

Unclassified

DAF/COMP/GF/WD(2009)23



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10-Feb-2009

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/GF/WD(2009)23
Unclassified

Global Forum on Competition

COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

Contribution from Germany

-- Session I --

This contribution is submitted by Germany under session I of the Global Forum on Competition to be held on 19 and 20 February 2009.

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JT03259487

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COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

--Germany--

1. Introduction

1. This contribution focuses on the relationship between industrial policy, including the issue of national champions, and competition law in Germany.

2. Economic policy thinking in post-war Germany has been strongly influenced by the so-called Freiburger Schule or ordoliberalism. Ordoliberalism is a German variation of neoliberalism, which stresses the importance of economic freedom, competition as a market organising principle and the role of government in protecting competition without interfering with the market forces, wherever possible¹.

3. The Bundeskartellamt endorses this thinking. In its view, competition is the best means to innovate and produce better and cheaper goods and services². Or, to use Friedrich August von Hayek's famous words: Competition is a "discovery process". In this respect, firms are generally closer than the state to market developments and the opportunities the markets offer. This means that firms rather than the state are likely to discover the technological as well as the product and service developments worth-while pursuing³. Consequently, the state should limit itself to guaranteeing the necessary regulatory framework and intervening only in cases of genuine market failures⁴.

4. The principle to let market forces work freely and limit state intervention to a minimum is reflected in modern-day economic policy formulation in Germany. The German Federal Ministry of Economics and Technology, for instance, stresses this principle of non-interference under the rubric "Industrial Policy" on its website: "Entrepreneurial initiative, contractual freedom between business partners, competition and a functioning price system are the central pillars of a market economy. These essential market mechanisms must not be distorted by state interference"⁵.

5. This position is reflected in the principle that the government does not interfere with mergers and acquisitions by either domestic or foreign-owned or foreign-based firms⁶. The fundamental freedom enshrined in Article 56 of the Treaty establishing the European Community (EC) (free movement of

¹ See also Michael Glos (German Minister for Economics and Technology from 2005 to 2009), Schlaglichter der Wirtschaftspolitik, Sonderheft Finanzkrise, available in German at <http://www.bmwi.de/BMWi/Redaktion/PDF/S-T/sonderheft-finanzkrise.property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

² See also Neelie Kroes, Address at the Institute of Electrical Engineers, Challenges to the Integration of the European Market: Protectionism and Effective Competition Policy (12 June 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/369&format=HTML&aged=0&language=EN&guiLanguage=en>. See also Deborah Platt Majoras, Remarks at the International Competition Conference/EU Competition Day, National Champions: I Don't Even Think it Sounds Good (Munich, 26 March 2007), available at http://www.ecd-ikk-2007.de/seiten/Majoras_en.pdf.

³ See also German Monopolies Commission, Competition Policy under Shadow of "National Champions", Summary of the Fifteenth Biennial Report 2002/2003, available in English at http://www.monopolkommission.de/haupt_15/sum_h15_en.pdf.

⁴ See the section on the present financial crisis below.

⁵ See <http://www.bmwi.de/English/Navigation/Economy/industrial-policy.did=76808.html>.

⁶ In this context, it is worth mentioning that there is no legal basis for the government to reverse decisions taken by the Bundeskartellamt in the area of anticompetitive agreements and unilateral conduct.

capital) allows firms based in the European Union to invest in Germany⁷. As for third countries⁸, however, the German parliament is currently working on an amendment to the Foreign Trade Act (“Außenwirtschaftsgesetz”) based on a government proposal⁹. The new amendment would allow the Ministry for Economics and Technology to investigate whether the acquisition of interests in “resident undertakings” amounting to at least 25% of the voting rights would endanger the “public policy or public security” of the Federal Republic of Germany.

