

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Non-price Effects of Mergers - Note by Germany**

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More documents related to this discussion can be found at [www.oecd.org/daf/competition/non-price-effects-of-mergers.htm](http://www.oecd.org/daf/competition/non-price-effects-of-mergers.htm).

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This submission provides hereinafter a short introduction to the role of non-price effects in merger control in Germany (1.): Innovation as an element of dynamic competition (2.) market definition based on non-price factors (3.) and possible implications of the recent reform of the national competition law with regard to non-price effects (4.) are discussed. Finally, the role of non-price effects in traditional regulated healthcare markets is presented (5.). The submission closes with conclusions (6.).

### **1. Introduction**

1. A merger may result in efficiencies but also lead to a market structure that allows for disproportionate price increases and/or reduces innovation efforts, or worsens quality, variety or other non-price-related parameters of competition on the merits. When reviewing a merger, the German Competition Authority ('Bundeskartellamt') applies solely the SIEC test: Pursuant to Section 36 (1) of the German Competition Act ('Gesetz gegen Wettbewerbsbeschränkungen', '**GWB**') a concentration which would significantly impede effective competition, in particular a concentration which is expected to create or strengthen a dominant position, shall be prohibited by the Bundeskartellamt. The provision does not distinguish between the price and non-price effects of mergers. The latter have come under increasing scrutiny in the decisional practice of the Bundeskartellamt.

2. A merger's impact on competition in innovation is a typical non-price effect that is part of the counterfactual assessment under German merger control. A less competitive and less innovative market structure may result in price-based and other welfare losses at the same time since a reduction in innovative efforts may for example lead to a loss of quality. The interface between the price and non-price effects of a merger is therefore often interdependent and rather complex.

3. Traditional industries that are driven by technological improvement and the ongoing evolution of the digital economy call for an analysis that is able to reflect the relevance of those factors. The 9<sup>th</sup> amendment of German competition law provided some criteria for the assessment of market power and a new transaction-value-based merger control threshold aimed to cover mergers that concern innovative market entrants or disruptive technologies. Also these amendments may be considered as having an indirect relevance or linkage to non-price-competition or non-price effects in the individual case.

4. In regulated markets with little room for price competition, such as national healthcare markets, merger control ensures competitive market structures to preserve efficient competition in quality within the regulatory framework.

### **2. Innovation and merger control**

#### **2.1. Economic rationale**

5. Innovation is a key element of dynamic competition. Competitive market structures induce companies to invest in and maintain their research and development

(‘R&D’) efforts and to introduce new technologies and enhanced products. Innovative companies may gain a competitive edge that ensures that their investments pay off.

6. The role of innovation in a merger control scenario is manifold. A particular merger may not only result in a product-based restriction of competition but also in shortcomings with regard to the R&D efforts of the merged entity. In some scenarios the ability and the incentive to compete in innovation may be enhanced as a result of the planned merger. The predictive perspective of merger control may not only require an in-depth investigation of the relevant market circumstances but also entail a balancing exercise with regard to the short- and medium-term effects of the merger on competition in innovation.

7. Generally, the incentives to innovate are greater in a competitive market environment than in a static monopoly situation with little incentive for improvement of process, products or services. The pressure of identifiable potential competition may ensure remarkable innovative efforts even in a market with little residual competition and a correlation between economies of scale and innovative output may exist.<sup>1</sup> Hence, not only does the market structure determine the conditions for innovation but innovation itself also has a substantial impact on the market structure in a disruptive or incremental manner. Capturing this mutual interaction under merger control assessment represents a challenge.

## 2.2. Decision-making practice

8. Among other considerations, past merger control decisions of the Bundeskartellamt addressed innovation in the following context:

- Market dynamics,
- Potential competition in online markets,
- Future product markets, and
- Merger-driven efficiencies.

9. A factor that may reduce the increase in market power of a merger are the market dynamics driven by innovation. In its *Lanxess/DSM*<sup>2</sup> merger clearance decision the Bundeskartellamt ruled out coordinated effects in an oligopolistic post-merger market structure *inter alia* due to the market dynamics based on the innovative nature of the relevant rubber products and the remaining innovative efforts of the market participants.

