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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES

-- Germany --

20 October 2009

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1. General remarks

1. When the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter: ARC) was enacted more than fifty years ago, state ownership played an important role in a number of sectors of the German economy. The importance of state ownership has declined continuously since then. The withdrawal of the state from economic activity has accelerated even more since the 1990s with deregulation of key network industries.

2. Recently, the financial and economic crisis has brought a recalibration internationally and domestically, although even in this extraordinary situation Germany has largely – though not entirely – avoided direct governmental ownership in ailing firms.

3. The ARC generally applies to enterprises without regard to their ownership structure. Thus, competition law is generally applicable to the commercial activities of state-owned enterprises; only in cases defined by statutory exemption state-owned enterprises are not subject to competition law. The provisions aim to ensure that the state does not exempt itself from the competition rules at its own discretion.

4. Although, historically, there have been exemptions of companies – or rather sectors of the economy – from competition law, in the last decade or so the German legislator has largely eliminated these exemptions.

2. Statutory basis and intention of the legislator

5. The ARC states explicitly that it applies also to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities.[1]

6. The German law follows a functional approach when determining which entities are covered by the ARC. This functional approach leads to a broad application of the act according to which the commercial activities of the state and of its organisation are also subject to the rules of the ARC. This approach is fully consistent with European competition law.

7. The functional approach reflects the intention of the legislator that the state and its enterprises shall not be able to avoid the application of competition law, when participating in the market, e.g. because they are acting with regard to a service of general interest (*Daseinsvorsorge*) or because there are safety or health considerations.[2] Thus, the rules of the ARC are applicable where a state-owned enterprise is commercially active and where no mandatory explicit justifying exemption regulated by public law exists. Hence, the application does not depend on the form of organization of the enterprise, the seat or the provenance of the enterprise, the level of participation or the share of the state-owned enterprise or on the

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1 Section 130 (1) ARC. Furthermore the provision provides for an exception from this general rule. It provides that the provisions of the Parts I to III of the Act (provisions *inter alia* on the ban of cartels, abusive practices and merger control) shall not be applicable to the German Central Bank (*Deutsche Bundesbank*) and to the Reconstruction Loan Corporation (*Kreditanstalt für Wiederaufbau*). An English version of the ARC is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

2 Cf. for example Federal Court of Justice (*BGH*) WuW/ E BGH 1661- *Berliner Musikschule* (1979); Bundeskartellamt (BKartA) WuW/E BKartA 2150- *Tariftreue* (2001).

intention of the state-owned enterprise to realize or maximize profits.[3] Activities of state-owned enterprises in commerce which aim at the exchange of products or commercial services are subject to the application of competition law[4].

8. It is not decisive whether the relationship between the state-owned enterprise and the other party is governed by civil law or public law. This aims at ensuring that the state-owned enterprise may not exempt itself by choosing public law as the legal basis for a certain activity. The application of competition law solely depends on the question whether the state actually or potentially offers or demands its services parallel to other market participants in the market[5]. The general applicability of the ARC is not ruled out, *a priori*, by sector-specific regulation or by the providing of services of general interest.[6]

3. Exemptions

9. Historically and until the 1990s, activities in the postal services, telecommunications and rail sector were conducted by the state – though not so much through state-owned enterprises, but rather by public administrations. However, since the 1980s more and more sectors have been privatized and the state's activities have decreased.

10. Even before the move to deregulation and privatization, market activities of state administrations were subject to competition law oversight. Therefore, when for example the Deutsche Bundesbahn – the German railway operator – was managed as a public administration, the Bundeskartellamt took up complaints, e.g. concerning issues of buyer power.[7]

11. However, historically the ARC provided for a number of sectors, which were exempted from the application important aspects of the ARC, among them public transport, banks, insurances and public utiliy companies.[8] These exemptions have largely been repealed.

12. In the context of this discussion some of these sectors are of particular interest because companies in these sectors tend to have strong ties with municipal or state entities. To give some examples, exclusive concessional contracts (*ausschließliche Konzessionsverträge*) with regard to the supply of electricity and gas were originally exempted *inter alia* from the application of Section 1 ARC (Prohibition of Agreements restricting competition). In connection with the new Energy Act of 1998, the former broad exemptions for agreements for the supply of electricity or gas (Section 103 ARC old version) were abolished.

13. Furthermore, the ARC contained a broad exemption for agreements, decisions and recommendations in the public transport sector in the beginning. Subsequently this blanket exemption was repealed in favour of a narrower provision with regard to undertakings in the public transports sector. In

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3 Cf. for example BGH NJW 1962, p. 196- *Gummistrümpfe*; BGH WuW/E BGH 1474- *Architektenkammer* (1977).

