Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

30-Mar-2006

English/French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2005)27
Unclassified

Cancels & replaces the same document of 22 December 2005

COMPETITION ON THE MERITS

JT03206706

English/French

GERMANY

After discussing the significance of "competition on the merits" in German competition law in general and in abuse control in particular (1), the contribution describes recent case law and general guidelines concerning national abuse provisions (2). For general considerations on how to modernise abuse control, please refer to the enclosed speech of Dr. Ulf Böge, President of the Bundeskartellamt, about "The Role of Economics in Antitrust Enforcement" given at the conference "Antitrust Reform in Europe: A Year in Practice" hosted by the International Bar Association and European Commission, DG Competition on 10 March 2005 in Brussels.

1. The term "Competition on the merits"

In Germany, the term "competition on the merits" plays a role both in the application of the Act against Unfair Competition (AUC), which aims at preventing dishonest commercial conduct, and the Act against Restraints of Competition (ARC), i.e. the core provisions of competition law.

1.1 Unfair competition

The AUC of 1909 prohibited certain trade practices considered to be unfair. The former general clause in section 1 read : "Any person who, in the course of business activity and for purposes of competition, commits acts contrary to honest practices may be enjoined from these acts and held liable for damages." Last year, the AUC of 1909 was replaced by a new act, which entered into force in June 2004. In the new Act the definition of unfair competition expressly states that the conduct in question has to be suitable to affect competition. Section 3 AUC now prohibits "unfair acts of competition which are liable to have more than an insubstantial impact on competition to the detriment of competitors, consumers or other market participants". Instead of the former concept of *honest practices* the new Act thus uses the concept of unfairness. This change in terminology, however, is seen merely as a modernisation and Europeanisation and not as a change of substance.

In delineating these "acts contrary to honest practices", both jurisprudence and literature referred to the notion of competition on the merits as a starting point. For the first time, competition on the merits was defined in an expertise by *Hans Carl Nipperdey* in the 1930's as "positive competition", promoting the sales activities of a company by means of its own efforts. In contrast, , "impediment competition" (Behinderungswettbewerb) was considered to be negative competition hindering competitors in order to smooth the way for one's own sales. The landmark case *Benrather gas stations* before the *Reichsgericht* for which the expertise mentioned above was made dealt with a price cartel of oil suppliers and involved gas stations which systematically undercut the prices of a freelance gas station operating in the city of Benrath by 0.01 *Reichsmark*. The cartel just lowered their prices in this area in order to oblige the freelance to align his prices to the cartel price. The freelance, however, considered this regional undercutting of prices to be unfair competition and went to court. The legal expert Nipperdey consulted by the oil companies concluded that the undercutting of the prices provided a clear example of competition on the merits in which the more efficient competitor with regard to price and quality prevails. The *Reichsgericht*, however, found that it was faced with a case of impediment competition, since the low gas price was proposed by the cartel only in the sales area of the freelance and nowhere else. This meant that the cartel aimed at bankrupting the freelance in order to raise prices at their ease afterwards.

Later , other forms of harming or obstructing competitors or consumers were included in a more general definition of "competition off the merits" (Nichtleistungswettbewerb). Nowadays, the decisive criterion for distinguishing competition on and off the merits is whether benchmarking is hindered or falsified . This includes the five standard cases of unfair influence on the freewill of the customer, obstruction of competitors by unfair means, imitation and exploitation, creation of a competitive advantage by disrespecting legal limitations and use of advantages due to market power . Briefly, this includes all behaviour which interferes with the functioning of competition on the merits in the competitive acts of individual companies or as an institution.

Competition on the merits is therefore not equivalent to, but a strong indicator for fair competition. The general clause prohibiting unfair competition has been interpreted by the courts as mainly protecting the fairness of competition on the merits. In the interest of competitors, consumers and other market players as well as the general public, competition should be protected from competitive acts which are contrary to moral and legal standards For example in a 2002 ruling the Federal Constitutional Court (Bundesverfassungsgericht) decided that competitive conduct can only be qualified as unfair if the object of legal protection of the AUC, i.e. the competition on the merits, is sufficiently threatened by it.

However, this decision has been criticised for stressing the term "competition on the merits" and for attaching normative impact to it.

Many critical authors claim that "competition on the merits" is nothing but an empty phrase . Instead, they advocate referring to the guiding principles of the existing economic and competitive order to define unfair competition.

