

THE ANALYSIS OF MARKET DOMINANCE AND RESTRICTIVE PRACTICES UNDER GERMAN ANTITRUST LAW IN LIGHT OF EC ANTITRUST LAW

Anca Daniela Chiriță¹

ABSTRACT

This article analyses key features of the German Act Against Restraints of Competition (section 19), including the more severe provisions of section 20, and aims to discuss the economic freedom of competition approach to the abuse of a dominant market position. Furthermore, the article details with specific examples of abuse in cases heard by the Federal Cartel Office, with particular focus upon predatory pricing, cross-subsidisation, rebates, exclusive contracts, tying and bundling, refusal abuses, hindrance and abuse of economic dependence. Emphasis is placed upon differences in the implementation of antitrust law and upon answering the question of whether more severe rules bring about greater compliance. Finally, the article aims to examine both the differences in substance between German and European antitrust law, and the similarities and potential for convergence and harmonisation of the two.

Keywords: German antitrust law, EC law, harmonisation

A. COMPARATIVE REVIEW OF MARKET DOMINANCE

1. Introduction, Evolution and Policy Objectives

The German Act Against Restraints of Competition (ARC) restricts the unilateral behaviour of both dominant undertakings in section 19 and non-dominant undertakings in section 20. The creation and strengthening of a dominant position falls within the scope of section 35. The main policy goals of the ARC are to protect the economic freedom of competition by maintaining the competitive structure of markets; to keep market entries

¹ Dr. iur (Europa-Institut, Saarland, Germany), lecturer in law, Durham Law School, UK. This paper is based on a previous conference paper and has been published in *European Competition Journal*, 29 (2008) 3, 415 ff.

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open; and to prevent the further foreclosure of markets by undertakings in a dominant or otherwise strong market position.²

The economic freedom of competition is one distinct feature of German antitrust law developed by the Freiburg school.³ The ordoliberal thinking of the Freiburg School begins from the premise that the market order is a constitutional order. The central concept of order, *Ordnung*, is related to the concept of economic constitution in the sense of the rules of the game *Spielregeln*, upon which economic systems are based.⁴ Eucken aimed at developing a systematically integrated approach to the theoretical study and political shaping of the constitutional order from a wider social, economic and political perspective.⁵ Böhm, in his seminal book about competition and monopolistic rivalry,⁶ referred to the free market economy and the competitive process as part of an economic constitution, seen as a legal order but with an exact constitutional structure.

As part of Böhm's vision, Mestmäcker described the interdependence between a free economic order and a free political system as an attempt "to translate the philosophy of the classical economists from the language of economics into the language of law".⁷ Accordingly, the essential means by which economic policy can seek to improve the economy is by improving the institutional framework within which economic activities take place, ie the economic constitution.⁸ In order to achieve their aims, both Böhm and Eucken considered that law and economics are indispensable prerequisites for the economic constitution,⁹ which would provide the basis for a free market economy. The free market economy is seen as an

² "Freiheit des Wettbewerbs" pleaded for a process-oriented, more dynamic competition and aimed at political and economic freedom. See, eg KP Schultz, in E Langen and HJ Bunte (ed), *Kommentar zum deutschen und europäischen Recht* (Neuwied, Luchterhand, 10th edn, 2006), s 19, 138.

³ See generally F Böhm, *Wettbewerb und Monopolkampf: Eine Untersuchung der Frage des wirtschaftlichen Kampfrechts und zur Frage der Struktur der geltenden Wirtschaftsordnung* (Berlin, Carl Heymann, 2nd edn, 1964); W Eucken, *Die Grundlagen der Nationalökonomie* (Berlin, Springer, 8th edn, 1965); Böhm, *Wirtschaftsordnung und Geschichtsgesetz* (Tübingen, Mohr, 1971); Böhm and EJ Mestmäcker, *Freiheit und Ordnung in der Marktwirtschaft* (Baden-Baden, Nomos, 1980); W Röpke, *Die Lehre von der Wirtschaft* (Bern and Stuttgart, Haupt, 13th edn, 1994).

⁴ W Eucken, *Die Grundlagen der Nationalökonomie* (Berlin, Springer, 9th edn, 1989), 240.

⁵ W Eucken, *The Foundations of Economics: History and Theory in the Analysis of Economic Reality* (Berlin and New York, Springer, 1992), 314.

⁶ F Böhm, *Wettbewerb und Monopolkampf: Eine Untersuchung der Frage des wirtschaftlichen Kampfrechts und zur Frage der Struktur der geltenden Wirtschaftsordnung* (Berlin, Heymann, 1st edn, 1933), IX.

⁷ EJ Mestmäcker, "Competition Policy and Antitrust: Some Comparative Observations" (1980) *Zeitschrift für die gesamte Staatswissenschaft*, 387.

⁸ W Eucken, *Grundsätze der Wirtschaftspolitik* (Tübingen, Mohr, 6th edn, 1990), 378.

⁹ For the concept of "Wirtschaftsverfassungspolitik" see, eg Eucken, *supra*, n 4, 240.

order of free competition in which all economic players meet as legal equals.¹⁰ Accordingly, the protection of individual economic freedom of action and of the competitive process constitutes the major goal of ordoliberal competition policy, and a value in itself as part of the overall protection of fundamental freedoms through the restraint of undue economic power.¹¹ Hoppmann also focused upon the individual freedom of action, and the freedom of competition, *Wettbewerbsfreiheit*,¹² is seen as a prerequisite for economic advantage, *ökonomische Vorteilhaftigkeit*.

In order to avoid misunderstandings, it is necessary to distinguish between the ordoliberal concepts of economic efficiency and performance-based competition. On the one hand, ordoliberals used economic efficiency as a generic term for growth and allocative efficiency, and economic efficiency is therefore an “indirect and derivate” goal.¹³ Not only Möschel but also Kerber considered economic efficiency as the outcome of the major goal of protecting individual freedom of action.¹⁴ Kerber also argued that economics has not yet developed normative concepts that can integrate these protected rights into a normative approach. Economic efficiency as an indirect goal does not mean that ordoliberals did not use economic models; for example, Eucken used the model of “perfect competition”,¹⁵ which was later rejected by Katzenbach,¹⁶ who defended the position that workable competition can only be achieved in a broadly oligopolistic market structure with a low degree of product differentiation.

¹⁰ F Böhm, “Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung“, in F Böhm, W Eucken and H Großmann-Doerth (ed), *Ordnung der Wirtschaft*, vol 1 (Stuttgart and Berlin, W Kohlhammer, 1937).

¹¹ See, eg W Möschel, “The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy” (2001) 157 *Journal of Institutional and Theoretical Economics*, 4.

¹² E Hoppmann, “Zum Problem einer wirtschaftspolitisch praktikablen Definition des Wettbewerbs“, in HK Schneider (ed), *Grundlagen der Wettbewerbspolitik* (Berlin, Duncker & Humblot, 1968), 9; Hoppmann, Das Konzept der optimalen Wettbewerbsintensität: Rivalität und Freiheit des Wettbewerbs – Zum Problem eines wettbewerbspolitisch adäquaten Ansatzes der Wettbewerbstheorie, in (1966) 176 *Jahrbuch für Nationalökonomie und Statistik*, 286. Cf E Kantzenbach, Das Konzept der optimalen Wettbewerbsintensität – Eine Erwiderung auf den gleichnamigen Besprechungsaufsatz von Erich Hoppmann, in (1967) 181 *Jahrbuch für Nationalökonomie und Statistik*, 193-41.

¹³ Möschel *supra* n 11. Cf Posner argued that “efficiency is the ultimate goal of antitrust” law. See, eg R Posner, *Antitrust law*, (Chicago, 2nd edn, 2001), 27.

¹⁴ W Kerber, “Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundation of Competition Law”, forthcoming in J Drexl, L Idot and J Moneger (ed), *Economic Theory and Competition Law*, (Cheltenham, Edward Elgar, forthcoming). Available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075265, accessed on 1 October, 2008.

¹⁵ Cf D Schmidtchen, “German Ordnungspolitik as Institutional Choice” (1984) 140 *Zeitschrift für die gesamte Staatswirtschaft*, 22-78. Schmidtchen argued that Eucken’s “complete competition” is not identical with perfect competition since what counts is the absence of coercive power.

¹⁶ E Kantzenbach, *Die Funktionsfähigkeit des Wettbewerbs* (Göttingen, Ruprecht, 2nd edn, 1967).

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However, the most important feature of ordoliberalism is that, apart from the constitutional level at which political choices are made, for a well-functioning competitive market order, a sub-constitutional level is also required, ie a level at which individual players determine the rules of the game.¹⁷ The task of the economic constitution is therefore to create and maintain the rules of the game for performance-based competition, *Leistungswettbewerb*.¹⁸ On the other hand, the ordoliberal concept of performance-based competition, *Leistungswettbewerb*, ie competition in terms of better service for consumers, aimed to achieve “consumer sovereignty”¹⁹ to the largest extent possible, and contrasts with *Behinderungswettbewerb* as a concept, well known as hindrance abuse. Thus, the ordoliberal notion of the latter concept is that of “prevention-competition”, ie competition by means that aim to prevent competition from other producers, rather than to improve one’s own performance in the service of consumer interests.²⁰ Vanberg considered “consumer sovereignty” to be a key criterion against which the performance of markets can be measured, and as the embodiment of performance-based competition, as a means to emphasise that the rules of the game should be defined and enforced in such a manner that better services to consumers is “the only route to business success”.²¹ From this perspective, the competition rules aim to ensure that the overall quality of performance determines the market success, ie profits and losses of firms reflect the relative quality of their performance for the benefit of consumers.²² Particularly because of its market outcome focus, Mestmäcker considered performance-based competition to fail to fit into Freiburg’s ambitious plans.²³ In order to prevent the deterioration of competition policy and avoid dirigisme, the preservation of market structures compatible with effective competition is crucial. Hoppmann saw competition as a dynamic process and considered market structure criteria alone were not best suited to evaluating market performance, there was therefore no need to

¹⁷ F Böhm, *Reden und Schriften* (Karlsruhe, CF Müller, 1960), 34-44, 67.

