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Introduction

The responsible use of natural resources is a cornerstone of future-oriented social policy. Since the 1970s, it has increasingly been realised in Germany, but also worldwide, that it will be impossible to maintain in the long term the massive level of consumption of natural resources, in particular of primary energy. In particular in the industrialised countries there is a need to dramatically improve the efficiency of use and consumption of resources. Although the future scarcity of resources can be alleviated by process and product innovation such innovations cannot be predicted with certainty. A „principle of caution" therefore urges the economical use of natural resources. It is the task of the state and society to provide the necessary behavioural incentives for this.

On the other hand, competition as an organising principle of the economy is also a cornerstone of future-oriented social policy. Sometimes it can be difficult to reconcile the demands of competition and environmental protection. This conflict of interests raises the question of how much weight should be attached to competition as an organising principle in the protection of resources and the environment.

1. The dichotomy between competition and environmental protection – the example of the waste disposal industry

In Germany in recent years the question of the relation between competition and environmental protection has been raised particularly in connection with the waste disposal industry.

The waste disposal industry is mainly regulated by the Waste Avoidance, Recycling and Disposal Act (*Kreislaufwirtschafts- und Abfallgesetz*) and by several specific provisions such as the Packaging Ordinance (*Verpackungsordnung*) or the Electrical and Electronic Equipment Law (*Elektro- und Elektronikgerätegesetz*). The legislator wants to make full use of all possibilities to avoid and recycle waste in order to reduce the amount of waste which needs to be disposed of to a minimum and to make the disposal itself as environmentally friendly as possible. The recycling sector is meant to significantly reduce the amount of waste. At the same time it is meant to defuse the issue of supply with natural resources by prolonging the availability of mineral and fossil resources through recycling measures. This essentially corresponds to a use of natural resources according to the principle of caution.

1.1 The dual system in Germany

The Bundeskartellamt has repeatedly dealt with the position and market behaviour of "Der Grüne Punkt – Duales System Deutschland GmbH (DSD)" (The Green Dot) which was established in 1990 to implement the Packaging Ordinance.

According to the Packaging Ordinance manufacturers and distributors have a direct product responsibility for sales packaging. Due to this responsibility they are obliged to take back used sales packaging and to use it for the manufacture of new packaging or for other purposes (take-back and recycling obligations). For most manufacturers and distributors it would be very time-consuming and costly to meet these obligations themselves. However, they have the possibility to fulfil their take-back and recycling obligations by participating in a so-called dual system which ensures nationwide a regular collection of waste from consumers and a subsequent recycling of it.

DSD was the first undertaking to offer such a dual system in Germany. Most manufacturers joined the dual system of DSD in the early 1990s.

1.2 The contract system of DSD AG

To organise the taking-back and recycling of used packaging DSD concludes a multitude of contracts with different partners.

- The so-called *Zeichennutzungsverträge* (contracts governing the use of the DSD trademark) regulate the assumption by DSD of the take-back and recycling obligations of manufacturers and distributors. The fees paid by manufacturers and distributors ensure the financing of DSD. The *Zeichennutzungsvertrag* grants the right to place the "green dot" on packaging. The fees are generally calculated on the basis of the actual utilisation of DSD's disposal services.

- The so-called *Leistungsverträge* (service contracts) or, as they are now also called, *Entsorgungsaufträge* (disposal mandates) regulate the collection, transport and sorting of sales packaging by disposal firms mandated by DSD.

- The recycling of the collected sales packaging is regulated by so-called *Garantieverträge* (guarantee agreements). In these agreements so-called guarantee companies undertake to properly recycle the material collected by DSD. These guarantee companies are usually waste disposal firms or groups, as well as companies that are linked to the manufacturing industries. In the meantime the guarantee agreements have lost significance because DSD partly allows for the self-marketing of the collected material by the collector itself or because DSD takes on the recycling of the material itself.

This contract system in conjunction with the corporate structure of DSD led to a bundling of demand for disposal services. Until the end of 2004 the DSD partners were large companies from trade and industry, companies which brought sales packaging into circulation and were under a take-back and recycling obligation. In the committees of DSD these partners agreed on essential issues such as licence fees. As a consequence the partners no longer demanded the relevant disposal services on the competitive market but cooperated with DSD instead.

