AK EUROPA

Position Paper
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Economic

Demands relating to competition policy from the viewpoint of workers and consumers

General Remarks

Competition policy is an important part of economic policy. In an economic system based on a market economy, competition policy has to determine the conditions for a competitive framework which ensure that competition between economic players functions and anti-competitive behaviour is stopped and penalised. To date the enforcement of European rules on competition, comprising the pillars' cartel ban, prohibition of restrictive practices, merger control and control over state aid, has contributed to a level playing field and protected final consumers in particular from damaging competitive practices. Ultimately this has been to the advantage of consumers.

As a cross-cutting issue, competition policy - and in particular merger control - influences other areas of policy, such as industrial and regional policy, employment and research policy. An ongoing merger that is very important for Austria, namely Nidec/Embraco, has shown very clearly the problematic effects the decision on merger control has had on the Nidec site in Fürstenfeld, and in particular on the workforce employed there. Important European industrial sites must not be endangered by decisions on merger control, particularly in view of global competition.

Geographical borders in the product, financial and services markets are becoming increasingly blurred with the advance of globalisation and digitisation. Competition authorities are still working along the lines of national or European markets in relation to market definition; however, this approach can become outdated very rapidly due to technological change. Advancing globalisation, together with new, powerful competitors, especially from Asia, has seen European companies increasingly join forces or initiate partnerships due to long-term industrial considerations in order to achieve the size needed to remain competitive vis-à-vis global competitors.

A further challenge for competition policy is advancing digitisation with its effects on the economy and society. The digital economy has given rise to completely new data-driven business models (e.g. online platforms) which function on the principle of "the winner takes it all", and which have created new, powerful companies in the market within a very short period of time. The most valuable companies in the world are now digital platforms from America and China. Even the liberal British magazin "The Economist" characterises such companies with the acronym BAADD - big, anti-competitive, addictive, and destructive to democracy (Economist, 2018). Europe cannot hope to succeed in these markets.

In the situation outlined above, the BAK's opinion is that competition policy must take into account these changed conditions, both from the point of view of workers and of consumers. Therefore the future European Commission will be called on to make a comprehensive assessment of current competition rules and adapt the new EU competition law to these new trends.

The AK's position in detail

Merger control

Protecting jobs in a globalised economy

Securing the international competitiveness of European industry against the major economic blocs of the USA and China is of eminent importance to protect jobs and create new ones. The manufacturing sector today employs 36 million, according to estimates of the European Commission, and every job in industry creates at least one additional one in the service sector. More than half of R&D investments are made by industry. These figures prove that the prosperity of EU citizens is closely linked to a competitive European industry.

In addition to EU merger control, a merger must be prohibited if it would significantly prevent effective competition in the Common Market, in particular through the creation or strengthening of a dominant market position. The Commission accordingly reviews a merger primarily from the aspect of competition. Other aspects of policy, such as the industrial or labour market, are largely excluded. The question of financing takeover costs should also be considered in this review since rolling over costs to the takeover target can severely impact the latter's competitiveness.

In view of the fact that the EU Competition Commission is the exclusive decision-making body for mergers, in the opinion of the BAK European competition law should also consider other aspects of policy appropriately within the framework of merger control. At this point we would like to refer to the Austrian regulations on antitrust law, according to which the Competition Court can approve a merger despite conditions indicating its prohibition (creation or strengthening of a dominant market position) if the merger is necessary and economically justified to maintain or improve the international competitiveness of the companies involved. This also allows employment aspects to be included in the decision.

Therefore, identical justification should be included in the Merger Regulation regarding European mergers. This would make sense insofar as the European Commission makes its decisions as a collegiate body and therefore aspects of industrial and labour market policy would be given greater importance through the relevant commissioners. Ultimately it is the responsibility of European economic policy to create a level playing field in competition with the USA and China as the major economic blocs.

As stated at the beginning of this paper, geographical borders in the product, financial and services markets are becoming increasingly blurred with the advance of globalisation and digitisation. For example, in merger control the definition of the relevant geographical markets can become irrelevant within a very short space of time due to technological change. From this point of view European merger control appears to be too static because its analyses focus primarily on the current situation.

Even though the possibility of potential competitors is considered in the decisions of the Commission, a reform of EU competition law should place greater emphasis on future developments in terms of competition through globalisation and digitisation. In particular, when reviewing major industrial mergers, the expected medium-term global competitive environment should be included in the review. Complementing merger control with this dynamic element appears to be necessary with regard to protecting and creating jobs in European industry.

However, we are rather critical of the current discussions on the introduction of a superordinate approving body - similar to Ministererlaubnis (ministerial approval) in Germany (e.g. exercised by the European Council). The BAK would prefer a discussion on extending merger control in the direction of a comprehensive approach to a review - as outlined above - because the Commission is appointed on a political basis and decides as a collegiate body.

