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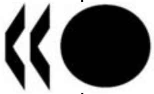

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REMEDIES AND SANCTIONS IN ABUSE OF DOMINANCE CASES

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GERMANY

1. Legal Instruments

The Bundeskartellamt has a variety of legal instruments and powers at its disposal to address abusive conduct. These powers have been strengthened and extended by the 7th amendment of the German Act against Restraints of Competition (ARC) which entered into force on 1 July 2005. The act provides the Bundeskartellamt and the competition authorities of the *Länder* with the following legal instruments:

1.1 Finding and termination of an infringement (§ 32 ARC)

§ 32 ARC provides that the competition authority may impose all measures which are necessary to effectively bring the antitrust infringement to an end and which are proportionate to the infringement established. The Bundeskartellamt may therefore impose structural and behavioural remedies in abuse cases. To the extent that a legitimate interest exists the competition authority may also declare that an infringement has occurred after an infringement has been brought to an end. In cases of urgency the authority may order interim measures *ex officio* if there is a risk of serious and irreparable damage to competition (§32a ARC).

1.2 Commitment decision (§ 32b ARC)

§ 32b establishes the instrument for making the commitments of the undertakings binding (as in Art. 9 of Regulation 1/2003). § 32b reads: Where, in the course of antitrust proceedings under § 32, undertakings offer to enter into commitments which are capable of dispelling the concerns communicated to them by the cartel authority upon preliminary assessment, the cartel authority may by way of a decision declare those commitments to be binding on the undertakings.

1.3 Settlements

In practice many abuse of dominance cases are concluded with a settlement. The proceedings against the company concerned are discontinued and in return the company undertakes a written agreement to meet certain commitments. Where the company does not meet the commitments the Bundeskartellamt may resume the abuse proceedings and conclude them with a prohibition decision or decision subject to conditions. This procedure therefore resembles that of the formal decision under Section 32b. One example where proceedings were discontinued subject to conditions was the gas price abuse case (see below).

1.4 Skimming off the profit from the illegal conduct (§ 34 ARC)

If an undertaking has intentionally or negligently violated an antitrust provision or a decision of the cartel authority and thereby gained an economic benefit, the competition authority may order – in an administrative proceeding – the skimming off of the economic benefit and require the undertaking to pay a corresponding amount of money. However, the undertaking shall not be obliged to transfer the additional revenue to the Cartel Authority if such additional proceeds have been skimmed off by payments for damages pursuant to civil actions or a fine.

1.5 Fines (§ 81 ARC)

The Bundeskartellamt has the power to impose a fine on undertakings for breaching abuse provisions. The abuse of a dominant position is considered to be an administrative offence and may be punished, if committed intentionally or negligently, by a fine up to EUR 1 million or, if a fine is imposed on an undertaking or an association of undertakings, by a fine up to 10 percent of the total turnover of the undertaking in the preceding business year. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

In addition to the sanctions available to the German competition authorities, private enforcement also plays an important role:

1.6 Civil actions (§ 33 ARC)

Third parties may initiate legal proceedings against abusive enterprises with the aim of obtaining injunctive relief or of recovering – if the abuse is conducted wilfully or negligently – actual, though not punitive, damages (§ 33 ARC). In Germany, many abusive practices are addressed by private law suits. Each year numerous private law suits against abusive practices are brought before the courts. Most of these claims aim at a court order to refrain from exclusionary conduct or at an obligation to deal on non-discriminatory and/or non-exclusionary terms and conditions.

1.7 Skimming off of benefits by associations and institutions (§ 34a ARC)

In addition to the competition authorities, other associations and institutions are under certain conditions also entitled to claim the skimming-off of benefits through the courts. Whoever intentionally commits a competition law infringement and thereby gains an economic benefit at the expense of multiple purchasers or suppliers may be required by such associations to surrender the economic benefit to the federal budget, to the extent that the cartel authority does not order the skimming off of the economic benefit.

