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Theories of harm in assessing retail alliances

EU Commission - DG Agri and Joint Research Centre

Expert workshop: *The role of national and international retail alliances in the agricultural and food supply chain*

Dr Michael Bauer

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Four main types of retailer alliances

National (NRA)	Traditional type	Alliance of SME Catch-up function	§ Usually pro-competitive
	New type	Association incl. larger buyer(s) s/t satellite network	§ (Pot.) anti-competitive § Commonality of costs § Transparency
European (ERA)	ERA focusing on 50-100 brands suppliers	National champions Sale of 'services' [?]	... from different countries § mediation, counseling § counterparts
	ERA focusing on private label	Gatekeeper function 'Testudo' principle	w/o international deal no national deal § All deal or no deal § Coordinated delisting

Two main legal dimensions

Cooperation
between retailers
(concerted practice /
agreement)

- E.g.
- joint buying
 - coordinated de-listings

Prohibition of
anti-competitive
agreements

EU:
- Art. 101 / HGL

MS:
- same rules
- HGL not binding

harmonised

Trading practice
towards suppliers
(unilateral conduct)

- E.g.
- de-listings
 - retroactive requests
 - no pay for performance
 - shift of business risks

Abuse of dominance

EU: Art. 102
MS: similar rules

Abuse of dependency

EU: not covered
MS: some

Unfair trading practices

EU: UTP Directive
MS: (still) wide range of
legal concepts

not harmonised

Thesis 1:

Existing EU Horizontal Guidelines already provide for toolbox to investigate Retail Alliances – but enforcement is missing

EU Horizontal Guidelines

EU competition law takes relatively liberal stance on joint buying

§ Three main potential negative effects (200ff HGL):

- Reduced price competition (commonality of costs)
- Reduced quality, innovation, choice
- Foreclosure of market (re other retailers)



§ Focus on consumer harm – less on competition as a 'process'

§ Difference between 'by object' and 'by effect' infringements

HGL: *'by object' infringement*

Disguised cartels

§ ... if parties engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation (205 HGL)

§ Disguised cartels

- if retailers allocate markets
- If retailers commit to apply agreed purchase prices
- If retailers coordinate de-listing
 - Output limitation



§ Not: if retailers agree to buy exclusively via alliance IF indispensable to achieve economies of scale (218 HGL)

§ (27 HGL) (Lack of) Downstream competition does not matter

HGL: *'by effect' infringements*

Likelihood test (208ff HGL)

Restraint of competition is unlikely ...

§ ... if market shares of retailers on both buying and downstream retail market are below 15% (safe harbour)

SME Alliances

OR

§ ... if retailers are not competitors on the downstream retail market

ERA
(but some overlaps)

§ unless the parties have a position in the purchasing markets that is likely to be used to harm the competitive position of other retailers (212 HGL)

§ Various theories of harm possible

Theory of harm: *Foreclosure effects*

Waterbed effect

§ Theory:

- Lower prices for strong buyers may lead to higher prices for weaker retailers
- As such creates foreclosure effects

§ Cases:

- BKartA: EDEKA/Plus (2008), EDEKA/Trinkgut (2010)
- CMA: Sainsburys/Asda (2019)

Spiral effect

§ Theory:

- High correlation between sales and purchases prices (similar to network effects)
- Drives concentration
- Risk of market tipping – outside merger control



§ Cases:

- COM: REWE/Billa (1996), REWE/Meinl (1999)
- BKartA: EDEKA/Plus (2008)
- EDEKA/KT: Application to minister (2015)

Why not investigated yet concerning NRA/ERA?

Exemption: *Consumer benefits?*

Efficiencies (Art. 101 par 3)

- § Price, costs
- § Innovation, choice, quality, availability, sustainability
- § Not: Fairness
 - Art. 81 par 3 guidelines (47): *The protection of fair conditions of competition is a task for the legislator ...*

Passing on to consumers?