¹⁸ Eucken, *supra* n 8, 266.

¹⁹ Eucken, *supra* n 8, 43; W Röpke, *A Humane Economy – The Social Framework of the Free Market* (South Bend, Indiana Gateway Editions, 1960).

²⁰ Böhm, *supra* n 10, 107, 123-7, 153; W Eucken, “Die Überwindung des Historismus“ (1938) 62 *Schmollers Jahrbuch*, 81.

²¹ V Vanberg, “Freiburg School of Law and Economics”, in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law*, vol II (London, MacMillan, 1998), 172-9; V Valenberg, “The Market and State: The Perspective of Constitutional Political Economy” in (2005) 1 *Journal of Institutional Economics*, 39.

²² Kerber, *supra* n 14.

²³ See, eg EJ Mestmäcker, “Competition Policy in an Industrial Society”, in *Standard Texts on the Social Market Economy*, (Stuttgart and New York, Gustav Fischer, 1973), 138-9. Mestmäcker considered that anti-competitive practices should be prohibited by rules that do not interfere with the effectiveness of competition.

accept restrictions upon competition that might negatively affect the market structure.²⁴ Hoppmann's freedom of competition refers to the freedom to emulate the performance of competitors and to introduce innovation (*Wettbewerb im Parallelprozess*) and the freedom to choose one's trading partner (*Wettbewerbs im Austauschprozess*).

Effective competition based on performance, influenced by the ordoliberals, implies the analysis of efficiency-based defences of competition with the help of the structure and conduct of undertakings.²⁵ Section 24 (2) provides that "competition rules are provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct that violates the principle of fair competition or effective competition based on performance." On the one hand, by not providing for a specific legal definition of what constitutes "effective competition based on performance," a broad and flexible range of interpretations is allowed. On the other hand, the purpose of the provisions is to counteract potentially harmful conduct. However, while the above allows for a great deal of flexibility, the result does not clearly distinguish between conduct that is justified economically and that which is not.²⁶ Additionally, there is a failure to deal directly with certain forms of harm covered by section 20 or those related to the restriction of competition.

Performance-based competition has been a core element of economic freedom and a means of protecting competition against particular forms of harmful conduct to competitors. However, because of difficulties associated with accurately measuring the true extent to which a particular anti-competitive conduct caused harm to competition, the exercise becomes one of balancing the interests of the parties concerned. The conduct of a dominant undertaking is considered abusive if it impedes the ability of competitors to compete, and this cannot be justified by any resulting improvements in either consumer welfare or the structure or intensity of competition in the market. An objective justification therefore requires a comprehensive balancing, using a case-by-case approach, of the harm caused to competitors against the expected benefits to society of the economic consequences when harm to competitors clearly outweighs any such results. While balancing the interests of the

²⁴ E Hoppmann, *Wirtschaftsordnung und Wettbewerb* (Baden-Baden, Nomos, 1988). In order to reduce legal uncertainty, Hoppmann advocated that restrictive practice should be prohibited per se.

²⁵ "Leistungswettbewerb" weakened the area of application of the ARC by favouring monopoly power. Since 1982, the emphasis has been upon a market-optimising antitrust.

²⁶ Further amendments in 1980, 1990 and 1998 added the provision that finds abuse when a dominant undertaking impairs without justification the ability of other undertakings to compete in a manner affecting competition in the market. There was no reference to the concept of performance competition or to its alternative, the balancing of interests.

parties, the economic freedom of competition and the aim of keeping the market entry open are considered paramount.

The term “effective competition” means “substantial competition” (*wesentlicher Wettbewerb*).²⁷ Substantial competition is in existence when competition eliminates the ability of any undertaking to act arbitrarily. Controlling the behavioural margin is a key criterion and therefore substantial competition is only workable²⁸ when this criterion is fulfilled.²⁹ A further structural criterion implies an analysis of the objective competitive requirements, while the market behaviour test has to prove how an undertaking uses its advantage within the relevant market.³⁰

The turning point in German antitrust law from a structure-performance paradigm toward a structure-behaviour one, with special emphasis upon keeping market entry open, “a commitment to open markets with free competition,”³¹ is also a point of convergence with European antitrust law.³² By contrasting the EC’s proposed consumer welfare-based approach,³³ we can consider if the protection of competition is at the core of the economic freedom-based approach. The premise is the protection of competition itself and not of competitors.³⁴

As German antitrust law has a reputation for being particularly stringent, Section II will consider whether stricter rules are also a prerequisite for better enforcement. The Federal

²⁷ For alternative theoretical forms see, eg competition as a model of intensive competition (“intensiver Wettbewerb”) in H Härry, *Die Intensität des Wettbewerbs: Ein theoretischer Beitrag* (Winterthur, Keller, 1954) or effective competition (“wirksamer Wettbewerb”) in E Käufer, *Industrie Ökonomik: Eine Einführung in die Wettbewerbstheorie* (München, Franz Vahlen, 1980), and as a model of pragmatic competition (“funktionsfähiger Wettbewerb”) whereas its goal is widened by a heterogeneous oligopoly see E Katzenbach, *Die Funktionsfähigkeit des Wettbewerbs* (Göttingen, Ruprecht, 2nd edn, 1967); E Hoppmann, “Workable Competition as wettbewerbspolitisches Konzept”, (1967) *Festschrift für T Wessels*, 145.

²⁸ Workable (“funktionsfähig”) competition of American influence is used as a pragmatic concept, since effective competition evolved into a more oligopoly-oriented concept and designates substantial competition.

²⁹ For substantial competition see, eg R Bechtold, *Kartellgesetz, Gesetz gegen Wettbewerbsbeschränkung: Kommentar* (München, Beck, 4th edn, 2006), s 19 GWB, 69 or HP Götting, in U Loewenheim, KM Messen and A Riesenkampf (ed), *Kartellrecht: GWB Kommentar* (München, Beck, 2006), para 27, 320.

³⁰ G Wiedemann, *Handbuch des Kartellrechts* (München, Beck, 1999), s 23, 26.

³¹ N Kroes, “A renewed commitment to competition in Europe”, Speech no 07/689/2007.

³² Case C-95/04 *British Airways v Commission* [2007] 6 CMLR 44, 1781-1816, para 106: “Article 82 is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (1) (g) EC.”

³³ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005, (“Discussion Paper”), para 4.

³⁴ See generally F Engelsing, P Marsden, and D Müller, “A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: A ‘Dialectic’ on Competition Approaches”, (2006) 2 *European Competition Journal*, 214. Cf EJ Mestmäcker, *Der verwaltete Wettbewerb: Eine vergleichende Untersuchung über den Schutz von Freiheit und Lauterkeit im Wettbewerbsrecht* (Tübingen, Mohr, 1984).

Cartel Office (FCO)³⁵ is the main executive body of competition policy responsible for both merger control and abuse of a dominant position.³⁶ In terms of its general policy objectives, the FCO aims at restoring the competitive conditions that would have existed in the absence of the abusive behaviour, at seeking legal certainty, and at ending the infringement by keeping the right balance in choosing the appropriate remedy for the alleged infringement.

2. To Whom Section 19 and Section 20 of ARC Apply

Both section 19 and section 20 (1) apply to dominant undertakings, and correspondingly to associations of competing undertakings (so-called legal cartels).³⁷ Dominant undertakings cover all natural and legal entities if and insofar as they are engaged in an economic activity. This functional approach also includes public entities that act in all matters of procurement. Even if the latter subject is only necessary for the fulfilment of sovereign tasks, the area of application is widened in comparison with Article 82 EC. Thus, section 19 does not apply if an undertaking enjoys superior or “relative” market power but is not dominant, while section 20 applies to both situations. Section 20’s target is the unfair hindrance of competitors and discrimination, and it can overlap with section 19, whereas a particular practice of a dominant undertaking that is generally abusive might hinder a competitor.³⁸

Furthermore, in order to keep the right balance in concentrated market structures, if an undertaking enjoys superior market power in relation to small and medium-sized enterprises (SMEs), section 20 (4) is applied. Section 20 (2) 1 applies to undertakings whose suppliers or purchasers are SMEs that depend on them in such a way that sufficient or reasonable alternatives do not exist. The special feature of section 20 (2) is that it widens the scope of application of section 20 (1), thereby allowing intervention in cases in which SMEs are affected, even if they are exposed to substantial competition. For example, section 20 (3) addresses the prohibition of passive discrimination by undertakings with superior market power.

Section 19 (1) applies to either suppliers or purchasers of certain kinds of goods or commercial services, while section 20 (1) applies to customers purchasing from them only insofar as their activities directly or indirectly relate to the relevant market in which they are

³⁵ The decisions of FCO “Bundeskartellamt” are available online at <http://www.bundeskartellamt.de/wDeutsch/archiv/EntschKartArchiv/EntschKartell.php>.

