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ROUNDTABLE ON THE STANDARD FOR MERGER REVIEW, WITH A PARTICULAR EMPHASIS ON COUNTRY EXPERIENCE WITH THE CHANGE OF MERGER REVIEW STANDARD FROM THE DOMINANCE TEST TO THE SLC/SIEC TEST

-- Germany --

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1. Introduction

1. The German Act against Restraints of Competition (ARC)[1] provides for the dominance test as the substantive test in merger control proceedings. Under Section 36 (1) ARC, the relevant question is whether the merger leads to the creation or strengthening of a dominant position.

2. Merger control was introduced in Germany in 1973. Since that time, merger control has been of great importance in German competition law and in the practice of the Bundeskartellamt.[2] Appeals by parties to the merger as well as third parties against the decisions of the Bundeskartellamt have led to a substantial body of court decisions including significant rulings on issues concerning the creation or strengthening of dominance as a consequence of a merger.

3. Before the last major amendments to the German Competition Act in 2005, which brought further harmonization with EC competition law, a change to the SLC/SIEC test was discussed, but ultimately rejected. A major argument against the introduction of the SLC/SIEC test at the time was the extensive and well established case law based on the dominance test and the legal certainty for businesses resulting from it. Furthermore, there was a widespread view that the dominance test was broad enough to address all types of potentially anticompetitive effects of merger projects. It is, however, to be expected that there will be further discussion concerning the legal standard in German merger control in the future.

2. Is there a gap in the dominance test that needs to be closed?

4. Probably the most pertinent question and the one most difficult to answer is whether the dominance and SLC/SIEC tests lead to different results and whether only the SLC/SIEC test is capable of addressing effectively all mergers that may seriously harm competition – in other words: whether there is a gap in the dominance standard that needs to be addressed by changing to the SLC/SIEC test.

5. Broadly, one view argues that the dominance test does not catch all potentially anticompetitive mergers, in particular because unilateral effects analysis stretches beyond the reaches of the concept of dominance.[3] The other view holds that the dominance test is a sufficiently comprehensive standard to address all those mergers that may significantly harm competition.[4]

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1 An English version of the ARC is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

2 In 2008, the Bundeskartellamt received notifications of 1,685 merger projects. The number of merger notifications is expected to decrease in future after the introduction of a second domestic turnover threshold in March 2009. In the last years roughly 2% of the notified merger projects were subject to in-depth investigations in Phase II.

3 See, e.g. Völcker, Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control, [2004] E.C.L.R., 395. Kokkoris, The Reform of the European Merger Control Regulation in the Aftermath of the Airtours Case – the Eagerly Expected Debate: SLC v Dominance Test, [2005] E.C.L.R., 37-47; Baxter and Dethmers, Unilateral Effects Under the European Merger Regulation: How Big is the Gap?, [2005] E.C.L.R., 380-389.

4 Christensen/Fountoukakos/Sjöblom, in: Faull & Nikpay, The EC Law of Competition, 2nd ed. (2005), paras. 5.205-5.206; Montag/v. Bonin, in: Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht), vol. 1 (2007), Art. 2 ECMR para. 34; Böge/Müller, From the Market Dominance Test to the SLC Test: Are There any Reasons for a Change?, [2002] E.C.L.R., 495-498.

6. In 2004, the revised EC Merger Regulation (ECMR)[5] introduced the SIEC test on the Community level. According to Article 2(3) ECMR, the Commission shall declare incompatible with the common market "a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."

7. The wording of Article 2 ECMR makes clear that the SIEC test is a hybrid test that combines the dominance and SLC tests. The revised ECMR maintains the dominance criterion as the main example for a significant impediment to effective competition. There is good reason for this: If market structures are such as to conclude that the merging parties will become dominant post-merger, it is highly likely that effective competition is harmed as a consequence of the proposed merger. The same applies if changes to the market structure brought about by the merger strengthen a pre-existing dominant position.

8. Recital 25 of the ECMR which refers to the change to the SIEC test states that "in the interests of legal certainty it should be made clear that this Regulation permits effective control of all such concentrations [i.e. including unilateral effects in an oligopoly where coordinated effects are absent]", and goes on to explain that "[t]he notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned."

9. While the wording of the first citation of recital 25 mentioned above may suggest, by referencing legal certainty, that the substantial test in merger control remains unchanged so that the amendment to the ECMR would be a mere change in language, the latter citation clarifies that this is not the case: The new test is meant to be broader and to cover situations where a dominant position, in particular a collective dominant position by more than one firm, cannot be proved. The new test thus seems to increase the scope for intervention for the Commission.[6]

2.1 The EC practice - The T-Mobile/tele.ring case

10. It is still not clear, however, if this increased scope for intervention for the Commission was necessary to effectively address significant competition issues; in other words, if there are cases that pose a significant threat to competition but cannot be addressed under the dominance test.

11. Since the introduction of the new test, there have been only few cases which could be argued to fall within the much-invoked gap. The case that is probably the one that is most often mentioned in this context is the *T-Mobile/tele.ring* merger:[7] T-Mobile, at the time the number two in the Austrian mobile telephone market, planned to take over a particularly active, smaller provider, tele.ring, the "maverick" in the markets that showed oligopolistic structures. None of the parties to the merger but a third provider, Mobilkom, was the market leader. The case was seen as a typical 'gap case' by many observers. However, in its decision the Commission itself argued that, in addition to unilateral effects, the emergence of

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5 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF.