2. Competition law, industrial policy and national champions

2.1. *The Bundeskartellamt bases its decisions solely on competition aspects*

6. German competition law strictly separates competition and non-competition aspects. The Bundeskartellamt (as well as the competition authorities of the German Länder) assesses and decides solely on competition grounds. The Bundeskartellamt must not and does not take any other aspects into account, including industrial policy aspects¹⁰. The track record of the Bundeskartellamt underlines that it has not shied away from adopting decisions that conflicted with the agenda of industry leaders as well as politicians when there were competition concerns.

2.2. *Institutional aspects – independence of the competition agency*

7. Apart from the substantive law, the institutional setting of the Bundeskartellamt helps to ensure that it can focus exclusively on competition aspects. In that respect it is of the greatest importance that the relevant decision-making bodies within the Bundeskartellamt are independent of external influence when they deal with individual cases. This also means independence from the Government, in particular the Ministry of Economics and Technology. But the principle of independent decision-making goes even further: The decisions are taken in a decentralised manner by each of the Bundeskartellamt’s twelve decision divisions (by the chair and two members of the competent division in a majority vote); the President of the Bundeskartellamt may not give any instructions.

2.3. *Section 42 ARC– Ministerial Authorisation*

8. With respect to mergers, however, Section 42 of the German Act against Restraints of Competition (ARC)¹¹ empowers the Minister for Economics and Technology the authority, in exceptional cases, to override a prohibition decision by the Bundeskartellamt on strictly non-competition grounds¹². More precisely, the provision allows the Minister “upon application, [to] authorise a concentration prohibited by the Bundeskartellamt if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified

⁷ The EC-Treaty is available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>. For restrictions of and exceptions to the principle of free movement of capital see Articles 57, 58 and 59 EC

⁸ Firms based in EFTA countries are considered to be community-based in the context of the proposed Section 53 of the Foreign Trade Act (“Außenwirtschaftsgesetz”).

⁹ The proposal is available at <http://dip21.bundestag.de/dip21/btd/16/107/1610730.pdf> (in German only).

¹⁰ In the view of the Bundeskartellamt this separation of objectives, i.e. the use of a purely competition-based standard by competition agencies, is highly preferable to a mixed standard that may allow non-competition objectives to be taken into account. In relation to the latter approach, see Evenett, *The Return of Industrial Policy – A Threat to Competition Law*, in: *Competition Law Today* (Dhall, ed.), 2006, p. 452-476, p. 472.

¹¹ Available in English at:

http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

¹² No such provision exists with respect to anticompetitive agreements and unilateral conduct.

by an overriding public interest.” The formulation of the provision already indicates what is common in practice, namely that a ministerial authorisation is difficult to obtain. In fact, since the introduction of merger control and the institute of the ministerial authorisation in 1973, parties to merger projects have only rarely applied for such an authorisation and have in even fewer cases done so successfully¹³. There may be various reasons for this: The criteria laid down in Section 42 set a high standard, the Minister for Economics and Technology conducts a transparent procedure involving third parties, the German Monopolies Commission is heard on the matter, a decision is published and the parties to the procedure may appeal against the decision in court. Furthermore, German Economics Ministers so far have made it very clear by applying Section 42 cautiously that the ministerial authorisation of mergers that had previously been prohibited by the Bundeskartellamt due to competition concerns is only granted in exceptional cases.

9. Section 42 shows that, whereas the Minister may invoke broader political reasons for his decisions, the Bundeskartellamt in its analysis of merger projects is confined solely to competition aspects. This is, besides its institutional independence, another shield protecting the Bundeskartellamt from outside pressure. Furthermore, it may be argued that the instrument of ministerial authorisation strikes the balance between the strictly competition based analysis of the Bundeskartellamt, that leaves no room for discretion in merger cases, and – in rare cases – the overriding interests of the public that may nevertheless justify the merger.