1.2 Competition Rules

Furthermore, the ARC contains provisions relating to the establishment of competition rules by trade and industry associations and professional organisations. These declarations are not legal instruments. Even if they are binding for the members of the associations or organisations according to their statutory rules, they are not generally applicable. The trade and industry associations and professional organisations may apply to the cartel authorities for recognition of these rules. Third-party undertakings operating at the same level of the economy, trade and industry associations and professional organisations of the suppliers and purchasers affected by the competition rules, as well as the federal organisations of the levels of the economy involved are given an opportunity to comment before recognitions are issued by way of a decision by the cartel authority and published in the Federal Gazette. The recognition by the competition agencies under the current ARC is equivalent to an authorisation of the competition rules as individual exceptions to the general ban on cartels. The seventh amendment to the ARC, which is currently undergoing legislation , will replace the system of notification and authorisation of anti-competitive agreements with a system of legal exception. The recognition will therefore just be a legal assessment reflecting the opinion of the competition authority and will not be binding for third parties (e.g. in the context of civil actions).

All in all, about eighty competition rules have been registered by the Federal Cartel Office and the Cartel Authorities of the German *Länder*, which contain examples of practices considered to be either fair competition or competition on the merits or both. A list is published in the biennial activity report of the Federal Cartel Office. Important examples include the rules for the brand name industry established by the trademark association (Markenverband) and registered by the Federal Cartel Office in 1976 as well as the competition rules for the pharmaceutical industry.

Section 24 ARC states that competition rules are provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct which violates the principles of *fair*

competition or *effective competition based on performance*, and of encouraging conduct in competition which is in line with these principles.

The possibility of establishing competition rules had been introduced into the ARC in 1958 as a compensation for the general ban on cartels in order to allow the economy to arrange for fair and respectable competition on the merits even if such competition rules restrict the ban on cartels. The criterion of *effective competition based on performance* was added to section 24 ARC in 1973 in order to protect competition against unjustified advantages obtained by dominant or otherwise powerful companies irrelevant of their own performance. The legislator stated that this addendum was supposed to encourage small and medium-sized enterprises to cooperate and to oppose practices which violate the principle of competition on the merits.

It is understood that e*ffective competition based on performance* is just another expression for competition on the merits. The legislator considered competition on the merits to be functioning, efficient competition, i.e. competition fulfilling its economic tasks as well as possible. In contrast to the civil law term "fair competition", which protects individuals, competition on the merits safeguards competition as an organising principle of economic policy and therefore as an institution.

There have been very few administrative decisions or court rulings dealing with the general notion of competition on the merits in the context of Section 24 in more general terms. Therefore, this issue is still not settled. Some critical literature even considers the term of competition on the merits to be elusive and to lack a palpable normative content .

1.3 Abuse of dominance

The concept of competition on the merits has been used in the context of the national provisions on abuse of dominance . German abuse control differentiates between *exclusionary abuse* (Section 19 (4) no. 1, Section 20 (1) ARC) which includes the special case of refusal of access to essential infrastructure facilities (Section 19 (4) no. 4 ARC) and *exploitative abuse* (Section 19 (4) No 2,3 ARC). Exploitative abuse is characterised by the instrumental use of market power to achieve certain commercial goods and can only be applied by dominant companies. Such business practices are in themselves abusive. Exploitative abuses are more difficult to establish, since they can include "normal methods of competition" which - if enforced by a dominant undertaking – distort competition and hinder competitors.

The general concept of "competition off the merits" has been used by the Berlin Court of Appeals (Kammergericht Berlin) in order to establish the existence of *exclusionary abuses* under section 19 (4) no.1 ARC. The Berlin Court of Appeals developed the so-called "two barriers" theory in its landmark case *combined tariffs (Kombinationstarif*) in 1977. It stated that an abuse might be presumed (i) if the conduct of the dominant company is not within the bounds of competition on the merits (Nichtleistungswettbewerb) and (ii) if the market structure is further worsened by it by profoundly restricting or even eliminating the competition remaining on the dominated market (Restwettbewerb).

When defining abusive behaviour, the court explained that under German law an abuse does not necessitate a causal link between the dominant position and the abusive conduct. This is why the dominant company cannot justify its behaviour by proving that it is common or widespread in the relevant business community. This different treatment of dominant companies with regard to their competitors is justified because of their powerful economic position. On the other hand, German competition law tolerates the emergence or strengthening of a dominant position if it is due to a company's inner growth. Therefore, the law cannot forbid all the business activities of a dominant company that influence the market structure – which they potentially do in most cases. Otherwise , the competitors of the dominant company would not

have to face any competition by the market leader at all and competition would come to a complete standstill.

