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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Germany --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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GERMANY

1. State-owned enterprises: Developments in Germany

1. Within the last 30 years, the federal German government has withdrawn as an active player from many markets. In the 1980s in particular, many state-owned enterprises were privatized. The main objectives of privatization were to reduce the market influence of the government and to strengthen market forces. Moreover, in the 1990s the European Union initiated liberalization processes in various grid-based industries, i.e. energy supply, telecommunications, railways and postal services. In this context, state-owned companies which are active in these sectors were partly privatized.

2. Nevertheless, numerous state-owned companies still exist in Germany. The German federal government, for example, remains the sole shareholder in Deutsche Bahn AG, the successor of the former state railway company, and holds about 32% of the shares in Telekom AG. The German federal states and municipalities also hold shares in numerous enterprises, including energy companies, hospitals or local public transport operators.

3. On the local level, even a trend towards remunicipalisation can currently be observed. Companies which were formerly privatised are being taken over again by local authorities and new municipal companies are being established. Between 2000 and 2011 the number of municipal companies increased from 11,000 to almost 13,500 (by almost 25%). More than 10% of the German gross domestic product is generated by municipal companies. This development is often in accordance with/reflects the wishes of citizens. Although a large part of the services offered by municipalities could also be offered by private firms, state-owned enterprises are often regarded as superior in terms of quality, democratic control and security of service. Despite the fact that local authorities often argue that they are acting in the interests of the public, in many cases their financial interests play an important role.

2. Competition neutrality and competition law

4. The double role of a government as a market participant and a sovereign decision maker can raise questions of competition neutrality. There is an increased potential to discriminate against private competitors. State economic activity can thus lead to a distortion of competition to the detriment of private companies and consumers.

5. The application of competition law can to a certain extent foster a level playing field for all market participants, state-owned and private. As far as market behaviour and changes in market structure due to mergers are concerned, competition law can set boundaries for the economic activities of state-owned companies. It can thereby contribute to competition neutrality. However, it is also understood that competition law cannot prevent the general competition advantages of state-owned companies such as, for example, their better credit standing. Neither can competition law prevent discrimination against private competitors which is based on legislation.

6. The German Competition Act explicitly states that competition law applies to both private and state-owned enterprises. It is irrelevant whether the state-owned company is organized under the private or public law regime. In European competition law the same principles apply although there is no specific provision on the application of competition law to state-owned enterprises. Only German competition law makes an exception for public fees which since 2013 have been exempted from abuse control.

7. The Bundeskartellamt frequently conducts merger control proceedings involving state-owned companies. In addition, abuse control plays a particular role with regard to state-owned companies. The reason for this is that they often have strong market positions. This is in particular the case where they hold a monopoly as, for example, in the supply of drinking water or where they have emerged from former monopolies such as postal or rail companies.

8. In addition to competition law there are other European law rules aimed at ensuring competition neutrality. Article 106(1) TFEU provides that in respect of public undertakings Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties. Furthermore, member states must observe European state aid rules.

3. Activities of the Bundeskartellamt

9. In recent years the Bundeskartellamt has faced numerous cases involving state-owned companies. On the one hand, the Bundeskartellamt supports the liberalization of former grid-based, state-owned monopolies with various proceedings. On the other hand, in view of the trend towards remunicipalisation, it also conducts cases involving municipal companies.

3.1 Activities in the context of the liberalization process

10. The liberalization process on markets with former state-owned monopolies can have very positive effects on the market structure and achieve significant benefits for consumers. Whether such a process is successful and leads to competition depends on the legal framework, in particular on the applicable regulation. In Germany, the liberalization of the telecommunication sector in particular was very successful. As a result there are a larger variety of suppliers, lower prices and numerous innovations. Less successful is the liberalization process in the postal and rail sectors. Here, the German legislator has not yet removed all existing barriers to competition.

11. As far as competition distortion is not based on the legal framework but on the behaviour of the (state-owned or privatized) incumbent, the Bundeskartellamt can contribute to market opening (provided that the specific behaviour is not addressed by regulation). Accordingly, the Bundeskartellamt supports the liberalization process by conducting competition law proceedings.

12. In 2005 the Bundeskartellamt prohibited Deutsche Post AG from hindering or discriminating against rival small and medium-sized providers of postal services in their “mail preparation services”. The mail preparation services concerned included in particular the collection and pre-sorting of letters and the feeding of mail items into Deutsche Post AG’s sorting centres. Before the proceeding, Deutsche Post AG awarded discounts for these services only to its own major customers. The Bundeskartellamt came to the conclusion that this practice violated German and European competition law. As a dominant company Deutsche Post was not allowed to treat providers of mail services feeding in letters from only one large customer and so-called consolidators feeding in letters from various customers differently without justification. As a result, Deutsche Post AG had to grant a discount for the feeding-in of pre-sorted bulk mailings into its mail sorting centres even where competitors collect and sort letters from different senders to ultimately hand these over to Deutsche Post AG bundled (“consolidated”).