³⁶ The FCO set up the economic concepts project team “Projektgruppe Ökonomische Konzepte” to advise decisions on economic criteria that should influence the interpretation of the ARC.

³⁷ Within the meaning of s 2, s 3 and s 28 (1) ARC.

³⁸ Schultz *supra* n 2, s 20 GWB. See U Böge, “Dominant Firm Behaviour Under German Competition Law”, in B Hawk (ed), *International Antitrust Law & Policy: Fordham Corporate Law* (Huntington, New York, Juris Publishing, 2003), 141-53.

dominant. Section 20 (2) 2 provides for a presumption of a superior market position that applies only to purchasers. Thus, none of the prohibition of price discrimination applies to all suppliers.³⁹ A supplier of a certain kind of good or commercial service is presumed to depend upon a purchaser if the latter regularly obtains special benefits from the supplier that are not granted to other “similar” purchasers.

3. Common Features of Market Dominance

Section 19 is in principle very similar to Article 82. The general clause of section 19 (1) prohibits only the abusive exploitation of a dominant position and not certain types of anti-competitive behaviour. Under EC Regulation 1/2003⁴⁰ and section 22 (3) of the ARC, Article 82 is also directly applicable. Abusive exploitation is not defined; instead, four examples of the section 19 (4) cover almost all types of abusive conduct. The concept of abuse implicit in these examples is designed to cover both the horizontal and the vertical aspect by addressing the exploitation of customers and suppliers on the one hand, and exclusionary practices towards competitors on the other. Hence, the special feature is having the structural abuse as a distinct form of abusive conduct.

Exclusionary abuses include unfair hindrance and refusal to grant access to networks and other infrastructure facilities. The hindrance abuses of section 19 (4) 1 and 4 refer to the conduct of dominant undertakings that substantially impair competitors, customers and suppliers in their competitive activities without any objective justification, thereby affecting competition. Unfair hindrance of competitors in section 20 covers the situation in which a dominant undertaking or an undertaking enjoying superior market power hinders its competitors in the market through additional obstacles.⁴¹ The findings are restricted to practices incompatible with the principles of effective competition and resulting in further deterioration of the market structure.

Market behaviour is only held to be abusive when it is objectively likely to have negative effects upon the hindered undertaking. This approach requires the determination of whether the behaviour constitutes competition justified on its merits. Therefore, the FCO has to balance all the interests of the undertakings involved, especially the economic and competitive interests of the dominant firm and its competitors. While balancing these

³⁹ S 20 (1)-(5) prohibit unfair hindrance and discriminatory practices of undertakings having dominant or superior market position, while s 20 (6) prohibits discriminatory practices by businesses and professional associations in their admission policies.

⁴⁰ According to Art 3 (2) 2nd sentence, member states may adopt or apply stricter national laws on their territory that prohibit or punish unilateral conduct by dominant undertakings.

⁴¹ Schultz *supra* n 2, s 19 GWB, 130.

interests, the main purpose of the ARC is to ensure the freedom of competition in the market and to keep the markets open.⁴² No actual effects upon consumer welfare need to be demonstrated;⁴³ rather, the abusive behaviour of the dominant undertaking must be likely to have an impact upon competition, particularly competitors' conduct.⁴⁴ Typical cases include rebates, tying or bundling, as is the case with Article 82 (2) d EC. Section 19 (4) 4 with its correspondent Article 82 (2) b covers specific sectors in relation to the refusal to grant another undertaking access to its own networks or other infrastructure facilities against adequate remuneration. The refusal to grant access is not abusive if the undertaking concerned demonstrates that, for operational or other reasons, concurrent use is impossible or cannot reasonably be expected. Objective reasons include insufficient capacity or damage to the effective functioning of the business.

Exploitative abuse, dealt with in section 19 (4) 2, refers to the conduct of dominant undertakings that demand unreasonable prices or conditions from suppliers or purchasers that would very likely not arise if effective competition existed (the concept of "as if" competition). However, the absence of substantial competition does not always lead to exploitation. As in Article 82 (2) a, dominant undertakings cannot be forbidden from using their competitive advantage accrues from having attained such a position. The core aim is to prevent dominant undertakings from "exploiting" those dealing with them: for example, by increasing prices beyond a level that a competitive market would allow, or by forcing suppliers or purchasers to grant terms more favourable than those that would prevail if substantial competition existed.⁴⁵ The findings for abusive pricing are based on a comparison between the actual market conditions and those conditions that would prevail if substantial competition existed by using the comparison market concept.

Structural abuse, dealt with in section 19 (4) 3 and section 20 (1), is a particular form of discrimination and covers in substance the discrimination of Article 82 (2) c. It consists of discriminatory pricing or non-pricing terms or conditions for particular customers or suppliers without objective justification. The unjustified differential treatment dealt with in section 20 (1) occurs where an undertaking is excluded from or otherwise discriminated against in; business activities that would be "usually open" to "similar undertakings". It

⁴² P Ditze and H Janssen, *Kartellrecht in der anwaltlichen Praxis* (München, Beck, 3rd edn, 2007), 443-5.

⁴³ See for similar focus on likely effects in Discussion Paper, para 54 and 58.

⁴⁴ W Möschel, in U Immenga and EJ Mestmäcker, *Gesetz gegen Wettbewerbsbeschränkungen: GWB; Kommentar*, (München, Beck, 3rd edn 2001), s 19, para 117, 666.

⁴⁵ The basic issue is attaining the right balance between substantive competition and the FCO's enforcement powers. Merely imposing a fine would restrict the FCO's ability to prevent pricing abuses, conflict with the goal of protecting economic freedom, and would therefore be seen as economic dirigisme.

includes all practices that impose unfair hindrance and lead to the unjustified differential treatment of another undertaking.

Apart from considering discrimination as a distinct form of abuse, the ARC distinguishes between hindrance abuses, as an upper form of discriminatory conduct applying to competitor-related cases, and unjustified differential treatment, which applies merely to customer/supplier-related cases.⁴⁶ Discriminatory behaviour may imply an absolute refusal to deal with or to agree upon specific terms and conditions, or any other act by which another undertaking is hindered or treated differently.

In order to determine whether specific discriminatory conduct is unfair or unjustified, a balancing of the interests of the alleged discriminating undertaking against those of the discriminated undertaking is required. Within the meaning of section 20 (2), discrimination is a differentiation without objective justification against producers of branded goods that refuse to supply to certain types of retailers in order to maintain the retail price of their products. The criterion used to evaluate structural abuses is the behaviour of the dominant undertaking in comparable markets.⁴⁷

The definition of the relevant product market is based on the same concept of demand substitution or functional interchangeability.⁴⁸ The FCO and the courts tend to take a rather restrictive view of substitute goods and services thereby narrowing the product market and increasing the likelihood of market dominance. In *GSM-Gateway*,⁴⁹ the relevant product market for call delivery services from national lines could not be considered a substitute for call delivery onto mobile phones. Otherwise, the customer would not be able to contact his desired call partner, and the conduct of the service supplier to grant the disposal for call delivery would not be exposed to any substantial competition in the market, since the end-customers could not know the value of their calls to mobiles using a SIM card.

The publisher Gelbe Seiten was found to be dominant in its distribution area in the market for advertising announcements in phone books, because due to their specialised content, Yellow Pages advertising announcements have no alternatives.⁵⁰ The FCO identified the

⁴⁶ For example, a refusal to supply all retail dealers might constitute an unfair hindrance, but would not constitute unjust differential treatment that would treat all retail dealers alike. Both forms of discriminatory behaviour are subject to the same standards.

⁴⁷ See Discussion Paper's "hypothetical as efficient" competitor test, para 63.

⁴⁸ Wiedemann, *supra* n 30, 9-13. W Fikentscher, "Mehrzielige Marktwirtschaft subjektiver Märkte: Wieder das Europa- und das Weltmarktargument" (1996) *Festschrift Mestmäcker*, 567-78.

⁴⁹ KG *GSM-Gateway* [2004] WuW/E DE-R 1274; HRC Düsseldorf VI-U (Kart) 35/03 *call media services v Vodafone* [2004]; HRC Düsseldorf *SIM-Karten* [2005] WuW/E DE-R 1577; HRC München *GSM-Wandler* [2004] WuW/E DE-R 1270.

⁵⁰ FCJ *Vorleistungspflicht* [2002] WuW/E DE-R 1051.

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market for TV advertising, where RTL and Pro7Sat1 held a dominant position,⁵¹ and the primary market for carbonator kits and the after-market for refilling cylinders, where *Soda Club* was dominant.⁵² Consumers who bought the carbonator kit would lose part of their initial investment by not pursuing the “lock-in-effect” refill strategy, as once the consumer has decided in favour of one system their freedom of choice is significantly reduced (ie the consumer is a captive customer). However, the court⁵³ considered demand substitution as merely an “ancillary criterion” and used the functional approach, holding that Soda Club was able to develop a distinctive competitive strategy in the segment of refilling the CO₂ cylinders as an independent sub-market. Due to technical developments, car producers are dominant in the market for motor vehicle servicing, as only certain manufacturers are specialised for a certain brand of car.⁵⁴ Football associations are dominant in the market for football game marketing vis-à-vis advertising media, because due to their popularity in the media, they are not substitutable.⁵⁵

The relevant geographical market encompasses the area in which the undertaking is active and the conditions of competition are sufficiently homogeneous, and can be limited to neighbouring areas. Actual or potential competition from undertakings active abroad is taken into account. Previously, the Federal Court of Justice (FCJ)⁵⁶ restricted the definition of the relevant geographic market to the territory of the Federal Republic of Germany, even if economic data showed a cross-border market. Thus, this view was narrowed further,⁵⁷ whereas the physical boundaries are not decisive. The local market is narrowed if undertakings operate within limited boundaries due to transportation costs, feasibilities or other restricting factors.⁵⁸ A distance energy supplier was not dominant vis-à-vis end-consumers, even if it was the only supplier in the relevant geographical market.⁵⁹ Another

⁵¹ FCO *RTL & Pro7Sat1* press release, 30 November 2007.

