

Competition authorities on their high horse

By Professor Dr. Wernhard Möschel

Competition authorities all around the world are currently behaving arrogantly. They have become almost invulnerable. One price cartel after another is being uncovered, often as a result of leniency programs. This concept, imported from US antitrust law, enables one of the cartel participants to get away scot-free if he blows the whistle on his co-conspirators, leaving the other cartel members to pick up the tab. Much to the amazement of the public, fines could exceed € 1 billion.

However, now competition authorities are becoming the victims of their own success. Instead of just promoting competition for its own sake – thus benefiting everyone – they are protecting individual competitors. This is largely down to competition authorities defining markets in a static and old-fashioned way, ignoring rapid changes in the economic landscape.

These shortcomings have become especially apparent in markets that are changing and developing rapidly, such as the IT market and, in particular, the retail sector. In the latter, not only is product diversity and quality increasing, but remarkable developments are occurring in marketing and logistics. The balance between independence and cooperation among market participants is in a state of flux and traditional separation of activities between manufacturers, wholesalers and retailers is becoming increasingly blurred.

This has become particularly apparent in the relationship between branded goods and private labels. Largely through the activities of discount traders, nearly half of all grocery products are now sold under private labels.

When assessing the purchases made by retailers, competition authorities generally distinguish between branded goods and private labels, leading to extremely narrow definitions of the relevant markets. The authorities' definition of the market plays a major role in the assessment of mergers and market abuse. If a market is defined narrowly, and as a consequence a company is found to have a high market share, it may be deemed to be in a dominant position. If this is the case, the company's activities will be extensively limited by competition law.

But, as the retail sector shows, product markets can change rapidly. In the supermarket there is "head-to-head competition" between branded goods and private labels. The shopper finds both types of product next to each other on the shelves or in freezer cabinets.

Competition at the retail level (sales to consumers) has an impact on the procurement market where retailers are buying from manufacturers – both have to be regarded together. Authorities tend to take this vital link into account only in exceptional cases. This is a mistake, as even with regard to retailers' purchases from their suppliers, branded goods and private labels should now be included in the same product market.

From this failure, two shortcomings in the practice of competition authorities can be discerned: first, their view of the relevant market is too rigid and fails to keep up with rapid changes in the business world. Secondly, their application of law has become too mechanistic. In many cases the authorities' practice is not strengthening competition, but actually restricting it.