When interpreting the term "abusive", the foremost objective of abuse control, which is to keep the entry to the dominated market open, has to be taken into consideration. An abuse therefore does not equate with condemnable conduct . It might be defined by keeping in mind the fundamental principles governing a competitive economy, and most of all the principle of freedom of competition. The Berlin Court of Appeal therefore concluded that an abuse might be constituted by all conduct outside the area of competition on the merits, i.e. promoting sale activities by the company's own able merits , even if it does not fall within the scope of application of the Act against Unfair Competition.

In the case at hand , the court considered that a combined advertising tariff for two different newspapers at an overall lower price than separate advertisements in the individual newspapers could not be qualified as competition on the merits. It further explained that linking two offers serves the purpose of pushing the sales of the less popular product or of enhancing the overall attractiveness of both products. In any case, the individual offer is not competing by its own merits anymore, but has something added to it. Incidentally , an abuse was finally denied since the second criterion was not met, i.e. there was no noticeable restriction of the remaining competition in the market.

In a later judgement, the court mentioned improved product or service quality or the passing on of cost advantages of mass production in the form of price reductions as examples for competition on the merits.(Fertigfutter II 1980)

An example for competition "off" the merits is provided by a temporary fidelity rebate awarded to buyers who had collected a certain number of tokens printed on the product . However, this special offer was not considered to be abusive since it did not create a serious and durable threat to the competition on the dominated market (Rama-Mädchen 1978).

In another case in 1979, the Berlin Court of Appeal further explained that dominant companies are allowed to compete by their merits even if this endangers weak competitors . Given the aim of the ARC to protect competition in order to increase efficiency and assure the best possible supply to consumers, behaviour contributing to these objectives can be qualified as competition on the merits. Furthermore, the dominant company has a right to fend off competitive measures/actions by its competitors on the same or substitute markets. Applying these principles, the court decided that the distribution of a newspaper's Sunday edition to subscribers for free qualifies as competition on the merits. It argued that the Sunday edition refurbishes the original offer of a daily newspaper without coupling it to a new one. Such competition on the merits is not abusive, irrelevant of the possible threat it poses to the market structure.

However, this jurisprudence has been largely criticised for employing terms which cannot be properly defined. Generally speaking, competition on and off the merits are considered to be impossible to distinguish. Therefore, most authors as well as the Federal Supreme Court apply the theory of the so-called moveable barriers in order to establish the existence of an exclusionary abuse. This method mainly focuses on an extensive weighing of the interests at stake on a case by case basis. More specifically, the question whether the conduct in question can be objectively justified is examined. This criterion plays an important role in all forms of abuse. Some provisions expressly state the requirement of such objective justification (e.g. section 19 (4) no. 1 and 3; section 20 (1) ARC), in other cases this requirement has been developed by courts or the Bundeskartellamt. To determine whether a behaviour is justified an extensive weighing of the interests of the parties concerned has to take place. The interests of the dominant company on the one hand and those of the companies whose opportunities to compete are impeded on the other hand have to be balanced. The purpose of the ARC, which is to guarantee freedom of competition, must be given its due weight. Apart from that only interests that are acknowledged by the existing legal order are relevant. Public

interest (such as the environment, health issues) are only restrictively taken into account. Efficiency aspects are generally not considered when balancing the different interests.

2. General guidelines on national abuse provisions and recent case law

The term "competition on the merits" does not play a decisive role in either the guidelines published or the recent case law and they are just exposed for completeness' sake. Incidentally , in the seventh amendment of the Act against restraints of competition, which is undergoing legislation right now, "competition on the merits" has not been mentioned in the governement's explanatory statement or in the Bundeskartellamt's advisory opinion either.

