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EXCESSIVE PRICES

-- Germany --

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1. Introduction

1. The practice of excessive pricing, i.e. the selling of goods or services at an unfair price, is defined as an anticompetitive conduct in a number of jurisdictions,[1] although the enforcement of its prohibition has often been a demanding task for competition authorities worldwide. Despite the difficulties inherent in such complex proceedings, recent efforts of the German Competition Authority (hereinafter: *Bundeskartellamt)* illustrate that the control of excessive pricing may generate benefits for consumers. The potential drawbacks on competition e.g. by diminishing incentives to enter the market can be avoided by using this tool with care and by focussiong on the most obvious cases,.

2. This paper illustrates the activity of the *Bundeskartellamt* in the prosecution of excessive pricing in Germany. The first part describes the legal framework on excessive pricing as established in the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter: ARC)[2] and the relevant case law.[3] The second part describes the experience gained by the *Bundeskartellamt* in this field on the basis of a few cases, which in particular concern the energy sector. The third part provides a short description of a private action for damages due to excessive pricing.

2. Statutory basis

3. Even though there is no explicit definition in the ARC of what constitutes excessive pricing as an anticompetitive conduct, it is prohibited under Section 19 ARC, which generally prohibits the abuse of a dominant position. Amongst other examples of abusive conduct laid down in Section 19 (4) ARC, Section 19 (4) no. 2 defines abusive conduct by a dominant undertaking as the demand of "payment or other business terms which differ from those which would very likely arise if effective competition existed". Therefore, Section 19 (4) no. 2 ARC does not identify a specific conduct as abusive, but prohibits dominant players business practices which deviate (too far) from those expected to occur if they were in "effective competition" (so called *Als-ob-Wettbewerb*). This also applies to their pricing strategy. Although this, at first glance, may be read as a prohibition of any pricing above the hypothetical competitive level, the difference between the actual price in question and the hypothetical conduct in a market where effective competition prevails must be substantial (*erheblich*) to establish an abuse.[4] The ARC does not exclude the use of methods other than the comparative market concept to establish the hypothetical competitive price, but Section 19 (4) no. 2 ARC stipulates that "particularly the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account". [5] The fact that the

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1 E.g. in the European Union, Article 102 of the Treaty on the Functioning of the European Union (TFEU). The English version of the Treaty is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF.

2 An English translation of the ARC is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf.

3 Some cases of abuse of a dominant position, like an alleged margin-squeeze in the telecommunications sector in 2009, have been based on national law as well as Art. 102 TFEU. Excessive pricing cases, however, so far have mostly concerned regional markets and therefore proceedings were based only on national law.

4 See *Bechtold*, KARTELLGESETZ GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN [ANTITRUST: ACT AGAINST RESTRAINTS OF COMPETITION] (Rainer Bechtold ed. 6th ed. 2010) at § 19, para 74 and 80; Bundesgerichtshof (BGH) [Federal Court of Justice] WuW/E DE-R 375 ff., 379f. - *Flugpreisspaltung.*

5 Although it has been established by the Federal Court of Justice that, lacking alternatives, also monopolists may be taken as a benchmark, see BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz.*

only method explicitly mentioned in Section 19 (4) no. 2 is the comparative market concept has occasionally been interpreted as an indication that other possible methods of proving excessive pricing – such as a cost mark-up approach or a profit-limitation approach – are subsidiary concepts and only applicable under special circumstances.[6]

4. Comparative markets can be other geographic markets, product markets with similar products or services, or the same market in the past - which typically means the former prices of the dominant undertaking under investigation. Actual prices found on the comparative market are taken as a basis for the benchmark against which the allegedly excessive prices are compared. Deviating conditions on the dominated market, which a comparative competitor would also have to take into account if he entered that market, must be qualified, quantified and provided for in the benchmark via mark-ups (*Zuschläge*) on and deductions (*Abschläge*) from the actual price used for comparison.[7] To encompass the element of uncertainty inherent in the analysis, either the individual factors should be interpreted to the benefit of the companies, or a security mark-up (*Sicherheitszuschlag*) should be added to the final amount, which then forms the benchmark.[8]

