

Bruno Lasserre
President of the Conseil de la concurrence

50 YEARS BUNDESKARTELLAMT
The look from across the Rhine: a story of brotherhood

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Fifty years is a golden age. One may claim to possess experience and maturity, while keeping the energy, will and imagination of a twenty-year old. The Bundeskartellamt (hereafter, the “BkartA”) celebrates its fiftieth anniversary this year; the Conseil reached the age of twenty last year. The two authorities have many differences, but at the same time, they enjoy many things in common. Given their geographic proximity and lasting relationship, there are a number of reasons for the Conseil to take great pride and pleasure in joining the celebrations.

Firstly, the personal links of friendship which bind both authorities and their respective presidents. In this respect, I want to pay tribute to the outstanding contribution of the former President of the BKartA, Dr Ulf Böge, to international cooperation, to the promotion of a competition culture in Europe and to the bilateral cooperation built with the Conseil. I also want to express my deep gratitude as well to the current President, Dr Bernhard Heitzer, who immediately opened promising prospects for new experiences of cooperation, for instance with the successful operation of the first simultaneous dawn raid in France and Germany, last Spring.

Secondly, the lasting dialogue on competition between our two countries deserves to be emphasized. Celebrating a half century of competition invites first to take a look back on the contrasting role in French and German post-war conceptions and organization of economic policies. This initial situation had lasting consequences, which might lead to reconsider some generally accepted ideas. But one feels next prompted to turn to the future, following Chancellor Konrad Adenauer’s famous sentence: “*Man muss das Gestern kennen, man muss auch an das Gestern denken, wenn man das Morgen gut und dauerhaft gestalten will*” [“one should know yesterday, one should also think at yesterday, if one wants to shape tomorrow in a good and lasting way”].

I. The look back: Differences on the two sides of the Rhine

1. Stark contrast in post-war Germany and France

In 1958, a lively debate was already ongoing for several years among all concerned parts of the German society, especially academics, representatives of the business community and members of political parties. Four years earlier, France had already set up a specialized body called the “*Commission technique des ententes*”. However, this very first competition authority had no means of enforcement and its scope of competences was very limited. It was created by a governmental decree in 1953 as a technical advisory body, merely empowered to deliver an opinion on cartel agreements, upon request from the Minister of Economy. The Minister was entrusted with the exclusive power to refer the infringement to the criminal courts as “illegal pricing practice”.

The contrasting ways to set up competition rules and competition enforcers were obviously determined by the differing economic and political backgrounds which characterized our two neighbouring countries. A retrospective view reveals two different national patterns. Even a cursory listing of the main philosophical, social and economic features of these respective contexts is striking:

– as concerns, first, the founding values which govern competition. In a nutshell, Germany shifted from cartellisation, which had long been the backbone of the economy, to ordoliberalism and to competition as standing high in the list of economic values grounding political democracy, while France went the other way, from pre-war liberalism to post-war “dirigisme”;

– second, as concerns economic policies, for example in the area of finance, where the strong currency policy in Germany contrasts with price control and monetary devaluation in France. On the right bank of the Rhine, the situation is marked by the currency reform of 1948 and the subsequent elimination of price control; the post-war decartellisation program undertaken at the Allies’ instigation; but also by the establishment, by future Chancellor Ludwig Erhard, of the Social Market Economy model, based on the theoretical fundament developed by the Freiburg school. On the other side of the Rhine, the picture signals post-war nationalization of major firms in strategic sectors; State intervention leaning on the General Planning Commissariat inspired by Jean Monnet and on the powerful Treasury Department; but also the use of a comprehensive range of means, such as price control, monetary devaluation in 1958 and selective industrial policy.

It certainly explains why our competition policies were developing in such a contrasting way, which illustrates a sort of “inversion of values” between pre-war and post-war situations in each country.

Nevertheless, one may argue that these different situations might represent two sides of the same “will-to-modernize” medal. Some ideas of Ludwig Erhard seem to be still topical, for example as he wrote that neither the State nor cartels have to decide who shall prevail on the market, but only the consumer (*“Nicht der Staat hat darüber zu entscheiden, wer am Markt obsiegen soll, aber auch nicht eine unternehmerische Organisation wie ein Kartell, sondern ausschließlich der Verbraucher”*). However, since consumers are generally not armed to defend themselves alone against misuses of this basic economic freedom, it is also for the State to find the ways to remedy such misuses. The achievements of the BkartA, along the last fifty years, show that the Federal State made the right choice by devoting the monitoring of fair competition to an independent body. Is this complementary idea not also reflected in the acknowledgement of Simon Nora, who advised both left- and right-wing French governments at that time and later, and according to whom an efficient State shall neither do everything nor permit everything but merely “have it done” (*“un État efficace ne doit ni tout faire, ni laisser faire, mais faire faire”*)?