⁵² FCO B 3-39/03 *Soda Club* [2006]; R Podszun, “A Sparkling Decision: Property Rights and Competition Law in a German Abuse Case” (2007) 28 *European Competition Law Review*, 695-9.

⁵³ HRC Düsseldorf VI-Kart-5/06 (V) *Soda Club* [2007], para 36.

⁵⁴ HRC Stuttgart 2 U 202/03 *Mandl&Dreyer v DaimlerChrysler* [2004] in S Hossenfelder, W Töllner and K Ost, *Kartellrechtspraxis and Kartellrechtsprechung 2005/2006* (Köln, RWS Verlag, 21st edn, 2006), para 196.

⁵⁵ FCJ *Hörfunkrechte* [2005] WuW/E DE-R 1597.

⁵⁶ FCJ *Backofenmarkt* [1995] WuW/E 3026, 3029. *Supra* n 30, s 23, 12.

⁵⁷ FCJ KVR 1403 *Staubsaugerbeutelmarkt* [2004] in C Burholt, “Auswirkungen des BGH-Beschlusses “Staubsauger-beutelmarkt” auf die Bagatellmarktklausel” (2005) 9 *Wirtschaft und Wettbewerb*, 889-99.

⁵⁸ KG *Bituminöses Mischgut* WuW/E 2093; KG *Rewe/Florimex* WuW/E 2862; KG *HaGE/Kiel* WuW/E 5364, 5371.

⁵⁹ HRC Düsseldorf VI-U (Kart) 19/04 *Fernwärme Kamp-Lintfort* [2005] in Hossenfelder, *supra* n 54, para 181.

supplier was found to be dominant at least vis-à-vis intermediary suppliers when it held a natural monopoly position due to transport possibilities.⁶⁰

4. Distinctive Features of Market Dominance

There are several features by which market dominance can be recognised. Firstly, the legal definition of dominance, in contrast to the EC's jurisprudential definition,⁶¹ presents three forms of market dominance, which are independently applicable. Section 19 (2) contains the basic standard for evaluating a dominant market position as the situation in which an undertaking has no competitors (monopoly), is not exposed to any substantial competition (quasi-monopoly), or has a paramount market position in relation to its competitors. Whether the undertaking is subject to substantial competition depends upon how far it can act in the relevant market independently of its competitors, suppliers or customers. However, even if an undertaking is exposed to substantial competition in the relevant market, it can still have a paramount market position.

Secondly, the presumptions of market dominance extend the area of application of section 19. Moreover, section 19 (3) sets forth two refutable presumptions of market dominance⁶² based on market share thresholds that are slightly lower than those developed by the ECJ.⁶³ In the case of monopoly, the undertaking is presumed to have a dominant position if it has a market share of 33% or more. In the case of oligopoly, dominance is presumed if three or fewer undertakings have a combined market share of 50% or more, or if five or fewer undertakings have a combined market share of 66% or more. The undertaking concerned may rebut the oligopoly presumption, but the rebuttal has to be based on the anticipated market structure. It is not sufficient to demonstrate that substantial competition between the oligopolies will prevail in the future; rather, it must be demonstrated that it will lead to substantial competition between the oligopoly and its competitors. The actual and past market behaviour of competitors can indicate whether and to what extent a given market structure permits the expectation of prevailing substantial competition. The FCO is obliged to thoroughly investigate *ex officio* the market position of the undertaking concerned, as well as the overall competitive conditions, and it may only rely on the above presumptions when the findings are inconclusive.

⁶⁰ HRC Naumburg 1 U (Kart) 6/05 *Fernwärme Halle* [2005] in Hossenfelder *supra* n 59, para 182.

⁶¹ See generally R Whish, *Competition Law* (Oxford University Press, 5th edn, 2005) 179. Case T-340/03 *France Télécom SA (formerly Wanadoo) v Commission* [2007] 4 CMLR 21, para 99.

⁶² The presumptions apply also to collective dominance and mergers.

⁶³ Case C-62/86 *AKZO v Commission* [1991] ECR I-3359; Case T-221/95 *Endemol v Commission* [1999] ECR II 1299, 134; Case T-219/99 *British Airways v Commission* [2004] 4 CMLR 1008, 211; Commission decision *Microsoft COMP/C3/37792* [2007] OJ L 32/23, 28.

Thirdly, the existence of the legal criteria⁶⁴ of section 19 (2) 2 to assess dominance requires a thorough analysis of the market structure as well as of market behaviour.⁶⁵ Market shares are an important indicator but are not considered per se. In practice, the identification of a paramount position is based on finding a large market share and on outstanding financial resources. For example, if the mere size of a paramount market power relative to the market shares of the next largest competitors was sufficient,⁶⁶ such a paramount position alone, even in the presence of substantial competition, cannot be justified and all other circumstances must be evaluated,⁶⁷ including superior market power due to the size, market shares and financial resources.⁶⁸ The fact that certain products are part of a group of products that a retailer almost inevitably needs in order to be able to offer a full product range to end-consumers is sufficient for finding relative market power; for example, a company having a market share of 18% fulfilled the threshold of relative market power.⁶⁹ A subsidiary of Deutsche Telekom, together with local editors of the formerly official telephone book (*Das Telefonbuch, Das Örtliche*), held relative market power.⁷⁰ Deutsche Telekom held a dominant market position in the national phone line market and relative market power vis-à-vis its competitor, Neumann Verlag.⁷¹

The concept of financial power led to the development of the theory of deterrence, according to which market dominance provides an undertaking with behavioural leeway that makes it possible to dampen actual or potential smaller competitors, or to deter them through an aggressive competition policy.⁷² Only the exchange of goods or commercial services between non-affiliated undertakings is considered, while captive markets are disregarded.⁷³

⁶⁴ Accordingly, the legal criteria are the market share, financial power, access to supply or markets, links with other undertakings, legal or factual barriers to market entry, actual or potential competitors, ability to shift supply or demand to other goods or commercial services, and the ability of the opposite market side to resort to other undertakings.

⁶⁵ FCJ *Backofenmarkt* [1995] WuW/E 3026.

⁶⁶ FCJ *Valium I* [1976] WuW/E 1445.

⁶⁷ FCJ *Klöckner-Becorit* [1980] WuW/E 1749.

⁶⁸ FCJ *Wal*Mart* [2002] WuW/E DE-R 1042, 1049.

⁶⁹ FCJ *Lancaster* KZR 2/02 [2003] (2004) 25 *ECLR* 11, 177-8.

⁷⁰ FCJ *Sparberaterin I* [2003] WuW/E DE-R 1377, upheld by FCJ KZR 2/04 *Sparberaterin II* [2005] in Hossenfelder, *supra* n 54, para 314.

⁷¹ HRC Celle 13 U (Kart) 143/00 *Deutsche Telekom v Neumann Verlag* [2005] in Hossenfelder, *supra* n 54, para 188 ; FCJ *Der Oberhammer* KZ R1/03 [2004] WuW/E DE-R 1283.

⁷² FCJ *Kfz-Kupplungen* [1978] WuW/E 1509.

⁷³ *Ibid* n 72, 1501,1503.

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Due to its large financial resources and significant economies of scale, the bonus system practised by a company holding a paramount market power⁷⁴ was more attractive than that of its competitors, forcing their customers to concentrate their demand on one supplier and thereby preventing them from switching to other suppliers. Fuchs held a dominant position in the market for dried spices and herbs, with a market share of 75%, due to its overall financial power as producer of a famous brand of condiment ingredients and its good access to the supply markets, which led to a competitive advantage.⁷⁵

Fourthly, oligopolies (two or more undertakings) hold a dominant position if there is no substantial competition between the members of the oligopoly and if the oligopoly itself has a dominant or a paramount market position in relation to its competitors.⁷⁶ In the case of collective dominance, two conditions must be fulfilled cumulatively.⁷⁷ If there are no smaller competitors in the market, the FCO must establish whether substantial competition exists between the allegedly oligopolistic undertakings (“inside competition”), and must examine further whether this entity, if it were one single undertaking and exposed to actual competition from smaller competitors, would enjoy a dominant market position (“outside competition”). Only in the absence of substantial competition may the FCO treat the undertakings as one single entity.

Pro7Sat1 and the RTL Group together held a dominant position (non-competitive duopoly) in the TV advertising market, with a constant market share of approximately 40% each in the absence of any substantial competition from outside.⁷⁸ RWE and E.ON together hold a dominant position in the national electricity market, as there is no substantial competition between them and they have a paramount market power in relation to their competitors.⁷⁹ Between them, the companies produce around 60% of the net electricity generated and control more than 50-70% of the German electricity networks. The regional lottery companies, German Lotto and Toto Block, were jointly dominant in the German market for commercial lottery services.⁸⁰ They abused their dominant position by hindering

⁷⁴ KG *Fertigfutter* [1980] WuW/E 2403.

