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Statement for the Panel

**”Economic assessment in competition enforcement:
developments in France and Germany”**

Ladies and gentlemen,

Thank you very much for inviting me to this conference.

It has - within quite a short period of time – evolved into one of the leading conferences on hot topics at the interface of competition economics and law enforcement in Europe.

I very much appreciate the opportunity to provide my views on the role of economic analysis in competition law enforcement just after the presentation on the same subject matter by you, Bruno.

We have already had several opportunities this year to share our authorities' experiences – most recently at the European Competition Day in Paris.

But, dear Bruno, it is always a great pleasure to meet you - not only on panels.

I. Economic assessment in competition enforcement: general remarks

The topic I am invited to talk about may give rise to an expectation that today I will answer the question whether German competition law and the Bundeskartellamt are now falling in line with the 'more economic approach' to competition law

But - even if I run the risk of ignoring the advice never to disappoint the expectations of an audience too much – I do not really intend to submit an answer to such a question – even if it were put to me!

The reason is quite simple: I do not consider such a question to be **the** truly relevant one.

Admittedly, it is beyond doubt that the role of economic analysis in competition policy has changed in Europe during the last decade.

But – let me just quote the following - I'll tell you immediately who the author is:

*“Characterizing this change (role of economic analysis in competition policy) as one towards a ‘**more** economic approach’ could be misleading.*

*The question for effective enforcement is **not** one of ‘more’ or ‘less’ economics, but rather **what kind** of economics and especially **how** the economic analysis is used.”¹*

This sceptical assessment of the catch-phrase “more economic approach” is a quotation from the paper “Economic Analysis and Competition Policy Enforcement in Europe” by Professor Lars-Hendrik Röller, the first Chief Economist in DG Competition (2003 – 2006).

The key merit of Professor Röller’s statement is that it focuses on the relevant issue – the challenge of **how to integrate** economics and law enforcement appropriately in order to ensure effective competition policy.

The discussion on the “more economic approach” at least sometimes bears some resemblance to lawyers and economists sitting in the car of competition law enforcement fiercely fighting over the steering wheel.

It is quite obvious that this is not a promising scenario.

Neither for keeping the car of competition law enforcement on the right track nor for avoiding dangerous hazards to other traffic participants – be it consumers or the business community.

In my view, only close co-operation between lawyers and economists can ensure effective competition law enforcement.

With this premise, I do not deny the potential for differences of opinion on which is the right way for the car of competition enforcement to take in **individual** cases.

However, in **any** case, the relevant challenge of properly integrating the principles of economics and law enforcement is not at all a matter of “black and white” or a “straight line” as was said in Paris at the Competition Day meeting.

Differences in opinion may however exist on the right “shade of grey”.

In the following, ladies and gentlemen, I’d like to highlight some major aspects which in my view are most relevant for finding the appropriate “shade of grey”.

¹ Vgl. Röller, Economic Analysis and Competition Policy Enforcement in Europe, in: Bergeijk, Kloosterhuis (eds.), Modelling European Mergers, Cheltenham 2005, p. 13.

II. Economics provides conceptual frameworks (examples: collective dominance and vertical mergers) ...

Let me start with a statement all of you probably agree with: Competition law enforcement is in its essence based on economics.

What else should it be?

One of the core contributions of economics to competition law therefore is to provide suitable conceptual frameworks.

To stick to the image used: Economics should provide the “maps” to find the way through the facts of a case.

One can develop this image a little further using the example of collective dominance.

This topic is also quite prominent in current European competition policy².

In my view, it is beyond doubt that due to the progress made in economic theory our knowledge on collective dominance - or as economists say: tacit collusion - has improved significantly.

The understanding of all those structural market features which facilitate coordinated behaviour is very well elaborated.

And the essential elements of this economic “map” are already reflected in the legal standards of current competition law enforcement practice.

In this regard, one may refer to a very recent judgment of the German Federal Court of Justice which summarizes the relevant route the car of competition law enforcement has to take.

This judgment reads – I quote:

“The question whether a collectively dominant position exists requires an overall assessment of the relevant competitive environment. It has to be examined whether

² **Hintergrundinformation:** Der Europäische Gerichtshof hat mit seiner Entscheidung vom 10.7.2008 im Fall „Impala“ die Grundsätze für die Beurteilung von Zusammenschlüssen, die eine gemeinsame marktbeherrschende Stellung mehrerer Unternehmen begründen oder verstärken können, weiter konkretisiert. Das Urteil betraf die Freigabe eines Zusammenschlusses zweier Produktions- bzw. Verlagsunternehmen für Musik (Sony / BMG), die vom Gericht erster Instanz (GeI) aufgehoben worden war. Der EuGH hat – obgleich im konkreten Einzelfall die Entscheidung des GeI aufgehoben und der Fall an das GeI zurück verwiesen wurde – mit seinem Urteil im wesentlichen die Grundsätze bestätigt, die vom GeI in einem früheren Urteil (dem so genannten „Airtours-Urteil“) entwickelt worden waren.

because of the specific structural features of the relevant market a coordinated behaviour of the members of an oligopoly is to be expected.

Important factors to be considered include market transparency and the deterrent and retaliation mechanism in case of deviation. An incentive has to be established not to deviate from the coordinated behaviour.”³ (End of quote).

I have just quoted from a judgement of the German Federal Court of Justice issued only a month ago.

With the decision, the court upheld a prohibition of the Bundeskartellamt concerning a merger in the electricity sector (E.ON/Eschwege).

In my view, this case is a very telling example.

It seems to me that the different cars of competition law enforcement driving around in Europe in fact already use very similar “maps” to find their way.

In this regard, the assessment of vertical mergers also provides a good example.