10. In its *dating platform*<sup>3</sup> merger decision the Bundeskartellamt cleared the merger of the two leading paid-access online dating platforms in Germany *inter alia* due to the ongoing mobile conversion that was fostered by an innovative mobile-exclusive market entrant and the dynamics of the internet. These factors indicated that it was unlikely that

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<sup>1</sup> For a detailed discussion of the economic literature and principles of competition in innovation see Bundeskartellamt - Herausforderungen für die Kartellrechtspraxis, pp. 8-16, available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Schriftenreihe\\_Digitales/Schriftenreihe\\_Digitales\\_2.pdf?\\_\\_blob=publicationFile&v=3](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Schriftenreihe_Digitales/Schriftenreihe_Digitales_2.pdf?__blob=publicationFile&v=3).

<sup>2</sup> Lanxess/DSM, decision of 19 April 2011, B3-143/10.

<sup>3</sup> OCPE II Master/EliteMedianet, decision of 22 October 2015, B6-57/15.

the parties had a dominant position in the market and that market tipping was imminent. The ambivalent effect of the indirect network effects could be clearly demonstrated in the market, e.g. in the case of the market entry of the mobile platform tinder.com which very quickly reached millions of users. The development of mobile applications within the context of the general shift towards mobile applications indicated strong market dynamics. The mobile applications enable the platform users to search for people looking for a date within a specific radius of their current location. This also affected the incumbent online dating platforms as the success of such dating apps challenged the web-based business model that is largely based on longer computer sessions. In this case, turnover-based market shares needed to be put back into perspective of the aforementioned market circumstances.

11. The Bundeskartellamt found that the barriers to market entry were low in the online dating platform sector. The changes in the use of online dating platforms illustrated the internet's innovative power and indicated that there was no uncontrolled scope of action in this sector. However, only specific, identifiable innovative dynamics can actually control the scope of action of merging parties. A mere general assumption that internet dynamics exist and favour competition in innovation cannot be used as an argument against market dominance.

12. Following an in-depth examination in *Tokyo Electron/Applied Materials*<sup>4</sup>, the Bundeskartellamt found that the proposed merger of two producers of semiconductor manufacturing equipment was unlikely to significantly hinder innovation and cleared the transaction. As chip production is a highly dynamic sector, the upstream level of chip production equipment, i.e. the level affected in this case, also depended on constant technological change. The investigations did not provide sufficiently convincing indications that R&D and innovation would be limited or delayed by the two companies within the relevant time-frame to an extent that would harm competition. The product portfolio of the merging parties appeared complementary rather than overlapping which made a post-merger cut in R&D funds fairly unlikely. On the other hand the investigations revealed a substantial degree of buyer power among the customers of the merger entity, i.e. the chip producers, which would have enabled them to implement strategies to keep sufficient pressure on their suppliers to remain innovative.

13. In its *SES/DPC*<sup>5</sup> decision the Bundeskartellamt identified a dominant position on the market for the provision of satellite transponder capacity and technical services for the provision of pay-tv but cleared the transaction due to the improvement of market conditions for pay-tv for end customers. The merger entailed the grant of access to the relevant technical platform for the provision of pay-tv to end customers and therefore rendered market entry for alternative pay-tv offers possible and incentivised product innovations.

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<sup>4</sup>Tokyo Electron/Applied Materials, decision of 14 November 2013, B5-138/13.

<sup>5</sup> SES/DPC, decision of 28<sup>th</sup> December 2004, B7-150/04.

### 3. Market definition based on non-price factors

#### 3.1. Starting point

14. Identifying the markets affected in a specific case is a fundamental step in merger control assessment. Market definition serves as an instrument to determine competitive forces that affect the companies concerned. Consequently, the definition of the relevant markets needs to take special characteristics into account. In the case of “free” products or services where the free-of-charge use by the user is often funded through advertising, the market definition may rely on non-price factors.<sup>6</sup> The definition of the relevant market may also be profoundly based on non-price factors in the case of direct payment business models. Price-related market definition tools like the SSNIP test may not always represent the most adequate approach to reflect the specific market circumstances despite a direct cash flow between users and providers. The actual relations between the market participants are sometimes highly complex, particularly in the digital economy.<sup>7</sup>

15. A central question regarding the market definition of multi-sided services is how to account for and treat the different market sides. The concept of demand-side substitutability that focuses on the opposite market side’s perspective does not automatically require a separation of both market sides. The opposite market side may in fact consist of two or more user groups, which is also the case on many one-sided markets. In applying the concept of demand-side substitutability, the Bundeskartellamt considers it possible to regard different market sides as a single market if the product or service in question provides an intermediary service and both user groups are understood as consumers of this service with essentially the same needs. If bilateral network effects occur between different groups on the demand side, the market definition needs to take them into account.