- § 219 HGL: The higher the market power of the retailers on the selling market the less likely they will pass on the efficiency gains to consumers
- § E.g. BKartA EDEKA/KT (2015): *The passing on of cost savings following the better purchasing conditions ... is doubtful due to the parties' significant market power on the selling market.*
- § Important:
 - No uniform price level across countries
 - Market shares of retailers on local markets vary
 - Closeness of competition
- § E.g. DICE on EDEKA/Plus: *After the merger prices increased particularly in regions with high expected change in retail concentration.*

Lebensmitteleinzelhandel Gesamt Großraum Berlin															
Marktraum	EDEKA	KT	Summe EDEKA + KT	REWE	Summe II: EDEKA /KT + REWE	LIDL	Aldi	Netto SH	NORMA	Summe Discount	Kaufland	Real	COOP	DOHLE	Summe Sonstige
Berlin [36]	(25 - 30)	(10 - 15)	(35 - 40)	(15 - 20)	(50 - 55)	(10 - 15)	(5 - 10)	<5	<2	(25 - 30)	(10 - 15)	<5	<1	<1	(15 - 20)
Eberswalde [80]	(25 - 30)	<2	(25 - 30)	(5 - 10)	(35 - 40)	(5 - 10)	(5 - 10)	(5 - 10)	<2	(20 - 25)	(30 - 35)	(5 - 10)	<1	<1	(35 - 40)
Potsdam [248]	(15 - 20)	<5	(20 - 25)	(20 - 25)	(40 - 45)	(5 - 10)	(5 - 10)	<5	<2	(20 - 25)	(20 - 25)	(5 - 10)	<1	<1	(30 - 35)
Strausberg [294]	(30 - 35)	<2	(35 - 40)	<5	(35 - 40)	(5 - 10)	(10 - 15)	(5 - 10)	<5	(25 - 30)	(30 - 35)	<1	<1	<1	(30 - 35)
Templin [298]	(25 - 30)	(5 - 10)	(30 - 35)	(20 - 25)	(55 - 60)	(10 - 15)	(5 - 10)	(15 - 20)	<2	(40 - 45)	<1	<1	<1	<1	<1

Lebensmitteleinzelhandel Gesamt Großraum München/Oberbayern															
Marktraum	EDEKA	Feneberg	KT	Summe I: EDEKA + KT	REWE	Summe II: EDEKA/KT + REWE	LIDL	Aldi	NORMA	Summe Discount	Kaufland	Real	Kaes	DOHLE	Summe Sonstige
Augsburg [13]	(20 - 25)	<1	<5	(25 - 30)	(15 - 20)	(40 - 45)	(10 - 15)	(10 - 15)	(5 - 10)	(30 - 35)	(10 - 15)	<5	<2	<2	(15 - 20)
Bad Reichenhall [23]	(40 - 45)	<1	(5 - 10)	(45 - 50)	(20 - 25)	(70 - 75)	(5 - 10)	(15 - 20)	<5	(25 - 30)	<1	<1	<1	<1	<1
Bad Tölz [26]	(25 - 30)	<1	(10 - 15)	(40 - 45)	(15 - 20)	(55 - 60)	(10 - 15)	(15 - 20)	<2	(25 - 30)	(10 - 15)	<1	<1	<1	(10 - 15)
Donauwörth [72]	(50 - 55)	<1	<2	(50 - 55)	(5 - 10)	(60 - 65)	(5 - 10)	(10 - 15)	<5	(20 - 25)	(10 - 15)	<1	<1	<1	(10 - 15)
Garmisch-Partenkirchen [102]	(20 - 25)	<5	(10 - 15)	(40 - 45)	(15 - 20)	(55 - 60)	(5 - 10)	(15 - 20)	(5 - 10)	(30 - 35)	<1	<1	(5 - 10)	<1	(5 - 10)
Landsberg [169]	(20 - 25)	<5	<1	(25 - 30)	(10 - 15)	(40 - 45)	(10 - 15)	(15 - 20)	<1	(25 - 30)	(10 - 15)	<1	(10 - 15)	<1	(25 - 30)
München [205]	(15 - 20)	<1	(10 - 15)	(30 - 35)	(20 - 25)	(50 - 55)	(10 - 15)	(10 - 15)	<2	(25 - 30)	<5	<2	<2	(5 - 10)	(10 - 15)
Pfaffenhofen / Freising [244]	(25 - 30)	<1	<2	(25 - 30)	(20 - 25)	(50 - 55)	(5 - 10)	(15 - 20)	<2	(25 - 30)	(10 - 15)	<5	<1	<2	(15 - 20)
Rosenheim [262]	(35 - 40)	<1	<5	(40 - 45)	(15 - 20)	(55 - 60)	(10 - 15)	(10 - 15)	<5	(25 - 30)	(5 - 10)	<5	<1	<1	(10 - 15)
Wasserburg a. Inn [319]	(50 - 55)	<1	<2	(50 - 55)	(10 - 15)	(65 - 70)	(10 - 15)	(15 - 20)	<5	(30 - 35)	<1	<1	<1	<1	<1
Weilheim / Tutzing [321]	(20 - 25)	<1	(10 - 15)	(35 - 40)	(5 - 10)	(45 - 50)	(5 - 10)	(15 - 20)	<5	(25 - 30)	(5 - 10)	(10 - 15)	<1	<1	(20 - 25)