5. A specific mark-up (so called *Erheblichkeitszuschlag),* is used to account for the requirement of a **substantial** deviation of the allegedly excessive price from the benchmark price, determining the threshold only above which the price is considered excessive and constitutes an abusive practice.[9] As postulated in the case law,[10] that mark-up can be linked to the degree of competitive pressure remaining in the dominated market with the consequence that the threshold for classifying prices as abusive is higher the more competition still remains in the market. The sum of all these necessary adjustments, however, must not account for the major part of the calculated benchmark price, to insure that suitable comparable markets or prices are chosen for the comparative market analysis.[11] Any substantial deviation from the hypothetical competitive price established according to these principles must be proven to be objectively unjustified to be classified as an abuse.[12] Particularly the last requirement occasionally made the

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6 *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011) at § 19 GWB para 107. Stating that the comparative market concept is an important, but neither the only nor the primarily admissible methodology to establish excessive pricing (however requiring a justification of the specific concept used): Oberlandesgericht (OLG) [Higher Regional Court] Düsseldorf, decision of 22.4.2002, Kart 2/02 (V) – *Netznutzungsentgelt*. When introducing Section 29 (2) into the ACR, the German legislator declared that the concepts of profit limitation and cost control to establish excessive pricing practices already were accredited methods in the case law for Section 19 (4) 2 ACR and Art. 82 EC Treaty (now Art. 102 TFEU) without any reference to subsidiarity, see Deutscher Bundestag [German Federal Parliament] – 16. Wahlperiode, Drucksache 16/5847, page11.

7 BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz.*

8 *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1,(Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para124.

9 *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1,(Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para 117 f.

10 BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz.*

11 BGH [Federal Court of Justice], WuW/E 1445 ff., 1454 - *Valium II.*

12 The range of possible objective justifications is very limited and subject to debate, see Nothdurft in Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para 119 ff. The case law accepts cost deficits as an objective justification, but only insofar as costs have been

establishment of excessive pricing a very complex task and difficult to prove before the courts for the *Bundeskartellamt*.

6. Following the European Commission`s lead investigation of the European gas and electricity sectors, which showed that the energy markets in Germany were highly concentrated and characterized by vertical integration as well as high prices,[13] the German government took several measures to strengthen abuse control in the German gas and electricity markets. One of these was the introduction of a sector-specific provision, Section 29 ARC, in 2007 to facilitate the prosecution of excessive pricing in the energy sector. The provision applies to companies with a dominant market position in the electricity and gas markets. Originally, the provision was introduced for a five-year-period that was supposed to end in 2012. Currently, discussions to prolong the provision are ongoing.

7. Section 29 ARC differs from the general anti-abuse-provision of Section 19 ARC in several aspects. Under Section 29 s. 1 no. 1 ARC the requirements for a company to be suitable for comparison are lower than under the general provision. This is because the prices of a dominant energy provider can be compared with those of other public utility companies, irrespective of whether these are active on a market in which competition prevails, or not.[14] This is connected to a reversal of the burden of proof to a certain degree, as the dominant companies have to demonstrate why the rejected behaviour was not abusive or that the comparative market concept applied by the *Bundeskartellamt* was erroneous, i.e. that the alleged deviation of their prices is objectively justified.[15] Furthermore, Section 29 s. 1 no. 2 ARC establishes that an abuse of dominance can also be constituted by demanding prices that "unreasonably exceed the costs", thereby explicitly codifying the concepts of cost mark-up (cost control) and, respectively, profit limitation.[16] Moreover, while in general proceedings the enforcement of an issued order is usually delayed by judicial recourse the decisions of the competition authorities were made immediately enforceable in course of the introduction of Section 29 ARC.[17] The application of Section 29 ARC has facilitated the investigation of a number of cases of allegedly excessive pricing in the energy sector.