16. To the extent that the different groups on the demand side have obvious different possibilities of substitution, the market sides have to be considered separately with a view to the function of the market definition, which is to describe existing competition relations. Otherwise essential competitors may possibly be overlooked. In this context, it is particularly relevant to establish whether both sides require the provision of an intermediation service as an upstream product of the transaction or whether they can do without it.<sup>8</sup>

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<sup>6</sup> For conceptual considerations regarding the treatment of free platform services see Bundeskartellamt -

Market Power of Platforms and Networks, pp. 32 et seq., available at: [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2)

<sup>7</sup> See also OECD (2018) Rethinking Antitrust Tools for Multi-Sided Platforms, available at: <http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm>.

<sup>8</sup> For a detailed discussion regarding the market definition in the context of platforms see Bundeskartellamt - Market Power of Platforms and Networks, pp. 25 et seq.

### 3.2. Decision-making practice

17. In its *Immonet/Immowelt*<sup>9</sup> decision, a merger of two real estate platforms, the Bundeskartellamt had already expressed an opinion in favour of defining a single market for online real estate platforms since the platform's core activity was providing intermediation services between real estate providers and potential customers. A separate consideration of individual user groups or a market definition solely based on price-related tests for each user group would not have adequately reflected the economic process and the pronounced interdependencies between both market sides.

18. In the aforementioned decision concerning the merger between two online dating platforms<sup>10</sup>, the Bundeskartellamt for the first time explicitly defined a single platform market. A distinction of markets on the basis of the two platform sides – that is, the user group of women on the one hand and the user group of men on the other – was not made since the user groups had the same possibility of substitution. Furthermore, the Bundeskartellamt did not distinguish between the different business and payment models in its market definition as, according to the authority's investigations, customers considered these to be interchangeable. The same applied in particular to the platforms that were solely financed by advertising and offered intermediation services to both user groups free of charge, as well as to business models where only one side did not have to pay fees. Despite the fact that their users did not have to pay for such products, they were considered an essential part of the market and a crucial source of competitive pressure for the functioning of the single online dating market.

## 4. Reformed national law

### 4.1. Assessment of market power

19. The 9th amendment to the GWB which came into force on 9 June 2017, contained amendments that seek to enable the Bundeskartellamt to react to developments in the digital economy. The new Section 18 (3 a) GWB added a non-exhaustive list of criteria for the competitive assessment of market power with regard to multi-sided markets and networks to the traditional ones (e.g. market shares). The provision contains the following factors that form part of the merger control assessment of market power:

- Direct and indirect network effects,
- Multi-homing and switching costs,
- Economies of scale in the context of network effects,
- Access to data relevant for competition, and
- Innovation-driven competitive pressure.

20. The list represents the legislative response to the characteristics of digital platforms or networks. Its relevance goes beyond the merger control dimension. It illustrates the possible interface between structural market conditions (e.g. network

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<sup>9</sup> *Immonet/Immowelt*, decision of 20 April 2015, B6-39/15.

<sup>10</sup> *OCPE II Master/EliteMedianet*, decision of 22 October 2015, B6-57/15.

effects), company-related features (e.g. economies of scale) and possible non-price effects of mergers (e.g. innovation). The criteria reflect the conceptual work of the Think Tank Internet of the Bundeskartellamt.<sup>11</sup> Even though these criteria are of particular importance for the digital economy, they are, whenever suitable, applicable to the full spectrum of industries and sectors that are subject to merger control review.

21. Multi-sided business models are a key part of the digital economy. According to the Bundeskartellamt, internet companies are considered platforms in competition law terms if they provide intermediation services which allow for direct interaction between two or more distinct groups of users that are connected by indirect network effects.<sup>12</sup> Indirect network effects exist when the value of a service or product for a specific group of users increases (positive network effects) or decreases (negative network effects) with the number of users of another group.<sup>13</sup> Direct network effects arise if the users of one product directly benefit if more (positive network effects) or less (negative network effects) people use the same product as well.<sup>14</sup> Network effects may spur a self-reinforcing positive feedback loop that represents an important factor in strengthening a company's market power or even create a lock-in effect for its customers. Accordingly, the "tipping risk" is particularly strong in the presence of network effects and needs to be closely monitored. Tipping means that a multi-sided market is in the end served by only one platform and other providers leave the market. At the same time, network effects may also boost competition on the market, as they may cause a rapid growth of new market players, thereby fostering market entry. Network effects may result in cost advantages.