Extending registration requirements and institutionalised participation of employee representatives in the procedure

Currently the information to be made available to the Commission when registering a merger is essentially limited to data on market structure. Information on the effects of a merger on employment and sites and on strategic orientation is only required to a very limited extent at present. Extensive reporting obligations already exist in this respect in numerous legal acts on company law (Takeover Directive, Transfer of Undertakings Directive, and finally in the negotiated company law package). In the legal acts on company law mentioned above, the institutional inclusion of employee representatives is provided for in the relevant procedure - through a comprehensive right to information, consultation and response conferred ex officio - and employee representatives receive the documents they require to exercise their rights (e.g. takeover offer, merger documentation). A similar regulation must also be introduced in merger control.

In the opinion of the BAK, registration for merger control must therefore include a clear statement on the intentions of the company taking over the other in terms of employment, sites and strategy. Furthermore, institutionalised participation of employee representatives is needed as part of merger control. This requires the registration documents to be made available to employee representatives at an early stage and their inclusion ex officio in the procedure as interested third parties.

Inclusion of data concentration in merger control

Many data-based business models of the digital economy are based on the collection, linking, and utilisation of personal data and this is already addressed by the competition authorities, in particular in data abuse control. At this point we would like to refer to the decisions of the European Commission against Google, of the German Federal Cartel Office against Facebook, and the ongoing actions against Amazon.

All cases reveal the reciprocal effect of market power and data power. As the number of users rises, the large internet companies gain ever-increasing knowledge over them. New business areas or takeovers increase the circle of users and also the power of data, which in turn leads to a strengthening of market position.

In terms of competition, data concentration in the digital economy is, therefore, a significant, non-monetary component of competition. In the opinion of the BAK a reform of European competition law should place greater focus on data concentration in merger control and when assessing abuse of a dominant position in the market.

Furthermore, data concentration must be assessed within a social context. The centralised, automatic collection, availability and utilisation of data create positions of power which pose new challenges for the State, its citizens, and society. This power goes in part far beyond economic power, as shown by the case of Cambridge Analytica (abusive evaluation of personal data for the purpose of exercising political influence).

It would be valuable to consider introducing an additional component to merger control and grant the European Competition Commission the democratically founded responsibility for data protection and privacy because the relationship of antitrust law to data protection must be re-assessed, particularly in relation to data-driven business models.

For example, in Austria a media merger is prohibited if it can be expected that this would limit media diversity, even if the merger does not create or strengthen a dominant market position. Following implementation of the General Data Protection Regulation, and with it the pan-European harmonisation of data privacy standards, an additional criterion should be added to the review of merger control in relation to data privacy or data concentration. The regulations to protect media diversity could provide an example.

Furthermore, legal measures should be taken at a European level to include the acquisitions of innovative (small) companies in merger control. The inclusion of transaction values as a criterion of merger control has already been introduced in Austria and Germany so as to be able to subject internet companies to merger control at an early stage. Similar considerations should be introduced in a reform of EU merger control.

It is the opinion of the BAK that the relationship of antitrust law to data protection must be re-assessed, particularly in relation to data-driven business models.

Control of abusive practices

Faster procedures

Previous experience has shown that investigations of the European Commission, in particular to control abusive practices, take too long. This is a problem insofar as companies can continue their behaviour, which gave rise to an investigation, until the process

is brought to a conclusion, and by the time of the decision circumstances have often been overtaken by technological change. Since a market dominant position is a precondition for the control of abusive practices, consideration should be given to setting market domination thresholds for rapidly growing companies which, experience has shown, show monopolisation tendencies at a much earlier stage, and to make greater use of the model for interim injunctions mentioned in the new ECN+ Directive (EU) 2019/1 to empower the competition authorities of Member States.

Adapting market demarcation to facts

While the market power of internet companies is not questioned in public discussions, the fact is not so easily determined in terms of EU competition law. For example, Amazon is by far the largest online merchant in Europe; however, it is questionable whether the company has a dominant market position in terms of the definition of the relevant market for certain ranges (e.g. books, clothing, electrical goods, etc.). It is the opinion of the BAK that a decision relating to competition based on market power in the digital economy must place greater emphasis on the interdependencies in platforms between the different parts of the market (direct and indirect network effects, lock-ins and economies of scale), whereby access to user data and the related opportunities for individual offers (advertising, products, personal pricing, etc.) should also be considered.

An overview of market power

The large internet companies use their market dominance and their resources in their core business to expand into other markets.

For example, Google not only runs by far the most important search engine, but also the largest video platform, "YouTube", and a widespread internet browser "Chrome", or one of the biggest email services with "Gmail". Furthermore, Google is the offeror of the operating system "Android"; Amazon is market leader in e-commerce, while other companies can sell their products via "Amazon Marketplace"; in addition, Amazon offers cloud services, video streaming, and is conducting research into autonomous driving.