2. Objectives and general policy

The primary objective of remedies in dominance cases is – in the view of the Bundeskartellamt – to restore the competitive conditions that would have existed but for the unlawful conduct. As the objective of the abuse provisions is the protection of competition (as a means of enhancing an efficient allocation of resources and of enhancing consumer welfare) the Bundeskartellamt aims to protect competition – not competitors - by imposing appropriate remedies in abuse cases. To create a market that is as competitive as possible is a wishful goal but the Bundeskartellamt restricts itself to protecting competition and not deciding which market structures or results are optimal.

Most of the abuse of dominance cases which the Bundeskartellamt handles are therefore about eliminating artificial barriers to entry – in other words they concern exclusionary conduct. There are several reasons for this focus. Firstly, this policy is based on the knowledge that in the medium and long term, open markets will lead to market entry and thus increased competition to the benefit of consumers. Secondly, exclusionary conduct is easier to identify and remedy than the indirect effects of these artificial entry barriers (such as e.g. higher prices, lower output, less innovation, etc.). Thirdly, reducing or eliminating artificial entry barriers created by the exclusionary conduct of dominant undertakings, is less intrusive as it does not require the competition authorities to mandate certain market outcomes. Also, it avoids the need for ongoing interventions as competition itself will in the medium and long term lead to efficient market outcomes. Nevertheless, in special cases the Bundeskartellamt also addresses non-exclusionary practices such as exploitative pricing.

In general, the primary objective of the Bundeskartellamt in abuse of dominance cases is to seek legal clarity and to bring the infringement to an end. Conversely, the deterrent effect of punishing violators through fines plays an important role but is not the key factor in abuse cases. Most of the abuse proceedings of the Bundeskartellamt conclude with a prohibition and remedies decision and not with a fine decision. Fine decisions are generally regarded to be more appropriate against hard-core cartels rather than in abuse cases. One reason for this approach is that abusive practices are easier to detect than hard-core cartels, so that the sanctions and remedies have to take into account that abusive practices go less frequently undetected if compared to cartels. Another reason is that in the area of abusive practices it is sometimes hard to distinguish between aggressive lawful behaviour and illegal anti-competitive behaviour, so that the sole purpose of a proceeding might be to "only" seek legal clarity.

Where a fine proceeding is not warranted, the Bundeskartellamt considers it important to skim off the economic benefit of a company gained by the abusive conduct. § 34 of the German Competition Law empowers the Bundeskartellamt to skim off any profit from a company's unlawful conduct in an administrative proceeding (see above).

3. Choosing and monitoring remedies

In general, the appropriate remedies are chosen according to the general objectives and the policy goals in the area of abusive practices as set out above. The key criterion in choosing an appropriate remedy is the principle of proportionality, which seeks to impose remedies which are proportionate to the infringement established. The Bundeskartellamt thus aims at remedies that are not overly intrusive, keep markets open, bring the infringement to an end and lead to optimal deterrence (neither over-deterrence nor under-deterrence).

The remedies are chosen and monitored by the Decision Divisions of the Bundeskartellamt which are responsible for all the proceedings in a certain sector. The case handlers who work several years in a Decision Division have a profound knowledge of the market, its structure and its players. They draft the remedies and are also best placed to monitor the implementation and effectiveness of the imposed remedies. They are supported by the General Policy Department which evaluates the remedies across the different branches.

Before imposing certain remedies on dominant companies the Bundeskartellamt generally asks the parties to the proceedings (who are mainly competitors, customers and other market players) if they consider the proposed remedies to be effective and sufficient. This is a kind of "market test" remedies have to undergo before being imposed by the Bundeskartellamt.

In general, in dominance cases behavioural remedies are more appropriate to impose than structural remedies, although remedies eliminating artificial entry barriers can be viewed as remedies which are behavioural in nature but structural in effect. One of the reasons why behavioural remedies are more appropriate in abuse proceedings is that abuse provisions aim at monitoring conduct whereas merger control aims at monitoring structures. Consequently, structural remedies should generally be imposed in merger control cases, whereas behavioural remedies are the more appropriate remedy in abuse cases.