2.1 Guidelines

The Bundeskartellamt has published principles for interpreting the ban on selling below cost price (section 20 (4) sentence 2 ARC). The principles take account of the findings from proceedings conducted so far and court rulings issued in this area in order to provide the companies with the necessary legal certainty. The principles explain in practical terms that an unfair hindrance exists if an undertaking with superior market power sells not merely occasionally below cost price, unless there is objective justification for so doing. In these guidelines it is clarified that sales below cost price over a period of up to three weeks are to be considered merely temporary. On the other hand, the requirements of section 20 (4) ARC can be fulfilled even if there is neither a predatory intent nor proof of a tangible restraint of competition conditions. The company concerned can only dispel the presumption that it is selling below cost price by proving that the conduct was objectively justified. Matching a competitor's below cost price strategy cannot generally be regarded as constituting such an objective justification. Rather, an objective justification of below-cost prices is limited to product specific characteristics such as the sale of perishable or seasonal goods. In the view of the Bundeskartellamt, sales below cost price may also be objectively justified when an undertaking enters a market for the first time in cases where its market share under the Bundeskartellamt's definition will be marginal anyway. That does not apply, however, when a firm changes hands or when a merger is involved. Moreover the principles also make clear that an offer below cost price may also be assumed if a constant offer price is exceeded by an increasing cost price. In this case the offer price is in principle to be raised to the extent that it no longer falls below the new cost price. Nevertheless, in individual cases and in the event of unexpected price increases, it may be objectively justified to temporarily maintain the offer price, provided this serves to establish a new supply source.

Furthermore, the Bundeskartellamt has published a discussion paper about the assessment of long-term gas supply contracts under competition law in January 2005. It deals with supply contracts concluded by German gas transmission and gas production companies on the supply side and the regional and local gas distributors in Germany on the demand side. The Bundeskartellamt considers problematic

- periods of contract of more than two years and supply quantities of more than 80 per cent of the respective consumer requirements and

- periods of contract of more than four years and supply quantities between 50 and 80 per cent of the respective consumer requirements.

Although the assessment is mainly based on the violation of the ban of cartels, national and European abuse provisions also come into play if the individual gas distributor holds a dominant market position.

Besides that, no other guidelines or policy statements on the application of the national abuse provisions exist. It is noteworthy that the term "competition on the merits" does not appear in any of the guidelines named above.

2.2 Recent case law

The prohibition of abusive behaviour of a dominant firm was established in 1958 when the German Act against Restraints of Competition (ARC) entered into force. Over nearly 50 years numerous administrative or civil proceedings (seldom fine proceedings) have been conducted pursuant to sections 19, 20 ARC. Although there were a number of leading cases over the last decades this contribution focuses on precedents from the last five years.

The most important cases concerning exploitative abuse can be found in the energy sector. The leading cases are Stadtwerke Mainz, TEAG and RWE Net. Concerning exlusionary abuse the leading cases over the last years were WalMart (below cost sales), Deutsche Lufthansa/Germania (predatory pricing), Oil Companies (price squeeze), Metro/allkauf (preferential terms), Puttgarden (essential facilities) and Mainova (essential facilities).

- *Preferential terms: Metro/allkauf*

In 1999, the Bundeskartellamt prohibited Metro, which took over the allkauf group, from causing suppliers to adjust their terms in Metro's favour and to make the corresponding compensatory payments to Metro. After the Metro/allkauf merger had been allowed to go ahead, Metro had asked both firms' suppliers to adjust their terms. The Bundeskartellamt found that Metro's conduct vis-à-vis at least half of the firms questioned met the conditions of unjustified hindrance within the meaning of section 20 (2) ARC. Metro obtained preferential terms by causing suppliers to retroactively grant it the most favourable prices and terms that had been agreed in the annual contracts with Metro and allkauf. This placed Metro at an advantage which had the same effect as preferential clauses. The Bundesgerichtshof (Federal Supreme Court) confirmed that retroactively granted most favourable prices are preferential terms that are prohibited by section 20 ARC.

- *Price squeeze: Oil Companies*

In 2000 the Bundeskartellamt prohibited with immediate effect the major six oil companies in Germany from demanding higher prices (plus a freight surcharge) for supplying independent petrol station operators than they charge final consumers at their own petrol stations. By opening up a price gap and charging small petrol station operators at their refineries higher prices than those charged to consumers at their own petrol stations the large oil companies were unfairly hindering independent petrol station operators. This pricing policy prevented independent petrol station operators right from the start from making a profit on fuel sales. Unlike the large vertically integrated six oil companies, small and medium-sized firms did not have the same access to the crude oil market and the financial resources to cushion any losses on the fuel market. In 2001 the Oberlandesgericht Düsseldorf (Higher Regional Court) reversed the decision.