4 BGH WuW/E DE-R 289, 291- *Lottospielgemeinschaft* (1999).

5 Cf. BGH NJW 2000, 866- *Kartenlesegerät;* BGH WuW/E BGH 1469- *Autoanalyzer* (1976); BGH WuW/E BGH 2399- *Krankentransport* (1987); Higher Regional Court of Dusseldorf (*OLG Düsseldorf*) WuW/E OLG 4998 – *Landesapothekerkammer* (1992).

6 Cf. BGH WuW/E DE-R 1396- DB/üstra (2006).

7 BKartA: Tätigkeitsbericht 1979/1980, p. 38.

8 Sections 99-104a ARC old version.

the course of the 6th amendment of the ARC the provision was removed from the ARC altogether and was incorporated into the Passenger Transportation Act (*Personenbeförderungsgesetz*; hereinafter: PBefG).

14. Finally Section 69 Book V of the German Social Welfare Code (SGB V) provides for an exemption for the legal relations between compulsory health insurance funds and doctors, pharmacies etc.[9] This exemplifies that German law does not allow for a general exception for state-owned enterprises, such as a general "state action doctrine".

4. The economic crisis: Financial Market Stabilisation Act

15. Due to the economic crisis the economy has to face new challenges. To address the extraordinarily difficult situation and restore confidence in the financial markets, the German parliament has enacted the Financial Market Stabilisation Act that came into effect in October 2008.[10] The Act comprises a package of measures aimed at stabilising the financial markets. The primary objectives of the act are (i) to secure the liquidity of financial institutions that have their seat in Germany and (ii) to prevent a general credit crunch. The concern was that systematically indispensible banks could fail with consequences which were unpredictable for the wider economy in Germany and beyond. The core of the package is a rescue fund which may (*inter alia* and under certain conditions) acquire (or otherwise secure) loans, securities, derivative financial instruments and other risk positions, acquire equity in the recapitalisation process and thus strengthen the core capital ratio of the undertakings or also acquire a participation, in particular, shares in firms.

16. According to Article 2 Section 17 of the Act, Parts I-III of the ARC[11] are not applicable. This means that the acquisition of interests by the fund in financial institutions is not subject to German merger control law.[12] This does not imply, however, that the acquisition of these interests from the fund by third parties in the future would also escape merger control law.

5. Enforcement practice

17. The debate on the reach of competition law in industries governed by sector specific rules – and which, incidentally, also have a strong nexus to the state – can be illustrated by important precedent cases in these sectors.

5.1 Public transport sector

18. In its decision *DB Region / üstra* the German Federal Court of Justice dealt with a decision of the Bundeskartellamt in a merger case, which involved the Deutsche Bahn – the German railway operator that is 100% owned by the Federal state – and regional/ municipal companies.[13] The case concerned the markets for regional rail transport and was only cleared subject to conditions. In the course of the

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9 Accoring to this provision these legal relationships are not subject to Section 1 ARC (Prohibition of agreements restricting competition). However, the legal relations mentioned in Section 69 SGB V are not exempted from the application of the rules on merger control. Therefore, the Bundeskartellamt applies the relevant provisions of the ARC to assess mergers of hospitals.

10 An English version of the Act is available at http://www.bundesfinanzministerium.de/nn_82/DE/BMF__Startseite/Aktuelles/Aktuelle__Gesetze/Gesetze__Verordnungen/Finanzmarktstabi__engl__anl,templateId=raw,property=publicationFile.pdf.

11 These are provisions *inter alia* on the ban of cartels, abusive practices and merger control.

12 This regulation applies only to the rescue fund established under the Financial Market Stabilisation Act.

13 BGH WuW/E DE-R 1681-1693 –*DB Regio/ üstra* (2006).

proceedings the Federal Court of Justice took the opportunity to clarify the application of competition law to the markets for regional rail transport. The Court reiterated once more that this sector is not generally exempted from the application of competition law. The involved parties had tried to argue that the legal relations between the regulatory authority and the transport enterprise were governed by public law and should ensure services of general interest. Thus, the argument continued, merger control should not be applicable to these cases as the providers of these services did not have any freedom of behaviour with regard to the relevant competitive behaviour. The court turned down this argument, stating that agreements between transport enterprises and for decisions and recommendations of such enterprises are only exempted from the application of Section 1 (Prohibition of Agreements restricting competition) and Section 22 (prohibition of recommendations) of the ARC old version.[14] Thus, under the current version of the ARC such agreements and decisions or recommendations are only exempted from the application of Section 1 ARC, as such cooperations may be necessary to ensure the functioning of public transport.[15] However, the relevant provision explicitly does not exclude the public transport sector from the application of other provision of competition law, in particular merger control.