3. Practical experience

3.1. Earlier Cases

8. During the 1970s, the *Bundeskartellamt* gained some early experience in the prohibition of excessive pricing practices, particularly in the pharmaceutical sector. The experience illustrated the theoretical and practical difficulties to establish benchmarks through the comparison with other markets and to determine hypothetical competitive prices. The most representative case is the so called *Valium*

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duly allocated and all rationalisation reserves have been exhausted (BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz*).

13 See *Lücke* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 29 GWB para 1.

14 Although case law had already established that this was also possible under Section 19 (4) ARC, see BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz*.

15 This shift in the burden of proof applies only to agency proceedings, not to private damages actions.

16 See *Lücke* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol.1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 29 para 37 ff. See also footnote 6 and acc. text.

17 The general suspensive effect of an appeal against a decision of the competition authority on the basis of Sections 19, 20 and 20 ACR, regulated in Section 64 (1) ACR (old version), was abolished.

case.[18] In 1974 the *Bundeskartellamt* investigated allegedly excessive prices charged by a pharmaceutical company for two different products. To establish whether the prices in Germany were excessive, they were compared with those that could be achieved on several other European markets for pharmaceuticals. The price comparison was complimented by a comparison of profits and, within limits, also costs. The analysis led to the conclusion that prices were excessive by approximately 35 % and 40 %.[19]

9. The decision of the *Bundeskartellamt* was appealed and generally upheld by the Higher Regional Court of Berlin (*Kammergericht*) with regard to the finding of excessive pricing, but the amount by which the prices were considered to be excessive was reduced. The court did not follow all methods and comparative markets used by the *Bundeskartellamt* in its analysis, but based its own estimation of the excessive price, using the comparative market concept, mainly on a benchmark price taken from one particular market it considered most adequate for comparison. The case was again appealed and in its final decision the German Federal Court of Justice (*Bundesgerichtshof*) judged in favour of the company.[20] The court concluded that the market used as a benchmark and particularly the hypothetical competitive price established by the Higher Regional Court of Berlin (*Kammergericht*) were not adequate for a number of different reasons, in particular the fact that contribution made to the benchmark price by the mark-ups ultimately exceeded the component of the benchmark price made up from the actual competitive price. This led the court to the conclusion that the benchmark market used in the comparative market analysis was unsuited.[21]

3.2. Recent Cases

10. After the introduction of the new provision Section 29 ARC in 2007 and the establishment of a specific decision division with a focus on cases of abuse of a dominant position in the energy sector in 2008, the *Bundeskartellamt* successfully initiated a number of proceedings against companies in the energy sector on account of alleged abusive practices.

3.2.1. Gas Suppliers

11. In 2008, the *Bundeskartellamt* analysed the prices of 35 suppliers of natural gas. The companies were suspected of having charged abusively excessive prices in the years 2007 and 2008 in the markets for the supply of household customers with heating gas. The proceedings were conducted under both Section 19 and Section 29 ARC. Proceedings concerning the year 2008 were subject to Section 29 ARC which could then be applied for the first time.

12. In its investigation the *Bundeskartellamt* examined whether the respective gas prices differed considerably from those of comparable companies. Incorporating elements of the profit limitation concept into its comparative (geographic) markets approach, the *Bundeskartellamt* checked net revenues[22] for 2007 against those of other public utility companies. This approach enabled the *Bundeskartellamt* to analyse price changes over time, take into account the importance of specific tariffs in the portfolio of the individual companies, and compare prices irrespective of their specific form. Revenue diminishing factors that could not sufficiently be controlled by the companies, such as taxes or the (regulated) grid fee, were

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18 BGH [Federal Court of Justice], decision of 16. 12. 1976, KVR 2/76 – *Valium*; BGH [Federal Court of Justice], WuW/E 1445 ff., 1454 *Valium II*.