- *Sales below cost price: WalMart*

In 2000 the Bundeskartellamt prohibited pursuant to section 20 (4) ARC the companies Wal-Mart, Aldi Nord and Lidl from selling certain basic foods below their respective cost prices. The Bundeskartellamt established that owing to their size, market shares and resources the three firms had superior market power over the independent grocers. The manufacturers' selling prices, discounts and other price-related terms, were decisive factors in determining the cost prices. Products were considered not to be sold merely occasionally below cost price if such offers lasted for more than two months. WalMart was the only company to appeal before the Oberlandesgericht Düsseldorf (Higher Regional Court) which finally acknowledged WalMart’s appeal because it did not regard WalMart’s sale of sugar below cost price as sufficient for prohibition. The Bundesgerichtshof (Federal Supreme Court) granted for the most part the

appeal lodged by the Bundeskartellamt especially clarifying that an unwritten criterion, i.e. "appreciability", should not be added to the conditions of section 20 (4) sentence 2 ARC.

- *Predatory pricing: Deutsche Lufthansa/Germania*

In 2002 the Bundeskartellamt prohibited Deutsche Lufthansa AG (DLH) from demanding a price for a one-way ticket per passenger on the Frankfurt-Berlin route which is not at least 35 euro above Germania's price, as long as DLH did not have to charge more than € 134 as a result. The Bundeskartellamt saw the pricing strategy of DLH as an attempt to squeeze its new competitor Germania out of the market and feared that emerging competition would be substantially impaired as a result. Germania started operating scheduled flight services between Berlin and Frankfurt/Main in November 2001. The company offered tickets at € 99 for a one-way, fully-flexible and re-bookable flight. The conditions essentially corresponded to DLH's economy tariffs suitable for business travellers. DLH reacted by also introducing a fully-flexible economy tariff which offered an immense price reduction (up to €485). In January 2002 DLH raised the price to € 105 clearly undercutting Germania's price of € 99 as it included services which were not offered by Germania. The price DLH set was clearly below its average operating costs per passenger. The only rational explanation for this pricing strategy was that DHL attempted to force Germania from this route and to recoup resulting losses at a later stage by discontinuing this price tariff and resorting to previous ones. Consequently, the Bundeskartellamt prohibited DLH from demanding a price (including passenger fees) for a one-way ticket per passenger on the Frankfurt-Berlin route which was not at least €35 above Germania's price, as long as DLH did not have to charge more than €134 as a result. The decision was confirmed for the most part by the competent court. The court made it clear that the decision did not constitute an active market structure control by the Bundeskartellamt. Instead, the Bundeskartellamt protected the newcomer Germania from being hindered by the dominant Lufthansa.

Against this background the Bundeskartellamt in 2002 considered the pricing strategy of Deutsche Lufthansa AG (DLH) for the Berlin – Frankfurt route abusive because DLH attempted to squeeze its new competitor Germania out of the market. In addition to the competitive problems on the affected route, the abusive conduct of DLH could have had a considerable deterrent effect on other potential rivals and on other routes which are currently dominated by DLH.

- *Essential Facilities: Puttgarden*

In 1999 the Bundeskartellamt prohibited Scandlines Deutschland from refusing competing ferry companies access to the Puttgarden terminal on payment of an adequate fee. The proceedings were based on complaints by competitors, who would have liked to start a ferry service on the Puttgarden-Rödby (Denmark) line, but whose application for the shared use of the Puttgarden ferry terminal was refused by Scandlines, the terminal owner. Back in 1993, the European Commission refused the Danish government permission to prevent Stena Rederi from setting up a ferry service in Rödby. The Bundeskartellamt found that Scandlines was infringing section 19 (4) no. 4 ARC in preventing terminal access. Scandlines dominated the market, both with regard to its terminal facilities and the downstream market for ferry services between Puttgarden and Rödby. Legal and physical obstacles stand in the way of the construction of a new terminal in Puttgarden, whereas the shared use of existing terminal facilities by an additional ferry operator would have been possible following appropriate construction and organisational modifications. Weighing Scandlines' interest in having the unlimited use of its own terminal against the applicants' interest in starting up competing ferry operations, the decisive factor for the Bundeskartellamt's decision was the public interest in opening up the market to competition.

The Düsseldorf Higher Regional Court set aside the decision of the Bundeskartellamt holding that the operative provisions of the decision were too vague. On the appeal of the Bundeskartellamt the Federal Supreme Court repealed the judgement stating that the decision was formally correct and not too

indefinite. It referred the case back to the Düsseldorf Higher Regional Court to decide on the material issues of the case (access to the terminal port) but the case was settled before the Higher Regional Court between the Bundeskartellamt and Scandlines.

