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Court raises question on the test for considering future potential competition under German merger control rules

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The case concerns the question under which conditions the possible future creation of potential competition can be considered to strengthen a dominant position under German merger control rules (see decision of December 22, 2010, VI-Kart 4/09 (V)).

The FCO had prohibited a merger between two local publishers that were active in separate, but neighboring geographic markets (decision of April 21, 2009, B6 – 150/08). The FCO considered each of them as dominant in the newspaper and advertising markets in their local areas. It found that the merger would eliminate potential competition between them, thereby strengthening their dominant positions.

The merging parties successfully appealed the prohibition. The Düsseldorf Court of Appeals found that there was no potential competition between the merging parties, because they had engaged in a comprehensive cooperation regarding the supply of content and the marketing of advertisements. For the duration of the cooperation, there was thus no incentive to enter each other's territory. The Court also found that neither party had an interest in terminating the cooperation. The FCO reasoned that if the cooperation really restricted any scope for potential competition it would be anticompetitive and should not serve as the reason for clearing the merger, but was rejected.

The Court of Appeals further rejected the FCO's argument that the merger would have strengthened the dominant positions because it would eliminate the possible creation of potential competition in the future. The FCO had argued that absent the merger, a different buyer could acquire the target. This could create an incentive for the target to quit the current cooperation, which in turn would create potential competition. The Court, however, confirmed that for taking into account expected future developments in merger control proceedings (including the development of potential competition), it is not sufficient to show that these developments would theoretically be possible – it is necessary to demonstrate, on the basis of actual evidence, that they would be highly probable. The Court found that the FCO failed to meet the test.

In this context the Court also questioned the general approach underlying the FCO's analysis. The FCO had referred to the possible creation of potential competition, which might occur *absent* the planned merger. The Court of Appeals took the position that only future market developments caused through the merger are relevant, also in the case of acquiring a future potential competitor. It left the question open in the case at hand, but explicitly allowed further appeal to the Federal Court of Justice ("FCJ").

That the Court required strict conditions for relying on expected future market developments for prohibiting a merger is positive and seems to be more in line with the European case-law than other previous decisions of the same Court of Appeals (notably the *Axel Springer/ProSieben* decision, in which the distinction between the possibility and the probability of future market conduct post-merger was not always very clear).

The Court of Appeals' position that developments arising absent the merger should not be relevant raises some questions (also because this part of the decision is not very clearly drafted): Indeed, merger control analysis compares the situation before and after the merger with a view to examine the effects caused by it. However, this approach does not seem to trigger meaningful results when the target is a future potential competitor: in that case, the transaction would always eliminate the possibility that the target could develop into a potential competitor. The question then is whether there is any realistic scope for future potential competition between acquiror and target. For this analysis it seems to make sense (and is probably necessary) to compare how the situation would have developed absent the merger.

The main or real question thus rather seems to be whether for a prohibition the FCO can rely on potential competition that is not yet present at the time of the merger and could only possibly develop in the future. (This is not, however, how the Court of Appeals phrased the legal question.)

In addition, it seems that the Court of Appeals does not necessarily consider the general legal question it raised as decisive for the outcome of the actual case – which would normally speak against the admissibility of a further appeal to the FCJ. But let's see how the FCJ will deal with the case.

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