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## ottoschmidt

Christoph Wagner

## Impact of Digitalization and Convergence on Merger Control in the Media Sector

### Five suggestions for a more adequate balance and format for merger control in the Digital Age

*In the social and digital media sectors, the past decade has witnessed enormous growth of formerly unknown players. The digital expansion disregards national borders and existing gate keepers, and to some extent even merger control and tax authorities.*

*The article explores the nature of digital expansion (I.) and compares it with the invariably narrower merger control limits for “old media” (II.). Based on this analysis, the article develops a call for a pan-European perspective on mergers for the single European digital market (III.) and forwards five vital suggestions for readjusting merger control for the Digital Age (IV.).*

#### I. Nature of Digital Expansion

In the social and digital media sectors, the past decade has witnessed enormous growth of formerly unknown players. Internet giants such as Google, Apple, Facebook, Amazon and Netflix have created new markets and platforms and appear to be dominating them. Their innovative offers undermine old media monopolies in the print and newspaper industry. YouTube attracts the millennials at the expense of linear TV; and Apple, Amazon and Netflix's streaming Video On Demand (VOD) services are challenging the incumbent distribution chains. The digital expansion disregards national borders and existing gate keepers, and to some extent even merger control and tax authorities.

#### 1. Digital Market Entry Follows Its Own Rules

This development is happening without acquisitions or big takeovers. The digital challengers do not buy market shares by taking over existing players. They create new markets and rapidly gain customers with innovative and often free services. Netflix disregarded the numerous potential takeover targets in the VOD sector (Watchever, Maxdome etc), and decided to enter the European market relying on the roll-out of its own services. The same is true for Amazon and Apple. If they buy companies, they do not buy competitors to gain market share but rather to grab technology or IP. Apple's acquisition of Beats<sup>1</sup>, Facebook's takeover of Oculus VR<sup>2</sup>, and

Microsoft's takeover of Yahoo!'s search engine<sup>3</sup> are perfect examples. Those cases did not give rise to competition issues, as the targets were not active on the same markets and the acquirer did not gain additional market share through the merger.<sup>4</sup>

#### a) Beyond Merger Control

The digital economy is effectively expanding without external growth and thus faces practically no limits in merger proceedings. Merger control creates no hurdles for “internal” growth which results from customer demand, or for the acquisition of new ideas and product lines. Competition law in general does not punish success, nor does it punish expansion based on innovation and consumer demand for attractive products. That is why digital growth rarely faces any limits, even if it reaches extreme thresholds and market shares like some of the players mentioned above.

#### b) Beyond Media Regulation

Some exceptions apply to the media sector, which requires special attention due to its critical role for democracy. In order to ensure plurality, national media concentration laws restrict even internal growth with audience caps or ownership limits. But so far these rules apply mainly to traditional linear TV and not to internet and digital media. Whether the scope of these provisions should be broadened and, for example, applied to search engines is an interesting question (raised by the EU Parliament and German ministers), which, however, realistically speaking, is not on the agenda of lawmakers or regulators in the near future.

#### c) Beyond Telecommunications Regulation?

Following a recent decision of the Cologne administrative court<sup>5</sup>, classifying Google Mail as telecommunica-

<sup>2</sup> /2014/jul/22/facebook-oculus-rift-acquisition-virtual-reality), accessed 24 March 2016.

<sup>3</sup> Microsoft News Center, Press Release on the Proposal dated 1 February 2008, (<https://news.microsoft.com/2008/02/01/microsoft-proposes-acquisition-of-yahoo-for-31-per-share>), accessed 24 March 2016. However, the deal failed as Yahoo! withdrew from the proposal as stated in Microsoft's Press Release dated 3 May 2008, (<https://news.microsoft.com/2008/05/03/microsoft-withdraws-proposal-to-acquire-yahoo>), accessed 24 March 2016.

<sup>4</sup> Apple/Beats (Case No. COMP/M.7290) Commission decision 2014/C 260/08 [2014] OJ C260/8.

<sup>5</sup> VG Köln, decision of 11 November 2015 – 21 K 450/15, CR 2016, 131–135.

▷ Christoph Wagner, Berlin. Further information about the author on p. 96.

<sup>1</sup> Apple Press Info, Press Release dated 28 May 2014 (<https://www.apple.com/pr/library/2014/05/28Apple-to-Acquire-Beats-Music-Beats-Electronics.html>), accessed 24 March 2016.

<sup>2</sup> S. Dredge, Facebook closes its \$2bn Oculus Rift acquisition. What next? The Guardian, 22 July 2014, (<http://www.theguardian.com/technology>