Legal Update
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German Federal Cartel Office published new Merger Guidelines

Introduction

On 29 March 2012, the German Federal Cartel Office (“**Cartel Office**”) adopted new Merger Control Guidelines (“**Guidelines**”). The new guidelines replace the Principles on the Assessment of Market Power, that the Cartel Office had released in 2000. A first draft of the Guidelines had already been published in July 2011 for consultation.

The Guidelines explain the substantive concepts the Federal Cartel Office applies in the analysis of mergers, *i.e.* the assessment whether a dominant market position will be created or reinforced. The goal of the Guidelines is to assist companies and their advisors to better understand the issues on which the Cartel Office focuses in merger investigations, but the Guidelines should not be understood as a “checklist” applicable to each and every case. As the Guidelines primarily describe the current practice, it is not expected that it will bring about changes in the Cartel Office’s approach to merger cases.

The Guidelines will be reviewed after amendments to the German competition legislation (Act against Restraints of Competition), that are currently being discussed, have entered into force, and case law relative to the amendments will be available. The amendment is expected to be adopted in early 2013. The changes *inter alia* foresee the elimination of the current dominance test and the introduction of the “significant impediment to effective competition” test which is applied in the EU and most EU Member States.

Content

The Guidelines emphasize the importance of an overall assessment of the market situation in order to determine the effects of a concentration. The Cartel Office also demonstrates, that the substantive assessment includes wider economic analyses as opposed to mainly relying on market shares.

Market shares however still remain an important criterion in the assessment since they serve as a relevant indication for an undertakings’ market power. Section 19 (3) Act Against Restraints of Competition provides that a dominant market position is presumed if an undertaking has a market share of more than 33.3% (this threshold would be lifted to 40% according to the current plans of the amendments). Nevertheless the Cartel Office has to conduct a full analysis of the relevant markets, even if the threshold is met. The presumption of a dominant market position however applies if the Cartel Office does not find sufficient evidence to establish that a dominant market position is or is not created or reinforced. The Guidelines further point out that even a small increment in market power can reinforce a dominant position if the level of competition is very low and the level of dominance is very strong. Neither the lessening of competition nor the increment need to reach a certain level of significance. However there has to be a concrete deterioration of the competitive environment. Depending on the market structure, a dominant position may be reinforced even without a market share increment.

Unlike the EU Commission, the Cartel Office does not conclude presumptions from the Herfindahl-Hirschman-Index (HHI) which indicates the degree of concentration in a given market.[1]

Besides market shares, the Cartel Office takes into account factors related to the relevant markets such as capacities and capacity restraints, customer preferences and switching costs, intellectual property rights and know-how, market phase, access to upstream and downstream markets, integration with other companies and financial resources. Other factors include potential competition, market barriers, chain of substitution and countervailing power.

1 The HHI is calculated by summing the squares of the individual market shares of all the firms in the market.

The Guidelines demonstrate that the Cartel Office is sceptical about the possible efficiency gains of a concentration. In the authorities' view, a concentration that creates or reinforces a dominant market position may only in exceptional cases have positive impacts on the market. Outside the scope of the Balance Clause (Section 36(1) Act Against Restraints of Competition) and the Ministerial Authorisation (Section 42 Act Against Restraints of Competition), the law would not provide for a legal basis to take efficiency gains into account, unless they have a direct impact on competition. Furthermore, it would be costly for both the Cartel Office as well as the undertakings concerned to investigate efficiency gains and it would also be difficult to reach reliable conclusions.

Conclusion

We welcome the Cartel Office's clarification that during the last few years it has shifted its focus towards a more economic and comprehensive analysis of market conditions. The expected introduction of the SIEC-Test will further support this development, thus aligning German merger control with the practice of the European Commission and other competition authorities in the EU. The fact that the Guidelines are published not even a year before the envisaged introduction of the SIEC-Test into German merger control may indicate that substantial changes to the Cartel Office cannot be expected. Indeed, the Guidelines make clear that the dominance test remains an important criterion of the SIEC-Test.

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