national competition authorities in all corners of the globe and the dismantling of barriers to international trade and investment - portended the extension to the international market of the sort of competition rules increasingly applied in national economies both to ensure that the conduct of firms on the international market conformed broadly to these widely accepted competition rules and also to ensure that international treaties opening up trade were not undermined by anti-competitive rules and conduct on the various domestic markets.

4. So this was a good time for proponents of competition law. We were speeding along a broad highway with no sign that our onward rush was to be interrupted in any way whatsoever. And yet if the title theme of this conference is to be believed, we have, a few years down the road, hit a cross-road in the middle of the highway. Why? Clearly, the theme of this particular panel

suggests that globalisation may have something to do with this.

5. I have to say at once that from where I sit, I'm not sure that globalisation has yet impacted much on the legitimacy and standing of national competition law enforcement. For the most part we are examining mergers and alleged anti-competitive practices located clearly within the boundaries of our national market.

6. But globalisation does regularly come knocking at our door – which is to say that we are regularly required to investigate and adjudicate international mergers and that we have, on at least one occasion, examined serious anti-trust harm to our local consumers perpetrated by a cartel based in a foreign jurisdiction. Moreover, I have no doubt that our consumers and our development prospects in general are undermined by the unchecked activities of international cartels and by the persistence of barriers to international trade that, were they to be applied to domestic trade, would contravene national competition laws. South Africa is, for example, one of the world's largest user of anti-dumping actions. Hence, even if not top of the agenda at the moment, I think that unless we seriously confront and resolve the problem that the globalisation of markets represents for essentially national competition enforcement, we are storing up problems for the future. And the problem is, of course, that if we don't find a global approach to a global issue we risk undermining the entire global project itself. The risks confronting cross-border investment will increase or, at least, become less certain; and the costs of transacting international trade will rise. Ultimately the consequences for the extent and conduct of international flows of goods and capital are potentially severe.

7. These problems will also undermine the standing of national competition laws. The legitimacy of competition laws in developing and transition economies is enormously enhanced by the high profile and standing achieved by competition law in Europe and the US. The notion that these two jurisdictions are at loggerheads and that they cannot harmonise approaches to the regulation of cross-border competition issues provides the basis for questioning the legitimacy for enforcement efforts everywhere. 'Europe' the argument goes, 'may enjoy the luxury of

being able to offend a large international investor. We don't.

8. The problems in the way of national solutions to this global problem are two-fold. The first is that even though such a multitude of nation states have passed competition statutes, statutes that, by and large, embody somewhat similar general principles, the fact is that they are sufficiently divergent in their objectives, in their substantive content and their procedures to constitute a veritable Tower of Babel of competition laws and practice. The second is the mercantilist approach that continues to dominate the international trade agendas of nation states. Hence a country noted for the vigour with which it pursues domestic and international cartels, can still have on its statute book a law that specifically provides for the establishment of export cartels. Or countries that extol the efficiency and welfare raising consequences of competitive markets can still deny their consumers access to the cheapest agricultural or steel products.

9. The second set of problems – that of anti-competitive national practices that inhibit international trade and investment – can only be resolved through the institution responsible for the development and enforcement of international trade rules, namely, the WTO. In the scale of what that organisation measures as progress, I have no doubt that there has been significant advance but we seem to be very far away from an effective international competition instrument. By 'effective' I understand an agreement that begins to subject locally sanctioned practices that impact on international trade to internationally agreed competition rules. My overwhelming impression of the WTO discussions – and I may well not understand the code in which these discussions are inevitably conducted – is that the negotiation of a competition instrument is not very high on anyone's list of priorities except possibly the EU and that its major role is going to be as a bargaining chip in securing agreements in higher priority areas.

10. I am rather more interested in the measures and institutions that are, at least in part, directed at solving the first set of problems that I have identified, namely the proliferation of diverse national statutes and efforts aimed at harmonising them. These are, I should underline, problems that arise

from globalisation and that will ultimately impact on the pace and character of globalisation. Hence, the proliferation of cross-border mergers is a phenomenon rooted in and representative of globalisation. The requirement to notify and seek approval of the transaction from an increasing number of national jurisdictions stems from the proliferation of national competition statutes. It is wholly conceivable that these notification and approval requirements tip the already considerable costs entailed in transacting an international merger beyond the point that the transacting parties find acceptable. Divergent national procedures, time frames and substantive evaluation criteria contribute significantly to increasing the costs associated with the review of international mergers. This will ultimately find expression in a reduction of cross-border investment and trade.

