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COMPETITION CONCERNS IN PORTS AND PORT SERVICES

-- Germany --

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1. Introduction

1. Ports are both, strategic gateways for supplies of goods and key economic clusters. With a view to the strategic importance of ports for the flow of goods, the European Commission issued a communication on a European Ports Policy in 2007, providing guidance for policymakers within the European Union.[1] Given the key role of ports as infrastructural nodes, competition issues in ports tend to have significant ramifications for the whole economy.

2. While the Bundeskartellamt has dealt with a number of merger cases and some abuse proceedings that concerned competition in ports, only few cases required an in-depth investigation.[2] The particular relevance of these cases lay in the strategic importance of the ports concerned for a specific region and for the domestic and international trade of goods. The fact that many ports and related facilities are (co-)owned by states or public entities, as well as the high development costs, requirements of administrative authorizations and the need for connecting infrastructures such as canals, railroads and motorways can complicate investigations in this sector. As a consequence, competition authorities investigating and trying to remedy competition problems in ports and port services can face particular challenges, as the Bundeskartellamt has experienced in the ongoing *Scandlines* case.[3]

3. This paper provides some insights gained from the relevant cases handled by the Bundeskartellamt as to (1) competitive constraints and market definition, (2) market power and its abuse as well as (3) appropriate remedies.

2. Competitive constraints and market definition

4. In the port-related cases that received more in-depth review by the Bundeskartellamt, market definition – both in terms of product and geography – was a key aspect. Other modes of transport are usually not easily interchangeable with sea transport. Air transport may in some cases be an alternative, but only for passengers travelling without a car and for the trade with light goods of high value. Accordingly, in both cases discussed below alternative modes of transport, including air transport, were not regarded as viable substitutes.

5. In 2004 *New Fruit Wharf NV*, a subsidiary of the Belgian *Sea-Invest Group,* intended to acquire control over fruit storage and handling capacities in the port of Hamburg.[4] Starting from a rather broad market for the "handling of cargo in sea ports", in this case the relevant product market was defined as the market for "fruit cargo handling in sea ports". This was because of the need for a special infrastructure due to the risk of deterioration intrinsic to fruit storage and transportation.[5] The geographic market definition included all ports in the "Hamburg/Le Havre" range, i.e. Le Havre – Dieppe – Dunquerque – Zeebrugge – Antwerpen – Vlissingen – Rotterdam – Bremerhaven – Hamburg. Ports located on the Baltic Sea were not

1 European Commission, COM (2007) 616, available at http://ec.europa.eu/transport/maritime/ports_en.htm

2 Bundeskartellamt, B9-188/05 „*Scandlines*"; Bundeskartellamt, B9-101/04 „*Belgian New Fruit Wharf*".

3 Bundeskartellamt, B9-188/05 „*Scandlines*"; in a preliminary ruling one of the key issues was that third-party access to the port was restricted due to specific rights provided for by the German General Railway Act (Allgemeines Eisenbahngesetz), OLG Düsseldorf, VI-Kart 1/10 (V), *Scandlines v Bundeskartellamt*.

4 Bundeskartellamt, B9-101/04 „*Belgian New Fruit Wharf*", para. 2.

5 Bundeskartellamt, B9-101/04 „*Belgian New Fruit Wharf*", para. 24.

considered adequate substitutes because they lacked the necessary handling and storage infrastructure or were insufficiently connected to the "hinterland" for the predictable future.[6]

6. In another case the Bundeskartellamt addressed the issue of market definition in the context of ferry services provided in the Baltic Sea between the ports of Puttgarden in northern Germany and Rødby in southern Denmark. The ferry route Rødby-Puttgarden essentially links Denmark (and Sweden) with Germany and the rest of western/central Europe. There is no viable alternative to the ports of Rødby and Puttgarden, as due to their location (duration of crossing) and connection to further means of traffic they are able to offer services no other port can offer. *Scandlines GmbH* is the owner and operator of the port in *Puttgarden* and the only operator (through a subsidiary) of ferry services on the Rødby-Puttgarden route.