Fortunately, German-French complementarities in the first decade do not boil down to finding different ways to set up and implement competition rules at national level. It also played a crucial role at supranational stage, as both governments had to find far-reaching compromises when negotiating the Rome Treaty, including the meanwhile famous prohibition principles laid down in the former articles 85 and 86. Were they suspecting that the implementation of these key provisions, which came into force on the same date as the GWB, would produce the tremendous set of regulation and case-law that has now become a common reference for competition authorities and practitioners throughout Europe and beyond?

Thus, our differences did not prevent the shaping of ambitious European competition rules. Quite the contrary. Former Articles 85 and 86 of the Rome Treaty would probably not have come into being (at least in the same shape) without the deal achieved by Germany and France:

Germany promoted the introduction of strong competition rules, which did not really matter to France, more preoccupied by, say, agriculture, but France supported strong supranational institutions, which were crucial in implementing these rules.

Meanwhile, the BKartA was playing a pioneer role during the very first years of its existence given that the EC rules were practically not enforceable until the European Commission was finally endowed with decision powers in 1962. At that time, there was no comparable institution in France, where the State was directly involved in the maintaining of a competitive market economy.

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2. The coming of age of competition in Europe

As a result of the “Europeanization process”, EC antitrust rules and case law have become a common reference throughout Europe and beyond.

2.1. The recognition of competition values by the Constitutional Treaty: easier in Germany than in France

At the time when France rejected the Constitutional Treaty by referendum, a striking element was the criticism voiced against the principle of “free and undistorted competition”. Paradoxically, competition was seen as a vehicle of uncontrolled liberalism and as a symbol of a deep unbalance in European policies, although the regulation of competition actually controls and limits commercial freedom. That perception would have been unthinkable in Germany.

The political agreement reached on the Lisbon Treaty was then achieved with a new compromise, that led to remove the reference to “free and undistorted competition” from the list of objectives of the Union. What is at stake behind this removal? Is it really all about two visions of competition (as a goal or as a means)? Or is it not also part of a new political compromise to achieve the next step of the Union construction? I will come back to that in a few moments. But, after having looked at values, let’s look at rules.

2.2. The modernization of competition rules: easier in France than in Germany

Where there is a strong competition culture, grounded in philosophical thinking and well ahead of everybody else’s, new projects obviously arise broader interest than where competition is a matter for specialists. This might perhaps explains why the modernization brought to life by the “Great Reformer” Monti was welcomed with greater passion in Germany than in France :

– overnight, France incorporated the various changes aimed at meeting European standards of competition law: the move was unproblematic since France was in full agreement with these changes, as reflected by its texts and its decisional practice. That was the case both for merger control (with the introduction of a SIEC test based on similar criteria as the ones of Article L. 430-6 of the French Code of Commerce), for antitrust (the legal exception mechanism was ever existing in France) and for economic analysis (the effects-based approach of unilateral conduct cases already being followed by the Conseil);

– in Germany, where competition appeals not only to reason, but also to the heart, these proposals led to rich discussions before eventually finding their way in the texts. A great experience, a number of rich debates, an important case-law and decisional practice had developed since the adoption of German competition law and merger control, and the new projects needed to be reconciled, in the hearts, minds and texts, with this impressive “acquis”. Ultimately, France came up with the final compromise, as regards merger control, by contributing to the drafting of the new test.

II. The look ahead: Bridging the gap

1. Competition under the Lisbon Treaty: Symbols and pragmatism

As mentioned, the Lisbon Treaty replaces the reference to “free and undistorted competition” that existed in Article 3 EC by a new Protocole. But jumping down from constitutional symbols to day-to-day reality, we remain fully in line with competition law and policy as they have been standing firm for fifty years. And, equally important, we converge increasingly as regards day-to-day implementation of competition rules, policies and culture:

– the Conseil and the BkartA, both independent from government institutions, are equally legitimate, listened to and accepted when they enforce competition;

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– simply, their legitimacy is different. If you allow me, Bernhard, to borrow this expression from the circus language, and not from the words usually used by the competition community, I would be tempted to compare both institutions in the way suggested by one of the cartoons featured in the booklet published for the anniversary of the BKartA:

– an edition of the Handelsblatt dated from 1970 shows the BKartA, now fifty, as “Der Dompteur”: his authority is obvious. By his only presence, he imposes respect, even to big animals. His reputation is made;

– by comparison, the Conseil, now twenty-one, could be a younger acrobat. He is anxious to succeed, but he has to prove his art at each exercise. His reputation must be conquered each day;

– thus, each case that comes before us, each question that is raised by market players, delivers the same message: whatever their specificities, competition authorities have a key role to play in making markets work. And this role requires not only to come to the right solution, in legal or economic terms. It also leads us to spread the message of the benefits brought by competition.

