



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**DAF/COMP/WP2/WD(2006)18
For Official Use**

Working Party No. 2 on Competition and Regulation

ROUNDTABLE ON ENSURING ACCESS TO KEY CAPACITY FOR NEW ENTRANTS.

--Germany--

6 February 2006

The attached document is submitted by the delegation of Germany to the Working Party No. 2 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 6 February 2006.

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JT00200330

INTRODUCTION

1. A number of markets can only be entered if newcomers are allowed to use the infrastructure on which activities in these markets are based. In these markets new suppliers in the downstream market wishing to enter into competition with the network owner have to use the existing networks if they do not wish to go to the lengths of setting up their own networks (often impossible in practice). In the German law access of existing and potential competitors to infrastructure facilities is determined by the essential facility doctrine. The general essential facility doctrine is laid down in the German Act against Restraints of Competition (ARC) and is complemented by sector-specific regulations. The provisions concerning the transport sector can be found in the General Railways Act (Allgemeines Eisenbahngesetz, AEG) and in the Act on Air Traffic (Luftverkehrsgesetz, LuftVG).

The essential facility doctrine in the German law

2. The essential facility doctrine was introduced into German law in 1999 as part of the general abuse control provisions. It is largely modelled after the essential facility doctrine developed in the US-American and European laws. Its wording is as follows:

“An abuse exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such concurrent use is impossible or cannot reasonably be expected.”

In the practical application of the law the essential facility doctrine creates competition through state intervention into market structures. In principle, this is incompatible with an understanding of competition as an open-ended process. The introduction of an essential facility doctrine to promote competition is therefore only justifiable where rigid market structures are complemented by a vertically integrated company structure. Typically these are situations where it is indispensable for the creation of competition that a competitor is granted access to resources owned by the dominant company. Rigid market structures are sometimes explained on the basis of the economic theory of natural monopoly. The theory of natural monopoly claims that due to their cost structure some markets are not open to competition. As a consequence a so-called natural monopoly emerges. Classic examples for such markets are the markets for gas and electricity, telecommunication services and railway transport.

3. One of the main motives behind introducing the facility doctrine into the ARC in 1999 was to prevent a fragmentation of the law on competition restraints into various sector-specific access regulations for the markets for gas and electricity, telecommunication services and railway transport. Meanwhile access to these markets is monitored in key areas by the Federal Network Agency (Bundesnetzagentur). After the amendment to the Energy Industry Act state control of gas and electricity network operators was transferred to the Federal Network Agency, which was established in 1998 under the name of Regulatory Authority for Telecommunications and Posts and was renamed in July 2005. In addition, as of 1 January 2006 the monitoring of the railway infrastructure market has also been consigned to the Federal Network

Agency. Thus, responsibilities previously assumed by the Federal Railway Office have now also been transferred to the Federal Network Agency. To sum up, the monitoring of access to the markets indicated above is in key areas assigned to **one** authority; nevertheless there are also sector-specific regulations for the individual sectors.

4. In particular with regard to the railway sector, however, the responsibilities and powers assigned to the Bundeskartellamt by the ARC remain unaffected by these developments. As part of the cooperation between the Bundeskartellamt and the Federal Network Agency the two authorities inform each other of facts that could be relevant for their respective tasks. In particular, the two authorities have to inform each other on any intended prohibition decision concerning abusive or discriminatory conduct. Before proceedings are terminated both authorities must give the other an opportunity to comment.

Sector-specific regulations in the transport sector

The rail sector

5. There is only one significant infrastructure provider in the German rail sector: Deutsche Bahn Netz AG. Deutsche Bahn Netz AG is a wholly owned subsidiary of Deutsche Bahn AG, the holding company of the Deutsche Bahn group. With the 1994 rail reform Deutsche Bahn AG was organised as an affiliated group under civil law. However, the state still owns all shares of Deutsche Bahn AG. The Deutsche Bahn group is the largest network provider in Germany and the leading provider of all railway services. In accordance with the objectives of the rail reform, railway companies must be granted non-discriminatory access to railway networks and, consequently, to Deutsche Bahn's infrastructure facilities. This principle of non-discriminatory access is laid down in the General Railways Act (Allgemeines Eisenbahngesetz, AEG) and corresponds in its nature to the essential facility doctrine. The last amendment to the legal framework for the railway sector has provided a clearer definition of this principle.

6. The amendment was carried out last year as part of the implementation in national law of the European infrastructure package, which consisted of several directives. The objective was to further advance the opening up of the rail sector to competition and, in order to do so, enforce the principle of non-discriminatory access to infrastructure facilities more effectively. For this purpose, the definition of railway infrastructure and thus the right to non-discriminatory access thereto was extended to facilities at the "last mile" stage of rail transport services, such as loading and unloading facilities. Furthermore, a new provision was introduced which commits railway companies to provide non-discriminatory information services, including information on train connections offered by other providers, in their timetable information systems.