13. In 2012 the Bundeskartellamt again initiated abuse proceedings against Deutsche Post AG. This action was prompted by complaints from independent letter service providers which accuse Deutsche Post AG of hindering competition on the letter services market. *The accusation is that the prices which Deutsche Post charges major customers for posting letters are not cost-covering. In the proceedings, which are still ongoing, the Bundeskartellamt is examining whether Deutsche Post AG is using a cut-price strategy to squeeze its competitors out of the market or prevent potential competitors from entering it.*

14. Currently, the Bundeskartellamt is also conducting proceedings against Deutsche Bahn AG. Deutsche Bahn AG is suspected of abusing its dominant position in the sale of rail passenger tickets. *Competitors have complained that they have at the most only limited access to Deutsche Bahn's sales channels.* The Bundeskartellamt is examining *why some of Deutsche Bahn's competitors cannot sell their tickets at railway stations and to what extent different rates of commission charged by Deutsche Bahn for ticket sales on behalf of its competitors are justified.* It is also examining whether Deutsche Bahn is abusing its legal obligation to set joint tariffs to oblige its competitors to use its ticket sales services. *Functioning competition in the sale of tickets is essential for competition in the rail sector.*

15. *In the packaging disposal sector the Bundeskartellamt fostered the transformation process from a state-owned monopoly to a competitive market by means of a number of competition enforcement measures. The competition which has developed between several service providers in Germany since the market was opened in 1998 has led to substantial cost savings and improvements in the quality of recycling. The results of a sector inquiry conducted by the Bundeskartellamt prove that the previous annual total costs of packaging disposal of around two billion euros have fallen to under one billion euros per year as a result of liberalization.* The introduction of competition to this sector has also unleashed a wave of innovation in technology for sorting the mix of waste material. The use of this modern sorting technology not only reduces costs but, due to the improved levels of sorting, enables higher quality recycling.

3.2 Activities with regard to municipal companies

16. The Bundeskartellamt is faced with a number of cases involving municipal companies. One of the reasons for this is certainly the general trend towards remunicipalisation. The main areas of the authority's activity in this area are merger control in the hospital sector and abuse proceedings in the award of energy network concessions and water supply.

17. A sector where the merger control of German municipal companies plays an important role is the hospital sector. One third of German hospitals are state-owned. Despite specific regulation, the hospital market is not much different from other market. Hospitals compete with each other for patients by offering a high quality of health services. In every merger case the Bundeskartellamt carries out a detailed analysis of the specific competitive situation. Geographic markets are typically regional. As a result, the Bundeskartellamt sometimes has to prohibit rather small mergers. In 2014 it prohibited plans by the administrative district of Esslingen and the town of Esslingen (Southern Germany, 90,000 inhabitants) to merge the Esslingen district clinics with the Esslingen clinical centre, i.e. the merger of two municipal hospitals. The merger would have eliminated the competitive pressure in the region. Because the hospital sector is subject to specific state regulation and there is only little price competition, it is particularly important to make sure that patients still have a number of hospitals to choose from. This ensures that quality competition between hospitals is preserved.

18. Furthermore, abuse control plays a particular role when it comes to municipal companies. Quite a few public companies have a dominant market position because they are active on markets where they have a natural monopoly (e.g. water, public transport).

19. In recent years the Bundeskartellamt finished abuse proceedings against several municipalities with regard to the award of concessions for local electricity and/or gas networks. These concessions must be re-awarded every 20 years by the local municipality. Currently, many of these concessions are being re-awarded throughout Germany as the contracts which were concluded in the context of the liberalization process in the 1990s are now expiring. Municipalities are, however, not only "suppliers" of concessions but often also bidders (via their own utilities). In individual cases municipalities have tried to give their own utilities preference in the award decision. From an antitrust law perspective, these municipalities are acting abusively. According to the case-law of the German Federal Court of Justice, municipalities act as entrepreneurs in the award of concessions and, as the sole owners of these rights, have a dominant position in the market. Therefore the award must be carried out in a non-discriminatory and transparent procedure and under competitive criteria. An

unjustified preference for the municipality's own utility is not allowed. In some cases where the municipality did not comply with the non-discriminatory and transparent procedure the Bundeskartellamt has ordered it to carry out a new award procedure. In 2013 and 2014 the Federal Court of Justice confirmed the position taken by the Bundeskartellamt in its decision-making practice in three different civil proceedings.

20. In 2012, the Bundeskartellamt terminated an abuse proceeding against the Berlin water supplier BWB. BWB charged prices under private law (not public fees), which means that competition law was applicable. In its decision the Bundeskartellamt ordered that the utility's revenue (excluding taxes and duties) from the supply of drinking water in Berlin must be reduced by 18% for 2012 and by 17% on average for the period 2013-2015, as compared to 2011. In 2014, the Bundeskartellamt ordered BWB to extend measures to lower its water prices for three more years until 2018. This was the result of a settlement between the company and the authority. The Bundeskartellamt refrained in return from ordering the reimbursement of excessive prices from the years 2009 to 2011.

21. In 2013, the German legislator expressly exempted public fees from abuse control. Price control by competition authorities is now explicitly limited to prices under private law. As a result, water suppliers now fall under two different regimes depending on whether they charge prices or fees. The Bundeskartellamt is only able to control the prices of water suppliers which opt for the private law regime. As a result, water suppliers can easily avoid price control by a competition authority by switching from water prices to water fees. There are already some examples of such "escapes" from abuse control in practice. Abuse control in the water sector has thus become almost impossible. In the end, the lack of control of public fees under competition law comes at the expense of the consumers. From their perspective it makes no difference whether they pay a fee or a price for drinking water.

4. Conclusion

22. From a competition policy view it is important that state-owned enterprises are subject to the same rules as private enterprises. *Competition neutrality is crucial to guarantee a level playing field for both private and public companies. In addition to its case work, the Bundeskartellamt therefore promotes the concept of competition neutrality in its advocacy work. The Bundeskartellamt criticizes in particular legislation intending to impede the application of competition law to public companies.*