



Bundeskartellamt



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16th GCLC ANNUAL CONFERENCE

THE TRANSFORMATION OF EU COMPETITION LAW:

NEXT GENERATION ISSUES

25-26 March 2022

Do we need to change the test of merger control?

25 March 2022

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Introduction

Challenges in merger control on high-tech/digital markets

- ⇒ How to deal with innovation dynamics in the digital world?
- ⇒ Many big-tech mergers cleared, almost none prohibited
- ⇒ Ex-post analysis points towards competitive harm
- ⇒ Recent “regulation” is about conduct; what about structure?

Two fields of action

1. Widening the formal scope of merger control: introduction of a transaction value threshold
2. Assessing acquisitions by digital ecosystems: new test required?

Some Reports

- Furman-Report (UK)
 - Cost-benefit approach
- CGE/IGF (France)
 - Reversed burden of proof for acquisitions with low turnover but high transaction value by digital firms
- Commission on Competition Law 4.0 (Germany)
 - No change in substantive test suggested
 - Standard of proof should depend on already existing concentration
 - Guidelines for new ToH in digital markets
- Crémer-Montjoye-Schweitzer Report (for the European Commission)
 - Development of new ToH adapted to digital ecosystems
 - SIEC “continues to provide a sound basis” for the assessment of mergers

Some Aspects

- Potential competition
- Linking user data from different sources
- Target company may “round off” ecosystem with limited direct/appreciable effect on dominated core market
- Traditional view too “market oriented”?
- Effects, strategy, uncertainty, prognosis, efficiencies...

The Hutchinson/Telefonica Decision

- 4-to-3-merger on British telecom markets
- Decision of the COM: May 2016
- Key points of the decision of the General Court (2020)
 - Effects *equivalent to* creation or strengthening of *dominance*?
 - Eliminating constraints *on each other*
 - Being *relatively close competitors* not sufficient
 - *Strong probability of SIEC*

Ruling of the Düsseldorf Higher Regional Court on Furniture Retail (3/2022)

- BKartA's decision XXXLutz/Roller was overruled
- Parties were by far the leading discounters in Germany and considered closest competitors
- **Overall:**
 - Tendency to require quite a high threshold for assuming a significant impediment
 - Court seems to assume quite a limited field of application for an SIEC without market dominance

Strengthening Digital Ecosystems? The (German) Meta/Kustomer Case

- The Meta/Kustomer case:
 - Assessing the obligation to notify (relevant domestic activity)
 - DG Comp had already assessed horizontal and vertical effects
 - Bundeskartellamt further analyzed a possible strengthening of the digital ecosystem

Summary

- SIEC test still evolving
- Consensus about necessity for a further development of ToH adapted to “killer acquisitions” and effects of acquisitions by digital ecosystems.
- Categorization of ToH on innovative markets (see BKartA paper “Innovations – challenges for competition law practice”)
- Costs of waiting for new ToH based on SIEC to be assessed by the courts?
- Additional substantive test for platform companies?
E.g. “(Significant) Strengthening of paramount significance for competition across markets” ?



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Thank you for your attention!

25 March 2021

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