⁷⁵ FCO B 2-12/00 *Fuchs v Teuto* [2002], para 32.

⁷⁶ S 19 (2) 2 ARC.

⁷⁷ Ditze, *supra* n 42, 429.

⁷⁸ FCO, press release, 11 November 2007. See also OECD, *Annual Report on Competition Policy Developments in Germany*, DAF/COMP (2006) 21/01, 63.

⁷⁹ FCO B 8-88/05-02 *RWE* [2007].

⁸⁰ FCO B 10-148/05 *DLTB & Landeslottogesellschaften* [2006], paras 503 and 507.

lottery agents from establishing stationary lottery collection points (the classic allocation of territory).⁸¹

5. Remedies and Penalties

Contracts that are based on or constitute an abuse of a dominant position are null and void.⁸² Pursuant to section 32 ARC, the competition authorities may impose all the measures that are necessary to effectively bring the infringement to an end. Third parties cannot intervene against abusive practices, but they may introduce civil actions to obtain injunctive relief or recover the actual damages incurred because of such practices if deliberate or negligent behaviour exists.⁸³ Punitive damages may not be awarded. The FCO may impose structural or behavioural remedies, and if legitimate interest exists, may declare that an infringement has occurred after it has been brought to an end, and may impose administrative fines.⁸⁴ In 2006, the FCO fined TEUTO for violating a prohibition decision of July 2002.⁸⁵ The FCO⁸⁶ imposed a fine on the advertising time of marketing companies for two private broadcasting groups because of anti-competitive discount agreements that the marketing companies acting for the two companies concluded with media agencies, thereby foreclosing entry into the market.

B. RESTRICTIVE PRACTICES OF THE FEDERAL CARTEL OFFICE

1. (Non-) Pricing Practices

Different sale conditions are rare and difficult to prove. The difference between the actual and past market behaviour of competitors can indicate whether and to what extent a given market structure permits the expectation of prevailing substantial competition, and has to be appreciable.⁸⁷ Metro was prohibited from forcing suppliers to retroactively adjust in its favour contractual terms that had been previously agreed, and from granting the most favourable prices.⁸⁸

(a) Predatory Pricing

⁸¹ They acquired more than 90% of the demand volume of commercial lottery agents' services in 2004, and therefore violated the prohibition of boycott of s 21 ARC.

⁸² Pursuant to s 134 BGB (German Civil Code).

⁸³ Pursuant to s 33 ARC and s 823 BGB.

⁸⁴ FCO, Communication no 38/2006 on setting up the fines against undertakings and associations of undertakings according to s 81 (4) 2 ARC [2006].

⁸⁵ FCO, press release, 9 May 2006. The fine amounted to € 250,000.

⁸⁶ FCO [2007] WuW 3 (2008), 279. The fine amounted to € 216 million (RTL € 96 million and Pro7Sat1 € 120 million). The companies accepted the fines at the beginning of October 2007.

⁸⁷ FCJ *Flugpreisspaltung* [1999] WuW/E DE-R 375.

⁸⁸ FCO *Metro MGE Einkaufs GmbH* [1999] WuW/E DE-V 94.

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Predation is not deemed an unfair hindrance per se; it is actually an essential element of healthy competition.⁸⁹ In practice, only indirect evidence of predatory intent is required, and it is not necessary to establish whether the dominant company investigating such pricing had a realistic chance of recouping its losses. Thus, if a firm attempts to squeeze a competitor out of the market by means of such pricing behaviour, then, for it to be considered predatory, the respective practice has to be maintained over a certain period of time,⁹⁰ or such an intention must at least be perceptible.⁹¹ Evidence of consumer harm is not a prerequisite for finding predation, and separate evidence on the likely effects on competition is rarely needed. In contrast, in *France Télécom*,⁹² emphasis was placed upon whether the recovery of costs is possible, and upon predatory intent, which was presumed; furthermore, if prices are below average total costs (ATC), then the existence of a plan to eliminate *competition* has to be proven.

Predation is presumed if the price demanded by the dominant undertaking is below its average variable costs (AVC). In *Abwehrblatt II*,⁹³ unfair price-cutting was deemed predatory only where there was use of non-efficiency-based competition aimed at driving competitors out of the market and eliminating them. In *Amtsanzeiger*,⁹⁴ the publisher of the sole local daily newspaper allegedly attempted to eliminate its rival's advertising journal from the market by subsidising it from the profits earned from its daily. The Federal Court of Justice confirmed its previous case line since, by offering such a service below cost prices, the practice aimed in the long run, by virtue of its superior financial strength, to squeeze its competitors out of the market.

Even a price below ATC may be an indicator of abuse. In *Lufthansa/Germania*,⁹⁵ before Germania's market entry, Lufthansa was the only airline operating on the Frankfurt-Berlin route. Germania offered one-way tickets for €99, similar to Lufthansa's economy tariffs. Thus, Lufthansa reacted by a massive price reduction of its round-trip ticket of up to €285 (from €485 to €200), but replaced this offer later with a flexible one-way ticket priced at €105, clearly undercutting Germania's price, as it included services which were not offered by Germania. The FCO's investigations concluded that Lufthansa's offer was clearly below its average operating costs per passenger on the Frankfurt-Berlin route. After deducting passenger fees and VAT, Lufthansa's lower offer was equivalent to a net price of €62.24, with AVT of about €94.55 per passenger. The FCO found that, by meeting Germania's prices,

⁸⁹ HRC Düsseldorf Kart 7/02 (V) *Germania WuW DE-R 867-87*; FCO B9-144/01 *Deutsche Lufthansa AG Köln v Germania* [2002] WuW 219.

⁹⁰ *Ibid* n 89.

⁹¹ FCJ KZR 18/90 [1991] BGHZ 116, paras 47-60.

⁹² Case T-340/03 *France Télécom SA (formerly Wanadoo) v Commission* [2007] 4 CMLR 21, para 197.

⁹³ FCJ *Abwehrblatt II* [1985] WuW/E 2195, 2196.

⁹⁴ FCJ *Amtsanzeiger* [1991] WuW/E BGH 2762.

⁹⁵ FCO B9-144/01 *Deutsche Lufthansa AG Köln v Germania* [2002] .

Lufthansa had undercut Germania's offer, and therefore prohibited Lufthansa from demanding a price for flexible one-way tickets, which was less than €35 above Germania's price. The only explanation for this pricing strategy is that it was an attempt to drive Germania out of the route and to recoup resulting losses at a later stage by discontinuing its price tariff and restoring previous ones. Lufthansa could impair emerging competition as a reaction to its rival by using a cut-price strategy that was intended to squeeze Germania out of the market. Otherwise, an economic analysis of the actual effects on consumers does not offer any evidence for an intervention. Thus, Germania was a newcomer and the intervention of the FCO was justified based on the aim of keeping market entry open to newcomers.

In the cases mentioned above, in which indirect evidence of predatory intent could be assumed from the circumstances of the case, pricing below ATC, including variable, fixed and sunk or non-recoverable costs, is sufficient to denote abuse. It can also be argued that in both cases, the predatory intent is clearly a plan to eliminate a competitor, therefore a stricter cost measure would not have been necessary.

(b) Cross-subsidisation

Section 19 (1) refers to the abusive behaviour of a dominant undertaking that also occurs in "third" or neighbouring markets, where it is necessary to establish a causal link, even if the undertaking is not actually dominant and its alleged practices do not have the same negative effects.⁹⁶ Cross-subsidisation is not considered an abuse per se. To establish whether Deutsche Post was able to dominate the third market of booklet delivery through its dominant position in the mail and catalogue delivery market, which was also the object of exclusive licensing, the court required direct evidence of effects on the dominated market.⁹⁷ The mere existence of cross-subsidisation in the third market, implying earnings from the dominated market, was not sufficient; other circumstances such as cut-pricing strategies were also necessary. The sole existence of the mail deliveries used for the delivery of booklets for advertisement purposes was not sufficient, as there was no evidence of abusive pricing. The possibility of hindrance abuse in a third market existed, but was denied in another case⁹⁸ because there was no causal link between the undertaking in the dominated market and the alleged hindering conduct. The sole usage of delivery within the territory of exclusive licensing was not abusive and there was no cut-price strategy.

⁹⁶ S Hossenfelder, W Töllner and K Ost, *Kartellrechtspraxis and Kartellrechtsprechung 2005/2006* (Köln, RWS Verlag, 21st edn, 2006), para 229.

⁹⁷ HRC Frankfurt *Fernsehzeitschrift* [2005] WuW/E DE-R 1589.

⁹⁸ HRC Celle *Einkaufsaktuell* [2005] WuW/E DE-R 1592.

(c) Discounts and Rebates

Loyalty or conditional rebates are prohibited per se. Other types of loyalty rebates are prohibited if they are not merely short-term marketing actions and have the effect of binding customers to the dominant undertaking and hindering competitors. Actual anti-competitive effects of rebates or bonus schemes are not required, only the mere likelihood of the conduct hindering the development of the competition still existing in the market. The incentive effect can only be established by an ex ante consideration, not based on actual market effects as the rebate system is an ex post consideration.