In a way, the two authorities come to a common point, even though they may at times follow different routes, in order to best interact with their respective societies.

2. A common answer to global challenges

Reform are always needed if one wants to remain in pace with the lapse of time – especially economic time. As concerns France, they might involve considerable movement, as proposed by the Commission for the Liberation of French Growth, presided Jacques Attali and to which both Mario Monti and I have had the chance of participating. The Commission is scheduled to deliver its final conclusions to President Sarkozy on 23 January 2007. They should include proposals of great importance for competition, notably:

– the development of competition in the retail distribution sector and in liberal services, in order to foster entry on the market, to increase competition, to put pressure on prices, to induce growth and job creation, and, ultimately, to enhance consumer welfare;

– the setting up of a single and independent competition authority, in order to finally adapt to the French context the strong model that has been diffused in all Europe, starting with the BKartA in the 1950's.

Developments are probably considered also in Germany; to use the terminology of the European Competition Network (ECN), the Conseil is not the “best placed authority” to discuss German issues. It is certainly well placed to take part to a modernization debate in France.

But whatever the decisions to be taken, its is obvious that European projects will be a powerful force of convergence. Articles 11, 12, 20 and 22 of Regulation N. 1/2003 provided novel and irreplaceable cooperation mechanisms. This is particularly true for the Conseil and for the BkartA: due to the increasing intertwining of our national economies. From the start, the BKartA and the Conseil have been two core contributors of cases to the ECN, being in charge of one out of four Network cases. Between 1st of May 2004 and 30th November 2007, French and German competition authorities have opened proceedings in more than 80 Article 81 EC or 82 EC cases (125 and 84 respectively). In addition, proposed decisions have already been communicated to the Commission in a third of this figure (40 for the Conseil and 32 for the BkartA). This record shows beyond doubt how determined they are to do their utmost for the ECN and, ultimately, for competition in Europe.

Nevertheless, a number of implementation issues have still to be accurately discussed. Some of them, like the parallel dealing with leniency applications, have already led to great steps forward, thanks to the ECN working group co-chaired by the British OFT and the Conseil, to which the BKartA actively contributed. Others, like the exchange of pieces of evidence and case related information under article 12 of Regulation N. 1/2003, are now supported by a sound and detailed ground of common principles and good administrative practices, thanks to the ECN working group on cooperation issues co-chaired by the Hungarian GVH and the BKartA, which also relies on active participation from the Conseil.

This context shows that the ECN is not only about the coherent application of European competition rules, but also that the experience gained with bilateral cooperation is one of the ECN's greatest assets.

The time has come now to intensively apply in practice the ECN rules on cooperation and the German-French commitment to work together in harmony will certainly bring further major contributions to the enforcement of competition in Europe. Far from becoming obsolete, bilateral cooperation is in this relation all the more important. Institutional as well as operational exchanges have successfully taken place, such as the German-French competition meeting suggested by the Conseil at the XI. Internationale Kartellkonferenz of 2003 and to be organised for the third time this year. Meanwhile, French case handlers and experts know much better how their colleagues across the Rhine deal with competition cases and peculiarities of both the GWB and Book IV of the French Commercial Code, such as the ban on loss leading which produce lively debates in both countries, are much better understood.

Such experiences enrich the human and professional potential of competition authorities and the Conseil is therefore strongly committed to pursuing this fruitful cooperation policy with the BKartA in 2008.

Several cases of multiple leniency application have also already been considered for coordinated actions by the BKartA and the Conseil. One of them gave rise to the first simultaneous inspection of the premises of several undertakings in France and Germany, which was organized at horizontal level.

What therefore matters is to find new ways of working hand in hand, bilaterally or within the ECN and a number of other avenues to develop cooperation have still to be explored but the operational aspects will certainly be expanding in the future.

It will call, more than ever, for a strong involvement of the German and French competition authorities, to remain in the forefront of this activity not as a new Paris-Bonn Axis but rather as a successful German and French Praxis.