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Speech  
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## I. Introduction

1. If we look at the themes of competition conferences in these weeks and months we find that everything seems to revolve around the modernisation and economisation of Art. 82 EC.

Both sound good: They imply competition law which is applied in a modern way and is founded on solid, in other words, empirically based economic findings.

Today I am pleased to share a panel again with John Vickers to discuss the issue of economizing and modernizing Art. 82 EC.

Sometimes we are seen from the outside as two antipodes/poles of opposite positions: John as the advocate of greater economisation and myself as the advocate of a more legalistic approach.

But this is not the case, for in my view our positions are not that far removed from one another. I will elaborate on this in my speech.

The view once expressed that in this debate the Bundeskartellamt takes a unique position represented by no one else in Europe, therefore depriving the EU of the support of its largest Member State with the modernization of Art. 82 EC, is at any rate wrong.

Our position is fully consistent with the case law of the European courts and the previous practice of the Commission. It is also consistent, so far as we are aware, with the predominant practice of the competition authorities of the Member States and with the view of the Federal Supreme Court, the highest German civil court.

2. Economy and Art. 82 EC belong together, there is no doubt about that. I myself am an economist like John Vickers and am therefore in principle positively minded towards economisation.

The same goes for my staff. Some years ago I installed a special economical unit, called "Ökon" and we also have a department for economical developments. One third of our case handlers are economists,

so that “economic thinking” is institutionalized in our decision-making processes.

As to latest developments in economic topics we have had several fruitful discussions with economists who gave lectures about economic and econometric analysis. Discussion on economic analysis is widespread among our staff. Articles (unfortunately most of them only in German) bear witness to this. Last but not least there were cases in the past and will be in the future, where undertakings took an economic approach. We were willing to argue upon this reasoning in our decisions.

3. But what do we mean exactly by the more economic approach in the case of Art 82 EC?

The emphasis here is not on “economic” but on “more”.

“More” can refer to quality, although in this case it should be called “better economic approach“. This means those taking decisions in the authorities and possibly courts and, vice-versa, those representing companies, usually law firms, i.e. legal experts, need better economic expertise, either their own or hired from independent experts.

This would produce better results – pro competition, of course, because, after all, that is the aim of abuse control.

Or “more” could refer to quantity.

This would mean substantiating actual market effects or estimations of such more comprehensively and intensively on the basis of various expert opinions.

In reality no clear cut distinction between the two will be possible. The objective, however, is clear: A comprehensive economic assessment of each individual case is desired.

## II. per-se rules

4. But does such an economic approach stand in the way of the system of per-se rules?

I don't think so because in any case the aim is to assess the individual case appropriately. The application of economic methods is of great practical use in this.

What are per-se rules? This question has perhaps been somewhat neglected in previous discussions.

For me per-se rules are essentially important abstracts from economic facts and prognoses which have been investigated empirically and found to be correct for the most part.

Such per-se rules imply, for example, that fidelity discounts granted by a dominant company in principle violate competition law.

Or that the prices of a dominant company which are below the variable costs are generally to be classified as abusive cut prices because according to economic findings they can only be motivated by the strategic squeezing-out of competitors.

There are a multitude of such per-se rules in the area of abuse control. These have mostly developed from the experience of competition authorities in the market and have then been acknowledged by the courts or have even been formulated by the courts themselves.

5. Generally recognized per-se rules are not only reflected in laws. They are often laid down in guidelines. We have such guidelines e.g. on sales below cost price. The OFT has also published a large number of guidelines and the Commission has plans for guidelines on Article 82 EC.

These guidelines result in a self-commitment of the competition authorities issuing them. And they provide companies with rules on which they can base their conduct.

If we possess sound economic and empirical knowledge proving that a certain conduct is abusive, we should develop per-se rules accordingly. Of course these can be reviewed by the courts in individual cases.

If, in economic terms, certain knowledge is still disputable or unsound, we should refrain from basing a decision on this or even codifying it.

