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Totally unacceptable? The impact of the announced Vodafone/Unitymedia merger on German markets from a competition law perspective

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A. Introduction

On May 9th, 2018, Vodafone Group Plc (hereinafter referred to as "Vodafone") confirmed press reports that it has agreed to acquire the German cable network operator Unitymedia GmbH (hereinafter referred to as "Unitymedia"). Unitymedia is currently owned by the American telecommunication and television group Liberty Global (hereinafter referred to as "Liberty"). The concentration is part of a wider scheme to reshape the business of Vodafone and Liberty in Europe. As part of the agreement, Vodafone will also acquire Liberty's operations in the Czech Republic, Hungary and Romania. In Europe, Liberty remains active in the UK, Republic of Ireland, Belgium, Switzerland, Poland and Slovakia. Vodafone and Liberty will also continue their Joint Venture VodafoneZiggo in the Netherlands. Vodafone's commercial rationale is to merge its own cable and mobile networks with Liberty's broadband and cable networks to provide integrated telecommunication, broadcasting and internet network services.

However, the concentration will be subject to approval from the responsible competition authority. It raises competition concerns, especially with regard to several German markets. These issues are currently being debated among competitors and customers and the academic community. The Chief Executive of competitor Deutsche Telekom AG (hereinafter referred to as "DTAG"), Timotheus Höttges, already stated in February 2018 that such a transaction would be "totally unacceptable" and unlikely to get approval. The merger of Vodafone and Unitymedia would create a nationwide cable monopoly. The associations BUGLAS and BREKO share this view and add that such fusion would also diminish economic incentives to roll-out high-performance broadband networks like fibre to the home (FTTH). The expansion of FTTH networks is primarily carried out by regional suppliers, e.g. municipal utilities. BUGLAS and BREKO represent the interests of these undertakings.

In contrast, the current Chairman of the German Monopolies Commission, Achim Wambach, believes the concentration between Unitymedia and Vodafone would have a positive impact on the expansion of broadband network. It would create another large player on the broadband market which could be able to compete with the predominant German telecommunication service provider DTAG. The competent authority will have to assess whether these positive impacts on the broadband market outweigh possible negative effects on Germany's cable market and the transmission of TV programmes.

The former Chairman of the Monopolies Commission, Justus Haucap, does not believe that any competition-impairing effects will be identified. According to him, the concentration is similar to a merger of regional newspapers due to a lack of overlap between Vodafone's and Unitymedia's cable network areas. Such process is generally harmless. The German Monopolies Commission is not the competent authority to investigate mergers in Germany. It is an independent expert committee which advises the German government on the basis of § 44 German Act against Restraints of Competition.

This article addresses the issues described above. First, the historical development which led to the present competitive situation and previous decisions of competition authorities and courts are outlined (see B.). Then, the question of whether it is already foreseeable that the concentration would result in a substantial lessening of competition is assessed (see C.), before a conclusion to the substantial issue of whether the merger is, specifically regarding competition law, "unacceptable" can be drawn. (see D.).

B. Historical development

The competition concerns outlined in the introduction are mainly raised by the fact that the concentration would allow Vodafone to hold almost all major cable network assets in Germany. In 2014, Vodafone already acquired Kabel Deutschland Holding AG. The subsidiaries of Kabel Deutschland Holding AG operate the cable networks in 13 of 16 German Federal States. By acquiring Unitymedia, Vodafone would also gain the major cable network assets in the remaining German Federal States of North Rhine-Westphalia, Hessen and Baden-Wuerttemberg. This scenario has to be assessed in the light of recent court rulings and decisions by competition authorities. They have continuously prohibited concentrations that would have led to all major cable networks assets in Germany being held by only one company.

I. Regulatory environment and sale of DTAG's cable networks (1997 – 2000)

Before 2000, DTAG controlled almost the entire cable network in Germany. The Commission published an economic study – the so called "Cable Review" – in 1997. This study showed that the joint ownership of telecommunication and cable TV network by the same company hindered the development of telecommunication markets by preventing convergence between telecommunication, media and information technology providers. The Commission recognised a conflict of interest between maintaining an incumbent position in voice telephony services and the inherent capability of the cable TV network to provide voice telephony services in competition to those offered by telecommunication networks. Any substantial improvement in either the telecommunication network or the cable TV network might lead to a loss of business for one another. Moreover, this situation was also considered to diminish incentives for the incumbent to upgrade its existing telecommunication network to broadband capability (cf. Directive 1999/64/EC, recital 10).