The relevant point of reference in that specific landscape of merger control can be found in the EU Commission’s guidelines on non-horizontal mergers.

I think that with this publication the Commission has made an important contribution to the debate on vertical mergers in Europe.

III. ... but differences of opinion exist on the appropriate standard and level of proof needed for intervention

But using the same or very similar “maps” does not necessarily imply that competition authorities always take identical routes in assessing similar cases.

The issue I want to address here is quite obvious: the relevance of the standard - and in particular the **level** - of proof for competition policy intervention.

³ **Übersetzung durch G3**; die Passage des BGH-Urteils in Sachen „E.ON / Eschwege“ vom 11.11.2008 lautet: „Maßgebend [...] ist eine Gesamtbetrachtung aller relevanter Umstände. [...] Es ist zu untersuchen, ob aufgrund der Marktstruktur mit einem dauerhaft einheitlichen Verhalten der Mitglieder des möglichen Oligopols zu rechnen ist. [...] Entscheidende Indizien dafür sind die Markttransparenz und die Abschreckungs- und Sanktionsmittel bei abweichendem Marktverhalten. Es muss ein Anreiz bestehen, nicht von dem gemeinsamen Vorgehen abzuweichen.“; BGH-Beschluss vom 11.11.2008, Rdz. 39.

In my view, this issue is at the core of the discussion on the best and most effective approach to integrating economic analysis into competition law enforcement.

Some of the numerous questions at stake are for example:

What are the most relevant factors and structural indicators to be taken into account when assessing the risk of harm to competition?

Are some of these factors more important than others?

And finally, how can they be appropriately assessed or measured?

I'm convinced that economic analysis can help in many cases to provide answers to these questions.

There is no doubt that competition policy regularly has to review whether enforcement standards are still in line with the state of play of robust economic thinking.

The reason is clear: modern economics is not a static science.

It is probably much more dynamic than the legal science.

But this is also one of its most important limitations.

Law enforcement cannot and should not simply replicate the sometimes quite conflicting views of economists.

To strike the right balance between effective law enforcement and the necessary refinement of the standard and level of proof is by no means an easy task.

The Bundeskartellamt wants to meet this challenge even better than in the past.

And this was essentially one of the main reasons behind last year's establishment of a new economics unit.

IV. Appropriate level of proof: On the role of economic tools / quantitative techniques in competition law enforcement

As regards the appropriate level of proof, the picture would however be incomplete without some short remarks on one very important issue.

It is the appropriate role of quantitative techniques and econometrics.

In this regard, however, Neelie Kroes, in a very recent speech in Fordham, already found very apt words – and I again quote:

*“Econometrics are a useful servant, but a terrible master”.*⁴

This statement in my view perfectly summarizes the relevant challenge.

I am convinced that quantitative analysis can provide useful insights which can complement and cross-check the qualitative assessment of the relevant competitive environment.

But on the other hand do you really think that economists wish to reveal the limitations of their quantitative toolkit?

In any case, highly sophisticated quantitative analysis should not be considered to be inevitably needed to justify intervention.

For me as an economist this would be tantamount to a “horror scenario” of competition law enforcement: some number-crunching economists feeding their computers with data of dubious quality, and finally presenting one single figure to serve as a lead.

Again, striking the right balance is not an easy task.

But at this point, I am in a comfortable position to refer to the subsequent panel which will be attended by Mr. Ewald.

He has promised to present a recent German merger case which will provide some useful insight into some of the relevant issues.

This efficient work-sharing gives me some time to remark on one further aspect of an appropriate integration of economics into competition enforcement.

⁴ Kroes, Neelie, Exclusionary abuses of dominance – the European Commission’s enforcement priorities, Fordham University Symposium, New York, 25.9.2008, S. 3; abrufbar unter: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/457&format=HTML&aged=0&language=EN&guiLanguage=en>

V. Keeping the “map” operational: pitfalls of using the “welfare standard”

German competition law is known to focus on protecting the competitive process, and not primarily consumer welfare.

The European Commission, however, is focusing more and more on consumer welfare.

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

But, actually, contrary to general perception, the consumer is not outside the picture in the German competition framework at all.

The original explanatory memorandum to the German Act against Restraints of Competition, when it was introduced in 1957, explicitly stated in its very first paragraph that the law also intends to safeguard *the best possible servicing of consumers.*⁵

Therefore in competition enforcement in Germany we are well aware of the fact that, what we do must also trickle down to customers.

But let me stress: As an economist, I am far from disputing that the welfare standard currently provides the only suitable point of reference for sound *theoretical* analysis.

But if you consider only some of the issues connected with making this concept operational, strong doubts arise as to whether it is a good *practical* point of reference for enforcement practice.

Even highly sophisticated theoretical and quantitative economic analysis may at the end of the day not clearly indicate the ultimate effect on consumer welfare.

What would be the consequence?

An overly cautious “hands-off” approach?

I do not consider this to be effective competition enforcement.

⁵ Übersetzung durch G5; Originaltext: „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, Seiten 21 f.)

Therefore, I consider the welfare-standard a perfect servant for **theoretical** analysis.
But it is a very poor master for law enforcers.

VI. Concluding remarks

Ladies and gentlemen,

Despite this sceptical view on one of the numerous aspects of the discussion on the role of economics in competition enforcement, I want to stress nevertheless:

Economic analysis is – and always will be – at the heart of competition enforcement.

But the debate on the right “shade of grey” needed to ensure that effective competition law enforcement is ongoing.

And let me say: I have no problem if it is ongoing.

It is my impression that this debate is necessary as a driving force which will finally lead to an improved and more accurate enforcement practice.

Ladies and gentlemen,

It was a real pleasure to provide my views today in a conference which also in the years to come will hopefully act as a platform for fruitful discussion on this topic.

Thank you very much.