Due to these structures, providers of alternative dual systems hardly had any possibility to offer their services on the market. In addition, even the disposal industry held an interest in DSD as a dormant partner. Since it is hardly possible or feasible to duplicate waste collection systems, alternative collectors were forced to use collection facilities provided for by DSD. DSD used its influence on the disposal firms to hamper as much as possible the commissioning of alternative dual systems and thus prevented even the market entry of such alternative suppliers.

1.3 The Practice of the Bundeskartellamt and the European Commission with regard to DSD AG

Despite competition concerns the Bundeskartellamt had at its own discretion tolerated DSD's activities initially against the background that this system was created to put in practice the objectives set forth in Section 1 of the Packaging Ordinance.

However, over the course of time it became apparent that the system led to considerable competition restraints. The result was excessive licence fees which filling companies and the retail trade could pass on in full to the consumer. Possible cost reductions were not undertaken in the interests of the disposal firms. DSD's competitors, i.e. rival dual systems or providers of self-management solutions, were considerably hindered from entering the market. In particular the last point prompted the European Commission to take

its decisions of 20 April 2001[1] and 17 September 2001[2], which aimed at improving market entry possibilities for alternative providers. Due to DSD's corporate structures such possibilities still remained extremely limited for these providers.

In 2001 the Bundeskartellamt initiated administrative fine proceedings against DSD and others on the suspicion of calling for a boycott against their competitors. However the competent court revoked the orders imposing the fines in this particular case because it did not consider the letters issued by DSD as a call for boycott but as a legitimate means of safeguarding its own business interests.

Against this background in 2002 the Bundeskartellamt informed DSD that it would discontinue its previous practice of toleration. DSD did not make use of the possibility to apply for exemption from the prohibition of cartels under Section 7 ARC.

As part of the 6th Amendment to the ARC the lawmaker had introduced a new exemption rule in Section 7 of the ARC which related i.a. expressly to cooperations for the purpose of meeting take-back and disposal obligations under the law on the protection of the environment. Accordingly, agreements and decisions which contributed to improving the taking back or disposal of goods, while allowing consumers a fair share of the resulting benefit, could be exempted from the prohibition of cartels provided the improvement could not be achieved otherwise by the participating undertakings and was of sufficient importance when compared with the restraint of competition connected with it, and the restraint of competition did not result in the creation or strengthening of a dominant position.[3] The aim of this regulation was not least to bring a certain amount of transparency and legal certainty into the conflict between competition objectives and environmental protection objectives.

In order to prevent a prohibition decision under competition law DSD implemented extensive restructuring measures. The holdings of companies in the waste management sector were dissolved and seats on the supervisory boards abandoned. In December 2004 a financial investor took over DSD and its previous companies from the trade and industry represented in the company resigned as partners. This ended the cartel-like structure of DSD as illustrated above, making it possible to discontinue the prohibition proceedings against the company.

1.4 Recent Developments

It is expected that as a result of the dismantling of DSD's cartel-like corporate structure the competition situation will change and the market will open up. The Bundeskartellamt is aware of the fact that a change to the shareholder structure will alter the cartel-like character of the company but not automatically alter the dominant position which DSD still holds in the market for taking back used sales packaging. DSD thus remains subject to abuse control under competition law. The Bundeskartellamt can take action against the unfair hindrance of competitors. However the Bundeskartellamt assumes that with the change to the shareholder structure the structural conditions for more competition in this market will have considerably improved. For it is likely that the demand side will base their choice of disposal system first and foremost on purely economic aspects. The function of DSD's shareholders with their possibilities of taking influence and thus pursuing their own interests will no longer play a role in the future. This

1 EC OJ L 166/1 of 21 June 2001.

2 EC OJ L 319/1 of 4 December 2001.

3 With the 7th Amendment to the ARC and the adaptation of German to European law this exemption, which was modelled on Art. 81 (3) EC, has been abolished. The content of the previous section has now been relocated in Section 2 (1) ARC (new version).

should open up improved opportunities for competition for newcomers to the market, release additional cost-cutting potential for DSD and thus ultimately also benefit consumers.

The positive effects of competitive market behaviour which is not burdened by vested interests could already be witnessed from the new invitation to tender for service contracts put out by DSD. In order to meet the requirements of the non-discriminatory awarding of public contracts by a dominant company DSD has since 2003 carried out award procedures in close cooperation with the Bundeskartellamt. As a result, from 2005 the costs of collecting and sorting, in comparison to the charges paid up to 2003, could be reduced by approx. 200 million €, which corresponds to a reduction of more than 20 per cent.