By then it was obvious, that the Commission intended to implement measures under former article 86(3) TEC (now article 106(3) TFEU) requiring telecommunication operators which were controlled by Member States to separate their cable network operation into independent legal entities. In this context, the management board of DTAG decided to separate the entire cable network business from the rest of the company by the 24th of November 1997 (see Commission, decision of 27 May 1998, Case No IV/M.1027 - *Deutsche Telekom/BetaResearch*, para. 47). First, DTAG transferred its cable network operations into its subsidiary Kabel Deutschland GmbH which was then split into nine regional companies. DTAG signed agreements with different investors, which guaranteed the sale of majority stakes in those regional companies that held the cable network assets in North Rhine-Westphalia, Hessen or Baden-Wuerttemberg. Thus, the companies Ish (North Rhine-Westphalia), Iesy (Hessen) and Kabel BW (Baden-Wuerttemberg) were established.

II. Prohibition of the proposed merger between Liberty and Kabel Deutschland (2002)

In 2002, the German Federal Cartel Office (Bundeskartellamt, hereinafter referred to as "BKartA") prohibited the concentration between Liberty and the six regional companies remained partners of the DTAG (BKartA, decision of 22 February 2002, B 7 – 168/01). It underlined how unlikely the third largest cable network operator at that time, EWT/Primacom, would have engaged in competition with the regional companies, because Liberty already exerted a competitively significant influence on EWT/Primacom.

III. Prohibition of the proposed merger between Kabel Deutschland and Ish, Iesy und Kabel BW (2004)

According to its preliminary assessment in 2004, the BKartA intended to prohibit a concentration that would have led to all cable networks formerly owned by DTAG being held by only one company situated just as the proposed Vodafone/Unitymedia merger. Kabel Deutschland GmbH intended to acquire Ish, Iesy and Kabel BW. The BKartA noted that the dominant position Kabel Deutschland GmbH already held by being the owner of cable networks in six regions would have been strengthened even further by the merger with the three other cable network companies. This conclusion was, inter alia, based on the finding, that the concentration would have restricted potential competition from regional cable network companies. Additionally, Kabel Deutschland GmbH pursued the strategy of establishing a digital platform for the encryption and decryption of TV-signals (pay TV) covering entire Germany. In this context, the BKartA outlined that the concentration could restrict the competition on the German pay TV services market. Until that stage of the proceedings, the notifying parties also failed to demonstrate sufficient overweighing impacts on competition (BKartA, Tätigkeitsbericht 2003/2004, BT-Drucks. 15/5790, p. 158). After having received this preliminary assessment by the BKartA, Kabel Deutschland GmbH withdrew its offer for the takeover of Ish, Iesy and Kabel BW.

In 2005, the BKartA cleared the concentration between Ish and Iesy. Although the BKartA found that this merger would eliminate the competition between these two cable network operators, it assumed that adverse effects on competition would be outweighed by the companies' increasing competitiveness compared to the largest cable network operator Kabel Deutschland GmbH (BKartA, decision of 20 June 2005, B 7-22/05 – Iesy/Ish). Since 2007, the operations of Ish and Iesy are continued under the brand name Unitymedia.

IV. Prohibition of the proposed merger between Liberty and Kabel BW (2011/2013)

At first, the BKartA conditionally approved the acquisition of Kabel BW by Liberty which already controlled Unitymedia (BKartA, decision of 15 December 2011, B 7-66/11 – Liberty Global / Kabel BW). However, the competitors DTAG and Net Cologne GmbH successfully appealed this decision. The Higher Regional Court Düsseldorf (Oberlandesgericht Düsseldorf, hereinafter referred to as OLG Düsseldorf) annulled the BKartA's conditional clearance decision. It noted that the BKartA based its approval on commitments of the parties that were not sufficient to remove the competition concerns raised by the concentration, in particular regarding the reinforcement of Liberty's dominant position on the market for the retail supply of signal transmission (OLG Düsseldorf, decision of 14 August 2013, VI Kart 1/12 [V]). Finally, the completion of the merger was conducted in 2015 only by intending a settlement between Liberty and its competitors Net Cologne GmbH and DTAG. Both Net Cologne GmbH as well as the DTAG withdrew any appeals to sign this settlement.