22. Due *inter alia* to network effects, the switching costs incurred by users can be high, reducing the incentive to switch to another provider. The switching costs not only include the costs of connection to a different network, but in particular the opportunity costs for users that can result from the loss of network effects when customers switch to another provider. Switching to another provider will only be attractive for users if the benefit created by the new network clearly outweighs the switching costs. In the case of a larger installed base, the benefit of a new network must be even higher. If switching costs are low, a market position in multi-sided markets is usually more contestable.

23. In a multi-homing scenario users use several, possibly differentiated platforms or networks for comparable services. Switching costs are low and users are not locked into the network of a single provider. This can lower entry barriers as a new entrant doesn't have to induce customers to exclusively use its new and still unknown platform. Therefore multi-homing can be a countervailing factor against the self-reinforcing feedback loop effect of network effects and reduce the risk of market tipping in the case of substantial multi-homing.

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<sup>11</sup> Bundeskartellamt - Working Paper on Market Power of Platforms and Networks, available at [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2).

<sup>12</sup> Bundeskartellamt - Working Paper on Market Power of Platforms and Networks, Executive Summary, p. 2, available at [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4).

<sup>13</sup> Ibid, p.3.

<sup>14</sup> Ibid, p.4.

24. Economies of scale have always been a relevant factor which has to be considered in the examination of market power because they may raise barriers to entry. Economies of scale are often based on cost advantages where increasing output as a consequence of constant fixed costs reduces the average costs. They can be based on specialisation, learning processes, advantages of high capacity utilisation or batch size economies. These advantages can prevent market entries or make them considerably more difficult as they might only be successful if a specific sales volume is achieved within a very short period of time (minimum scale of entry). Regarding platforms and networks, economies of scale play an additional role as they can further strengthen the self-reinforcing positive feedback loop due to network effects. In the digital economy, economies of scale are often based on specialisation and learning processes of platforms. In the presence of network effects they are of additional relevance for the market tipping potential that forms part of the merger control examination concept. In general, economies of scale can also have a non-price related dimension (e.g. in the context of innovation). The implications to competition (harmful, positive or neutral) must be assessed.

25. Access to data sources is a factor which may indicate market power, particularly in the case of online platforms and networks.<sup>15</sup> Customer and user data, but also third party data, have always been a valuable source of information for businesses. The degree of commercial use of customers' or users' personal data is a new phenomenon because above all digitalisation and the internet enable the collection and use of data in a completely new dimension. The fact that the search for information, private and professional communication as well as the trade in goods and services now take place online has enabled businesses to build profiles of (potential) customers by means of so-called 'tracking methods'. Only the process of digitalisation has made it possible to analyse particularly large amounts of data (volume) from different sources and formats (variety) as fast as possible (velocity). Control over data per se is not an indication of market power but data is increasingly becoming the currency of the digital age. Just like other price or non-price related competitive aspects, access to and control over data may play an important role in the necessary consideration of all circumstances in the assessment of the market position of a company. It must be examined which data are collected, their relevance for competition in the market, whether they can be duplicated and which options are available to a company wishing to combine data from different sources.

26. The new Section 18 (3a) GWB was applied for the first time in a recent merger decision concerning a vertical integration that could have led to a customer foreclosure for competing ticketing systems that is further discussed below.<sup>16</sup> With regard to the additional criteria for the assessment of market power, the Bundeskartellamt follows a holistic approach that reflects the relevance and actual interplay of the criteria in the given context. In this landmark case, the assessment of market power focused particularly on the (i) existence of bilateral positive indirect network effects, (ii) the superior access of the market leader to competitively relevant data and (iii) the limited degree of multi-homing.

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<sup>15</sup> For a detailed discussion of data and the implications for competition law see, Bundeskartellamt/Autorité de la concurrence, Joint Paper on Competition Law and Data, available at [http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2).

<sup>16</sup> CTS Eventim/Four Artists, decision of 23 November 2017, B6-35/17.