19. This interpretation has become well-established case-law, so that there is no room for doubt with regard to the applicability of the ARC to the public transport sector.[16]

5.2 Postal sector and telecommunications sector

20. Also in other privatized sectors – such as the postal sector and the telecommunications sector – the applicability as well as the practical application of competition law is well-established.[17] Whereas the competences of the sector regulator Federal Network Agency (*Bundesnetzagentur*) are concentrated, largely, on issues of network access, general competition law covers all other relevant aspects in these sectors. In applying the ARC the Bundeskartellamt has taken important action in these sectors.[18]

5.3 Hospital sector

21. Competition law, and in particular merger control, is also applicable to the health and hospital sector, notwithstanding the fact that the hospital market is a highly regulated market and that many hospitals and health operators are state-owned entities. However, merger control in the health and hospital sectors – especially with regard to state owned entities – remains a controversial issue in Germany.

22. The German courts have only recently affirmed that merger control applies to these sectors.[19] Merger control aims at maintaining competitive framework conditions in this economically highly significant and socially sensitive area where planning requirements and market-economy control mechanisms exist alongside one another. Enforcing competition as a controlling mechanism does not jeopardise the provision of health care services to the population – which generally is one of the main arguments of critics- but ensures a long-term offer of choices for patients in the interest of high-quality care. Furthermore, the decisive factor is the relationship between patients and hospitals. The patients are

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14 This exemption is laid down in Section 8 (3) sentence 7 PBefG.

15 BGH WuW/E DE-R 1681-1693 –*DB Regio/ üstra* (2006), para. 20.

16 Cf. BGH WuW/E DE-R 1797-1802- *Deutsche Bahn/ KVS Saarlouis* (2006); for older cases see BGH NJW 1995, 2168 – *Wandelhalle;* BKartA WuW/E DE-V 603 – *ÖPNV Göttingen* (2002).

17 Cf. BKartA, Tätigkeitsbericht 1993/94, p. 25, p.133 ff ; BKartA, Tätigkeitsbericht 1995/96, p. 24, p. 139 ff.

18 See landmark decision OLG Düsseldorf, WuW/E DE-R 1473 – *Konsolidierer* (2005); BKartA WuW/E DE-V 1023- *Konsolidierer* (2005).

19 Cf. for example BGH WuW/E DE-R 2327- *Kreiskrankenhaus Bad Neustadt* (2008).

direct consumers of hospital services. They decide independently whether to go into a hospital, and if so, which hospital to choose.[20]

23. The Federal Court of Justice consequently clarified that the exception in Section 69 SGB V does not exempt mergers between hospitals from the merger control under the ARC.[21] There is no indication in the wording or in the purpose or objective that the legislator tried to exempt mergers of hospitals from the ARC. The exemption shall only help the compulsory health insurance funds to fulfil their obligations with regard to ensuring the public health care mandate (*öffentlich-rechtlicher Versorgungsauftrag*). A hospital merger is generally not related to this mandate. This decision shows once more that the German Courts interpret the exceptions very narrowly and that as soon as the state engages in commercial activities in parallel with other market participants, the state is also subject to the ARC.[22]

6. Conclusion

24. In their decisions, the Bundeskartellamt and the courts in Germany have been restrictive in making exemptions from the applicability of competition law to state-owned enterprises. German law does not contain a general exception for state-owned enterprises, such as a general "state action doctrine". Thus, only in the cases where the statutory provisions exist and only where the state-owned enterprises do not compete, actually or potentially, with other market participants by offering or demanding services parallel to them in the market, an exception can be made. The current crisis should not be used to introduce more exemptions into national legislation; rather, governments should be committed to further reduce the scope of existing exemptions.

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20 Cf. OECD DAF/COMP(2006)20.

21 See Footnote 9. For details of the argumentation see BGH WuW/E DE-R 2327- *Kreiskrankenhaus Bad Neustadt* (2008).

22 See also *Monopolkommission*, Sondergutachten 45, Zusammenschlussvorhaben der Rhön-Klinikum AG mit dem Landkreis Rhön-Grabfeld, 2006, p.22 ff, with the same result and further arguments. The Monopolies Commission is an independent evaluative and advisory body assessing the development of competition law in Germany (see http://www.monopolkommission.de/).