7. Following a complaint by two shipping companies, the Bundeskartellamt found that the port constituted an essential facility and that *Scandlines* infringed competition law by refusing to grant access to the complainants on reasonable, non-discriminatory terms.[7] In line with the market definition of the European Commission in Case 94/119/EC "*Port of Rødby*"[8] the Bundeskartellamt defined the relevant upstream market as "organization of port services in *Puttgarden"*, i.e. a single port,[9] because other ports in the region were not seen as viable alternatives.[10]

3. Market Power

8. Over the past decades policies have been developed for the de-monopolization and liberalization of sectors that for much of the twentieth century were regarded as natural monopolies or considered to be outside the scope of competition rules, and which were often under state control or ownership. It has been recognized that downstream competition is slow to emerge where service providers can only compete if they have access to important infrastructures such as telecommunication networks, electricity grids or ports. In such cases, control of the infrastructure generates a bottleneck situation where one company can prevent others from operating on the market by denying access to what is to be considered an 'essential facility'. The 'essential facilities' doctrine has its origins in United States antitrust law[11] and was first applied in Europe by the European Commission in the case *Sealink/B&I – Holyhead.*[12] In Germany the essential facility issue has received close attention in the competition policy debate since the mid-1990s.[13]

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6 Bundeskartellamt, B9-101/04 „*Belgian New Fruit Wharf*", para. 26.

7 Bundeskartellamt, B9-188/05 „*Scandlines*", p. 45, 50.

8 European Commission, OJ 1994 No. L 55/52 „*Port of Rødby*", para. 7 et seq.

9 Bundeskartellamt, B9-188/05 „*Scandlines*", p. 28 et seq.

10 Bundeskartellamt, B9-188/05 „*Scandlines*", p. 29 et seq.

11 *United States v Terminal Railroad Association of St. Louis,* 224 US 383 (1912); the scope of the essential facilities doctrine has been broadened more recently by the Department of Justice and the Federal Trade Commission as *amici curiae* in the *Verizon Communications v Law Offices of Curtis Trinko* case before the US Supreme Court, available at: http://www.ftc.gov/ogc/briefs/02-682.pdf

12 European Commission, „*Sealink/B&I – Holyhead*", OJ [1994] L 15/8.

13 The topic was the subject of several conferences hosted by the Bundeskartellamt, including the 1997 International Conference on Competition and a competition experts meeting ('*Professorentagung'*) in 1997; see Annette Klimisch and Markus Lange, Zugang zu Netzen und anderen wesentlichen Einrichtungen als Bestandteil der kartellrechtlichen Mißbrauchsaufsicht, WuW 1998, Issue 1, p. 15 et seq.

In 1998 a specific provision (cf. Section 19 (4) no. 4) was introduced into the German Act against Restraints of Competition.[14]

3.1. Essential facilities and refusal to supply

9. The Bundeskartellamt has applied the essential facility doctrine in the „*Scandlines*" case. Since there were no suitable alternatives to the Rødby-Puttgarden route, the Bundeskartellamt considered *Scandlines* to be dominant on the relevant market for the "organization of port services in *Puttgarden"*. The Bundeskartellamt therefore dealt with the question of whether the port facilities were essential, i.e. whether they could be duplicated[15] and whether there was any objective justification for the refusal to grant the complainants access to the port.[16]

10. Following an in-depth investigation, the Bundeskartellamt concluded that the port facilities in *Puttgarden* could not be duplicated because it could be ruled out that the competent authorities would issue a construction permit within a reasonable time horizon and there were reasonable doubts as to whether a construction permit would be issued at all.[17] Furthermore, a duplication of the port facilities was excluded for practical, notably economic reasons. The long-term development plan for the region foresees a bridge to be built between Germany and Denmark within this decade which would ultimately lead to a significant reduction of the market capacity and thereby render the recoupment of the costs for the construction of a new port impossible.[18]

11. According to standing case law as well as the practice of the Bundeskartellamt, dominant companies are not required to grant access to essential facilities if there are capacity constraints which make it impossible to provide access. Although *Scandlines* argued that this was the case, expertise by a nautical expert confirmed that the port infrastructure was sufficient to allow access for a competitor without unduly interfering with the ferry operations of *Scandlines*.[19] It follows that if a dominant firm claims that all the capacity in an essential facility is being used, it is necessary to determine whether the claim is genuine or whether the argument is being used to deny access to a downstream competitor.

