

Deutsche Vereinigung  
für gewerblichen Rechtsschutz  
und Urheberrecht e.V.

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht  
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Hauptgeschäftsstelle Köln

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Unser Zeichen:  
(Bei der Antwort bitte angeben)

**RE: PROPOSAL FOR A COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS ("THE EC MERGER REGULATION")**

Ladies and Gentlemen,

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V. (German Association for the Protection of Industrial Property and Copyright) is a scientific association of legal scientists and practitioners in the fields of protection of industrial property, copyright and competition law. According to its articles, it aims at promoting scientific development in the field of protection of industrial property and at providing assistance to legislative organs and to ministries and institutions competent in matters of intellectual property and fair competition.

1. In the discussions of the Council of the European Union regarding the EC Merger Regulation it has been proposed to draft Art. 2 (2) as follows:

A concentration which ~~does~~ **would** not create or strengthen a dominant position as a result of which effective competition would be significantly impeded **significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position**, in the common market or in a substantial part of it shall be declared compatible with the common market.

It has been proposed to draft Art. 2 (3) as follows:

A concentration which ~~creates or strengthens a dominant position as a result of which effective competition would be significantly impeded~~ **would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position**, in the common market or in a substantial part of it shall be declared incompatible with the common market.

Both amendments are referred to as "proposed amendments".

2. The Deutsche Vereinigung für Gewerblichen Rechtsschutz und Urheberrecht (DVGRUR) strongly recommends not to change the present wording of both articles and not to adopt the proposed amendments.
  - a) The second part of the present wording "as a result of which effective competition would be significantly impeded" has not played a significant role in the practice of the Commission of the Court of Justice and of the European Court of Justice. If a merger created or strengthened a dominant position, it was practically always accepted in this practice that the result was that effective competition was impeded. Putting this second part in front and referring to the (until now) first part "creating or strengthening a dominant position" as an example only ("in particular") of "impeding effective competition" logically and cogently presupposes that "impeding effective competition" has a larger scope than "creation or strengthening of a dominant position". It furthermore indicates that "creation or strengthening of a dominant position" is an "example" of "impeding effective competition" only insofar as it indeed would significantly impede effective competition, because the "creation or strengthening of a dominant position" is an "example" of "significantly impeding effective competition" only if it has such quality.
  - b) Therefore, it is not true that A plus B is nothing else than B plus A. To the contrary, the change would have the following possible consequences:
    - (1) The fact that a dominant position is not created or strengthening in itself would in future not be sufficient to clear a merger. What "extra-effect" on competition would have to be established, is completely open. There is no basis in the decisions of the Commission and the Court of Justice and the European Court of Justice for such an "extra-effect".
    - (2) A merger may have to be declared as incompatible with the Common Market (and thereby forbidden) if there is no "creation or strengthening of a dominant position". For this alternative, there is no precedent in EU-merger-practice. The term "significantly impede effective competition" is so vague, and not accompanied by other examples than the (known) "creation or strengthening of a dominant position" that European Industry and their advisors cannot anticipate when a merger will be declared compatible or incompatible with the Common Market. This is clearly contrary to the principles of clarity, transparency and legal security being binding for the Community legislative process.
3. No clarity can be derived from the apparent aim of the proposal to bring EU- and US-merger-law closer together. This closing of a "gap" certainly cannot be achieved by simply taking over the US-standard (SLC = substantial lessening of competition), since it is for the EU to define her own merger-law. The assumed "gap" can be closed only by a way of compromise. Where this compromise will be in effect, cannot be derived from the proposed wording. Therefore, reference to the US-legal situation (which is not coherent and has changed in the course of time) cannot provide for the necessary legal certainty.
4. The only practical problem put forward by the proponents of the proposed change is the unilateral effect of a reduction of partners in an oligopoly, if a collective behaviour cannot be proved. If necessary, this problem could be solved by a formulation addressing it directly. This way of legislation would be transparent. The proposal is not.

5. The dangers of the unacceptably general words of "significantly impede effective competition" could only be reduced, but not avoided, if more "examples" were given besides "creation or strengthening of a dominant position". A greater number of examples would indicate the way in which that clause is intended to be understood and to be applied. However, the DVGRUG is unable to think about other examples than that mentioned in no. 4 above. If no further examples can be found in the Council deliberations, this only would prove that the consequences of the envisaged change cannot be foreseen and, furthermore, that a practical need for that important change cannot be proved.

Dr. Kunz-Hallstein  
President

Dr. Loschelder  
general secretary