V. Prohibition of the proposed merger between Kabel Deutschland and Tele Columbus (2013)

The BKartA prohibited the concentration between the cable network operator Tele Columbus GmbH and Kabel Deutschland (BKartA, decision of 22 February 2013, B7-70/12 – Kabel Deutschland/Tele Columbus). At that time, Tele Columbus GmbH was the third largest cable network operator in Germany and the main competitor of Kabel Deutschland in the eastern parts of Germany. Although Kabel Deutschland offered commitments, the BKartA found that the competition-impairing effects of the concentration were too substantial to once and for all allow that the oligopoly of Unitymedia Kabel BW and Kabel Deutschland on the nationwide retail TV services market would have been encouraged by the merger.

C. Assessment under the European Merger Regulation

As outlined above, concentrations were regularly prohibited when Kabel Deutschland or Liberty Global/Unitymedia intended to acquire other considerable cable network assets, especially those cable network assets formerly owned by DTAG. There is no evident reason why such a scenario should be interpreted differently in forthcoming merger control proceedings. According to the applicable European Merger Regulation (see 1.), the Commission shall declare a concentration incompatible with the common market when it would significantly impede effective competition in the common market or in a substantial part of it (so-called SIEC test). That is particularly the case when a dominant position is created or strengthened as a result of concentration (see II.) and there are no counteracting efficiencies which compensate for the disadvantages the concentration causes in the field of competition (see III.) (Article 2(3) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings – EU Merger Regulation, hereinafter referred to as EUMR).

I. Application of the European Merger Regulation

The Merger Regulation, inter alia, applies to concentrations where the combined turnover of all affected global players is more than EUR 5.000 million. Furthermore, the aggregate Community-wide turnover of at least two of the involved undertakings is supposed to be more than EUR 250 million, unless each of these undertakings achieve more than two-thirds of its Community-wide turnover in one and the same Member State (Article 1(2) EUMR). For the purpose of calculating the revenue, the obtained figure derived by companies in the preceding financial year through sale of products and provision of services is crucial (Article 5(1) EUMR).

According to Vodafone and Unitymedia, they have a combined world-wide turnover of more than EUR 5.000 million; each of them has an EU-wide turnover in excess of

EUR 250 million. Certainly in the year 2012, Vodafone did not achieve more than two-thirds of its aggregate EU-wide turnover within one EU Member State (Commission, decision of 20 September 2013, Case No. COMP/M.6990 – Vodafone/Kabel Deutschland, para. 7).

However, the Commission may assign a notified concentration to the competent authority of the Member State if a concentration threatens to affect competition in their specific market, or it affects competition in a market within that Member State, which presents all characteristics of a distinct market and which does not constitute a substantial part of the common market (Article 9(2) EUMR). In recent years, the Commission considered itself in a better position to decide on cases in the telecommunication and cable sector even if those cases caused competitive effects in markets of national or regional importance.[1] Hence, the Commission will probably also review the Vodafone/Unitymedia transaction in merger control proceedings under the EUMR.

II. Competitive assessment

The proposed concentration may lead to a creation or strengthening of a dominant position. In this respect, the intermediary market for signal delivery (see lit. a) and the retail supply of signal transmission (see lit. b) is to be examined in detail.

1. *Intermediary market for signal delivery*

a) *Market definition*

(1) *Relevant product market*

The relevant product market comprises services supplied by operators of so called level 3 networks to operators of level 4 networks (Commission, decision of 20 September 2013, Case No. COMP/M.6990 – Vodafone/Kabel Deutschland, para. 73 et seq). In Germany, the cable network is separated into four different network levels. The level 3 network runs from the cable head-end from which TV signals are fed into the network to the edge of a real estate property. The level 4 network runs within such real estate property. In order to supply signal transmission services to end customers, operators of level 4 networks need to receive the signal through a level 3 network beforehand. Therefore, the relevant product market has to be limited to certain signal delivery services supplied by operators of level 3 networks. The relevant product market does not include services of IPTV operators in correspondence.

