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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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ROUNDTABLE ON REFUSALS TO DEAL

-- Note by Germany --

This note is submitted by the German Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 17-18 October 2007.

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1 Statutory basis

1. In Germany, anti-competitive refusals to deal are prohibited by Article 82 EC as well as Sections 19, 20 and 21 of the Act against Restraints of Competition (ARC).

2. Section 19 (1) ARC constitutes a general prohibition of abuse of market power by dominant companies as a blanket clause and is similar to Art. 82 sentence 1 EC. Similar to Article 82 sentence 2 EC, Section 19 (4) ARC sets out four non-exhaustive examples of forbidden abusive behaviour. These examples include impairing the ability to compete, demanding unfavourable or discriminating business terms and the refusal to provide network or infrastructure facility access. Even though the examples in Section 19 (4) ARC are not conclusive, in practice they cover almost all abuse cases. Section 20 (1) ARC adds that unfair hindrance and discrimination by dominant firms are prohibited.

3. Sections 20 and 21 of the ARC also apply to refusals to deal by non-dominant firms under certain circumstances. According to Article 3 (2) sentence 2 of Regulation 1/2003, the member states are not precluded from adopting or applying on their territory stricter national laws which prohibit or punish unilateral conduct by companies. Section 20 ARC provides that an undertaking with a position of "superior market power" in relation to other undertakings must not unfairly abuse its position or hinder another undertaking without an objective justification. "Superior market power" may be present in a horizontal or vertical context. Section 21 (1) ARC contains a special provision against requests to refuse to supply (so-called boycotts) which applies irrespective of a market power test: "Undertakings and associations of undertakings shall not request another undertaking or other associations of undertakings to refuse to sell or purchase, with the intention of unfairly harming certain undertakings."

4. The elements that have to be established in order to find a refusal to deal anti-competitive include:

- Dominance, or at least "superior market power" (except for boycott cases);
- Hindrance/foreclosure;
- Absence of an objective justification.

2 Hindrance/foreclosure and defining refusal to deal

5. A hindrance according to section 20 (1) ARC is a market behaviour which has objectively negative effects on the hindered firm. However, such a behaviour is not abusive solely because of negative effects on a firm. Rather it has to be determined whether the behaviour constitutes objectively justified competition on the merits or not (Federal Court of Justice - FCJ, 22.9.1981, Original-VW-Ersatzteile II). Similarly, under Article 82 an abuse is defined as a behaviour which, through recourse to methods different from those which condition normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (European Court of Justice - ECJ, 13.2.1979, Hoffman-La Roche).

6. In assessing refusals to deal, the definition of a "refusal to deal" is thus irrelevant from a legal perspective. Instead, the element to be established is whether the behaviour is likely to have (or have had) a hindrance/foreclosure effect. In refusal to deal cases, this assessment is typically straight-forward. From a more analytical (non-legalistic) perspective it should be noted that a refusal to deal in practice can take many different forms: Apart from simply declaring its refusal to deal the supplier may for example use delaying tactics, request excessive prices for the input or impose other unreasonable trading conditions. Also a margin squeeze is properly conceived as a "constructive" refusal to deal. In addition, a broad

concept of hindrance/foreclosure includes the unjustified differential treatment (so-called discrimination) as treating customers differently without objective justification typically results in hindering the customer that obtained unfavourable terms.

7. Conceptually similar to a refusal to deal is the refusal by an undertaking to allow another company access to its own networks or other infrastructure facilities. The concepts of "refusal to deal" and "refusal of infrastructure access" can thus be viewed as two instances of a class of behaviour which could be labelled as "input foreclosure". In 1998, the refusal of infrastructure access was adopted as an abuse example in the ARC. According to Section 19 (4) no. 4 ARC, an abuse exists in particular if a dominant undertaking refuses to allow access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable to operate as a competitor of the dominant undertaking on the upstream or downstream market (unless such concurrent use is impossible or cannot reasonably be expected).

3. Objective justification

3.1 Defence and weighing of interests

8. Under Article 82 EC the objective justification takes more the character of a defence for which the dominant company carries the burden of proof (see the case law referenced in the DG Competition Article 82 EC discussion paper).

9. According to the case law on Section 19 and 20 ARC the element of objective justification requires a comprehensive weighing up of interests and is the central element in the assessment of abusive practices. The weighing up of interests allows and calls for a broad consideration of all relevant facts of the individual case. In weighing up the different interests concerned, the purpose of the ARC, which is to ensure that competition between undertakings is, as much as possible, free of limitations, has to be taken into consideration at all times. This means primarily that markets are kept open and artificial barriers to entry are not raised. All the interests of the parties concerned and directly involved must be considered. In refusal to deal cases, the following aspects typically play an important role in the weighing up of interests:

- degree of market power of the supplier,
- degree of (likely) hindrance/foreclose effect,
- whether there has previously been a supply relationship, and
- all other aspects of the individual case.