Case example – E.ON/Ruhrgas

10. A recent example in which it was decided by ministerial authorisation that the serious competition concerns of the Bundeskartellamt – which had blocked the merger – were outweighed by overriding public interest, is the E.ON/Ruhrgas merger. This case concerned the energy sector, in particular the supply of gas. The Bundeskartellamt had found that the merger would strengthen dominant positions both in the gas and electricity sales markets¹⁴. The Bundeskartellamt held that the merger would be problematic in particular with respect to the gas markets where the merger would lead to a cementation of Ruhrgas’ dominant position and would significantly diminish the likelihood of any effective competition from other grid gas companies. In the ministerial authorisation it was argued that the merger would strengthen the international competitiveness of Ruhrgas on the supply as well as the demand side. Furthermore, the merger would improve security of energy supply through the long-term supply of well-priced gas, in particular from Russia¹⁵.

11. After the merger was consummated it became clear that competition in the energy sector remained unsatisfactory despite the liberalisation process in Germany.

12. To open the markets to competition, the Bundeskartellamt initiated proceedings based on Articles 81 and 82 EC to investigate E.ON/Ruhrgas’ practice of long-term gas supply contracts with its customers. A survey had shown that almost three-quarters of the contracts concerned cover 100% of the gas distributor’s requirement or at least quantities of between 80% and 100%. Almost all of these contracts ran for more than four years, in some cases up to twenty years. This combination of long contract periods and a high degree of requirement satisfaction leads to considerable foreclosure effects. In its decision in

¹³ In the 22 cases in which parties to a merger have applied for a ministerial authorisation, the Minister has issued (at least partial) authorisation in five cases, some of them subject to obligations.

¹⁴ See Bundeskartellamt WuW/E DE-V 511-526 – E.ON/Ruhrgas. See also English press release, available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002_01_21.php.

¹⁵ See WuW/E DE-V 573-598 – E.ON/Ruhrgas and WuW/E DE-V 643-653 – E.ON/Ruhrgas.

January 2006¹⁶, the Bundeskartellamt prohibited E.ON Ruhrgas' existing long-term contracts with distributors, which covered more than 80% of their actual gas requirements. These contracts were to be terminated at the latest by the end of the same gas year, on 30 September 2006.

2.4. *Other political measures that are relevant to competition*

13. There are of course other means that may have the effect of protecting "domestic" firms from competition by "foreign" firms: One example is the adoption of laws that raise barriers to entry for (potential) competitors of the incumbent firm. A recent illustration can be found in the postal services sector. Germany has formally opened up the market with the discontinuation, from January 2008, of the last exclusivity rights of the incumbent Deutsche Post. However, Deutsche Post still enjoys considerable advantages such as the exemption from value added tax obligations. Further to this, a rather high minimum wage was introduced for the postal sector in 2007 that has rendered the offer of postal services in competition with the incumbent Deutsche Post uneconomic for many newer competitors in the market¹⁷. In the view of the Bundeskartellamt the measure is effectively a barrier to market entry for new competitors that may undermine the full legal market opening that took effect at the beginning of 2008.

3. Measures adopted in the recent economic crisis

3.1. *The Financial Market Stabilisation Act*

14. The last months have been characterised by a severe crisis in the financial markets with implications extending to the real economy. 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 2008¹⁸. 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 systemically indispensable 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.

15. According to Article 2 Section 17 of the Act, Parts I-III of the German Act against Restraints of Competition are not applicable. This means that the acquisition of interests by the fund in financial institutions is not subject to German merger control law. This does not imply, however, that the

¹⁶ See WuW/E DE-V 1147-1162 – E.ON Ruhrgas. See press release at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2006/2006_01_17.php.

¹⁷ The German Monopolies Commission has criticized this step in a special opinion entitled "Monopoly fight with all means, see press release (in German only) available at http://www.monopolkommission.de/sg_51/presse_s51.pdf. A leading competition lawyer, Prof. Wernhard Möschel, argued in an expertise for a hearing before the German parliament's Committee on Economics and Technology on 19 January 2009 that the minimum wage (based on the in-house wage scale of the Deutsche Post) deprives (potential) competitors of the most important competitive instrument. Prof. Möschel concludes that the decision to declare the collective agreement between Deutsche Post and the labour union ver.di as binding for the whole sector is in violation of the German constitution, German and European competition law (as an anticompetitive agreement, Article 81 EC and Section 1 ARC), and also in violation of the freedom of establishment, Article 43 EC.

