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Statement by

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Round Table no. 2:

Consumer welfare at the heart of competition enforcement.

What kind of benefits? Consumer welfare as a standard of competition policy

This conference brings together two themes – competition enforcement and consumer interests.

Nowadays, this seems like an unsurprising combination of subjects, even like a natural one to many people.

After all, isn't competition in the market place inextricably intertwined with the interest of consumers?

And so, logically: Isn't it the role of competition policy to further the interests of consumers?

Isn't that what ten years of debate in Europe about the "more economic approach" in competition law enforcement have taught us?

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To approach this issue, let me draw an analogy.

The shortest connection between two points is a straight line. This seems obvious and needs no mention in the country of Descartes, the inventor of analytic geometry.

Along these lines one might say:

Let point A be a competition problem in the market.

Let point B be a state of enhanced consumer welfare after the competition problem is resolved.

Then, isn't competition policy a straight line leading from A to B?

Frankly, I'm not convinced. When talking about causes and effects in the hands-on reality of competition cases – are we really in a realm of Euclidean geometry?

Do we really get from point A – a specific competition problem in the market – to point B – the enhancement of consumer welfare – via a competition policy that takes the form of a straight line, to be calculated ex-ante in its every single point?

I doubt this. I think competition policy and the ways by which competition works in the market place are more complicated.

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German competition law is known to focus on protecting the competitive process, and not primarily consumer interests. This is, incidentally, also the principle that European competition law has followed for decades.

European jurisprudence, for its part, continues to adhere to this. Let's not forget: In the *British Airways* case the European Court of Justice recently clarified the following:

To determine that a certain conduct is abusive, it is *not* necessary to prove that it causes consumers a measurable harm. According to the Court, the only decisive criterion is whether competition has been restricted.[1]

The European Commission, however, is focusing more and more – in the context of the "more economic approach" – on consumer welfare.

This is seen as a stark contrast to the well-established approach of European jurisprudence and to the German perspective.

In fact, however, contrary to the general perception, the consumer is not really left out of the picture in the German competition framework.

The original explanatory memorandum to the German Act against Restraints of Competition, when it was introduced in 1957, stated in its very first paragraph:

> "The 'Act against Restraints of Competition' [...] is intended to safeguard the freedom of competition and to overcome economic power wherever it infringes the effectiveness of competition, its tendencies to improve efficiency, *and the best possible servicing of consumers.*"[2]

In a similar vein, the explanatory memorandum refers to a competitive market economy as the system best suited to promote general welfare.

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[1] ECJ Case C-95/04 P, British Airways, of 15 April 2007: "106 Moreover, Article 82 EC [...] is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (1) (g) EC. 107 The Court of First Instance was therefore entitled, without committing any error of law, not to examine whether BA's conduct had caused prejudice to consumers within the meaning of Art. 82 (2) b EC, but to examine whether the bonus schemes at issue had a restrictive effect on competition and to conclude that the existence of such an effect had been demonstrated by the Commission in the contested decision."

[2] Translation by theBundeskartellamt (italics added), original text: „Das ‚Gesetz gegen Wettbewerbsbeschränkungen' [stellt eine der wichtigsten Grundlagen zur Förderung und Erhaltung der Marktwirtschaft dar. Es] soll die Freiheit des Wettbewerbs sicherstellen und wirtschaftliche Macht da beseitigen, wo sie die Wirksamkeit des Wettbewerbs und die ihm innewohnenden Tendenzen zur Leistungssteigerung beeinträchtigt und die bestmögliche Versorgung der Verbraucher infrage stellt." (Deutscher Bundestag, Begründung zu dem Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, Drucksache 1158, 1955, S. 21 f.)

Thus, the German legislator is not bent on some abstract idea of competition for its own sake, or competition as *l'art pour l'art*.

In the German system of competition enforcement we are well aware of the fact that, ultimately, what we do must trickle down to customers and economic agents in general.

Let me stress this: There is no doubt that in terms of *theoretical* analysis, a welfare standard is the best standard we have for measuring the outcome of any economic activity.

However, this does not make the *theoretical* toolkit the most useful one for the purposes of *practical* competition enforcement.

Trying to put the theoretical toolkit to use in hands-on competition law cases leads to what I call the "straight line fallacy" of competition enforcement that I have alluded to.

Competition is a complex process: Its results cannot be known in advance, but we can assume that it will create beneficial outcomes. One of these beneficial outcomes – amongst others – will be an improvement of consumer welfare.

However, what exactly will be the outcome for consumers, and how big any benefits will be – that is left to the essentially unpredictable process of competition.

For a competition agency to reach beyond this open, non-determined process – that is to say: to try to directly manipulate one of the potential results of the process, namely consumer welfare – is an endeavour fraught with numerous uncertainties.

It may turn out that what looks like a straight line is in fact more complicated, and that trying to force the process into a direct, straight line may cause more harm than good to the system.

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So – are German and European competition policy in conflict with one another?

In *practice*, so far, they are not.

And, as far as I can see, even differences – or different nuances – in the *theoretical* framework may be more in appearance than in reality.

A divergence in the future between the two systems of competition enforcement is not a foregone conclusion. Both approaches are reconcilable.

Here, an aspect comes into play that Philip Lowe stressed at a recent conference held at the Bundeskartellamt:

When assessing the consumer welfare effects that may specifically result from buyer power, Philip Lowe pointed out that one has to go *beyond* the *short-term* view – namely low prices.

