

## **INTERNATIONAL ANTITRUST: RECENT DEVELOPMENTS AND TRENDS**

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**Statement by**  
**DR. BERNHARD HEITZER**  
President  
Bundeskartellamt

## I. INTRODUCTION

Eleven years ago, at the 25<sup>th</sup> Annual Conference of the Fordham Law Institute, Douglas Melamed, then Principal Deputy Assistant Attorney General at the US-DoJ, opened his statement by saying: “**We live in a global economy, but we do not live in a global state**”.<sup>1</sup>

Nowadays, this holds just as true as it did then. Nonetheless, **many things have since changed significantly**:

Back in 1998 the International Competition Network (ICN) – which today is one of the most important forums for international cooperation in the area of competition law – had not even been founded.

Instead, the US was about to launch the Global Competition Initiative which eventually led to the **establishment of the ICN**.<sup>2</sup>

And let us not forget: The Fordham conference itself has played a significant role in bringing this about.

Back in 1998, **who would have imagined** that we would establish a global forum for cooperation within less than three years time?

Who would have guessed that this forum would have more than one hundred members within less than a decade?

And who would have imagined that this forum would **issue recommendations** which would then – as was the case in Germany – serve as a guideline for the amendment and harmonization of national legislation?

We must not forget that **international organizations like the OECD and the UNCTAD** have also been very active in the field of competition.

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<sup>1</sup> See A. Douglas Melamed, Principal Deputy Assistant Attorney General, U.S. Department of Justice, Antitrust Enforcement in A Global Economy, Speech delivered at the Fordham Corporate Law Institute, 25<sup>th</sup> Annual Conference on International Antitrust Law and Policy, New York, October 22<sup>nd</sup>, 1998 (speech available under <http://www.usdoj.gov/atr/public/speeches/2043.pdf>).

<sup>2</sup> See Joel I. Klein, Assistant Attorney General, U.S. Department of Justice, Time for a Global Competition Initiative?, Speech delivered at the EC Merger Control 10th Anniversary Conference, Brussels, September 14<sup>th</sup>, 2000 (speech available under <http://www.usdoj.gov/atr/public/speeches/6486.pdf>).

The **OECD** provides valuable work through its Competition Committee. Additionally, in 2001 it established the Global Forum on Competition, at which almost 90 competition agencies meet annually.

But let me come back to the first part of my introductory remark: “**We live in a global economy**”. This development has gained prominence and respective importance especially through the current **financial and economic crisis**.

I would like to **begin** with a few words on international competition policy and the current financial crisis. Then I will turn to international antitrust enforcement at the Bundeskartellamt.

## **II. INTERNATIONAL COMPETITION POLICY AND THE FINANCIAL CRISIS**

The current crisis in the financial markets and in the “real” economy **strongly influences the environment within which competition policy is shaped**.

As far as the financial sector is concerned, many governments have invested heavily in private banks in order to stabilize the financial system.

Many governments have also granted more or less extensive “rescue packages” to other sectors.

These measures have not always been fully compatible with the principle of free and open markets and consequently they run the risk of **seriously distorting competition**.

But that’s not all. The **principles of free and open markets have themselves drawn some fire** during the crisis.

Let me point out that I am deeply convinced that we can only effectively overcome the current economic crisis if we **fully and unconditionally recognize the benefits of open and competitive markets**.

We must not neglect the benefits that free and open markets have brought to consumers worldwide. This of course does not speak against the need for **adequate and intelligent regulation of markets**, especially **financial markets** – far from it.

I see it as our **duty as competition law enforcers** not only to confidently enforce our competition laws, but also **to forcefully advocate free competition**.

Conferences like this one play an important role in this process, and this is why it is a great pleasure for me to speak to you today.

The financial crisis has put some topics on the agenda that have not been in the spotlight for some time: These include, in particular, the **failing firm defence** that both the **OECD** Competition Committee and the **ICN** Merger Working Group have taken up recently.

I am very much looking forward to the oncoming discussions in the OECD and the ICN.

Furthermore, the financial crisis has impressingly proved the **need for increased global cooperation between government bodies**.

In the course of the financial crisis, **other international networks of government bodies** outside the antitrust community have been dealing with questions similar to those faced by antitrust enforcers.

These questions include, for example, **network efficiency** and **organizational issues**.

I am convinced that it would be a rewarding exercise for the antitrust community to **identify structures and mechanisms used by these and other networks** to facilitate member and advisor inclusiveness.