- *Essential* Facilities: Mainova

In October 2003 the Bundeskartellamt prohibited Mainova AG from denying other energy suppliers connection to its medium-voltage network. The complaining companies depended on this network connection in order to operate site network facilities on premises used for business or housing purposes and to supply end customers located there with electricity generated by the companies themselves or by third suppliers. Both site network operators were in accordance with section 19 (4) no. 4 ARC entitled to have access to Mainova AG's medium-voltage network. According to the Bundeskartellamt the grounds given by Mainova AG to justify the denying of connection were not valid. No additional network costs would arise to Mainova AG nor would its existing customer structure be negatively affected. Energy law provisions provided no legal basis for Mainova AG to claim each new site for itself either. The Düsseldorf Higher Regional Court affirmed the decision of the Bundeskartellamt.

- *Exploitative* Abuses: The *Energy* Cases

The Bundeskartellamt prohibited German Network Operators in three model cases from charging abusively excessive network fees in respect of metering and billing fees. The Bundeskartellamt ordered Thüringer Energie AG (TEAG) in February 2003 to reduce its current fees for network use with immediate effect. The Bundeskartellamt regarded TEAG's method of charging as abusively excessive and as a violation of section 19 Abs. 1, Abs. 4 Nr. 2 and 4 ARC on the basis of a cost calculation approach. It was the first ruling on abusive practices issued by the Bundeskartellamt within the context of the several abuse proceedings in the energy sector. The aim of all proceedings was to substantially reduce fees for network use which due to their level constituted the main obstacle to effective competition in the electricity markets. The decision was quashed by the Düsseldorf Higher Regional Court in February 2004 and has not been appealed by the Bundeskartellamt.

Also in February 2003 the Bundeskartellamt prohibited RWE Net from charging excessive electricity metering and billing prices on the basis of the comparable market test. The Bundeskartellamt found that these prices were abusively excessive and constituted a violation of section 19 (4) No 1, 4 ARC. In comparison with the other major electricity providers RWE Net's metering and billing prices were among the highest in Germany. This decision was also repealed by the Düsseldorf Higher Regional Court in December 2003 .

Finally, the Bundeskartellamt prohibited Stadtwerke Mainz AG (Mainz municipal utilities) from demanding abusively excessive fees for network use and ordered it to reduce its current fees for network use by 20% and declared the decision to be immediately enforceable. The Bundeskartellamt used a revenue-based comparison with another network operator for its findings (comparable market test, a kind of benchmarking). The Düsseldorf Higher Regional Court set aside this decision in March 2004 holding that the network fees of Stadtwerke Mainz are not abusively high and do not infringe section 19 (4) No. 2 and 4 ARC. This judgement has been appealed by the Bundeskartellamt.

ANNEX I.

Dr. Ulf Böge
President of the Bundeskartellamt

Speech
on
"The Role of Economics in Antitrust Enforcement
- a German and European Approach" -

at the conference
"Antitrust Reform in Europe: A Year in Practice"

hosted by the
International Bar Association and European Commission, DG Competition

on 10 March 2005
in Brussels

I.

1. If we look at the themes of competition conferences taking place in the next few weeks and months we find that everything seems to revolve around modernisation and economisation.

> Both sound good: Competition law which is applied in a modern way and is founded on solid, in other words, empirically based economic findings.
>
> However, on closer inspection we find that those calling for modernisation also mean economisation. This simplifies our discussion. The more economic approach is equated with one which is modern.
>
> Or is this just a catchword?
>
> I think that we can deny this because the term "more economic approach" is based on one concept: The aim being in examining the conduct of a company for its potential abusive effect to prove or estimate in economic terms the market effect of an action which has either already been performed or announced or is impending.
>
> One could say: So far so good, if the devil wasn't in the details.
>
> Alone the approach of proving a market effect as evidence of abuse and that of only estimating it lie worlds apart.
>
> But neither are really possible without economics.
>
> I think that there is general consensus on this.

2. So what do we mean by the more economic approach?

The emphasis here is not on "economic" but on "more".

> "More" can refer to quality, although in this case it could be called "better economic approach", i.e. those taking decisions in the authorities and possibly courts and, vice-versa, those representing companies, usually law firms, i.e. legal experts, need better economic expertise, either their own or hired from independent experts.