(2) *Relevant geographic market*

In past decisions, the Commission found that the geographic market encompasses the network area of the relevant level 3 network operator (Commission, decision of 25 January 2010, COMP/M.5734 – Liberty Global/Unitymedia, para. 33 et seq;

Commission, decision of 15 June 2004, COMP/M.3355 – Apollo/JP Morgan / PrimaCom, para. 11). In more recent decisions, the Commission did not define the definition of the geographic market (Commission, decision of 16 June 2011, COMP/M.5900 – Liberty Global/Kabel BW, para. 106 et seq; Commission, decision of 20 September 2013, Case No. COMP/M.6990 – Vodafone/Kabel Deutschland, para. 79).

b) Creation or strengthening of a dominant position

Despite the circumstance, that the geographic market has been defined in this case, the proposed concentration between Vodafone and Unitymedia is also likely to strengthen a dominant position in the relevant market.

(1) Regional markets

If the geographic market is considered to be limited to the level 3 network area, Vodafone already holds a dominant position in each regional market upon which it operates (BKartA, decision of 22 February 2013, B7-70/12 – Kabel Deutschland / Tele Columbus, para. 237). An undertaking can strengthen its dominant position by removing potential competition in the relevant market if the concentration would relieve this undertaking from competitive constraints. This can be assumed if the merger eliminates a potential entrant who could grow into an effective competitive force and there are no other potential competitors which could maintain sufficient competitive pressure after the concentration (Commission, Notice on Horizontal Mergers, para. 58 et seq). This particularly applies to cases where the undertakings are active on the same product market but only on neighbouring geographic markets. In this context, it is relevant whether objective factors prevent an undertaking from entering the neighbouring market (Commission, decision of 18 January 2000, COMP/M.1630 – Air Liquide / BOC, para. 203 et seq). The Commission already found that there are positive commercial incentives for undertakings to expand their cable networks into neighbouring markets in Germany (Commission, decision of 16 June 2011, COMP/M.5900 - Liberty Global/Kabel BW, para. 67, 80, 90). This finding is underpinned by the fact that several other undertakings like Tele Columbus already infiltrated the intermediary market for signal delivery. There is no point for Liberty to possess the assets necessary for entering neighbouring cable markets exhausted by Vodafone. Accordingly, Liberty had already announced plans to launch a network extension initiative on a larger scale in Germany on the 8th of May 2015. This program was supposed to be similar to its building program in the UK "Project Lightning". As a result, Liberty is to be regarded as a potential competitor of Kabel Deutschland and the concentration would result in the removal of Liberty as a potential entrant.

The Commission considered that Kabel Deutschland and Liberty may hold a collective dominant position which allows them to divide the market by network areas even without signing an agreement or resorting to a concerted practice within the meaning of Article 101 TFEU (Commission, decision of 16 June 2011, COMP/M.5900 - Liberty Global / Kabel BW, para. 81 et seq). However, a collective dominant position does not imply that competition between such undertakings is completely eliminated. On the contrary, the existence of a dominant position presupposes the existence of economic links between economic entities which are capable of competing with one another (Court of First Instance, decision of 30 September 2003, joined cases T-191/98 and T-212/98 to T-214/98 – Atlantic Container Line AB, para. 653-656). Accordingly, the OLG Düsseldorf found that the dominant cable network operator in Baden-Wuerttemberg Kabel BW was a potential competitor to Unitymedia which operated with former DTAG cable networks in North Rhine-Westphalia and Hessen and therefore also held a dominant position in these markets.

Consequently, the concentration between Vodafone and Unitymedia has certain competition-impairing effects if their respective network areas do not overlap. Therefore the argument that the concentration is harmless to competition because it can be compared to a merger of regional newspapers does not apply. Even in those newspaper cases, any evaluations are obliged to assess whether each specific merger would eliminate potential competition. A concentration between regional newspapers is only harmless to competition when there is no potential encounter between these newspapers, for example due to a geographical distance of the particular regions (BKartA, decision of 27 January 2009, B6 – 20/09 – Neusser Pressehaus/Rheinisch-Bergische Verlagsgesellschaft). Subsequently, concentrations were already prohibited when the merger would eliminate potential between the regional newspapers concerned (BKartA, decision of 26 November 2009, B6 - 79/09 - Rheinische Post/Aachener Nachrichten; BKartA, decision of 8 September 2004, B6 - 27/04 - M. DuMont Schauberg/Bonner Zeitungsdruckerei). The argument outlined above is therefore not applicable in case of potential competition between Kabel Deutschland and Unitymedia.