19 BGH [Federal Court of Justice], decision of 16. 12. 1976, KVR 2/76 – *Valium.*

20 BGH [Federal Court of Justice], WuW/E 1445 ff., 1454 - *Valium II*.

21 *Ibidem.*

22 The revenues are calculated by price times quantity and are adjusted for factors that cannot be influenced by the company.

deducted. For 2008, quantity-adjusted net tariffs, which were considered the best proxy for revenues, were compared.[23]

13. As required, the *Bundeskartellamt* also added a mark-up (*Erheblichkeitszuschlag*) to the compared revenues and tariffs to account for the requirement of a substantial deviation. The amount of that mark-up was calculated depending on the degree of competition in the market. This approach was also expected to defuse the conflict between the objective of prosecuting excessive pricing and not diminishing incentives for newcomers to enter the market, as consequently price control conducted by the *Bundeskartellamt* would subside in markets characterised by increasing competition. As a possible objective justification for price differences, particularly cost deficits (*Kostenunterdeckung*) were accepted, provided that costs had been duly allocated and rationalisation reserves had been fully exhausted.[24] Especially relevant in this context were differing procurement costs, which the *Bundeskartellamt* accepted as justified up to the average procurement costs of companies in the same or comparative markets.[25]

14. The proceedings could be concluded quickly with commitment decisions[26] whereby the suppliers under investigation offered commitments in all cases that were investigated in-depth after the initial stage. This might be explained by the stricter instruments established in Section 29 ARC. Apart from financial compensation of consumers, the commitments made by the companies also included commitments to stimulate competition, for example by making it easier for new suppliers to win customers by granting these suppliers access to a detailed map of the gas system.

15. In 2010 the *Bundeskartellamt* verified that the gas companies had abided by their commitments and estimated that consumers had received financial compensation amounting to a total of € 444 million.[27] Consumers were compensated by direct financial re-imbursement in the amount of around € 130 million; the rest consisted of financial easement when numerous companies refrained from passing on cost increases in the two years following the proceedings. Moreover, the evaluation showed that competition on the end-consumer level was not stifled but had consistently gained momentum after the proceedings.[28]

3.2.2. Heating current

16. In 2009, the *Bundeskartellamt* initiated proceedings under Sections 19 and 29 ARC against 18 suppliers of electricity for heating purposes (electrical heat pumps, night storage heating). The proceedings

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23 Quantity-adjusted net tariffs were used to predict revenues for 2008 as the relevant data were not available for the year 2008 at the time of the decisions. Tariffs were compared on the basis of several archetype consumption patterns, adjusted for temperature-dependent differences in monthly gas consumption based on historical data. See for example Bundeskartellamt, decision 01.12.2008, WuW/E DE-V 1704 – *RheinEnergie.*

24 With this the *Bundeskartellamt* followed the case law, see BGH [Federal Court of Justice] WuW/E DE-R 375 ff. - *Flugpreisspaltung*, stipulating that a dominant firm may not be forced to sell its goods and services at prices below costs, provided that costs have been adequately allocated and all rationalization reserves have been exhausted.

25 See Bundeskartellamt, Activity Report (Tätigkeitsbericht) 2007/2008 = Deutscher Bundestag [German Federal Parliament] – 16. Wahlperiode, Drucksache 16/13500, page 30. Available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf.

26 On the basis of Section 32 b ACR, making the commitments binding on the undertaktings.

27 See Bundeskartellamt, Activity Report 2009/2010 = Deutscher Bundestag [German Federal Parliament] – 17. Wahlperiode, Drucksache 17/6640, page 120. Availabe only in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf.

28 *Ibidem.*

focused on end consumer prices charged by the suppliers in the years 2007, 2008 and 2009. In total, 25 companies were investigated.

17. The *Bundeskartellamt* applied a comparative market concept that was consistent with the one used in its proceedings against gas suppliers. The *Bundeskartellamt* established net revenues per year and compared these to those of other companies active on different geographic markets. Factors with an impact on the revenues that could not be influenced by the companies, e.g. taxes or licence and grid fees, were deducted from the comparative net-revenues and a substantiality mark-up (*Erheblichkeitszuschlag*) added. The *Bundeskartellamt* regarded higher procurement and distribution costs as possible objective justifications, but only as far as they were justifiable under efficiency considerations.[29] In its calculation, the *Bundeskartellamt* accepted quantity-adjusted average procurement costs of all investigated companies, while with regard to distribution costs it accepted the average costs of the five most efficient companies - incorporating elements of a cost mark-up approach into its analysis[30] .