3.2. Buyer power and public private partnerships

12. In the „*Belgian New Fruit Wharf*" case, the merging parties had horizontal overlaps and gained a significant market position on the market for "fruit cargo handling in sea ports" in the "Hamburg/Le Havre" range. The merger was cleared in the second phase of German merger control (following a preliminary investigation phase of four weeks). Other aspects taken into account were (i) countervailing

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14 An English version of the Act against Restraints of Competition („ARC") is available on the website of the Bundeskartellamt at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf

15 Bundeskartellamt, B9-188/05 „*Scandlines*", p. 33 et seq.

16 Bundeskartellamt, B9-188/05 „*Scandlines*", p. 40 et seq.

17 Bundeskartellamt, B9-188/05 „*Scandlines*", p. 33 et seq.

18 Bundeskartellamt, B9-188/05 „*Scandlines*", p. 39.

19 Bundeskartellamt, B9-188/05 „*Scandlines*", p. 42.

buyer power,[20] (ii) the fact that the terminals were operated under a public-private partnership,[21] and (iii) future port developments in the Baltic Sea[22].

13. The competitive pressure on *New Fruit Wharf* was not only exercised by competing ports with fruit handling/storage facilities but also by strong customers. The demand side for "fruit cargo handling in sea ports" consists essentially of the designated marketing organizations of the country of origin with significant buyer power. Given that fruit terminals are only profitable if they operate at high capacity levels, the threat of switching fruit imports to another port in the "Hamburg - Le Havre" range restricted the possibility of *New Fruit Wharf* to profitably raise prices beyond the competitive level.[23]

14. Another factor to be taken into account was the fact that the state of Hamburg continued to hold certain veto rights as a minority shareholder of the relevant port facilities. Since the city had no interest in losing customers to competing ports - for job security and regional development reasons - it was expected to not just aim at maximizing profits and thus have a moderating influence on the pricing policy of New Fruit Wharf.[24]

15. Finally, the planned development of fruit terminals in the Baltic ports in Gdansk (Poland) and Gdynia (Poland) as well as the planned improvement of other handling and forwarding infrastructures contributed significantly to remedy competition concerns with a view to the future. Although new market entries (i.e. the development of new port facilities) are generally difficult in this sector due to high sunk costs (i.e. economic barriers to entry) and long administrative planning procedures (i.e. legal barriers to entry), in this case the development of the Baltic ports was considered to be sufficiently likely and timely to allay any competition concerns.

4. Remedies

16. The drafting of guidelines on the design and implementation of remedies in Germany is foreseen in the near future.[25]

4.1. Mergers

17. The Bundeskartellamt has so far not imposed any remedies in merger control proceedings concerning ports or port related services. In order to avoid a situation where the Bundeskartellamt would have to act like a regulator, German law rules out a situation in which the Bundeskartellamt would have to monitor the behaviour of the merging parties on a continuous basis (cf. Section 40 (3) ARC). Therefore, in a relevant case, a clear-cut divestment of a viable business (e.g. port or terminals within a port) that would reduce a horizontal overlap to a degree that eliminates the competitive concerns would generally be

20 Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf", para. 34.

21 Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf", para. 35.

22 Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf", para. 39.

23 Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf", para. 34.

24 Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf", para. 35.

25 Bundeskartellamt, Activity Report 2009/2010,
shortly available at: http://www.bundeskartellamt.de/wEnglisch/Publications/Report.php

regarded as the more effective and preferred remedy. The Model Remedy Clauses published by the Bundeskartellamt provide further guidance.[26]

4.2. Unilateral Conduct

18. Remedies in unilateral conduct cases are an important, even integral, part of an enforcement action, and it is advisable to consider available remedies at an early stage in the proceedings. Not only when it comes to addressing competition issues in ports, the preferred remedy will be the one that accomplishes the goals of stopping anticompetitive conduct and restoring competitive conditions while minimizing the costs of remedy design and administration and the risks of curtailing efficient conduct. Against this background and in order to minimize administrative costs, the Bundeskartellamt issued a decision requiring *Scandlines* to grant access on non-discriminatory terms that were to be negotiated between the parties and presented to the Bundeskartellamt until a fixed date.[27] While this obligation was quashed by the competent appeal court on the ground that it was too vague, it was finally upheld by the German Federal Court of Justice.[28]

[26] Bundeskartellamt, Clearance of a Merger Project subject to Remedies, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/0902_Obligations.pdf

[27] Bundeskartellamt, B9-188/05 „Scandlines“, p. 43 et seq.

[28] Federal Court of Justice, decision of 24.09.2002, KVR 15/01 „Fährhafen Puttgarden“; this decision was taken in an earlier proceeding concerning the same substantive issues.