It is noteworthy that the market positions in different markets reinforce each other (synergies between search engine, email, video and shopping offers as well as browsers and mobile phone operating systems; between social networks and messenger services).

The control of abusive practices should be extended in the case of market-dominant groups to all business units, even if they are not yet dominant in a specific market. This should be worded as a presumed offence, whereby the burden of proof to the contrary should be borne by the company.

This would mean that market dominance would not be assessed for each relevant market individually, as it is the case hitherto, but would be subject to an overall assessment. This would allow competition control to be applied significantly earlier and with a greater scope.

Ensuring non-discriminatory access to internet platforms

Because of their nature (direct and indirect network effects, economies of scale and lock-ins) internet platforms show a tendency to create monopolies.

These factors accelerate the concentration process towards a monopoly; this is reflected in the market shares of the large internet companies. For example, in the search engine market Google has a market share of 90% and the Android operating system from Google has a market share of 80%; Facebook also has a market share of 80% and Amazon dominates e-commerce (proprietary trading and Marketplace) with around a 50% market share. These markets are known as "the winner takes it all" markets.

Platforms have become essential access mechanisms for a wide range of economic sectors and the dependency of economic players through platforms is growing constantly. That is why platforms are viewed increasingly as new infrastructures and are placed on an equal footing with traditional infrastructures of post, rail, telecoms and energy. Therefore non-discriminatory access to these platforms, based on equal rights, must be ensured. A reform should also assess which regulatory instruments are necessary in order to guarantee fair competitive conditions. Different measures are possible, depending on the business model of the platform: The introduction of a proprietary sector-specific regulation, mediation bodies for companies and consumers, unbundling measures (e.g. separation of infrastructure provision and proprietary business activities).

The BAK commissioned a study on the subject of internet platforms which was published in December 2018.[1]

State aid and public procurement law

Every year around 2.3 million workers are posted abroad throughout the EU. This repeatedly gives rise to social dumping which distorts competition. Some countries allow favourable social security tax rates for posted workers. The following variations are known:

- the social security contribution is calculated on the basis of the national minimum wage and not on the actual wage in the destination country;
- social security contributions are capped.

These "state aids" allow companies which post workers to other countries to offer lower prices; this creates a competitive disadvantage for their competitors and workers which should be taken seriously.

The European Commission has already determined that country-specific tax advantages for individual companies can represent a prohibited state aid (e.g. Apple in Ireland, Amazon in Luxembourg).

The BAK calls for a reorientation of European legislation on state aid, whereby preferential treatment of ancillary labour costs which distort competition, including social security contributions for cross-border employment relationships in favour of certain companies or associations of companies, should be treated as forbidden state aid and therefore the corresponding procedures are to be initiated.

The BAK also calls for a reorientation of EU Guidelines on State aid for environmental protection and energy. Exceptions to the costs for the energy transition - such as network charges, extraction costs for renewable energy, or taxes currently applicable to energy-intensive companies - require radical limitation, an exact definition, and they must be related to the energy transition (e.g. exceptions for public electrified rail traffic, in order to keep it affordable and create an incentive to switch from individual forms of transport to public modes of transport, as an important contribution to lowering CO2). Vulnerable private households who are affected by energy poverty or unemployment should be given options to relieve their financial burden in order to prevent these households from bearing the majority of costs for the transformation of the energy system due to the exceptions granted to industry and large consumers of electricity. Furthermore, guidelines for state aid for environmental protection and energy must be formulated so that they comply with the "polluter pays" principle and priority is given to increasing energy efficiency.

Regarding the procedural framework, the BAK calls for an expansion of the term "interested party" according to Article 1(h) of the Regulation (EU) 2015/1589: trade unions and employee representative bodies under public law should also be considered to be "interested parties". There is no factual justification why business associations should be considered as "interested parties" in the current version, while employee representative bodies are not. Therefore the BAK is proposing an amendment to Article 1(h) of the Regulation as follows: "'interested party' means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations, as well as trade unions and employee representatives bodies under public law."

Furthermore the "Almunia package" should be developed further, with tasks and services of general public interest, in particular local public transport, the extension of infrastructure (renovation of cultural facilities, trade fair halls, etc.), clearly excluded from the law on state aid. This would make it possible for public authorities to carry out ambitious investment and infrastructure projects and projects concerning services of general interest and to maintain the State's power to shape policies.

In the opinion of the BAK a quasi-specific and expanded exception from the scope of public procurement law would be desirable regarding services of a general economic interest in order to protect the access of citizens to such services.

Footnotes

01 https://wien.arbeiterkammer.at/service/studien/digitalerwandel/Internet-Plattformen.pdf

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About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.7 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transperency Register under the number 23869471911-54.

The main objectivs of the 1991 established AK EUROPA Office in Brussels are the representation of the BAK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant Inforamtion from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.