### III. ANTITRUST ENFORCEMENT AT THE BUNDESKARTELLAMT

Let me now turn to **merger control enforcement**. The Bundeskartellamt received nearly 1.700 premerger notifications in 2008.<sup>3</sup> This number has decreased from roughly 2.200 notifications in 2007.

Not surprisingly, many of these **transactions were international in scope** because they involved firms or assets based outside Germany.

For example, of all transactions in 2008, the **acquiring company** was in almost 200 cases **based in the U-S** (in 2007: more than 300 cases).<sup>4</sup> With no other foreign country have there been so many international transactions as with the U.S.

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<sup>3</sup> See *Bundeskartellamt*, Tätigkeitsbericht 2007/2008, page 177 (available in German under <http://www.bundeskartellamt.de/wDeutsch/publikationen/Taetigkeitsbericht.php>).

<sup>4</sup> See *Bundeskartellamt*, Tätigkeitsbericht 2007/2008, page 183.

Apart from the consequences of the current economic crisis, we expect the **number of premerger notifications to further decline** in the future: This is partly due to **recent national legislation**.

In order to reduce the regulatory burdens for national as well as international undertakings, the merger notification requirements in Germany were reduced significantly in early 2009.

Nowadays, a transaction must only undergo merger review if it meets **two national thresholds**: The domestic turnover of at least one undertaking must exceed EUR 25 Mio. and that of another undertaking EUR 5 Mio.

The second criterion – **based on an ICN recommendation** – was introduced in early 2009. In addition to these criteria, the combined aggregate worldwide turnover of the undertakings concerned must – as in the past – exceed EUR 500 Mio.

Let me say a few words on our **immensely successful anti-cartel enforcement program**: In early 2008, we established a **new decision division** that is exclusively devoted to cartel prosecution.

Furthermore, our **leniency program** – that was introduced in 2000 – has proved a great success. In 2008, the Bundeskartellamt received a total of 39 leniency applications.<sup>5</sup> Both developments will help us to be even more successful in prosecuting national as well as international cartels in future.

In the **area of unilateral conduct** we have primarily concentrated on the **national energy sector**.

More than ten years after liberalization, the competitive environment is still not fully satisfactory in this sector.

This illustrates the problems that we face when a formerly heavily regulated industry is opened up to competition.

Against this background, the German legislator has seen a need to address **exploitative conduct** – including **excessive pricing** – in the electricity and gas sectors.

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<sup>5</sup> See *Bundeskartellamt, Tätigkeitsbericht 2007/2008*, page 9.

#### IV. DEVELOPMENTS IN ECONOMIC METHODS

Let me now turn to a subject that, internationally, has gained tremendous significance over the past decade or so. That's the increased role of economic analysis in competition law enforcement.

The Bundeskartellamt has always stressed the importance of a sound economic underpinning of competition enforcement. Not surprisingly, the Bundeskartellamt has, since its early days, had a high share of economists in its ranks.

There is no doubt, economics provides the road map for the assessment of our competition cases.

But the Bundeskartellamt has always kept a cool head about the merits of complex quantitative economic methods if they claim to provide a detailed measurement of individual competition effects.

However, we do see that there is great potential in sophisticated methods of economic assessment.

That is one of the reasons why, in 2007, I set up a dedicated economics unit in the Bundeskartellamt.

To sum up the rationale of our approach in this field, let me refer to Professor Röller, the first Chief Economist in the European Commission's DG Competition (2003-2006). He said:

"The question for effective enforcement is not one of 'more' or 'less' economics, but rather what kind of economics and especially how economic analysis is used."

I think this is a very useful thought that should guide us when it comes to opening the economic – and especially econometric – tool-kit.

Economic methods are useful tools, but they should be seen as that: tools. And we should always be aware of the limitations of these tools, whenever we use them and benefit from their power to explain and make projections.

#### V. CONCLUSION: THE WAY AHEAD

Back in 1998, Douglas Melamed emphasized that we lived in a "**global economy**". More than 10 years later, the economy has become even more global. Certainly, not

everyone expected that we as competition enforcers would keep up with this development – as we very successfully did!

In the last decade we achieved tremendous results not only within the ICN, but also within other organizations like OECD and UNCTAD. As we approach the 50<sup>th</sup> Fordham Conference, I hope that we can **maintain the current momentum** and further improve international antitrust cooperation.

Thank you very much for your attention!