These developments clearly show that the environmental requirements of the Packaging Ordinance can be harmonised with competition rules and can now be more efficiently fulfilled.

2. The dichotomy between competition and environmental protection – Example: The energy sector Emissions trading

With the implementation of the Kyoto Protocol[4], the trading of emission rights for pollutants in the European Union began on 1 January 2005. The system for trading greenhouse gas emission certificates within the European Union was prepared for by a Commission Green Paper[5]. At European level its legal basis is Directive 2003/87/EC on a scheme for greenhouse gas emission allowance trading within the European Community[6]. In Germany this European Directive was implemented by the Law on greenhouse gas emissions trading (*"Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Treibhausgas-Emissionshandelsgesetz – TEHG)"* and the Law on the national allocation plan for greenhouse gas emission allowances in the allocation period 2005 – 2007 (*"Gesetz über den nationalen Zuteilungsplan für Treibhausgas-Emissionsberechtigungen in der Zuteilungsperiode 2005 bis 2007 (Zuteilungsgesetz 2007 – ZuG 2007")*.

The emissions trading system is to serve as an economic basis for reducing the emission of greenhouse gas by those companies which are in a position to achieve this aim at the lowest possible cost. The economic sectors and each production facility concerned have been set concrete targets for the reduction of pollutants; corresponding to these volumes emission allowances are granted free of charge. The crucial argument in favour of allocating emission allowances free of charge was that the burden of costs and competition distortions vis-à-vis competitors outside Europe were to be avoided in the interests of the German economy. Furthermore, the allocation of emission certificates is generally based on historical data or notified emissions.

As stipulated by the law the emission allowances are tradeable. If, due to effective measures taken to reduce its greenhouse gas emissions, a company's emission volume is lower than the volume originally allocated, the company may sell emission allowances it no longer requires on the market. If a company does not possess the number of emission allowances required for its greenhouse gas emissions, it has to purchase further allowances on the market. The companies concerned are required to return emission rights corresponding to their volume of greenhouse gas emissions of the previous year. If a company does not

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4 The Kyoto Protocol has been in force since 16.2.2005: http://unfccc.int/resource/docs/convkp/kpeng.pdf.

5 Green Paper on greenhouse gas emissions trading within the European Union, COM (2000) 87 final of 8 March 2000; see Bundesrat publication 206/00 of 5 April 2000.

6 Cf. the following brochures issued by the European Commission: "Die EU im Einsatz gegen den Klimawandel"; http://europa.eu.int/comm/environment/climat/pdf/emission_trading3_de.pdf; und „Questions & Answers on Emissions Trading and National Allocation Plans", http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/84&format=HTML&aged=1&language=DE&guiLanguage=en.

possess enough emission allowances to cover its emissions at this point, sanctions will be imposed, i.e. 40 Euros per tonne of carbon dioxide equivalent in the first trading period from 2005 to 2007. The obligation to provide the emission allowances required remains even after payment of this sum.

The Bundeskartellamt has received a number of complaints with regard to the introduction of emissions trading and its effect on electricity prices. According to the complainants the market leaders E.ON, RWE and other producers of electricity include the current stock market prices of allowances allocated to them in their electricity supply prices. The complainants basically accuse the suppliers of achieving "opportunity gains" by including these costs in their supply prices, thus generally inflating electricity prices. According to the complainants, the emission allowances allocated free of charge represent imputed costs which cannot be accounted for by any actual costs.

A WWF (World Wide Fund for Nature) survey conducted in this context[7] has found that emissions trade has become a multi-billion business for the five major German electricity providers, to the detriment of the consumer. The allocation of emission allowances free of charge is providing E.ON, RWE, Vattenfall, EnBW and Steag with total annual windfall gains of between 3.8 and 8 billion Euros. According to WWF estimations the earnings of the electricity companies from this additional source of income could amount to 31 to 64 billion Euros by 2012, reaching a volume of four times the announced investments of 11.6 billion Euros.

The Bundeskartellamt is examining the complaints and is investigating in particular whether E.ON and RWE as dominant companies are abusing their dominant position on the electricity market for major customers.

7 Available at http://www.wwf.de/imperia/md/content/klima/14.pdf.