7. The responsibility for monitoring compliance with these sector-specific regulations lies with the Federal Network Agency. It monitors compliance with the provisions on access to railway infrastructure facilities, in particular with regard to the preparation of a working timetable defining all planned train and rolling-stock movements, the decision on train-path allocation, access to service facilities and, finally, conditions for infrastructure utilisation, charging principles and amount of charges.

The air traffic sector

8. In the air traffic sector access is mainly controlled via airport coordination. Airport coordination refers to the allocation of take-off and landing slots at airports and is a result of the liberalisation of the European air traffic market. This liberalisation has considerably intensified competition between airlines for the increasingly scarce capacities at airports. While new competitors are not content to fly at whatever time is available, the established airlines are not willing to accept a reduction of their capacities for the benefit of other airspace users. It is the purpose of airport coordination to address this congestion problem

at airports and its anti-competitive effects by introducing a reliable and non-discriminatory procedure for capacity allocation.

9. A distinction is made between coordinated airports and fully coordinated airports. The classification of airports into these two categories is based on a capacity analysis. In Germany there are currently 10 coordinated airports (Bremen, Dresden, Erfurt, Hamburg, Hanover, Cologne/Bonn, Leipzig/Halle, Münster/Osnabrück, Nürnberg, Saarbrücken) and 5 fully coordinated airports (Berlin, Düsseldorf, Frankfurt/Main, Munich and Stuttgart). At coordinated airports it is sufficient if the owner of an aircraft notifies all intended take-offs and landings to the airport coordinator. At a fully coordinated airport an air carrier needs to apply for an allocation of take-off and landing slots. The airport coordinator deals with the applications for slots in order of receipt. Where an airport cannot provide sufficient take-off and landing slots the allocation is based on specific priority rules.

10. Apart from the allocation of slots, airlines are strongly dependent on groundhandling services in order to be able to carry out their air transport activities. These are services which are directly and inseparably connected with air transport. They include ground administration and supervision, passenger handling, baggage handling, freight and mail handling, ramp handling, cleaning, aircraft services, refuelling, surface transport and catering. Therefore, and in implementation of another EU directive, it was laid down in the Act on Air Traffic that airport providers are obliged to enable air carriers and other providers to supply groundhandling services. Exemptions from or restrictions of this rule are possible according to EU guidelines in the area of ramp handling and where there are under-capacities in terms of space and resources.

Competition law enforcement of the essential facility doctrine in the transport sector

11. Since the introduction of the essential facility doctrine the Bundeskartellamt has conducted several proceedings in which the granting of access was claimed on the basis of this provision. These proceedings involved in particular issues relating to network access in the energy sector. However, one of the proceedings in the electricity sector also concerned the transport sector as it involved complaints against DB Energie AG. Like DB Netz AG, DB Energie AG is a subsidiary of Deutsche Bahn AG. Within the Deutsche Bahn group its task is to provide Deutsche Bahn and other railway companies with all types of energy, in particular traction current. Some railway companies which were active in the market as Deutsche Bahn's competitors wanted to purchase the electricity for operating their railway vehicles from other suppliers than DB Energie AG. They demanded that these suppliers be granted access to Deutsche Bahn's electricity network or that adequate fees should be charged for the use of Deutsche Bahn's network. The proceedings were not formally concluded. In its investigations the Bundeskartellamt had to take into account that granting access to other suppliers is difficult due to the fact that the frequency of Deutsche Bahn's electricity network differs considerably from the frequencies of other electricity networks. Furthermore it became apparent that it would have been very hard to prove abusive pricing by Deutsche Bahn in these cases on the basis of the legal situation existing at that time and the Düsseldorf Higher Regional Court's case-law. After the amendment of the railway laws, however, traction current is no longer a part of the railway infrastructure, but is covered by the new Energy Industry Act.

12. One of the first prohibition decisions in the transport sector which was also based on the essential facility doctrine concerned the proceedings regarding port operations in the Baltic Sea ferry port of Puttgarden. The ferry connection between Puttgarden on the German island of Fehmarn and Rödby on the Danish island of Lolland was operated by Scandlines GmbH. Scandlines GmbH also owned the ferry port in Puttgarden. The company is a joint venture of Deutsche Bahn AG and the Kingdom of Denmark. Two competitors, both of which intended to establish an independent ferry service between Puttgarden and Rödby, were denied the joint use of Scandlines' landside and portside infrastructure at the ferry port of Puttgarden. At the end of 1999 the Bundeskartellamt prohibited Scandlines from refusing to grant at least