And of course we must develop per-se rules further. If they are no longer up to date with current solid economic findings, we must adjust them. I think there is no difference between John and myself here.

Per-se rules usually leave enough scope for diverging solutions in individual cases. There are always exceptions to the rule if they are soundly justified. Per-se rules and the economic analysis of each individual case thus complement each other.

In my view the economisation of Art. 82 EC should therefore not mean that per-se rules cease to be justified and generally lose ground to the economic analysis of each individual case.

For per-se rules are indispensable in legal practice. They ensure legal certainty and predictability.

### **III. Efficiencies**

6. The aim of the comprehensive economic assessment of an individual case is to ensure that entrepreneurial conduct, even by a dominant company, is not punished that would perhaps be not at all abusive in its effects on the market.

Some advocate the view that the hindering conduct of dominant companies would be acceptable if this achieved efficiencies which benefit the consumer or even the economy as a whole.

For example, the producer of a bulk product can reduce his unit costs by squeezing out his smaller rivals and partially pass these reduced costs on to the consumer in the form of price reductions.

But the economic analysis cannot end here. When competitors disappear from the market the competitive pressure on the dominant producer, who is now even stronger, to pass on his efficiency gains to the consumer, also reduces. And we must of course ask ourselves whether the narrowing of the supply structure to under some circumstances only one provider does not reduce incentives for innovation.

This can also be deduced from economic theory, particularly in cases where there are high barriers to market entry.

Should it not rather be possible to fall back on experience, in other words empiricism, to assess this issue or is there need for concrete economic substantiation?

Under German and European competition law the effects on competition have so far been the decisive direct criterion, also in a more long-term assessment, for evaluating whether and to what extent a certain conduct is abusive. Economists do not dispute the possible restraining effects of cut prices.

Although economic methods can provide answers to precisely formulated individual questions they cannot replace an overall competitive assessment. Of course this assessment should also be guided by economic expertise.

Moreover the quantification of efficiency gains poses enormous evaluation difficulties. The dynamics which are often connected with efficiency gains add to these difficulties.

7. Weighing up efficiency gains against the negative effects of the restraint of competition can thus result in considerable problems even if economic methods are applied. A possible consequence is a lower enforceability of competition law.

To put it provocatively: Can economisation also lead to a paralysis in competition law enforcement?

On 23<sup>rd</sup> February 2005, lawyers from an international law firm publicly declared in the *Frankfurter Allgemeine Zeitung* that in future merger control proceedings conducted by the Commission they would advise companies to

commission expert economic opinions to have the effects on competition analysed in each individual case.

According to the lawyers this would require the Commission to spend more effort and time on such cases which would increase the time pressure and could even serve as a basis for future appeals as the Commission would have to deal with all facets of the expert opinion in sufficient detail.

Do we want to further such developments for Article 82 EC as well?

8. Let me give you a practical example:

In November 2001 the newcomer Germania entered into competition with the dominant Lufthansa on the Berlin-Frankfurt route by offering considerably lower prices. Lufthansa already reacted in December by reducing its ticket prices, in some cases by more than half of the original price, using a cut-price strategy to squeeze Germania out of the market.

In a swift reaction the Bundeskartellamt issued a decision two months later prohibiting Lufthansa's predatory pricing strategy. In the proceedings we conducted an in-depth economic analysis of the case and reverted to foreign case-study on predatory pricing.

Only one and a half months later the Düsseldorf Higher Regional Court confirmed this decision in a preliminary decision because it found the Bundeskartellamt's economic conclusions convincing, too.

By using economic studies and investigations it would have been possible to substantiate the abusive conduct in this case in more detail and evaluate the actual market effects even further. However, this would have been time-consuming.

And would this not ultimately have played into the hands of the dominant company? In the meantime the newcomer Germania would long have been squeezed out of the market! And the result of this development would certainly have been that no other newcomer would have dared to enter the market either.