11. It is fundamentally mistaken and, in fact, counterproductive, to embark on the process of reducing these differences by seeking harmonisation in the letter of national competition laws or 'hard convergence'. Better to seek 'soft convergence', a harmonisation in the investigative and adjudicative approaches of national competition authorities. This requires an institutional setting that maximises the degree of contact between competition officials with an agenda that focuses on substantive enforcement issues. There are, in my experience, two bodies that meet these criteria, viz, the OECD Global Competition Forum and the newly established International Competition Network. Both are ambitious ventures that bring together competition officials from both the mature and emerging competition jurisdictions and whose agendas are, by and large, concerned with examining concrete enforcement issues.

12. The OECD Forum is, in my view, making a major contribution to soft convergence. The forum incorporates both OECD members as well as a large number of non-member developing countries. The research reports and the papers and transcripts of the various roundtables are standard reading in most developing country jurisdictions largely because they deal with complex issues in a very accessible, almost conversational manner. The actual forums themselves generate useful documentary material and an unusually high level of participation by both devel-

oped and developing countries. However it is the OECD peer reviews that are without parallel both in providing the participating agencies with mirrors that allow them to critically examine their own performance in a very supportive environment and that are enormously enhancing of their standing in their own countries.

13. The ICN is, if anything, a more ambitious effort than the OECD global forum, and this for three reasons. Firstly it seeks to bring together a larger grouping of nations than does the OECD effort. This means that it includes amongst its members a number of jurisdictions that have barely embarked on the path of enforcing competition law. Secondly, although the ICN is, on the face of it, an institution for soft convergence, in reality there is an impatient desire to move into hard convergence. Thirdly, it is trying to realise its ambitions through the medium of a virtual organisation. These problems are inter-related.

14. There is good reason for the ICN's attempt to include all national competition agencies in its ranks – certain of these may not be very functional at present, but many of these will, and possibly already are, engaged in merger review. But it does mean that the concerns and discourse of the institution has to accommodate them – in other words the ICN risks becoming an organisation that appeals either to the well established or to the fledgling agencies or to neither. At the moment it is keeping two sets of activities going – the ongoing merger projects in which there is next to no developing country involvement and which some developing countries feel is dominated by the non-governmental advisors or private lawyers associated with the ICN; and then a number of projects oriented towards development although even here the actual involvement of developing countries has been minimal.

15. The ambivalence regarding the proper role of the ICN vis a vis the crucial convergence question is expressed in the merger groups which have increasingly seen the adoption of tortuously negotiated 'best practices' as their way forward. It is reasonably clear and perfectly understandable that those agreeing these best practices view them as areas around which hard convergence is most likely. The upshot is that the discussions and the agree-

ments are hedged by the same sort of painful caution and conservatism as say the WTO discussions so that the outcome is not the best practice but rather the best possible practice – in other words these are not aspirational practices against which actual practices can be reflected but they are rather a measure of what the major agencies and national law groups will accept. But in contrast with the WTO there is no way of enforcing them and this is starting to call into question the credibility of the agreements and of the ICN itself. This is not to say that the only way that enforcement can be achieved is through a legally binding international treaty. There are more subtle forms of enforcement, or, what is the same thing, softer modalities of enforcement but for this a very active, dedicated organisation is required to ensure that the agreements are inclusive of the membership and that there is tight and consistent follow up and advocacy in favour of the agreed practices.

