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ROUNDTABLE ON HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT

-- Note by the Delegation of Germany --

This note is submitted by the delegation of Germany to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

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ROUNDTABLE ON HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT

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1. Introduction

1. The rising significance of environmental protection issues over the past decades has conferred increased importance to the interplay of competition law and environmental law in the practice of competition authorities. Given the importance that environmental aspects – both as a basis for opening up new markets and as a general political concern – have gained for the economy and for businesses, it is fitting that competition agencies should be aware of developments in the environmental area. Consequently, the European Commission has already paid particular attention to environmental agreements in its Horizontal Guidelines of 2001.[1]

2. In the Bundeskartellamt's practice, environmental agreements between competitors are analysed on the same basis as other horizontal agreements. This submission seeks to first provide an overview of the legal framework (2.) and it will continue by giving case examples (3.)

2. Legal framework

3. Where, in the application of the legal provisions, conflicts between environmental law and competition law may arise, it is important to remember that neither sphere can claim to generally take priority over the other. The Bundeskartellamt takes due consideration of this in applying competition law.

4. Environmental regulation and the obligations that it imposes on businesses and individuals are an important factor in promoting the emergence of certain new markets. For example, most waste management markets exist largely due to environmental regulations. These regulations are not only important factors in creating the markets concerned, but they also set important parameters for the functioning of the markets, and are therefore key elements to consider when applying competition law. If competition law and environmental law turn out to be in conflict with one another in a particular case, a mechanism for resolution is needed. An obvious solution is to pursue the environmental objectives while imposing as little restriction as possible on competition.[2]

5. Cases in the environmental context are decided by the Bundeskartellamt on the basis of competition law and in accordance with the national legislation for waste management. Furthermore the

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1 The European Commission defined environmental agreement as agreements "by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives [...]. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations." Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements - OJ C 3, 6 January 2001, p. 2 ff, para 179. Please note that the Horizontal Guidelines are currently under review.

2 ECJ, Judgement of 25 June 1998, C-203/96, Chemische afvalstoffen Dusseldorp; ECJ, Judgement of 23 May 2000, C-209/98, Sydhavnens Sten/Københavns Kommune.

Bundeskartellamt has to interpret national waste management legislation[3] and environmental legislation in accordance with European competition law.

6. In the Bundeskartellamt's experience, competition cases involving environmental issues can be dealt with under existing competition law.[4] The need for a special statutory exemption on environmental grounds has not been identified. This is in line with European Law. The European Commission's Horizontal Guidelines that are currently in force include a chapter on environmental agreements.[5] However in the current draft of the Horizontal Guidelines such a chapter is no longer included. The European Commission stresses that the removal of the chapter does not imply any downgrading for the assessment of environmental agreements.[6] On the contrary, instead of having a chapter addressing a narrow aspect of environmental standards, the European Commission now makes it clear that environmental agreements are to be assessed under the relevant topical chapter of the Draft Horizontal Guidelines, on R&D, production, commercialisation or standardisation.

7. A conflict between environmental law and competition law is frequently invoked by parties in proceedings before the Bundeskartellamt who argue that their conduct – though possibly contrary to competition law – is justified under environmental law. However, practice has shown that the alleged conflict usually does not exist.

8. Under German law a restrictive agreement according to Section 1 of the Act against Restraints of Competition (ARC)[7] and Art. 101 (1) TFEU[8] may gain exemption under Section 2 ARC and Art. 101 (3) TFEU respectively, if the four conditions laid down in these rules are satisfied. These conditions are efficiency gains; fair share for consumers; indispensability of the restriction; no elimination of competition.

9. In its competition advocacy, the Bundeskartellamt strives to draw the attention of other government institutions to any possible anti-competitive effects that their policies might inadvertently entail. The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety and the Bundeskartellamt have consulted each other on issues of waste management legislation.

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3 The competent ministry stresses on its website: "German waste management is an important industrial sector and provides high-quality technology for the efficient use of waste as a resource and the environmental sound disposal of the remaining residual waste. Germany supports sustainable waste management concepts for obtaining raw materials or energy from wastes. German waste management has the highest waste recovery quotas worldwide. There are numerous regulations which apply to this sector." See website of the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety at http://www.bmu.de/english/waste_management/general_information/doc/4304.php

4 For more details see Section 3.

5 See Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements - OJ C 3, 6 January 2001, p. 26 ff.

6 See MEMO/10/163 Commission consults on new regime for assessment of horizontal co-operation agreements, FAQs at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/163 .

