Fairness in German Competition Law

Nothing more than a feelgood epithet?

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Introduction

Prima facie view

- Fairness is essentially a matter for the interpretation of the German Unfair Trade Practices Act and does not as such describe any essential element of competition law analysis (save for the idea of procedural fairness under Article 6 European Human Rights Convention).

Secunda facie view

- Fairness as a legal concept comes close to the legal test of "equity" (Billigkeit) under Section 315 of the German Civil Code and the overall balancing test under the German equivalent of Article 102 TFEU (Abuse of a dominant position).
- Moreover, in parallel to the development of the concept at European Union level, and even preceding this development, the terms "fairness" and "fair competition", along with "level playing field", are notions which are frequently used in communications from the German Federal Cartel Office (FCO) to the media. Fairness is also used – sparingly – in the case law of German courts.

Fairness as a legal term (Germany)

- Fairness is used in German legal language insofar as the original English law term has been absorbed tel quel into German legal language:
  - Fair trial under Article 6 European Rights Convention
  - FRAND
- Typically, however, for the official German equivalent of "fair/unfair" as part of English language EU legal drafting (Article 101 para 3, Article 102 TFEU: "... fair share ...."; "unfair trading conditions") other adjectives are used which – if translated back into English – correspond more to terms like "inappropriate", "improper", "inequitable".
- The German translation of Directive 2005/29/EC concerning Unfair B-to-C Commercial Practices is "unlauter", not "unfair", "unlauter" being an old-fashioned term which more closely mirrors English terms like "dishonest", "improper" – similar to the French law term of "déloyal".

Fairness as a legal term (Germany) (2)

- The adjectives “fair/unfair” have for a long time been part of everyday German language parlance and are used in a sense which broadly corresponds to the original sense in the English language. “Fair/unfair” will typically be used to describe behaviour in sports, in the workplace between colleagues or in trade negotiations between companies, and could also relate to the behaviour of politicians etc.. In all these situations “fair/unfair” would have a meta legal meaning. “Unfair” would be used as a verdict on behaviour which technically complies with the rules but which is somehow considered to be socially/morally reprehensible. This would explain why administrators and judges find the application of the term as a legal concept difficult.

German Competition law:

A smorgasbord of undefined terms, fairness as a substantive term of legal analysis would be yet another one

- Inequitable from the Roman law concept of aequitas.
- Inappropriate.
- Competition on the merits/unmeritorious behaviour.
- Necessity of a general balancing test in abuse cases.
- Necessity of establishing “a significant” overcharge in pricing abuse cases.

- Where would fairness come in here and what would be the benefit of yet another vague term?

Use in communication by the FCO

- Quite frequently and at least since 2005 the FCO uses the term “fair/unfair” or “fair competition” in many of its German language communications.
- The standard formulae used in this context are:
  - Objective of the FCO’s enforcement policies are: “To keep markets open and to assure fair competition to the benefit of undertakings and consumers”.
  - Achieving a “level playing field for privately owned and municipal network operators in the energy sector is a key requirement for ensuring fair competition”.
- While the term “fairness” will appear frequently in such kinds of communication, there would be no consensus in the legal community that “fair competition” would mean anything different to “competition on the merits” or “effective competition”. The term “fair” is not necessarily confined to describing the market structure but it could also be used to describe the behaviour of dominant companies.

Review of the „equity“ of pricing, notably of utilities

German Civil Code, German Antritrust Act

- Based on the Roman law concept of aequitas, Section 315 of the German Civil Code provides for the civil judge (not the FCO) to review the “equity” of all contract provisions (notably on pricing) which can be determined at the discretion of one party.
- This has led to a long established practice of civil courts (often lower courts at the district level) reviewing in particular the general trading terms and pricing schemes of utilities, especially in cases of price increases.
  – The review standard as such is not that of competition law and at least in nuances differs from Article 102 TFEU. But, if the trading terms that are being reviewed have been imposed by companies in a dominant position, there is often a reversal of proof in that the dominant company needs to show that cost increases were the reason for an increase in the price.
– At the same time, pricing abuses, especially by utility companies (water utilities, district heating etc.) are also frequently reviewed by the German Federal competition authorities. Here, fairness may be used in press communication, but is not an element of the legal analysis as such.

Examples of reviewing „inequitable“ behaviour in abuse cases

- Traditionally, in German competition law, a form of behaviour which could be classified as abuse of a dominant position is only unlawful if it is considered inequitable by the standards of a general balancing test which, however, not only looks at the interests of the stakeholders involved but also the “freedom of competition”.
- Here are a number of examples from the more recent case law:
  - The Pechstein case (German ice skating World champion Claudia Pechstein was excluded from the relevant governing body of the International Skating Union for doping charges. The review mechanisms of the competent Court of Arbitration for Sports (Lausanne) were [also] considered “fair” by the standards of the German Antitrust Act).
  - The number plate printer cases (case law, purely based on German antitrust law whereby municipalities as owners of office space geographically close to number plate registration offices must tender this office space every five years for rent by the private sector companies which produce and print car number plates, to achieve fair market access).

Examples of reviewing „inequitable“ behaviour in abuse cases (2)

- The newspaper wholesaler case (termination of a newspaper distribution agreement between a large newspaper publishing group and a long established regional multi-brand newspaper wholesaler was considered acceptable under German antitrust law even though there was a strong relation of dependency and the competitive conditions for a wholesaler not stocking newspapers of all major publishers where significantly impaired).

The role of fairness/unfairness in defining enforcement priorities

- As shown, fairness has not yet developed into a stand-alone legal concept. Yet, the term is frequently used in communication by the FCO about its most important cases.
- One observation could be that those cases where fairness as a general concept helps to define the overall enforcement policy goal are selected for more intensive press communication.
- Such a phenomenon, however, could also be explained by the FCO's trend, for the past ten years, of communicating more actively about its cases which have a direct impact on consumers.
- Hence, it would be difficult to show with any degree of certainty that cases which lend themselves to being associated with "fairness" would be more easily picked up by the FCO than others.

Thank you