Two major German private TV companies, Pro7Sat1 and the RTL Group,⁹⁹ had each independently offered proportional advertising discounts to advertising agencies that spent large parts of their advertising budget with the respective broadcasting groups. By granting substantial discounts and other refunds, the access of smaller TV companies to the advertising market was foreclosed, as they could not afford to offer the same discounts as the two large companies. As discounts were granted retroactively for the entire budget, the media agencies had a strong incentive to place the respective proportions of their advertising budgets with these two companies. Thus, it was not the amount in excess of the discount thresholds that made market access more difficult, but rather the economic incentive effect. Moreover, retroactive quantity discounts themselves have a negative effect upon competition.

(d) Exclusive Contracts

Exclusivity clauses are not prohibited per se. While balancing the interests of the dominant undertaking with the interests of the undertaking that is bound by the exclusivity clauses, the market shares, duration, quantity bound, or the relation to the overall demand – for example, long-term gas supply concluded under exclusive agreements – are taken into account. The FCO's Discussion Paper¹⁰⁰ with regard to long-term gas supply contracts held that contracts between gas transmission and production companies and regional and local distributors for more than two but less than four years, and for supply quantities of more than 80% or between 50% and 80% of the respective consumer requirements, are prohibited.

⁹⁹ FCO press release, 11 November 2007. See DAF/COMP (2006) 21/01, 63.

¹⁰⁰ FCO B 8-113/03 *Kartellrechtliche Beurteilungsgrundsätze zu langfristigen Gasverträgen*, Bonn 25 January 2005. Available on http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/050125_DiskussionspapierGasvertraege.pdf accessed on 25 May 2008.

In *E.ON Ruhrgas*,¹⁰¹ the FCO found that 70% of the customers were tied to the dominant supplier through long-term contracts covering 100% of their demand. Moreover, a substantial part of the market (75%) where the dominant undertaking had its own gas distribution network was covered by such supply contracts. The higher percentage implies a stronger potential for market foreclosure, with detrimental effects upon competition in the market. Even if no safe harbours exist, exclusive dealing agreements entered into by a dominant firm, which have a long duration and cover a significant percentage of the requirements of the buyer/seller, are likely to have a market foreclosure effect. In *Fleurop*,¹⁰² the court held that there was no objective justification for the differential treatment and hindrance of the selling partners under exclusive dealing agreements for the distance selling of flowers. Thus, the advantages acquired are likely to impede certain of the other partner's advertising measures.

2. Tying and Bundling

The tying of products is considered to be abusive when a dominant undertaking bundles its products with those on the non-dominated market.¹⁰³ It may be justified by technical requirements or as a short-term purchase incentive. For example, a price combination schedule improved the sales of the tied product on a "non-performance" basis by using the power of the tying product.¹⁰⁴ Deutsche Telekom (DT) offered combined national phone line services and Internet access through its subsidiary T-Online. The price for the latter was based on the degree of use and did not include a minimum "by-call" tariff. AOL, another Internet service provider, claimed that T-Online had taken advantage of its dominant position in the primary market for network extensions in order to expand its presence in the aftermarket for Internet access. The combined tariff was a natural advantage, which the company could only acquire once, and was not tied¹⁰⁵ because the offer did not oblige the customer to choose T-Online services. In contrast, the FCJ¹⁰⁶ found that the combined offer could have been overly attractive, and hindrance in the third market could have been possible even if competitors were not present in the dominated market.¹⁰⁷

¹⁰¹ FCO B 8-113/03 *E.ON Ruhrgas Essen AG* [2006].

¹⁰² KG *Blumendistanzhandel* [2005] WuW/E DE-R 1595.

¹⁰³ FCJ *Inter-Mailand-Spiele* [1987] WuW/E 2406.

¹⁰⁴ KG HRC Berlin *Preis Kombination* [1977] WuW 1767.

¹⁰⁵ HRC Hamburg 3 U 68/01 *AOL/Deutsche Telekom* [2002]; Hossenfelder, *supra* n 96, para 238.

¹⁰⁶ FCJ *Der Oberhammer* KZ R1/03 [2004] WuW/E DE-R 1283.

¹⁰⁷ Hossenfelder, *supra* n 96, 240.

Previously, it had been necessary for the undertaking to be present in the dominated market.¹⁰⁸ Nevertheless, the FCO held that every undertaking is basically free to make combined offers as long as this behaviour does not lead to the impairment of competition, particularly where a dominant undertaking expands its dominant position from one market to another by tying. There was no objective justification. The likelihood effects are essential, namely that the majority of customers in the neighbouring market would be lost. Having chosen T-Online, customers would probably not bother to switch to another Internet provider.

Bundling appears when customers are offered other services together with mobile services as bonuses, such as free Internet minutes, air miles or purchase rebates. DT attempted to participate in the mileage bonus system of a leading German airline company in which its competitor had already been integrated, offering mobile transmissions services. The courts¹⁰⁹ refused its demand because DT's ability to compete had to affect or even foreclose the competition in the market and not the competitor itself. The bundling of transmission services with the company's mileage bonus was also justified by DT's structural advantage in the market for phone line services where it held a dominant position, while its competitor had to "overtake" DT.¹¹⁰

3. Refusals

(a) Refusal to Deal

The application of section 20 entails a particularly strong intervention¹¹¹ in the business freedom of an undertaking to conclude contracts and choose parties to an agreement because it implies an obligation to deal. The core elements include dominance or at least superior market power (except in boycott cases),¹¹² the likelihood of hindrance or foreclosure, and the absence of an objective justification or balancing of interests (the freedom of action of third parties against the freedom of undertakings to choose their own customers).

Dominant undertakings are free to decide their sales strategies and with whom to deal. A car manufacturer granted its leasing firm preferential conditions, which it did not offer to

¹⁰⁸ FCJ *Sonderungsverfahren* [1988] WuW/E 2483, 2487.

¹⁰⁹ Regional Court Düsseldorf *Bonusmeilen für Mobilfunkanbieter* [2003] WuW/E DE-R 1135 upheld by HRC Düsseldorf U (Kart) 17/03 *Bonusmeilen* [2004].

¹¹⁰ Hossenfelder, *supra* n 96, para 242.

¹¹¹ K Markert in U Immenga and EJ Mestmäcker, *Gesetz gegen Wettbewerbsbeschränkungen: GWB; Kommentar*, (München, Beck, 3rd edn 2001), s 20, para 6, 754.

¹¹² S 21 (1) ARC contains a special provision against requests to refuse to supply "boycotts" that applies irrespective of the market power of the undertakings concerned.

other leasing firms.¹¹³ The FCJ held that the greater the market power of the supplier, the more restricted the possibility of refusal to deal. If the refusal results in a significant barrier to entry, it is unlikely to be justified.¹¹⁴ A dominant undertaking has to choose the means with the lowest possible hindrance effects in order to be capable of achieving its own interests.¹¹⁵

An obligation imposed upon drug wholesalers to establish business relationships with the importer entailed a major interference with their contractual freedom. Thus, the general interest to open up the German pharmaceuticals market to more competition was superior to the wholesaler's interests.¹¹⁶ There was no interest in protecting long-standing supplier-buyer relationships, as the purpose of the ARC is to ensure performance-based competition.¹¹⁷

*RMS Radio Marketing*¹¹⁸ refused to establish business relations with two local radio broadcasters that, as small competitors, were unable to sell on their own radio advertising slots and depended on RMS. RMS was found to be dominant in the affected market and to have marketed advertising slots to others while it discriminated against these two broadcasters. The FCO did not order to enter into any specified contract, leaving RMS free to negotiate the terms.¹¹⁹ An objective justification was denied when a phone directory refused to deal with an advertisement agency because the latter sought to reduce advertising prices to end-customers by rearranging previous contracts,¹²⁰ or when a health insurance company refused to deal with a private provider of patient transport because it wanted to keep the market exclusively for public providers of patient transport.¹²¹

(b) Refusal to Supply

The termination of an existing supply relationship is less likely to be objectively justified than the refusal to start a supply relationship. It may be justified if a supplier reorganises its distribution system according to objective criteria and the retailer no longer meets these

¹¹³ FCJ KZR 2/90 *Aktionsbeiträge* [1991].

¹¹⁴ FCO *Krankentransportunternehmen I* [1991]; FCJ *Krankentransportunternehmen II* [1991] WuW/E 2707, 2714.

¹¹⁵ FCJ *Original-VW Ersatzteile II* [1981] WuW/E 1829, 1832.

¹¹⁶ FCO *Importarzneimittel – Boykott* [1992] WuW/E 2543.

¹¹⁷ FCJ KVR 11/94 *Importarzneimittel* [1995] WuW/E 2990, 2294.

¹¹⁸ FCO B 6-127/1999 *RMS Radio Marketing* [2001].

¹¹⁹ Upheld by HRC Düsseldorf 100, *eins Radio Aachen* [2003] WuW/E DE-R 1058; FCJ KVZ 7/03 *RMS* [2004].

¹²⁰ FCJ KZR 17/03 *Sparberaterin I* [2004], upheld by FCJ KZR 2/04 *Sparberater II* [2005].

¹²¹ FCJ *Krankentransportunternehmen II* [1991] WuW/E 2707, 2714.

criteria.¹²² A refusal to supply is not justified by the mere fact that the supplier competes with a customer who has unlawfully copied his design.¹²³ Such refusal amounts to discrimination and contravenes the aim of keeping markets open, as the dominant undertaking might also extend its position into the downstream market.