¹⁸ An English version of the act is available at: http://www.bundesfinanzministerium.de/nn_69116/DE/BMF_Startseite/Aktuelles/Aktuelle_Gesetze/Gesetze_Verordnungen/Finanzmarktstabi_engl_anl.templateId=raw.property=publicationFile.pdf.

acquisition of these interests from the fund by third parties in the future would also escape merger control law.

3.2. *Specific measures taken on the basis of the Stabilisation Act*

16. The Stabilisation Act is of great importance to rescue financial institutions that are vital for the financial market to function (“systemic banks”). However, such extraordinary measures are fraught with the problem of distinguishing between genuine rescue situations and cases where this instrument may be used to pursue other objectives. This question has been raised in the press with respect to the merger case of Commerzbank and Dresdner Bank¹⁹. In this case, it has been argued that the objective of granting aid from the rescue fund has been to support the envisaged concentrations between the respective parties rather than to rescue a bank in serious financial turmoil. Whatever the merit of the criticism, it highlights the problem that with a powerful instrument like a rescue fund, the state is likely to be lobbied to intervene for all kinds of special interests.

17. Such intervention would run counter to ordoliberal traditions where the state was supposed to leave the market forces to work independently where possible²⁰. Industrial policy measures bear the risk of the state taking wrong decisions that have to be paid for by taxpayers. Furthermore, competition may be seriously distorted. State intervention should therefore, as mentioned before, be restricted to the minimum necessary.

18. It is feared that the financial crisis may extend to other sectors and affect the real economy. Parliament has therefore adopted a broader investment and stimulus package to bolster the economy. As far as the implementation of the measures is concerned, the government will have to ensure that they will not lead to significant market distortion, to the detriment of those competitors that do not benefit from the measures adopted²¹. Furthermore, the state measures should not provide an incentive for firms to take money from the state although the aid is not needed to gain a competitive advantage over their competitors. The issue of aid by the state may finally run counter to the objective of creating a level playing field for firms in different countries²².

4. Conclusion

19. The Bundeskartellamt takes a critical view of state intervention that goes beyond setting a regulatory framework for markets to function. Generally, developments within the markets and developments which open up new markets should be left to firms, not the state, since these will normally have a much better insight into how markets function than the state. Thus, it should be left to firms and competition to identify key sectors, technologies as well as goods and services that merit investment and development. Or, as the former Chairman of the United Kingdom’s Competition Commission, Prof. Paul Geroski, put it: “[T]he kind of ‘competitiveness’ which competition policy actually strives to create is

¹⁹ See, e.g., Ist Ihnen noch zu helfen?, Süddeutsche Zeitung, 27 January 2009, p. 17.

²⁰ See also the critical opinion of the German Monopolies Commission, available in German at <http://www.monopolkommission.de/presse/pressemitteilung090122.pdf>.

²¹ See German Monopolies Commission, press release, available in German at <http://www.monopolkommission.de/presse/pressemitteilung090122.pdf>.

²² Creating a level playing field between firms throughout the European Union is the objective of the EC Treaty’s rule on state aid, see Articles 87 et seq.

virtually the only way a nation state can achieve the kind of “competitiveness” which industrial policy proponents aspire to.”²³

20. If market intervention is in fact necessary, for instance in these difficult times of financial crisis and spill-over to the real economy, governments setting up rescue funds and granting state aid to firms in trouble should limit themselves to rescuing or supporting firms that are crucial for the functioning of the system. Any other measure may only lead to high costs for the tax payer and seriously distort competition in the markets concerned.

²³ Paul Geroski, Competition Policy and National Champions, Speech to WIFO (Austrian Institute of Economic Research) in Vienna (8 March 2005), available at http://www.competition-commission.org.uk/our_peop/members/chair_speeches/pdf/geroski_wifo_vienna_080305.pdf.