Thesis 2:

EU and national UTP laws deserve some improvements

Unfair trading practices: *Legal landscape*

Different legal concepts

Abuse of dominance

Abuse of dependency

Unfair trading practices

Notion of dependency

§ Theory:

- Not an element of EU competition law, but some national laws, e.g. Germany
- Closes the gap between 'abuse of dominance' and 'prohibition of anti-competitive agreements'
- 'Revenues' not good proxy but concept of 'outside options'

Long standing experience from e.g. Germany could be translated into other (EU/national) laws

§ Cases: e.g. German Fed. Civ. Supr. Court (2018) on EDEKA

- Asymmetric business structure (product portfolio vs. full store portfolio)
- Percentage of total sales (10-20%)
- Limited 'must have' products - Limited brand loyalty - 'One stop shopping'
- Private labels - Annual agreements

UTP Directive: *Room for improvements*

- Protected parties
- § Suppliers with annual turnover > EUR 350m not protected against UTP by retailers
 - § General idea of Directive:
 - Avoid negative impact on the agricultural community through pass-on of the commercial consequences from UTP on downstream markets (cascading effect)
 - § Exclusion of larger suppliers is counterintuitive:
 - Passing on of consequences even more likely if supplier is large enterprise
 - Same consideration on German UTP law caused lawmakers to include large enterprises

-
- List of UTP
- § First loophole
 - List of UTP addresses many relevant practices but allows for exceptions if practice has been agreed
 - The Directive does not address the issue of unjustified demands
 - § Second loophole
 - Lack of a general clause to avoid circumvention or cover new practices

Conclusions

Not every retail alliance is the same – ERAs are a particular issue

De lege lata

Retail alliances may be in conflict with (i) prohibition of anti-competitive agreements and/or (ii) prohibition of unfair trading practices

European Retail Alliances create disadvantages not only for suppliers but also for their competitors and subsequently consumers

EU HGL already provide for toolbox to investigate infringements based on various theories of harm, e.g. foreclosure effects

Competition authorities should make use of this possibility before retail markets reach tipping point

Unfair trading practices law is not harmonized and various different concepts exist

De lege ferenda

HGL could be focused more strongly on protection of competition as 'process'

EU and national UTP laws should include protection of large suppliers, unjustified demands and a general clause



Dr Michael Bauer
CMS / EU Law Office
Avenue des Nerviens 85
1040 Brussels
T +32 2 6500421
M +49 173 2831322
E Michael.Bauer@cms-hs.com



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