(2) National market

In practice, mergers that create or reinforce dominant positions with shares in excess of 70 per cent are very likely to be prohibited.[2] If the relevant market is considered to be of national scope, the concentration would result in a significant market share. There are only few level 3 cable network operators active in Germany and Kabel Deutschland and Unitymedia are by far the largest players on the market. Seemingly the raised concern that a dominant position on a national market would be created or strengthened is sufficient.

2. *Retail supply of signal transmission*

a) *Market definition*

(1) *Relevant product market*

Whereas the intermediary market for signal delivery comprises the services of level 3 network operators supplied to level 4 network operators, the market for the retail supply of signal transmission encompasses the infrastructure operators' supply of television signals to end customers. In Germany, housing associations often negotiate and conclude basic TV supply contracts on behalf of their tenants and then pass on the fees as part of the monthly rent. While these fees are usually much lower than the fees payable by individual households for comparable services, tenants of multiple quarters are often bound to accept the certain supplier of basic free-TV services whom delivers to their apartment. Considering this, the Commission distinguished between the retail supply of signal transmission to individual households/single dwelling units ("SDUs") and multiple dwelling units ("MDUs"; so-called "Gestattungsmarkt"), usually housing associations (Commission, decision of 16 June 2011, COMP/M.5900 – Liberty Global/Kabel BW, para. 32). The relevant market for the retail supply of TV signals to SDUs is limited to the transmission mode cables and IPTV (excluding satellite and DVB-T) because end customers buy themselves the necessary decoders or satellite dishes from third parties and not form satellite and DVB-T infrastructure operators (Commission decision of 16 June 2011 in case COMP/M.5900 - Liberty Global/Kabel BW, para. 233 and BKartA, decision of 22 February 2013, B7-70/12, para. 237 – Kabel Deutschland/Tele Columbus, para. 248 et seq.). As regards the MDUs market, the Commission found that cable continues to "be by far the infrastructure of choice for housing associations" (Commission, decision of 20 September 2013, COMP/M.6990 – Vodafone/Kabel Deutschland, para. 93).

(2) *Relevant geographic market*

The Commission indicated that the relevant market for signal transmission to SDUs is regional in scope (Commission, decision of 20 September 2013, COMP/M.6990 – Vodafone/Kabel Deutschland, para. 101, 103; see also BKartA, decision of 15 December 2011, B7-66/11 – Liberty Global/Kabel BW, para. 235; BKartA, decision of 22 February 2013, B7-70/12 – Kabel Deutschland / Tele Columbus, para. 253 et seq.), whereas the MDUs market appears to be national (Commission, decision of 20 September 2013, COMP/M.6990 – Vodafone / Kabel Deutschland, para. 100; see also FCO case B7-66/11 Liberty/KBW, paragraphs. 56-58; BKartA, decision of 22 February 2013, B7-70/12, para. 237 – Kabel Deutschland / Tele Columbus, para. 70-72).

b) Creation or strengthening of a dominant position

On the national market for signal transmission to MDUs, Vodafone would take over its actual competitor Unitymedia. Such concentration would impede competition by creating a dominant position of the merged entity with a market share of 65-75% or would at least strengthening the dominant position already held by Vodafone. Unitymedia and Kabel Deutschland currently have a market share between approximately 30-45% in the relevant market (see BKartA, decision of 22 February 2013, B7-70/12, para. 237 – Kabel Deutschland/Tele Columbus, para. 82). Therefore, Unitymedia would effectively be eliminated as an independent competitive force.

On the regional market for signal transmission to SDUs, the proposed concentration is likely to reinforce the dominant position Vodafone already enjoys in each of its network areas. The concentration would eliminate Unitymedia as a potential competitor. In this regard, the same explanations apply to the potential competition on the intermediary market for signal delivery. In particular, the OLG Düsseldorf already outlined that it appeared commercially reasonable to extend cable networks into network areas of other cable network operators because of the increasing competition from IPTV providers (OLG Düsseldorf, decision of 14 August 2013, VI Kart 1/12 [V], para. 131). However, those IPTV providers were not considered unable to exercise sufficient competitive constraint on the merged entity (OLG Düsseldorf, decision of 14 August 2013, VI Kart 1/12 [V], para. 125 et seq.).