## 4.2. Decision-making practice

27. In its *Immonet/Immowelt*<sup>17</sup> merger clearance decision the Bundeskartellamt found that the merger between two runner-up online real estate platforms can prevent the relevant market from tipping into a monopoly in favour of the market leader, strengthen the multi-homing user pattern and reduce the asymmetries between the merged platforms. Online real estate platforms are characterised by pronounced indirect network effects since a larger number of real estate providers leads to more consumers joining the platform, which in turn has a positive impact on the group of real estate providers. The merger provided the opportunity for a second big platform to promote multi-homing by service users, thus intensifying competition. In this case, extensive studies on user behaviour were available.

28. Economies of scale were present, particularly on the part of the market leader resulting from higher investment costs and decreasing average costs for the operation of online real estate platforms. Compared with the parties to the merger, this created an asymmetrical cost situation, which the envisaged merger could potentially have mitigated, as the merger would increase “output quantities” and/or the size of the merged real estate platform would grow, allowing parties to the merger benefit from economies of scale.

29. The Bundeskartellamt used a similar line of argument in its *Verivox/ProSiebenSat1*<sup>18</sup> decision clearing the merger between two online price comparison platforms. In this case, the Bundeskartellamt ruled out the tipping risk due to the multi-homing tendencies of the supply side and the lack of a competitive edge of the merging parties on the market.

30. Among the considerations in its *CTS Eventim/ Four Artists*<sup>19</sup> decision that led to the prohibition of the planned merger between the leading ticketing system provider in Germany and a company that organises and markets concerts for national and international artists was access to data. As part of its investigation, the Bundeskartellamt examined whether the control over specific user and sales data represented an additional factor that ascertained the market power of the leading ticketing system. The Bundeskartellamt found that the market leader benefited from a substantial lead over its competitors in its access to this data which is relevant for competition as it is used for marketing and pricing purposes and could not be duplicated by less frequented ticketing systems. This lead was not mitigated by multi-homing due to its limited presence in this case. Additionally, the Bundeskartellamt could not identify any particular competitive pressure based on innovation in this case as there were no specific indications of a market entry of alternative ticketing services in Germany by online platforms like Amazon or Facebook.

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<sup>17</sup> *Immonet/Immowelt*, decision of 20 April 2015, B6-39/15.

<sup>18</sup> *Verivox/ProSiebenSat1*, decision of 24 July 2015, B8-76/15.

<sup>19</sup> *CTS Eventim/Four Artists*, decision of 23 November 2017, B6-35/17.

### 4.3. Additional reference point for merger control thresholds

31. It is a common feature of the digital economy that new products or services are first put on the market without instant monetarization to create a critical user mass or that they are offered free of charge to the users and financed via advertising revenues. Nevertheless, those novel products or services might be of crucial importance for the competitive process and act as a source of particular competitive pressure on established solutions and business models. The competitive assessment of a merger concerning such a turnover-free target may require a closer look at non-price effects. However, the traditional sole recourse to turnover thresholds under German merger control posed the risk of a potential loophole for mergers concerning low turnover targets.<sup>20</sup> Therefore, the 9th amendment of the national competition law introduced a transaction-value-based threshold in Section 35 (1a) GWB. The provision fills the gap, refers to the value of the consideration for the intended transaction and ensures that companies cannot simply buy off emerging competition from new entrants or competing R&D efforts without the assessment of any anticompetitive effects under German merger control.

32. Incidentally, it should be noted that the new threshold solely applies if the target company has significant domestic activity in order to eliminate cases from the scope of the provision which at their core only relate to the takeover of a company which only operates abroad. The actual measurement of domestic activity relies on the selection of appropriate indicators to determine the level of significance of the geographical market-related activities of the company. Due to the above mentioned impetus of the provision, those indicators do not necessarily derive from turnover or the financial statement. A domestic activity must be presumed to exist, for example, if the company's products and services are consumed to a significant extent by domestic users even if no charge is made. R&D can also constitute a relevant activity for the material nexus.

33. Together with the Austrian Competition Authority ('BWB') the Bundeskartellamt has recently issued a draft guidance paper on the transaction value thresholds for mandatory pre-merger notification for public consultation as the Austrian legislator decided to introduce a similar transaction threshold to its national competition law.<sup>21</sup> According to the new Section 43 (a) GWB, the experiences gained from the application of the turnover threshold will be subject to an evaluation by the German Federal Ministry of Economy and Energy three years after its entry into force.