18. As in the gas price cases, most of the cases could be closed with committment decisions when the companies offered commitments that included lower prices, financial compensation of customers and measures to increase transparency in the market. Financial compensation amounted to a total of more than € 27 million and consumers received at least another € 20 million when companies, not least with regard to the then ongoing proceedings, refrained from raising prices in 2010 despite rising costs.[31] In addition, the electricity suppliers made further comprehensive commitments. The companies promised a transparent publication of electric heating tariffs on the Internet; the establishment of temperature-dependent load profiles by the network operator and transparent publication of load profiles on the Internet by the network operator. It is expected that these commitments will decrease market entry barriers for new competitors and make it easier for consumers to switch providers, thereby stimulating competition in the market.

3.3. Private Enforcement

19. In addition to public enforcement activities by the *Bundeskartellamt*, excessive pricing by a dominant undertaking has occasionally been successfully challenged in civil law suits, recently in an action for damages in 2010.[32]

20. The circumstances of the case were however quite specific and may not be suited as a model for other cases. A seller of pharmaceuticals had claimed excessive pricing by its contract manufacturer, which, after moderate price increases over several years, suddenly had raised prices by 400 % without sufficient objective justification, as the court established. Therefore, the claimant was entitled to damages, which the court calculated as (equalling) the difference between the price paid by the claimant and the price that would have been demanded under competition. To estimate that difference, the court applied a (temporal) comparative market concept, comparing the allegedly excessive price of the contract manufacturer with prices the company had asked in the past. An accepted moderate price increase of 10% and a mark-up to

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29 In line with the case law, BGH [Federal Court of Justice] WuW/E DE-R 375 ff., 377 - *Flugpreisspaltung*. See for example Bundeskartellamt, case B10-13/09, available in German at: http://www.bundeskartellamt.de/wDeutsch/archiv/EntschMissbrauchaufsichtArchiv/2010/EntschMissbrauchsaufsicht.php.

30 See *Bundeskartellamt* 2010, Heizstrom – Marktüberblick und Verfahren, p. 6. Availabe only in German at http://www.bundeskartellamt.de/wDeutsch/publikationen/Diskussionsbeitraege/Stellungnahmen.php.

31 Bundeskartellamt, Press release of 29 September 2010, available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2010/2010_09_29.php.

32 OLG [Higher Regional Court] Frankfurt a.M., decision of 21.12.2010, 11 U 37/09 (Kart) – *Arzneimittelpreise.*

account for a substantial deviation (*Erheblichkeitszuschlag*) of 20% were added to the hypothetical competition price. Compared to the resulting benchmark, a price increase of 400 % was seen to "undoubtedly" exceed the threshold of a substantial deviation.[33]

21. Although several aspects in the reasoning of that judgment may be questioned,[34] including the market definition used and the method applied to estimate the competitive price, it shows that under certain conditions excessive pricing can also be successfully challenged by private parties in civil law suits, even without a prior public proceeding by the *Bundeskartellamt*. It is important to note, however, that in civil proceedings the court has considerably larger discretion in assessing the amount of damages (in this case the part of the price that was deemed abusively excessive) than the *Bundeskartellamt* has in estimating the excessive proceeds in its own proceedings concerning excessive pricing.

4. Conclusion

22. Despite the difficulties raised by complex excessive pricing cases, the experience in Germany shows that by pursuing such abusive practices, even when cautiously focusing only on the most exorbitant excessive pricing cases, benefits for consumers can be achieved reasonably quickly and other tools available to competition authorities can be deployed to foster the emergence of competition in dominated markets.

33 *Ibidem*, para 30.

34 See Wiemer, „Der `reine´Preishöhenmißbrauch – das unbekannte Wesen", WuW vom 05.08.2011, Heft 07-08, p. 723 ff.