(c) Refusal to Grant Access to “Essential Facilities”

In *Bewag*,¹²⁴ established network operators refused to grant access to the electricity network in Berlin due to lack of capacity, and hindered new entrants by charging a “transfer fee” to customers who signed a supply contract with another provider. Scandlines held a dominant position in the market for terminal facilities and the downstream market for ferry services, and refused to allow competing ferry companies’ access to the Puttgarden terminal despite payment of an adequate fee.¹²⁵ Legal and physical barriers stood in the way of the construction of a new terminal in Puttgarden, whereas the shared use of existing terminal facilities by an additional ferry operator could not have been possible without modifications. While balancing Scandlines’ interest in having unlimited use of its own terminal against the applicant’s interest in starting up competing ferry operations, the decisive factor was the public interest in opening up the market to competition.¹²⁶

Mainova AG prevented two other energy providers that were dependent upon connection to its medium-voltage network from operating side network facilities or supplying end-consumers with electricity generated by the company themselves or third-party suppliers.¹²⁷ The operation of side networks represented a newly emerging market in which Mainova attempted to eliminate competition from the outset. There was no objective justification for the refusal. Balancing the interests of the parties under the Energy Industry Act, which specifies a general obligation to connect and supply, there was no legal basis for Mainova to claim each new side network for itself by unfairly hindering its competitors.

In *Arealnetz*, the FCJ¹²⁸ held that it is sufficient that the concerned undertaking is dominant in the market for the allocation of the relevant essential facility, and that dominance in the downstream market is not required. The latter contradicts the legal context, pursuant to which the essential facilities doctrine within the meaning of section 19 (4) 4 may not apply

¹²² FCJ *Adidas* [1981] WuW/E 1885, 1887.

¹²³ FCJ *Lüsterbehangsteine* [1988] WuW/E 2540.

¹²⁴ FCO B 8-99/99 *BEWAG/RWE* [1999] WuW/E DE-V 149.

¹²⁵ FCO B 9-199/97 and B 9-16/98 *Puttgarden (Scandlines)* [1999]; *Deutsche Bahn*, WuW/E DE-R 253.

¹²⁶ Overruled by the HRC Düsseldorf Kart 3/00 (V) *Scandlines* [2000] WuW/E DE-R 472; FCJ KVR 15/01 [2002].

¹²⁷ FCO B 11-12/2003 *Mainova* [2003], upheld by HRC Düsseldorf *GETEC net* [2004] WuW/E DE-R 1307.

¹²⁸ FCJ *Arealnetz* [2005] WuW/E DE-R 1520.

unless the requirement of dominance in the downstream market has been established according to section 19 (2). The owner or operator of the essential facility may not invoke as a defence their refusal to grant access because the allocation of the essential facility to competitors in the downstream market would impair the owner/operator's market position in the relevant downstream market.¹²⁹

(d) Abuse of Intellectual Property Rights

The exercise of intellectual property rights and licensing may be abusive if it has the sole purpose of hindering competitors. The sole ownership of exclusive licensing does not lead to the creation of an independent product market in the downstream market.¹³⁰ The decisive factor is the fact that the use of the patent right is not substitutable for the intended purpose for technological reasons. A patent holder may be obliged to give a licence to competitors if access to a downstream market is impossible in the absence of a licence, if the licensed technology has become a *de facto* industry standard, and there are no objectively justified reasons for the refusal. Nevertheless, as long as a dominant company has no interest in the essential or normal functions of the property right, then the use of such a right against competitors might be abusive.¹³¹ *Soda-Club* was obviously interested not in a renting relationship, but merely in hindering its competitors in the aftermarket in order to compensate for its losses in the primary market.¹³² More restrictively, the court held that sole ownership is a means to restrict and distort the competition in the relevant market, and that it was maintained for anti-competitive purposes.¹³³

4. Hindrance Abuses and Discrimination

Section 20 (3) ARC explicitly prohibits dominant undertakings from using their market position to cause other undertakings to grant them preferential terms in business activities without objective justification. Even if hindrance as market behaviour has objectively negative effects, it is not abusive per se; rather it has to be determined whether or not it could be objectively justified as competition on its merits.¹³⁴ Hindrance includes unjustified differential treatment or discrimination.¹³⁵ *Deutsche Post* hindered and discriminated against

¹²⁹ S 17 (3) of the Energy Industry Act enables the Federal Government to provide for balancing the interests against and in favour of granting network access through a regulation that should grant access to the upstream network primarily to site network facilities in the meaning of s 110 of the above Act.

¹³⁰ FCJ *Standard-Spundfass* [2004] WuW/E DE-R 1329 II.

¹³¹ FCO B 3-39/03 *Soda Club* [2006], para 8.

¹³² *Ibid*, para 37.

¹³³ HRC Düsseldorf VI-Kart-5/06 (V) *Soda Club* [2007], para 65.

¹³⁴ FCJ *Original-VW Ersatzteile II* [1981] WuW/E 1828.

¹³⁵ FCO B 8-77/00 *Kraftstoffpreise* [2000], reversed by HRC Düsseldorf 6 U 103/01 *Kraftstoffpreise* [2001].

a certain group of providers of postal services (mail consolidators in charge of collection and pre-sorting of letters);¹³⁶ for example, it granted benefits that it had previously refused to another consolidator and refused consolidators access to partial services without objective justification (DP's limited exclusive licence under the Post Act was not retained as justification).

The concept of performance-based competition or "competition on the merits" is used to distinguish "abusive" from competitive behaviour.¹³⁷ Accordingly, the conduct of a dominant undertaking constitutes an abuse if its behaviour is not based on its merits and the structural effects are substantial; for example, if the conduct leads to the destruction or serious impairment of the competition that exists in the dominated market. As the strengthening of a dominant position reduces the intensity of competition in the market, dominant undertakings must be subject to a higher standard of performance.¹³⁸ Non-performance competition that does not violate the unfair competition rules may fall under section 20 if it restricts competition in the dominated market.¹³⁹ Combined advertising for two different newspapers,¹⁴⁰ the use of a bonus rebate system for distributors¹⁴¹ or the use of fidelity rebates in an advertising campaign,¹⁴² did not qualify as competition based on their merits.

Fuchs unfairly hindered its competitor Hartkorn, one of the few remaining medium-sized suppliers of spices.¹⁴³ The FCO examined whether the freedom of economic activity of the dominated undertaking was unfairly hindered and whether, through its abusive behaviour, Fuchs achieved its own interests to the detriment of competitors due to its large market share, brand reputation and its own competitive advantage in the market.¹⁴⁴ *Praktiker*, acting as franchiser vis-à-vis independent franchisees, unfairly hindered them by operating a dual

¹³⁶ FCO *Deutsche Post AG Konsolidierer* [2005] WuW/E DE-V 1025. Confirmed by HRC Düsseldorf *Konsolidierer* [2005] WuW/E DE-R 1473.

¹³⁷ P Ulmer introduced the test, having borrowed it from the German law of unfair competition, where it was introduced in 1930s. See P Ulmer, *Schranken zulässigen wettbewerbsmarktbeherrschender Unternehmen* (Baden-Baden, Nomos, 1977). The first to define the concept was HC Nipperdey, in the context of "positive competition", promoting the sales of a company by means of its own efforts, in contrast to hindrance. Later, it was referred to as competition off the merits ("Nichtleistungswettbewerb").

¹³⁸ KG HRC Berlin *Handpreisauszeichner* [1969] WuW 995-1000.

¹³⁹ U Immenga and EJ Mestmäcker, *Gesetz gegen Wettbewerbsbeschränkungen: GWB; Kommentar*, (München, Beck, 3rd edn 2001), 681-82.

¹⁴⁰ KG HRC Berlin *Preis Kombination* [1977] WuW 1767.

¹⁴¹ KG *Fertigfutter* [1980] WuW/E 2402.

¹⁴² HRC Berlin *Rama-Mädchen* [1978]; KG *Rama-Mädchen* WuW 1983.

¹⁴³ FCO B 2-12/00 *Fuchs v Teuto* [2002], para 38.

¹⁴⁴ *Ibid*, para 41.

distribution system and imposing an obligation to purchase goods from the system's product range. The purchasing benefits gained from supplies to franchisees or associated companies were not passed on to the relevant franchisees.¹⁴⁵ While balancing the interests, the generally positive competitive role played by franchising systems was considered and the FCO did not examine whether the system's benefits remained solely with the franchisor, whereas the franchisor was the supplier/wholesaler and at the same time a competitor of his franchisees. In *E.ON*, the FCO held that the interest of E.ON Ruhrgas¹⁴⁶ to secure the economic risk in the downstream market that resulted from the long-term supply contracts in the upstream market did not outweigh the interest to open up the energy market from foreclosing the vertical distribution agreements that perpetuated de facto monopolies.