6 Cf. Bishop and Ridyard, Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control, 2003] E.C.L.R., 357-363.

7 Commission decision of 26 April 2006 in case COMP/M.3916 *T-Mobile Austria/tele.ring*, OJ L 88, 29 March 2007, p. 44.

coordinated effects was also to be feared[8], although the Commission did not see a need to investigate the issue in more depth in this case.

12. In the view of the Bundeskartellamt, it appears that the case might just as well have been taken up on the basis that it would have led to the strengthening of a collective dominant position of T-Mobile and Mobilkom. In fact, the merger resulted in two network operators of roughly equal size and the elimination of the maverick firm tele.ring. Furthermore, product and market features were such that they seemed to favour oligopolistic behaviour. It seems highly likely, in the Bundeskartellamt's assessment, that the dominance test would have been able to address any negative effects resulting from the merger.

2.2 No gap in the Bundeskartellamt's practice so far

13. In the practice of the Bundeskartellamt, there are no cases to date in which the Bundeskartellamt had competition concerns but where it was not able to remedy those cases effectively under the dominance standard - but would have been able to do so under the SIEC standard.

3. Standard of proof

14. Under both standards, the competition authority needs to assess the evidence and balance the probabilities of harm to competition that is to be expected if the merger were put into effect. The question is if it matters whether such harm to competition is qualified as a significant impediment to effective competition or as the creation or strengthening of a dominant position. In particular, under the SIEC standard, harm to competition needs to be "significant". Under the dominance standard, the hurdle for the competition authority is the demonstration of dominance.

3.1 Role of economic methods

15. In connection with the new SIEC test it was also intended to improve the basis for deciding cases at the European level by applying economic methods.

16. The Bundeskartellamt holds the view that the use of economic methods is not constrained by the dominance test. In its analysis of whether market dominance is created or strengthened the Bundeskartellamt conducts a comprehensive assessment of all relevant competition factors. Of course, the depth of the analysis depends on the complexity of the case under investigation. In the last years, decisions have indeed been based more and more on economic considerations. This includes more recent developments in economic theory. For example, in recent decisions concerning collective dominance, account was taken above all of incentive considerations based on the oligopoly theory.[9]

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8 Commission decision of 26 April 2006 in case COMP/M.3916 *T-Mobile Austria/tele.ring*, C (2006) 1695 final, paras. 127-129. The Commission expressly notes at para. 127 that "[f]urthermore, the Commission does not rule out the possibility that the proposed merger, besides producing the non-coordinated effects as described above, may also lead to a weakening of competitive pressure as a result of coordinated effects." (the relevant paras. are not reported in OJ L 88, 29 March 2007, p. 44.).

9 Bundeskartellamt, decision 11 April 2007 in case B 3 – 578/06 – *Phonak/ReSound*, WuW/E DE-V 1365, excerpts available in English at:
http://www.bundeskartellamt.de/wEnglisch/download/pdf/entscheidungen/07_Phonak_e.pdf.
See also decisions of 17 February 2009 in case B 2 47/08 - *Nordzucker/Danisco* (available in German at http://www.bundeskartellamt.de/wDeutsch/entscheidungen/fusionskontrolle/EntschFusion.php) and of 7 March 2008 in case B 8 – 134/07 – *Shell Deutschland/Hanseatic Petrol*, available in German at http://www.bundeskartellamt.de/ wDeutsch/download/pdf/Fusion/Fusion08/B8-134-07.pdf.

3.2 Scope of discretion for competition authorities

17. Some commentators have argued that the SIEC test may confer a wider discretion to the Commission and that this may at least matter at court level. In particular, Bo Vesterdorf, former President of the European Court of First Instance, has pointed out that, "when you get to the court, the criteria of whether you create or strengthen dominance are something that the court can adjudicate quite clearly about. If you have the SIEC test, it necessarily leaves a much larger margin of appreciation to the Commission, and the court would normally refrain because it is a complex technical matter of market examination…"[10]

18. Five years after the introduction of the SIEC test at Community level, it seems to be too early to judge on this position. However, what can be said when considering experience in Germany is that the dominance test provides quite a clear and strict standard which gives courts the possibility to scrutinize the Bundeskartellamt's decisions rather strictly.

4. Ramifications for multi-jurisdictional mergers

19. The introduction of the SIEC standard at Community level has brought the EC more in line with important jurisdictions, in particular the United Kingdom, the United States, Canada, Australia and New Zealand.

20. One may argue that the use of the same substantive standard in merger control eases the burden for businesses in multi-jurisdictional mergers. On the other hand, both the SIEC/SLC and the dominance tests use the same criteria when analyzing if a specific merger project harms competition. The competition assessment thus arguably does not differ significantly under both tests.

5. Conclusion

21. There are good arguments for as well as against keeping the dominance test or changing to the SLC/SIEC test, as the case may be. In the case of Germany, where the dominance test has been used since 1973 in merger control proceedings, the factors speaking in favour of introducing the SIEC test on a Europe-wide basis, e.g. having a level playing field in the EU, would need to be balanced against the advantage of the existing test, e.g., a high degree of legal certainty due to the existing substantial body of case law.

[10] See, Focus: Merger Review – Do National Competition Authorities Apply the Same Test as the European Commission? Discussion, p. 191-195, Statement by Bo Vesterdorf, p. 194 et seq., in, Neueste Entwicklungen im europäischen und internationalen Kartellrecht, 15. St. Galler Internationales Kartellrechtsforum, Band 10, 2008 (forthcoming).