16. Which brings me to my final point: a virtual organisation has about as much chance of performing its functions as a paperless office. In fact, the ICN has achieved a remarkable amount given the constraints of its organisational form although one may argue that its organisation is as virtual as the DOJ or FTC buildings and staff in Washington or the DG-Comp building in Brussels. That is to say there is an unacknowledged secretariat and it is to be found in the international departments of the big agencies. However this is not sustainable. For one thing I sense that even these relatively well resourced agencies are straining under the weight of their ICN obligations. Also it means that the effective secretariat is unaccountable to the ICN and will inevitably and understandably ensure that the organisation meets the objectives of the national agencies to whom it is actually accountable rather than the membership as a whole. An important function of a secretariat in an organisation whose membership is as objectively unequal as is this one is precisely to ensure that the least able are assisted and drawn into the organisation. Indeed in the case of the ICN it is vital – from the perspective of ensuring soft convergence – that the ideas and 'best practices' emanating from the conferences and working groups engage the national staff responsible for the nuts and bolts of

daily competition work. Indeed, possibly the most significant activity that the ICN has thus far undertaken has been a conference on merger investigation in Washington directed at more junior staff levels than grace the councils of the ICN. If the ICN is to be an instrument for soft convergence then this activity has to be extended and it has to embrace the whole national membership of the ICN and this requires something more than a virtual organisation.

17. I should not be misunderstood: there is a huge amount of goodwill towards the ICN from all of its members reflecting, I think, the shared perception that an international network of competition agencies is necessary. But if it is not established on a sounder organisational footing then it will not survive beyond the present crop of leadership and it will be difficult to resurrect. Nor should I be heard to say that there is not awareness of these problems in the ICN – there is. But there is also a fear that any attempt to move from the present virtual state of the organisation is tantamount to buying an office block in Geneva staffed by overpaid and underemployed international civil servants. That is not the only alternative model although any strengthening of the institution will require resources. I cannot believe that the powerful private and public actors and institutions that stand behind this initiative cannot do what it takes to establish the ICN on a sounder footing.

SCHLUSSWORT

CLOSING REMARKS

Dr. Ulf Böge

Präsident des Bundeskartellamtes

Lieber Herr Prof. Möschel, haben Sie herzlichen Dank für die Moderation dieser abschließenden Diskussionsrunde der Konferenz.

Ein besonderer Dank auch den Podiumsteilnehmern.

Meine Damen und Herren,
wir sind am Ende der XI. Internationalen Kartellkonferenz angelangt.

Die Beiträge hätten nicht vielfältiger und facettenreicher sein können. Und sie haben bestätigt, dass die Wettbewerbsbehörden in der Tat in einem schwierigen Spannungsfeld operieren.

Die Herausforderung, mit kartellrechtlichen Eingriffen unternehmerische Freiheit nur so weit wie nötig, d. h. zur Gewährleistung des Wettbewerbs und der Freiheit anderer, einzuschränken, bleibt eine Daueraufgabe.

Deutlich wurde aber auch, dass viele der Teilnehmer die Gefahr der Zerfaserung der Kartellrechtsanwendung und der Wirtschaftspolitik sehen, die mit dem politischen Bestreben zusammenhängt, einzelne Branchen oder Sektoren einer spezifischen Aufsicht zu unterstellen.

Für die Aufforderung „Wehret den Anfängen!“, ist es schon spät, aber vielleicht nicht zu spät.

Die Diskussion von heute Morgen hat gezeigt, dass wir zu Recht dem Thema der Globalisierung und der Bedeutung des Wettbewerbsrechts für diese Entwicklung aber auch die der Rückwirkung der Globalisierung auf das Wettbewerbsrecht breiten Raum gegeben haben.

Ob nun

- Gratwanderung zwischen Eingriff und Freiheit,
- weiteres Eintreten für eine Wettbewerbspolitik und Wettbewerbsrechtsanwendung aus einem Guss statt ihrer Zerfaserung,
- oder Bewältigung der Herausforderung an die Wettbewerbsbehörden durch die Globalisierung,

ein Fazit bleibt: Die Wettbewerbsbehörden müssen stärker zusammenrücken.

Ich bin sicher, dass die Zukunft weitere Fortschritte bringen wird. Denn schließlich eint uns alle das Ziel, einen fairen und sicheren Rahmen für die Wirtschaft zu schaffen, um Wettbewerb und Wohlstand zu fördern.