3.2 The seller's right of autonomy vs. special responsibility of dominant firms

10. In principle, dominant undertakings are also free to determine their sales strategy and thus to decide with whom to deal. This is especially true for dealing with competitors. The Federal Court of Justice held that in principle there is no duty for dominant companies to promote competition (FCJ, 12.11.1991, Aktionsbeiträge). In addition, the dominant company may in principle design its distribution system in the way it believes to be efficient, i.e. refuse to sell to retailers according to quantitative and qualitative criteria. At the same time, the dominant company has a special responsibility not to allow its conduct to impair genuine undistorted competition (ECJ, 9.11.1984, Michelin). In German case law these seemingly polar opposites are reconciled by the comprehensive weighing of interests which takes all relevant aspects of the case into account.

3.3 Relevance of the degree of market power and hindrance effect

11. The degree of market power and the degree of the hindrance/foreclosure effect play an important role in the weighing of interests.

12. The greater the market power of the supplier, the more restricted is its freedom to refuse to deal. A monopolist may only under quite limited circumstances refuse to deal whereas a supplier that has only "superior market power" enjoys a rather broad margin of discretion.

13. Similarly, there is a sliding scale with respect to the (likely) hindrance effect. A refusal to deal is unlikely to be objectively justified if the refusal results in a significant barrier to entry (FCJ, 12.3.1991, Krankentransportunternehmen II). In pursuing its interests, the powerful firm has to choose the means with the lowest possible hindrance effect that is capable of achieving the objectives of the firm (FCJ, 22.9.1981, Original-VW-Ersatzteile II).

3.4 Termination of existing supply relationship vs. refusing to start a supply relationship

14. In the case law, it also makes an important difference whether the refusal to deal amounts to the termination of a previously existing supply relationship or rather to not starting a supply relationship. The termination of an existing supply relationship is less likely to be objectively justified than the refusal to start supplying.

15. A previously existing supply relationship shows that the supplier previously considered it efficient to engage in such a supply relationship. However, also the termination of an existing supply relationship may be objectively justified. Such circumstances include in particular a situation where the supplier reorganises its distribution system according to objective qualitative and/or quantitative criteria (selective distribution), and the retailer does not meet (any more) these criteria (FCJ, 30.6.1981, Adidas). Such selection criteria have to satisfy the competition law principles applicable to selective distribution, and reasonable periods of notice must be met. The termination of an existing supply relationship is also objectively justified if the customer faces illiquidity. The supplier cannot invoke this justification if the customer provides sufficient securities (e.g. payment in advance).

3.5 Some examples of objectives justifications

16. A refusal to deal was found to be objectively justified:

- if the supplier ceases supply of an input because its customer/competitor has unlawfully copied the design of the supplier (FCJ, 25.10.1988, Lüsterbehangsteine);
- if a car manufacturer grants its leasing firms preferential conditions which it does not offer other leasing firms (FCJ, 12.11.1991, Aktionsbeiträge).

17. A refusal to deal was not found to be objectively justified:

- if a phone directory refuses to deal with an advertisement agency because that agency seeks to reduce advertisement prices to end-customers by re-arranging previous advertisement contracts (FCJ, 13.7.2004, Sparberaterin);

- if a health insurance refuses to deal with a private provider of patient transports because it wants to keep the market exclusively for public providers of patient transports (FCJ, 12.3.1991, Krankentransportunternehmen II);

- if a (monopolist) supplier ceases supply because it wants to expand into the downstream market (ECJ, 6.3.1974, Commercial Solvents).

18. Further examples which are explained in more detail are provided below.

4 Bundeskartellamt enforcement practice: Some selected cases

19. In Germany, refusal to deal cases are primarily enforced through private litigation so that there is a quite ample case law. Over the past years, the Bundeskartellamt investigated refusal to deal cases primarily in liberalised sectors.

4.1 Deutsche Post – refusal to provide mail services to competitors

20. In February 2005, the Bundeskartellamt prohibited Deutsche Post AG from hindering or discriminating against a certain group of providers of postal services, so-called "mail consolidators", which carry out "mail preparation services."[1] The mail preparation services concerned include in particular the collection and pre-sorting of letters and the feeding of mail items weighing under 100 grammes into Deutsche Post AG's sorting centres. Deutsche Post AG awarded discounts of 3 to 21 per cent on the regular postage for these services only to its own major customers but not to the mail consolidators concerned. Small and medium-sized senders generally do not reach the minimum volumes of letters required by Deutsche Post AG to qualify for the higher levels of the discount echelon. They can thus only reduce their postage costs through the activities of the consolidators which allow senders to achieve higher discounts through pooling the mail volumes of various senders.

21. In its examination of the case the Bundeskartellamt came to the conclusion that the practice of Deutsche Post AG 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 mail consolidators feeding in letters from various customers differently without justification. Furthermore Deutsche Post AG may not hinder consolidators by refusing them access to the partial services of letter conveyance and delivery (without collection, pre-sorting and feeding-in) without any objective justification. According to the Bundeskartellamt's decision Deutsche Post AG now has to grant discounts 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").