4. Setting fines

For the reasons indicated above the Bundeskartellamt conducts proceedings against the abuse of a dominant position almost entirely in the form of administrative proceedings which can be concluded with a prohibition decision or a commitment decision (if a violation can be proved). Abuse proceedings are rarely conducted in the form of administrative fine proceedings, which are concluded with a decision imposing a fine. Since many abuse proceedings raise new legal issues or concern marginal cases from an economic or

legal point of view, a prohibition or commitment decision is often more appropriate than a decision imposing a fine. Where a more severe sanction is required the Bundeskartellamt also imposes fines as a deterrent.

5. Selected recent cases

Below are five recent abuse of dominance cases reported. These cases illustrate both the enforcement focus of the Bundeskartellamt as well as the diversity in remedies chosen.

Case	*Type of abuse*	*Type of remedy*
E.ON Ruhrgas, 2006	*Exclusionary conduct*	*Cease and desist order*
Deutsche Post, 2005	*Exclusionary conduct*	*Cease and desist order*
Soda Club, 2006	*Exclusionary conduct*	*Cease and desist order*
Gas prices, 2006	*Excessive pricing*	*Settlement*
Fuchs spices, 2006	*Exclusionary conduct*	*Fine decision*

5.1 E.ON Ruhrgas, 2006: Market foreclosure by long-term gas supply contracts

In January 2006, the Bundeskartellamt prohibited E.ON Ruhrgas' long-term gas supply contracts with distributors. In this prohibition decision the Bundeskartellamt informed E.ON Ruhrgas AG that its gas supply contracts with distributors in their combination of long-term purchase obligations and high degree of requirement satisfaction violated European and German competition law. The Bundeskartellamt concluded that binding gas distributors by long-term supply contracts had a foreclosure and thus price-raising effect because it prevented the market entry of newcomers and deprived third providers of supply possibilities for years.

The Bundeskartellamt thus prohibited E.ON Ruhrgas' long-term contracts with distributors which cover more than 80 per cent of their actual gas requirements. These contracts are to be terminated at the latest by the end of the current gas year on 30 September 2006. As regards the conclusion of new contracts with regional and local gas companies, those contracts are to be prohibited which run for more than four years and which cover more than 50 per cent of actual gas requirements, or which run for more than two years and cover more than 80 per cent of requirements. In order to prevent circumvention, multiple supply contracts between the supplier and the customer are to be considered as one individual contract. Tacit extension clauses are also prohibited.

When a consensus was not reached at the end of September 2005 and the Bundeskartellamt threatened the company with prohibition proceedings, E.ON Ruhrgas offered a voluntary declaration of self-commitment. However, the offer not only included a later opening-up of contracts in 2008, it also left many aspects open or unregulated, such as contract stacking, which opened up circumvention possibilities. In the

Bundeskartellamt's view the offer did not go far enough to remedy the anti-competitiveness of the gas contracts. Rather, there was still the danger that the self-commitment offer would do nothing to change the

market-foreclosure effect of current contract practice. At the same time the proposals showed that E.ON Ruhrgas would not bring the anti-competitive practice to an end of its own accord.

E.ON Ruhrgas filed an appeal against the decision of the Bundeskartellamt.

5.2 Deutsche Post, 2005: Hindering competitive entry of "mail consolidators"

In February 2005, the Bundeskartellamt prohibited Deutsche Post AG from hindering or discriminating against rival small and medium-sized providers of postal services in their so-called "mail preparation services." The mail preparation services concerned included in particular the collection and pre-sorting of letters and the feeding of mail items weighing under 100 grammes into Deutsche Post's sorting centres.

Previously, Deutsche Post awarded discounts of 3 to 21 per cent for these services only to its own major customers and also PostCon Deutschland as a registered cooperative. However, with this practice of awarding discounts Deutsche Post was hindering the market entry of competitors (so-called "mail consolidators") in the collection, pre-sorting and feeding-in of letters. Small customers generally do not reach the minimum volumes of letters required by Deutsche Post to qualify for such discounts, but they can reduce their postage costs through the activities of the mail consolidators.

In its examination of the case the Bundeskartellamt came to the conclusion that this practice of the Deutsche Post violated German and European competition law. As a dominant company it may not treat providers of mail services feeding in letters from only one large customer and so-called mail consolidators feeding in letters from various (smaller) customers differently without justification. It may also not discriminate between consolidators, i.e. grant benefits to a cooperative which it refuses another consolidator. Furthermore Deutsche Post may not hinder consolidators by refusing them access to the partial services of letter conveyance and delivery (without collection, presorting and feeding-in) without any objective justification. The sender's address on the letters is of no significance whatsoever as regards the provision of conveyance and delivery services.