one of the competing ferry service providers joint use of its port facilities against payment of an adequate fee. In particular, Scandlines GmbH had not plausibly explained that a joint use of the port would be impossible or unreasonable for nautical or other reasons. According to the Bundeskartellamt the fact that the existing port facilities would have to be converted to some extent to allow joint use, and that organisational measures in the area of nautical safety would be necessary before a further operator would be able to start operating ferry services was not sufficient reason to deny a claim for joint use in the first place. The Düsseldorf Higher Regional Court revoked the Bundeskartellamt's prohibition decision on the grounds that it lacked precision. The Federal Supreme Court, however, considered the Bundeskartellamt's decision to be sufficiently precise and referred the case back to the Higher Regional Court for a rehearing. Meanwhile, however, the proceedings had become moot as one of the interested companies had filed a petition for bankruptcy and the other competitor, a consortium, had given up the project because the participating companies were no longer prepared to cooperate due to differences of opinion. Recently, however, the case has re-emerged because another ferry operator has claimed access to the Puttgarden port facilities as a competitor. This company filed a complaint with the European Commission which referred the case to the Bundeskartellamt. Deutsche Bahn AG has meanwhile initiated action to sell its share in Scandlines. Therefore it remains to be seen whether the new owner will also deny access to its facilities.

13. In another case the Bundeskartellamt examined, on the basis of complaints by two stevedore companies, whether the refusal of Bremer Lagerhausgesellschaft Automobile Logistics (BLG Automobile) to grant the stevedore companies access to the premises of the car terminal at Bremerhaven, where they intended to provide transshipment services for the import and export of motor vehicles, violated the essential facility doctrine. As a result of a hearing at the Bundeskartellamt BLG Automobile agreed to set up a hand-over point on the premises of the car terminal (close to the ships to be loaded) where the vehicles could be handed over to the stevedore companies. In the Bundeskartellamt's view this was sufficient to generally enable the stevedore companies to submit competitive offers for the provision of transshipment services. As the unfair hindrance was thus eliminated, the initiated abuse proceedings could be discontinued.

14. Other cases affected the railway sector in particular. These proceedings were based on the general provision regarding the essential facility doctrine and the sector-specific regulations for the railway sector. They were conducted by both the Bundeskartellamt and the Federal Railway Authority.

15. In February 2003 the Bundeskartellamt initiated investigations against Deutsche Bahn AG on account of the company's refusal to include information on timetables and fares of two long-distance routes operated by the Connex group in DB information and timetable systems. The Connex group is integrated into the Vivendi group of companies and has so far been the only competitor of Deutsche Bahn AG in long-distance passenger rail transport. It offers a regular train connection on the routes Gera-Leipzig-Berlin-Rostock and Zittau-Görlitz-Berlin-Stralsund. In parallel to the proceedings before the Bundeskartellamt, the Connex group took legal action before the civil courts and obtained a preliminary injunction obliging Deutsche Bahn to include the timetable data of Connex connections in their timetable information systems. The proceedings are pending because Deutsche Bahn AG has submitted an appeal against this decision. However, it has to be noted that, as already mentioned, with the amendment of the regulatory framework a provision was introduced which obliges railway transport companies to provide non-discriminatory information on all providers' train connections in their timetable information systems. Consequently the proceedings have become moot. One could thus say that the proceedings ended in a rather unusual way as the decisions to be made by the Bundeskartellamt and the civil courts became redundant due to the changes to the law.

16. A similar development took place with regard to complaints relating to the problem of non-discriminatory access to the "last mile" in the rail freight transport sector, i.e. in particular access to loading, unloading and shunting facilities. In these cases no formal abuse proceedings or prohibition

proceedings had to be initiated due to the fact that in the course of the Bundeskartellamt's investigation of the facts of the individual cases an amicable agreement could be reached with the parties involved. However, such proceedings will no longer be necessary in the future anyway as with the amendment the legislator has now explicitly clarified that the term "railway infrastructure", and thus the claim to non-discriminatory access, also covers the facilities of the so-called "last mile".

17. In the past the Federal Railway Authority also repeatedly exercised its powers with regard to granting non-discriminatory access to the railway network. Such interventions concerned on the one hand train-path allocation conflicts between DB subsidiaries and competing providers of rail transport services. However, the proceedings also concerned individual technical details of network access, such as the extent to which DB Netz AG had to provide specific services (e.g. manning periods of signal boxes) or the extent to which technical requirements had to be fulfilled by railway companies seeking access.

18. In summary, it can be concluded that since the mid-1990s the essential facility doctrine has gained importance in German legal practice as a consequence of the extensive liberalisation measures in the markets for telecommunication services, in the gas and electricity markets and in the railway sector. In this context it has to be considered that the liberalisation and the resulting changes in the infrastructure of these markets were based on the rationality behind the essential facility doctrine, i.e. to give potential competitors at the downstream market level access to the infrastructure of the upstream market level, thus creating competition for the first time.