7 An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf .

8 An English version of the Treaty on the functioning of the European Union is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF

3. Case examples

10. This submission focuses on cases that concern Germany's Packaging Ordinance. The Packaging Ordinance[9] is a regulation intended to ensure adequate waste management of packaging waste. To ensure an efficient recycling system, the Packaging Ordinance stipulates that every business which produces packaging or puts packaged products on the market in Germany must make certain that it fulfils the take-back and recycling obligations for all types of packaging. To ensure the take-back of sales packaging such businesses can conclude an agreement with a collection and disposal system licensed in Germany (so-called "Dual System"). Dual systems charge a "full service" fee, which includes the costs of collecting, sorting and recycling packaging, as well as the costs of municipal information campaigns. Today, more than 80% of sales packaging is taken back at or near households. Specific schemes with their own channels for taking back sales packaging exist for specific kinds of customers (restaurants, small trade, etc.). To date and due to the intervention of the competition authorities who have worked against a monopolisation of the market, nine dual systems for the collection and recovery of sales packaging exist and compete in Germany.

3.1 Duales System Deutschland

11. In 1990, the German government and industry designed the Duales System Deutschland ("DSD") as the only nationwide dual system for the collection and recovery of sales packaging. The system was intended to fulfil the provisions of the Packaging Ordinance. In the discussion on how to deal with waste packaging, the general opinion among the relevant stakeholders – politics, waste disposal companies, industry – was that the desired outcome was only to be achieved if the activity was reserved to one service provider. The understanding was that competition was neither possible nor useful, that it would have negative effects on the environment and that the recovery system of sales packaging would even collapse.

12. A re-thinking took place, at least in part prompted by competition law proceedings of the European Commission[10] and the Bundeskartellamt.[11] In a decision that became final in 2007, the European Commission ordered DSD not to inhibit (potentially) competing "dual systems" from contracting with the packaging waste collection companies. The Bundeskartellamt announced in 2002 that its policy of tolerating the restrictive agreements within the DSD system would end in 2006. Consequently, DSD decided to dismantle the cartel-like structure of the company. In 2003, companies from the waste management sector left the circle of silent partners. DSD was sold to a financial investor in 2005. The proceedings finally led to the opening of the waste disposal markets for competition.

13. The subsequent development has proved that the fear of the collapse of the collection and recovery system of sales packaging was unfounded. Competition has increased in the markets for the collection and recovery of the sales packaging, to the advantage of consumers. To put this in numbers, the cost for the collection and recovery of sales packaging amounted to about two billion Euros when DSD's monopoly was in place. Today, with competition in this market, this amounts to about one billion Euros each year. The environmental objectives are achieved just as well in the competitive environment.

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9 Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen („Ordinance on the Avoidance and Recovery of Packaging Waste"), last amended 2 April 2009, BGBl. I, p. 531.

10 See for example the DSD prohibition decision by the European Commission dated 20 April 2001, OJ L 166, 2001, p. 1-24.

11 See *Bundeskartellamt*, press release of 12 October 2004 (available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004_10_12.php).

3.2 Gesellschaft für Glasrecycling und Abfallvermeidung

14. A further case concerned the collection and recycling of glass. The Bundeskartellamt reviewed this case in 2007.[12]

15. A substantial share of waste glass is used in the production of container glass – drink bottles, food jars, etc. More than 67 per cent of the waste glass used in this recycling process is recovered from household-oriented collections by dual systems. In 1993 German container glass manufacturers set up the glass recycling company "Gesellschaft für Glasrecycling und Abfallvermeidung" ("GGA") to jointly purchase the entire waste glass recovered from household collections. The GGA purchased the entire waste glass centrally from the waste management companies and organized its delivery to special recycling plants. The container glass manufacturers retrieved quantities as required and settled the cost of reprocessing with the operators of the reprocessing plants. The GGA passed on its purchasing cost for the waste glass and transportation to member companies, all container glass manufacturers with production sites in Germany, in the form of standard tonnage prices.