III. Countervailing Factors

The Commission also examines if substantial efficiencies generated by the merger are likely to promote certain consumers-short or medium term-benefits and such countervailing factors outweigh the adverse effects on competition which were identified (Recital 29 EUMR; Horizontal Merger Guidelines, para. 77). However, the Horizontal Merger Guidelines establish a cumulative set of strict requirements. So the required substantial efficiencies have to privilege consumers. Besides the merger has to be specific and verifiable (Horizontal Merger Guidelines, para. 78). It is up to the notifying parties to demonstrate and prove such efficiencies.

The Commission has rarely found that these requirements were met.[3] It has regularly considered the evidence provided by the notifying parties to lack sufficiency despite the notifying parties having submitted comprehensive information on efficiencies and moreover underpinning their arguments with economical studies (see Commission, decision of 1 February 2012, COMP/M.6166 – Deutsche Börse/NYSE Euronext; Commission, decision of 30 January 2013, COMP/M.6570 – UPS / TNT Express). In previous merger control proceedings, the notifying parties have never succeeded in demonstrating sufficient efficiencies if the combined market shares would exceed 70 per cent and the market share increment of the proposed transaction would exceed 10 per cent. Already on this basis, it seems difficult for Vodafone and Unitymedia to verify sufficient efficiencies generated by the concentration (cf. BKartA, Tätigkeitsbericht 2003/2004, BT-Drucks. 15/5790, p. 158).

In particular, the argument that the concentration would lead to an expansion of the broadband network which would have an positive impact on the competition in telecommunications markets does not seem convincing in this context. If achieved, efficiency is merger specific. Nevertheless the Commission found that economic and technical progress is not merger specific if the merged entity will also control an integrated infrastructure for providing TV services since it is not necessary to achieve technical progress and it could lead to less variety of TV programs in the future (Commission, decision of 19 July 1995, Case No IV/M.490, para. 146 et seq – Nordic Satellite Distribution). On this account, the Commission will have to examine carefully in what sense Vodafone intends to use its extensive distribution network to cross-sell Liberty's broadband, telephony and TV offerings to end customers.

Finally, it seems rather doubtful that a different conclusion could be achieved even when Vodafone would grant access to its infrastructure for interested parties. Such an open infrastructure would provide strong incentives to use the capacity within the existing network of the merged entity. Therefore, the incentive to build up own broadband networks could be reduced. Consequently, the qualitative competition would be impeded. Currently, the undertakings in the relevant broadband and TV markets rely on different technology solutions to provide their services: Vectoring (mainly DTAG), cable networks (mainly Unitymedia) and fibre to the home (FTTH) high performance network (mainly municipal utilities).

D. Conclusion

The proposed concentration between Vodafone and Unitymedia would lead to a situation where all major cable networks assets in Germany would be held by only one company. In the past, courts and competition authorities have continuously prohibited transactions that would have led to such a situation.

There is no evident reason why such a scenario should be interpreted differently in the forthcoming merger control proceeding. The dominant position already enjoyed by Vodafone on the intermediary market for signal delivery and regional markets for the retail supply of signal transmission would most likely be strengthened. The concentration would eliminate Unitymedia as an important actual or potential competitor in these markets. Therefore, it cannot be compared to the merger of regional newspapers which generally does not harm competition. Moreover, it is not apparent how the concentration could have positive impacts on the broadband market even if Vodafone grants open access to its networks as the qualitative competition between the different technologies (Vectoring, cable networks and FTTH-networks) would be endangered.

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1 see *Wagemann*, in: Wiedemann (ed.), Handbuch des Kartellrechts, 2nd edition, § 17 para. 149 with further references:

2 See *Reeves/Dethmers*, in: Hawk (ed.), Annual Proceedings of the Fordham Competition Law Institute, p. 153, 161 with further references.

3 For detailed information on this subject: Reeves/Dethmers, in: Hawk (ed.), Annual Proceedings of the Fordham Competition Law Institute 2013, p. 153, 180 et seq.