This would produce better results – pro competition, of course, because, after all, that is the aim of abuse control.

> Or "more" could refer to quantity.

This would mean substantiating actual market effects or estimations of such more comprehensively and intensively on the basis of various expert opinions.

> In reality no clear cut distinction between the two will be possible. The objective, however, is clear: A comprehensive economic assessment of each individual case is desired.

In the light of the heavily case-based analysis under Anglo-American law it is not surprising that this approach originates above all from this particular legal tradition.

But does such an economic approach stand in the way of the system of per-se regulations?

I don't think so because in any case the point is to assess the individual case appropriately. The application of economic methods is of great practical use in this.

3. Let me illustrate this with an example of the prosecution of a suspected cartel agreement.

> In 2003 the Bundeskartellamt proved the initial suspicion of a price agreement in the nationwide public tender for service contracts of "Der Grüne Punkt – Duales System Deutschland AG" (DSD) ("The Green Dot") based on statistical analyses and economic argumentation. Only in this way could a search warrant be obtained from the competent court.
>
> The outcome of the first round of the DSD's nationwide tender was, in fact, not what would have been expected under competitive conditions.
>
> In around half of the contract areas only one waste management company had submitted a bid although many more would have been in a position to do so. As a result the bid prices in the contract areas with only one offer were on average approx. 70 per cent above those in the other contract areas.
>
> Another striking feature was that in many cases only the former contract holder had submitted a bid.
>
> This gave rise to the suspicion of a cartel agreement.
>
> Consequently DSD put out a second tender in some contract areas, which reduced costs by over 20 per cent (200 mio €).
>
> In these proceedings the Bundeskartellamt conducted extensive economic analyses based on the first round of the tender to prove the suspicion. On this basis the competent court permitted searches of the accused companies, which then confirmed the suspicion of a cartel agreement.

II.

4. And now to the issue of abuse.

> The aim of the comprehensive economic assessment of an individual case is to ensure that no entrepreneurial conduct, not even by a dominant company, is punished which might not be at all abusive in its effects on the market.
>
> Some advocate the view that the hindering conduct of dominant companies would be acceptable if this achieved efficiencies which benefit the consumer.
>
> For example, the producer of a bulk product can reduce his unit costs by squeezing out his smaller rivals and partially pass these reduced costs on to the consumer in the form of price reductions.
>
> But the economic analysis cannot end here. When competitors disappear from the market the competitive pressure on the dominant producer, who is now even stronger, to pass on his efficiency gains to the consumer, also reduces. And does a narrowing of the supply structure to in some cases only one provider not ultimately bring innovation to a standstill?

> Should it not rather be possible to fall back on experience, in other words empiricism, to assess this issue or is there need for concrete economic substantiation?

Under German and European competition law the effects on competition and other competitors have so far been the decisive direct criterion for evaluating whether and to what extent a certain conduct is abusive. Economists do not dispute the possible restraining effects of cut prices.

On the other hand it must be examined in each individual case whether or to what extent possible benefit arises from a dominant company's conduct for the opposite side of the market and the consumers, also in the medium and long term.

This must not mean, however, that per-se rules cease to be justified and should generally be replaced by an economic analysis of each individual case.

Per-se rules are essentially important abstracts from economic facts and prognoses which have been investigated empirically and found to be correct for the most part.

They are indispensable in legal practice. They ensure legal certainty and predictability.

This is fundamentally important for companies, authorities and courts which have to make assessments under competition law.

Although in some cases economic methods can provide answers to precisely formulated individual questions they cannot replace an overall competitive assessment.

Moreover the quantification of efficiency gains poses enormous evaluation difficulties.

The dynamics which are often connected with efficiency gains add to these difficulties.

Weighing up efficiency gains against the negative effects of the restraint of competition can thus result in considerable problems even if economic methods are applied. A possible consequence is lower enforceability.

> I have chosen this case because it demonstrates that it is absolutely possible for the more economic approach to result in disadvantages in competition law enforcement.
>
> Or, as a provocative question: Can economisation also lead to a paralysis in competition law enforcement?

5. Let me give you another practical example:

> In November 2001 the newcomer Germania entered into competition with the dominant Lufthansa on the Berlin-Frankfurt route by offering considerably lower prices. Lufthansa already reacted in December by reducing its ticket prices, in some cases by more than half of the original price, using a cut-price strategy to squeeze Germania out of the market.
>
> In a swift reaction the Bundeskartellamt issued a decision two months later prohibiting Lufthansa's predatory pricing strategy. In a preliminary decision issued only one and a half months later the Düsseldorf Higher Regional Court confirmed this decision.