16. This purchasing cartel limited the individual demand of the container glass manufacturers for secondary glass materials and was in contravention of German and European law.[13] Above all the Bundeskartellamt ascertained in an examination that, contrary to claims made by the member companies, the cartel was not necessary to guarantee the recycling quotas for waste glass in the long term, which for years had exceeded 80 per cent. The production of container glass relies on a high utilization rate of waste glass.

17. The use of waste glass as a secondary raw material brought considerable cost savings to the glass producers, not only because it is cheaper to purchase than primary raw materials but because its lower melting temperature leads to significant energy savings. Therefore, in the Bundeskartellamt's view there was an economic incentive to replace primary raw materials to a large extent with secondary raw materials in the production of container glass. In the proceedings before the Bundeskartellamt the members of the GGA had claimed that the purchasing cartel was indispensable for the achievement of environmental goals stipulated by the environmental protection regulations.[14] However, the investigation of the Bundeskartellamt showed that this was not the case.

18. The Bundeskartellamt was able to assess and decide the case on the basis of the existing competition law. It gave consideration to the environmental arguments raised by the parties and weighed them in the existing framework of Art. 81 (3) EC (now Art. 101 (3) TFEU) and Section 2 ARC. The purchasing cartel led to the elimination of competition as it covered a substantial share of the waste glass markets. The Bundeskartellamt established that the stipulated environmental goals of recycling could be attained without the far-reaching elimination of competition.

19. The GGA case illustrates that there is hardly ever substance to the alleged conflict between competition law and environmental law. Furthermore, the case proved that the existing legal framework allows for a balance to be struck without the need for a special exemption.

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12 *Bundeskartellamt*, Decision of 31 May 2007, B 4-1006/06 available in German only at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell07/B4-1006-06.pdf?navid=37 .

13 *Bundeskartellamt*, Decision of 31 May 2007, B 4-1006/06, p. 44 ff.

14 *Bundeskartellamt*, Decision of 31 May 2007, B 4-1006/06, p. 71 ff.

4. Joint body for self-regulation by competing waste packaging compliance schemes

20. In Germany, there are now nine competing sales packaging take-back schemes in operation (see also above). The Packaging Ordinance requires the assurance from each compliance scheme that its collection of waste sales packaging covers all of Germany. In practice, this means that used sales packaging is collected jointly by the compliance schemes throughout Germany. For each region, the nine dual systems contract with the same company for the actual collecting. The collecting company is paid by the dual systems on a pro-rata basis ("shared use concept").

21. In order to enable and ensure the joint full-area coverage requirement, the legislator ordered the compliance schemes to set up a joint body by January 1, 2009. Section 6 para 7 of the Packaging Ordinance stipulates:

> *"Compliance schemes shall take part in a joint body. This joint body shall have the following tasks in particular:*
> *1. Assessment of the quantities of packaging of several compliance schemes in the area of a public body responsible for waste management to be assigned on a pro rata basis,*
> *2. Allocation of the coordinated supplementary fees,*
> *3. Coordination of tendering in a way that does not distort competition.*
> *[...]"*

22. The compliance schemes have set up such a joint body. All major decisions are taken unanimously. Decisions of the compliance schemes within the body are also agreements among competitors that need to conform with competition law.

23. For the past two years, the Bundeskartellamt has monitored the joint body and discussed planned decisions with the compliance schemes in a number of cases. So far, the compliance schemes have discontinued activities that the Bundeskartellamt has criticized, so that a formal injunction has not been necessary. For example, the Bundeskartellamt criticized attempts by the compliance schemes to extend the scope of agreements beyond the three tasks prescribed by the packaging ordinance (see above). The Bundeskartellamt has pointed out that the joint body still does not fulfil its task of coordinating the tendering of local collection contracts in a way that does not distort competition. Currently the incumbent DSD still conducts all collection tenders. The situation with regard to the tenders for local collection contracts has not changed with the formation of the joint body.

5. Conclusion

24. In applying competition law, the Bundeskartellamt is well aware of the alleged potential for conflict that may arise between environmental law and competition law. However, in the relevant cases analysed so far, the intended environmental goals could be reached without straining the limits of competition law. Based on the Bundeskartellamt's experience, there is no need for an environmental exemption from competition law.