5. Economic Dependence

The FCO examines whether the dependent undertaking has objectively sufficient and subjectively reasonable possibilities to deal with other undertakings, and whether it is in a position to obtain goods from alternative sources or to sell them through other distribution channels.¹⁴⁷

Undertakings that have been closely connected with each other, such as exclusive car dealers, are dependent because of long-standing relationships and economic difficulties.¹⁴⁸ Such an agreement may be terminated only within a reasonable termination period.¹⁴⁹ Lufthansa dominated the travel agencies market as an intermediary in the booking of flights and enjoyed a superior market power due to its turnover, market position and relationship with business clients.¹⁵⁰ Therefore, travel agencies could not turn down Lufthansa's flight bookings and purchasers depended on them. Contractual leasing dealers are not dependent upon producers of heavy goods vehicles as long as the leasing relationship has been developed in an independent manner and without granting exclusive deals in the relevant market segment.¹⁵¹ Vertically integrated undertakings that supply raw materials to non-integrated undertakings are dependent upon them during times of scarce supply, such as an independent gas station that used to purchase from a vertically integrated oil company.¹⁵²

¹⁴⁵ FCO B 9-149/04 *Praktiker Baumärkte GmbH* [2006].

¹⁴⁶ FCO B 8-113/03 *E.ON Ruhrgas Essen AG* [2006], paras 30-3.

¹⁴⁷ Ditze *supra* n 42.

¹⁴⁸ FCJ *BMW Direkthändler* [1976] WuW/E 1455; FCJ *KZR 20/86 Opel Blitz* [1988] WuW/E 2491.

¹⁴⁹ FCJ [1995] *Kfz-Vertragshändler* WuW/E 2983; FCJ *Opel-Blitz* [1988] WuW/E 2491.

¹⁵⁰ HRC Düsseldorf VI-2 U (Kart) 3/04 *Lufthansa-Provision* [2004] in Hossenfelder, *supra* n 96, para 210.

¹⁵¹ HRC Frankfurt/Main 11-U 60/03 *Lkw-Leasing* [2005] in Hossenfelder, *supra* n 96, para 211.

¹⁵² KG [1974] WuW/E 1499.

A dealer depends upon a supplier of certain branded goods if it is necessary to remain competitive.¹⁵³ The branded goods play a significant role in the dealer's competitiveness due to their reputation, quality or price, regardless of whether comparable goods are already available.¹⁵⁴ If sufficient possibilities exist, then the issue is whether switching to such alternatives is likely to create a substantial disadvantage for the dependent undertaking, and thus damage its competitiveness.¹⁵⁵ Leading trade magazines enjoy superior market power in this market segment vis-à-vis their advertisers due to their reputation, coverage, brand awareness and audience.¹⁵⁶ The franchisees obliged to purchase most of their product range during the term of the franchise agreement were dependent upon Praktiker.¹⁵⁷ Dependence upon leading products¹⁵⁸ or producers refers to branded goods or the products of a certain manufacturer that specialised retailers must be able to offer to their customers in order to be able to compete effectively.¹⁵⁹

C. FOLLOW-UP PERSPECTIVE FOR EC LAW: CONCLUDING REMARKS

The German economic freedom of competition approach is keen to ensure workable competition in the market by maintaining competitive market structures and therefore favours the likely restrictive market effects as prima-facie abusive behaviour on the structure of competition, and actual harm to consumers does not need to be proven. The difficulties of measuring market power due to a lack of economic data disappear as no causal link between the dominant position and the abusive behaviour needs to be shown. Furthermore, the existence of the legal criteria for assessing dominance and the refutable presumptions of dominance give the competition authorities fewer discretionary powers of market evaluation based on market shares.

German ordoliberal thinking considers SMEs to be crucial to achieving the goal of enhancing consumer welfare, and therefore restrictions upon dominant undertakings' unfair behaviour, such as below-cost prices, are prohibited. Thus, dominant undertakings are allowed to compete based on their merits. Because of the difficulties associated with accurately measuring the true extent to which particular anti-competitive conduct caused

¹⁵³ FCJ *Nordmende* [1979] WuW/E 1567.

¹⁵⁴ FCJ *Rossignol* [1975] WuW/E 1391.

¹⁵⁵ FCJ [1976] WuW/E 1429.

¹⁵⁶ HRC Düsseldorf VI-U (Kart) 32/04 *Kosmetikmesse* [2005].

¹⁵⁷ FCO B 9-149/04 *Praktiker Baumärkte GmbH* [2006].

¹⁵⁸ FCJ *Designer-Polstermöbel* [2000] WuW/E DE-R 481; FCJ *Depotkosmetik* [2003] WuW/E DE-R 1203.

¹⁵⁹ Düsseldorf HRC VI-U (Kart) 30/00 *Rolex-Uhren* [2003].

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harm to competition, the analysis of performance-based competition has become one of comprehensive balancing, using a case-by-case approach, of the harm caused to competitors against the expected benefits to society of the economic consequences. While balancing the interests of the parties, the economic freedom of competition and the aim of keeping the market entry open are considered paramount. Therefore, the reasoning of the FCO and the courts in the above case law tends to be legal rather than economics-based. However, the economic freedom-based approach does not aim at protecting SMEs' competitors, but at avoiding foreclosure, with the aim of keeping market entry open. If we keep this argumentation in mind, this is exactly what is endeavoured at the European level. Thus, the requirement of less proven evidence and of insufficient economic analysis might give a rather legal shape to the German antitrust authorities' reasoning. Moreover, due to a lack of economic rigour in the likelihood of effects, the decisions can usually be challenged before the courts, which weakens their legal certainty.

However, a question still has to be answered: would the ARC lead to a better enforcement? All of these points lead to the conclusion that we are facing not only stringent, but also much more effective, provisions against anti-competitive behaviour of dominant undertakings. Under both German and EU antitrust law, the effects on competition and other competitors represent a decisive criterion for evaluating whether and to what extent certain conduct is abusive. In the medium and long term, it has to be determined in each case whether and to what extent possible benefit arises for the opposite side of the market and for consumers from a dominant undertaking's behaviour.

Under the German antitrust, objective justifications are restrictively interpreted and balanced to ensure that no entrepreneurial conduct, not even by a dominant undertaking or one with superior market power, is prohibited if it might not be abusive in its effects upon the market. Nevertheless, German jurisprudence demonstrates that balancing the efficiency gains with the negative effects of the restraint of competition can lead to less enforceability.

The German rationale for the likelihood of effects is that, by driving competitors out of the market, competitive pressure disappears, and in the long run, this is to the detriment of consumers, as no efficiencies have been gained. If the supply structure in the market is narrowed, then it is likely that the innovation incentive will also be brought to a standstill. Reviewing the European Commission's rationale¹⁶⁰ for prohibiting or punishing powerful

¹⁶⁰ N Kroes, "Industrial Policy and Competition Law and Policy", in Barry E. Hawk (ed), *Annual Proceedings of the Fordham Competition Law Institute*, (Huntington and New York, Juris Publishing, 2007), 205. "An artificial interoperability advantage for a super-dominant player actually dampens the market's incentive to

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companies, both perspectives are convergent regarding the aim of preserving the incentives of firms to innovate.

The argument is that by driving competitors out of the market it would be very likely to bring the incentive for enterprises to innovate to a standstill. Thus, less powerful enterprises also need freedom to perform their business strategies, even if these are not of benefit to the consumer. Otherwise, the interference grants assistance to smaller enterprises by helping them to “overtake” their competitors. To be more specific, the function of the so-called “Aufholwettbewerb” would assist them in developing to the detriment of the innovation incentive and the competitiveness of other undertakings that had previously been more active in the respective market segment. This “special” protection from the excess of market power applies merely to SMEs and newcomers who could be driven out of the market by powerful undertakings, and reveals a modern facet of German “ordoliberalism”.

Of course, the idea that powerful undertakings should not unduly hamper smaller businesses is also reflected in the ECJ’s jurisprudence,¹⁶¹ which states that below-cost prices “can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them”. Hence, German jurisprudence allows for greater leeway, particularly in cases involving refusals to deal, while balancing the interests of the parties against the main policy goals of the ARC, and to a certain extent grants protection to SMEs.

The main goal of opening up the markets to more competition is indeed the convergent perspective for both German and EC antitrust law. Thus, under the latter, this policy goal of protecting SMEs is attenuated by furthering the other EC Treaty objectives, such as market integration. In contrast, German ordoliberal thinking remains more pragmatically oriented towards competition based on merits, while the higher requirements for assessing dominance under Article 82 EC has made the abuse of dominance most unlikely to be proven. Thus, the growing use of effects-based analysis in recent cases¹⁶² demonstrates that

innovate, since companies know that, however good their products are, they cannot compete on the merits of these products.”

¹⁶¹ Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para 72.

¹⁶² See Case COMP/38233 *Wanadoo Interactive* [2003] OJ C 83 [2008], upheld by CFI in Case T-340/03 *France Télécom SA (formerly Wanadoo) v Commission* [2007] 4 CMLR 21; Case T-339/04 *Wanadoo v Commission*, OJ C 262 [2004]; Case COMP/37792 *Microsoft* OJ L 32/25 [2007] upheld by CFI Case T-201/04 *Microsoft v Commission* OJ C 269 [2007].

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the European Commission is also moving towards a modern economic thinking on predatory pricing or tying.

The main divergence between German and EC antitrust law is the time perspective, wherein the competition authorities may interfere or intervene. The proposed EC approach allows for intervention when negative market effects have already emerged, but requires actual or likely effects upon consumer welfare to be proven, while for the German approach the likely harm to the structure of the market is paramount. Therefore, the German advantage of the likelihood of effects is preventing abuse at “the earliest stage”.¹⁶³

¹⁶³ According to Dr Ulf Böge, abusive practice has to be prohibited “at the earliest possible stage”. See, eg U Böge, “The Role of Economics in Antitrust Enforcement – a German and European Approach” Speech 10 March 2005, DAF/COMP (2005), 27.