22. The Bundeskartellamt rejected the claim of Deutsche Post AG in which it invoked its limited exclusive licence under the German Postal Act to justify its behaviour. According to a decision issued by the European Commission in proceedings against the Federal Republic of Germany, the German Postal Act violates European provisions to open up the postal sector insofar as it reserves mail preparation services for letters under 100 grammes exclusively for Deutsche Post AG. A behaviour cannot be justified by invoking a national provision which is in violation of European law.

23. In an interim ruling, the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt decision in April 2005. The German Federal Network Agency has in the meantime issued some additional decisions regulating access to partial services of Deutsche Post. The proceedings are currently on hold

[1] The full text of the decision is available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell05/B9-55-03.pdf

awaiting a preliminary ruling by the ECJ according to Article 234 EC which is expected by the end of 2007. [*Anmerkung: Die mündliche Verhandlung ist am 13.9.*]

4.2 Mainova – Refusal of electricity network interconnection

24. In October 2003, the Bundeskartellamt prohibited the energy supplier Mainova AG from denying GETEC net GmbH and Energieversorgung Offenbach AG (EVO) connection to its medium-voltage network.[2]

25. Mainova AG supplies the city of Frankfurt with electricity. Its shareholders include the city of Frankfurt/Main and the E.ON group. GETEC net and EVO depend on this network connection in order to be able to operate site network facilities on premises used for housing or business purposes and to supply end customers located there with electricity generated by the companies themselves or by third suppliers. The establishment and operation of site networks represented a newly emerging market in which Mainova AG attempted to eliminate competition from the outset.

26. According to the Bundeskartellamt's decision, both site network operators were entitled to have access to Mainova AG's medium-voltage network (Section 19 (4) no. 4 of the ARC). In several other German cities distributing site networks are not operated by the local distribution network operator but by third companies. However, Mainova AG refused the necessary connection to its medium-voltage network for several projects in Frankfurt and announced that it would continue to do so with regard to future projects.

27. According to the Bundeskartellamt the grounds given by Mainova AG to justify this conduct were not valid. Energy law provisions such as the general obligation to connect and supply under Section 10 of the Energy Industry Act provided no legal basis for Mainova AG to claim each new site for itself either. Supply security was not threatened nor did alleged "cherry picking" by the competing site network facility operators constitute an objective justification as claimed by Mainova.

28. In 2004 the Düsseldorf Higher Regional Court and in 2005 the Federal Court of Justice confirmed the Bundeskartellamt decision.

4.3 Scandlines – refusal of access to Puttgarden ferry terminal

29. In December 1999, the Bundeskartellamt prohibited Scandlines Deutschland GmbH from refusing competing ferry companies access to the Puttgarden terminal on payment of an adequate fee.[3]

30. The proceedings were based on complaints by two competitors who wanted to start a ferry service on the Puttgarden-Rödby (Denmark) route, but whose application for the shared use of the Puttgarden ferry terminal had been refused by Scandlines, the terminal owner. One of these competitors was easy-line A/S, Rödby, owned by the Norwegian company Eidsiva Rederi and the other was a consortium owned by the Swedish company Stena Rederi AB, the Danish company Difko A/S and the Danish ship owner Ole Lauritzen. Back in 1993, the European Commission refused the Danish government permission to prevent Stena Rederi from setting up a ferry service in Rödby. On the basis of the complaints, the Bundeskartellamt investigated whether Scandlines was infringing Article 82 EC and Section 19 (4) no. 4 ARC in preventing terminal access.

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2 The full text of the decision is available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B11_12_03.pdf

3 The full text of the decision is available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B9_199_97_16_98.pdf

31. According to the Bundeskartellamt's decision, Scandlines dominated the market, both as regards its terminal facilities on the Puttgarden-Rödby route and the downstream market for ferry services between Puttgarden and Rödby. The existing fringe competition from alternative ferry routes and the bridge across the Great Belt was not strong enough to prevent this market dominance on the Puttgarden-Rödby route. Legal and physical obstacles stood 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 was possible following appropriate construction and organisational modifications. In the necessary process of 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 was the public interest in opening up the market to competition.

32. In August 2000 the Düsseldorf Higher Regional Court overturned the Bundeskartellamt decision. In September 2002 the Federal Court of Justice rejected the arguments of the Düsseldorf Higher Regional Court by which it overturned the Bundeskartellamt decision. However, the Düsseldorf Higher Regional Court did not issue a new decision because in early 2003 the proceedings ended as both undertakings requesting access did not exist anymore. Later in 2003 Eidsiva Reederi SA, the former owner of easyline, which went bankrupt, resurrected its complaint before the European Commission. In 2006 the European Commission referred the case to the Bundeskartellamt. The Bundeskartellamt started a new proceeding tying up to the 1999-decision and recently commissioned a nautical expertise about the potential of the Puttgarden port basin to set up a further ferry service.