## 5. Non-price effects in regulated healthcare markets

34. A classical case for the non-price effects of mergers are regulated markets such as the national healthcare system because prices for healthcare services like hospital services are often regulated and merger control has to focus on other competition parameters. In the hospital sector merger control guarantees competition on quality. Under German law

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<sup>20</sup> Monopolkommission, Wettbewerbspolitik: Herausforderung digitale Märkte (SG 68), paras. 451 et seq..

<sup>21</sup> Bundeskartellamt/BWB, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification, available at [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden\\_Transaktionssschwerpunkte.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionssschwerpunkte.pdf?__blob=publicationFile&v=2).

the statutory health insurance funds and private health insurance companies insure their members against the risk of ill health and make sure that patients receive the necessary medical treatment. These services are provided by various entities, so-called healthcare providers, including e.g. hospitals, doctors and therapists.

35. In the light of increasing consolidation in the sector, planned mergers between different hospital operators are regularly subject to German merger control. From a competition perspective the health markets are frequently regional markets, e.g. in the area of acute in-patient hospital treatment, or even local markets, as in the area of general out-patient medical care. The task of the competitive assessment is to identify the competitive scope for manoeuvre in light of the regulatory framework and to determine what factors influence patients in their choice of hospital and other healthcare providers and how those providers try to set themselves apart from their competitors in terms of the services and areas of specialisation or quality management which they offer.

36. Hospital services may not only differ with regard to the selection and training of their doctors and medical staff, the equipment they provide, patient accommodation, and their organizational structure., They may also differ in the degree of specialization and the portfolio of treatments that they offer.

### 5.1. Decision-making practice

37. In its *Klinikum Esslingen/Kreiskliniken Esslingen*<sup>22</sup> decision the Bundeskartellamt prohibited plans to merge the Esslingen district clinics with the Esslingen clinical centre since the merger would have led to a substantial restriction of competition on the regional hospital markets.

38. The investigation found that other more remote hospitals did not qualify as an equivalent alternative for patients. The decision stressed the importance to ensure that patients still have a variety of hospitals to choose from in order to preserve quality competition between the hospitals in the region.

### 5.2. Sector inquiry into hospitals

39. In 2016, the Bundeskartellamt launched a sector inquiry into the hospital sector to examine and analyse competitive conditions in the sector. The sector inquiry also serves to further develop examination criteria for the authority's merger control proceedings. The aim of the sector inquiry is to obtain information about the current market situation and intensity of competition in acute inpatient hospital treatment. The analysis focuses in particular on the market structure as well as the management possibilities of the hospitals in view of state regulation.

## 6. Conclusions

40. How to measure and evaluate the non-price effects of a merger depends on the specific circumstances of the individual case. The clarification provided by the list of additional criteria for the assessment of market power which the latest reform of German

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<sup>22</sup> *Klinikum Esslingen/Kreiskliniken Esslingen*, decision of 14 May 2014, B3-135/13.

competition law introduced serves as a good example of how conceptual ground work can nevertheless inspire the evolution of competition law and merger control in particular.

41. As usual, the actual relevance of non-price effects and in particular of innovation in a merger control scenario is highly contextual and also depends on the information that is available in the limited time- frame of a merger control investigation, e.g. customer surveys to determine single- or multi-homing patterns.

42. The concepts of demand-side and supply-side substitutability are capable to adequately reflect the specific competitive relations in a multi-sided market environment. Market definition needs to take into account whether network effects occur between the different groups on the demand side. To adequately capture the impact of disruptive innovations such as pipeline products or essential IPRs represents a challenge for competition authorities that will further foster the evaluation of mergers in fast-moving and dynamic markets. The recent case practice of the Bundeskartellamt shows that merger control is a constant source of detailed market insight for competition authorities and an opportunity for them to sharpen and adapt their tools and concepts of market definition and assessment of market power to the economic realities they face.

43. The careful assessment of market tipping potential may be of crucial importance in future merger cases concerning the digital economy. However, a mere general assumption that internet dynamics exist and favour competition in innovation cannot be used as an argument against market dominance. Only specific, identifiable dynamics can actually control the scope of action of merging parties.