The mere existence of market power, combined with lengthy proceedings, can thus already hinder competition without the existence of a specific abusive conduct.

#### **IV. Effect on the market**

9. I have thus come to the question of whether Article 82 EC aims at prohibiting conduct that is potentially detrimental to competition or whether an actual impact on the market is required.

According to the Commission's previous practice and the Court of First Instance's 2003 judgements in the Michelin II and British Airways/Virgin cases it is not necessary to provide proof of actual market effects in order to prove abusive conduct. An abstract threat effect is sufficient, as was also the case in the Lufthansa/Germania proceedings explained above.

In contrast, literature calls for an adoption of a market-based analysis in order to take into account the economic effect of such practices.

In particular with regard to market simulation approaches a growing tendency to apply theory can be observed. However, this poses higher demands on the quality and quantity of databases, without which no reliable conclusions can be deduced.

Unfortunately it is often not possible to obtain the necessary data because of either methodical, statistical, time or budgetary restrictions.

10. In my view the market-based analysis involves a number of disadvantages:

First of all the causality between conduct and market effect would have to be proven. However, such proof requires a comparison between the actual market situation and the potentially possible market result. As the possible market result can ultimately only be speculated upon, the market-based analysis as a whole can be challenged at any time.

Let me illustrate this by using the rebate system as an example.

If a dominant company uses a rebate system as a prevention against expected competitive pressure from competitors, and if this rebate system provides a strong incentive for its customers to continue to purchase the product from that company, there will be no effect on the market.

An ex-post consideration of market shares is thus not always appropriate to ascertain the actual effects of a rebate system.

11. As I explained in the Lufthansa/Germania case, a second considerable disadvantage of a market-based consideration of conduct lies in the time perspective.

The protection of competition requires that abusive practices are prohibited at the earliest possible stage in order to avoid long-term damage to the competitive structures.

If proving abusive conduct required the existence of a market effect, an intervention by the competition authorities would only be possible at a stage where the negative market effects had already emerged.

At this late stage, however, competition could possibly have already been damaged irreversibly.

The Bundeskartellamt is therefore always interested in having abusive practices discontinued at an early stage, possibly by means of negotiation.

Again, let me give you an example:

In 2003 the Bundeskartellamt initiated abuse proceedings against Deutsche Bahn AG as the company intended to tie two large orders for the supply of railway cars and engines to the purchase of vehicle maintenance works (with employment guarantees). The Bundeskartellamt regarded this as an abusive exploitation of Deutsche Bahn's dominant position and initiated proceedings. The company subsequently abandoned its tie-in plan for the invitation for tenders.

## V. Conclusion

12. What conclusion can be drawn from this?

(1.) An application of Art. 82 EC and of the national abuse provisions without economic concepts is not feasible. However, we must be cautious about the call for **more** economics (which would certainly be good for consultancy firms). This must not be allowed to unduly prolong proceedings. Also we should not immediately jump on every new theory and method. First of all they must be verified and their usefulness proven.

(2.) It is indispensable that all parties (the legislator, competition authorities, competition law judges and companies) develop a stronger awareness of economic causalities. In this respect the more economic approach is to be judged positively.

On the other hand, however, there are possible disadvantages such as less legal certainty and predictability and the prolongation of proceedings which is often problematic.

(3.) In my opinion, per-se rules and focusing on abstract threat effects continue to be useful instruments of abuse control.

However, per-se rules must be developed further and adjusted to new economic insights and methods.

(4.) In Germany we have been **applying** per-se rules for almost 50 years. **The seventh amendment to the Act Against Restraints of Competition is currently going through legislation.** Each amendment casts into law new insights which have often been gained through economics.

Perhaps this explains why we in Germany advocate economics on the one hand, but initially did not understand the call for an “economic approach” since we already considered it as a matter of course. Still, we continue to be somewhat sceptical about the “**more** economic approach” because we are concerned about a weakening of competition law enforcement.