According to the Bundeskartellamt's decision Deutsche Post AG has in future to grant discount for the feeding-in of pre-sorted bulk mailings into its mail sorting centres even where competitors collect and sort letters from different senders to ultimately hand these over to Deutsche Post AG bundled ("consolidated").

5.3 Soda-Club, 2006: Excluding competitors from refilling CO_2 cartridges

In February 2006 the Bundeskartellamt prohibited Soda-Club GmbH from preventing competing suppliers from refilling CO_2 cartridges for water carbonating machines by claiming its ownership of the cartridges. The Bundeskartellamt considered the behaviour of Soda-Club to be an exclusionary abuse and a violation of the German and European provisions against an abuse of a dominant position. Soda-Club was dominant in the market for refilling CO_2 cartridges with a market share of more than 70%. Hindering competitors from refilling CO_2 cartridges represented an abuse of this dominant position. By this conduct Soda-Club prevented consumers from taking advantage of alternative refilling possibilities. On appeal for interim measures the Düsseldorf Higher Regional Court in April 2006 confirmed the Bundeskartellamt's decision in all its material respects.

5.4 Gas prices, 2006: Exploitative abuse in gas supply of end consumers

At the end of January 2006, after strong price rises since the previous October, the Bundeskartellamt instituted abuse proceedings against seven national gas providers on suspicion of their charging end consumers abusively excessive prices.

A nationwide survey on gas prices conducted by the Bundeskartellamt and the competition authorities of the *Länder* at more than 700 gas providers had identified price differences of more than 40 per cent between the least and the most expensive providers. Private consumers had not only complained about the high prices but also about the fact that they were not free to switch gas providers.

The companies undertook in writing to offer private customers the possibility to switch providers from 1 April 2006. As a consequence, the Bundeskartellamt decided in February 2006 to discontinue the proceedings. The Bundeskartellamt considered this remedy to be superior to price abuse control. The freedom of choice of consumers is one of the principles of the free economic and social system and the remedies were expected to arrive at a more rapid and less intrusive solution. If consumers have an effective opportunity to switch providers this would stimulate competition in general.

The possibility to change provider runs under the rubric “provision”, a market-opening regulation which is already applied in the telecommunications sector and electricity market. This practically involves a “triangular relationship”. The private end consumer concludes a supply contract with the new supplier, who in turn buys the gas from an established local network operator on the basis of a “provision” contract.

5.5 Fuchs spices, 2006: Systematically driving competitors out of the market through exclusivity agreements

In May 2006, the Bundeskartellamt imposed a fine of 250,000 € against TEUTO Gewürzvertrieb GmbH (TEUTO) for violating a prohibition decision of the Bundeskartellamt dating back to July 2002. TEUTO belongs to the Fuchs group. Fuchs is the clear market leader in Germany and Europe. The company sells dried spices and herbs in household packages under several brand names to food retailers in Germany via the distribution company TEUTO. With a market share of more than 70 per cent Fuchs has a dominant position on the German markets.

In 2002 the Bundeskartellamt prohibited the Fuchs group from unfairly impeding the business activities of Hartkorn, one of the few remaining small competitors. The impediment amounted to systematically forcing competitors out of the market by paying retailers high contributions to advertising costs, which induced them to agree to stock exclusively Fuchs products.

According to the Bundeskartellamt’s investigations at least five violations of the prohibition decision were committed by TEUTO sales representatives after the decision had been issued in July 2002. TEUTO’s sales representatives had no longer enforced exclusivity upon the retailers they supplied on a written basis but had either agreed this verbally or de facto enforced it by the manner in which the provisions of the supply agreements were formulated. As an incentive for granting exclusivity to the detriment of Hartkorn, the retailers received unrivalled contributions to advertising costs in the form of payments and/or services in kind (of economic value) such as in particular the free supply of basic fittings, i.e. shop shelves filled with spices.