By using economic studies and investigations it would have been possible to substantiate the abusive conduct in this case in more detail and evaluate the actual market effects even further. However, this would have been time-consuming.

And would this not ultimately have played into the hands of the dominant company? In the meantime the newcomer Germania would long have been squeezed out of the market! And the result of this development would certainly have been that no other newcomer would have dared to enter the market either.

The mere existence of market power, combined with lengthy proceedings, can thus already hinder competition without the existence of a specific abusive conduct.

III.

6. I have thus come to the question of whether Article 82 EC aims at prohibiting conduct that is potentially detrimental to competition or whether an actual impact on the market is required.

According to the Commission's previous practice and the Court of First Instance's 2003 judgments in the Michelin II and British Airways/Virgin cases it is not necessary to provide proof of actual market effects in order to prove abusive conduct. The abstract threat effect is sufficient.

In contrast, mainly literature calls for an adoption of a market-based analysis in order to take into account the economic effect of such practices. Otherwise, according to this, there is the threat that possible negative effects could be exaggerated and the companies' freedom of action could be curbed inappropriately. Even such conduct by dominant companies which on the whole enhances welfare could otherwise be prohibited.

7. In my view the market-based analysis involves a number of disadvantages:

First of all the causality between conduct and market effect would have to be proven. However, such proof requires a comparison between the actual market situation and the potentially possible market result. As the possible market result can ultimately only be speculated upon, the market-based analysis as a whole can be challenged at any time.

Let me illustrate this by using the rebate system as an example.

A market-based consideration is always an ex-post consideration. The decisive criterion in determining abuse is, however, the ex-ante incentive effect emanating from the rebate system.

If a dominant company uses a rebate system as a prevention against expected competitive pressure from competitors, and if this rebate system provides a strong incentive for its customers to continue to purchase the product from that company, there will be no effect on the market.

An ex-post consideration of market shares is thus not appropriate to ascertain the actual effects of a rebate system.

As I explained in the Lufthansa/Germania case, a second considerable disadvantage of a market-based consideration of conduct lies in the time perspective.

The protection of competition requires that abusive practices are prohibited at the earliest possible stage in order to avoid long-term damage to the competitive structures.

If proving abusive conduct required the presence of a market effect, an intervention by the competition authorities would only be possible at a stage where the negative market effects had already emerged. At this late stage, however, competition could possibly have already been damaged irreversibly. Even a clarification of the abusive conduct by way of legal action would hardly be possible.

The Bundeskartellamt is therefore always interested in having abusive practices discontinued at an early stage, possibly by means of negotiation.

Let me give you an example:

In 2003 the Bundeskartellamt initiated abuse proceedings against Deutsche Bahn AG as the company intended to tie two large orders for the supply of railway cars and engines to the purchase of vehicle maintenance works (with employment guarantees). The Bundeskartellamt regarded this as an abusive exploitation of Deutsche Bahn's dominant position and initiated proceedings. The company subsequently abandoned its tie-in plan for the invitation for tenders.

IV.

8. What conclusion can be drawn from this?

(1.) The application of competition law is unthinkable without economics. However, we must be cautious about the call for **more** economics (which would certainly be good for consultancy firms). This must not be allowed to unduly prolong proceedings. Also we should not immediately jump on every new theory and method. First of all they must be verified and their usefulness proven.

(2.) Greater awareness of economic correlations is indispensable. In this respect the more economic approach can be positively evaluated.

On the other hand, however, it could have disadvantages such as less legal certainty and predictability and the prolongation of proceedings which is often problematic.

(3.) In my opinion, per-se rules and focusing on the abstract threat effect continue to be useful instruments of abuse control.

However, per-se rules must be developed further and adjusted to new economic insights and methods.

(4.) In Germany we have been developing per-se rules for almost 50 years. Currently we are working on the 7th amendment of our competition law. Each amendment casts into law new insights which have often been gained through economics.

Perhaps this explains the difference why we in Germany advocate economics on the one hand, but initially considered the call for an "economic approach" as incomprehensible since we had taken it for granted, and why we continue to be somewhat sceptical about the word "more": This is because we are concerned about a weakening of competition law enforcement.