Die letzten zwei Tage haben uns einige wichtige Orientierungen gegeben.

Meine Damen und Herren,

ich danke Ihnen ganz herzlich, dass Sie der Einladung nach Bonn so zahlreich gefolgt sind.

Und ich hoffe, Sie hatten neben dem Konferenzprogramm Gelegenheit – oder haben sie noch heute Nachmittag – die Stadt Bonn und die Umgebung – wozu auch Köln gehört – näher zu erkunden.

Ich möchte allen sehr danken, die diese Konferenz unterstützt und in dieser Form erst möglich gemacht haben. Hier wende ich mich an erster Stelle an die Dolmetscher. Sie haben erst die Voraussetzung geschaffen, um Sprachgrenzen zu überwinden, sie haben ausgezeichnete Arbeit geleistet.

Ich möchte vor allem aber auch den Mitarbeitern des Bundeskartellamtes danken, die diese Konferenz organisatorisch vorbereitet und begleitet haben. Stellvertretend für alle Mitarbeiter des Referats für Internationale Wettbewerbsbeziehungen möchte ich Herrn Mundt als den Leiter dieser Einheit nennen.

Meine Damen und Herren,

der Schauspieler und Schriftsteller Curt Goetz hat einmal gesagt:

Eine Geschichte schreibt man am besten, indem man mit dem Anfang beginnt, sie zu Ende führt und dann sofort aufhört.

Ein Schlussredner sollte sich daran halten.

Deshalb möchte ich die Konferenz für dieses Jahr schließen, Ihnen einen schönen Nachmittag vielleicht in Bonn und eine gute Heimreise wünschen. Und ich würde mich freuen, wenn sich die Wettbewerbsfamilie in zwei Jahren wieder hier in Bonn versammeln würde.

Dr Ulf Böge

President of the Bundeskartellamt

Professor Möschel, thank you very much for moderating the closing discussion of our conference.

And particular thanks also to the panelists.

Ladies and Gentlemen,

We have now come to the end of the 11th International Conference on Competition.

The contributions that have been made could not have been any more diverse. And they have confirmed that competition authorities indeed operate within a difficult area of conflict.

The challenge of intervening under competition law in such a way that entrepreneurial freedom is limited only to the extent necessary to ensure competition and the freedom of others, remains a continuous task.

It has also become clear, however, that many participants see the danger of a fragmentation of the application of competition law and economic policy due to political endeavours to subject individual sectors to a specific control.

It is a little late to "nip things in the bud", but maybe not too late.

This morning's discussion has shown that we were right in devoting so much time to globalisation and the significance of competition law in this development as well as the repercussions of globalisation for competition law.

Whether we speak about

- a tightrope walk between intervention and freedom
- further commitment to creating a uniform competition policy and application of competition law instead of them becoming fragmented
- or coping with the challenge globalisation poses for competition authorities

one conclusion remains: Competition authorities must move closer together.

I am sure that the future will bring about further progress. For ultimately we are all united by the same goal of creating a fair and secure framework for the economy in order to promote competition and prosperity.

The past two days have given us some important ideas for achieving this.

Ladies and Gentlemen,

I was delighted that so many of you accepted our invitation to come to Bonn. Thank you all very much for coming!

And I hope that if you have not already had an opportunity to do so during the conference days, you might have a chance this afternoon to explore Bonn and the surrounding area, for example the city of Cologne.

I would like to thank all of those who supported this conference and who made it possible in the first place for the event to take place in this form. Here, my thanks first of all go to the interpreters. It is their work which has enabled us to overcome language barriers, and they did an excellent job.

In particular I would also like to thank the Bundeskartellamt staff responsible for the organisation of the conference. Here I would like to mention Mr Mundt, the Head of the International Section, as the representative of all staff members of this unit.

Ladies and Gentlemen,

The actor and author Curt Goetz once said:

The best way to write a story is to start at the beginning, finish it and then stop immediately.

A closing speaker should stick to that.

Therefore I would now like to close this year's conference and wish you a nice afternoon, perhaps in Bonn, and a safe trip home. And I would be delighted to see the competition family meet once again here in Bonn in two years' time.

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