Instead, *longer-term* aspects need to be integrated into the analysis.

These are the effects on parameters like product choice for consumers and on quality, to name two examples. And I would add: innovation.

This is not to downplay the differences in theory between the view of the Bundeskartellamt and the Commission.

But for all practical purposes, bringing longer-term aspects into play allows for a rapprochement of the two different perspectives.

And it might actually bridge the differences we have.

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However, the risk of divergence is real.

In the light of recent Commission policy initiatives , there is the possibility that European competition policy might take what I would consider to be a wrong turn.

This is apparent from the Commission's Priority Paper on Art. 82 EC.

I welcome the fact that the Commission expressly adheres to effective competition as the immediate object of protection.

However, in its Priority Paper it focuses very heavily, at times exclusively, on a *consumer welfare approach* – which is not in line with European jurisprudence, as I have pointed out.

Moreover, the European Court of Justice does not require proof of recoupment or specific damage to consumers in the case of refusal to supply[3]. However, these are two aspects on which the Commission lays great stress.

At least under German procedural law this much is obvious: If the proof of harm to consumers were to become a central criterion for instituting proceedings in future –

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[3] See for ECJ: ECJ Case C-95/04 P, British Airways, of 15 April 2007 para. 107.

this would lead to highly complex examinations. Consequently, abuse control would fail in view of this excessive demand for proof.[4]

We should maintain an open mind towards the *process* of competition. This may also keep us from neglecting the *longer-term dynamic* aspects of competition and possible long-term harm to consumers.

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Another field that offers ample opportunities for wrong turns is private enforcement, as laid out in the Commission's White Paper on Damages Actions.

Here, the idea is to get market participants, especially the demand side of the market, more involved in competition issues.

This can be seen as strengthening consumer welfare, by getting consumers of all shades involved in enforcing the principle of competition and fighting for their interests.

There is little to object to in principle, but some of the proposals that the Commission has made in this context nonetheless raise questions. I would like to mention two of them.

The first point concerns **collective redress**.

In its paper the Commission proposes representative action that may essentially amount to what is usually called "opt-out collective action".

"Opt-out collective" in this context means that an association can go to court and demand compensation in the name of all members of a particular group of people – or even a whole market level – that may have been harmed.

This can be done *without* being mandated by the individuals harmed, and *without* the legal obligation to present and explain each individual harm incurred.

Unless, that is, an individual actually takes the active step of "opting out" of the law suit initiated on his or her behalf by an association that he or she has never mandated in the first place.

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[4] In the United States this is currently one of the Federal Trade Commission's main points of criticism on the report recently published by the Department of Justice on "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act" (available at http://www.usdoj.gov/opa/pr/2008/September/08-at-787.html). There is controversy between the two authorities about the right standards of examination and requirements of proof. Cf. Statement of Federal Trade Commission Chairman William E. Kovacic and Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (both available at http://www.ftc.gov/opa/2008/09/section2.shtm)

Such an opt-out collective action by an association cannot be reconciled with the legal regimes in Germany and most of the other Member States which are based on the fundamental principle of *private autonomy*.

Under German legal principles, each individual damage has to be presented and proved. This is next to impossible in an opt-out collective action, since the association usually does not know the extent of the individual damages.

Consequently, the court is not able, either in legal or factual terms, to completely verify the facts of the case.

In addition, if in the case of opt-out actions individual victims are also able to bring actions for damages, the defendant runs the risk of being sued several times for the same damage.

All considered, an opt-out collective action for damages does not achieve substantive justice.

Based on the American "class action" the defendant is merely forced by means of public pressure to agree to a settlement.

Another point is **access to evidence**.

The Commission proposes far-reaching disclosure rules along the lines of Anglo-Saxon law.

The parties would be obliged to disclose whole categories of documents which the claimants believe to be connected with the matter in dispute. The claimant would not be obliged to adequately identify the evidence to be submitted.

This is inconsistent with essential underlying concepts of the German and other continental legal systems.

Such a regulation would facilitate and even promote the abuse of discovery to gain access to competitors' trade secrets. This might lead accused firms to agree to expensive settlements, even where the plaintiff has no viable case.

In the US, from what I have gathered, firms and the judicial system are aching under the tremendous costs of disclosure.

The British system, from what I have learnt, seems to fare a bit better. Although Sir Hugh Laddie, eminent British lawyer and former High Court judge, once

stated: “[Disclosure of documents] ... is both expensive and, in the vast majority of cases, yields meagre returns.” [5]

An effective, but also a painful way of learning is from our own mistakes. A more elegant way is to learn from the mistakes of others.

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Ladies and gentlemen,

As an economist I know that economic theory can open up totally new insights in the analysis of competition issues.

But as an economist I also know that in a number of fields the economic toolkit does not yet have the instruments for a fully-fledged exact analysis.

If we go for the “straight-line fallacy” that I have mentioned we risk pretending to fully understand the economic and competitive world before us, while actually we don’t.

And in the process, we risk raising the bar for proving anticompetitive effects to a level that sentences us, as competition law enforcers, to inaction.

I prefer to admit: We cannot fully calculate and thus we cannot predetermine the process of competition. In fact – if we could, it would be a sad verdict on competition.

So, as long as we have nothing better to work with we should embrace certain heuristics that we have established over time.

The most reliable one is: Ultimately, competition enhances welfare.

[5] The Times, 22 May 2007