

Summary of the dissertation

„Antitrust liability of cartel facilitator” by mgr Katarzyna Wiese

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The subject matter of the dissertation is the controversial practice of the European competition authority of attribution of the liability for participation in an anticompetitive agreement to the cartel facilitator, which is an undertaking that knowingly contributes to the common antitrust goal of the agreement, although it is not active on the market, where the prohibited collective practice is implemented. The starting point of the dissertation is the observation that the competition law, that has been in force for decades in the European Union (previously in the European Community) might not be suitable for proper market regulation in times when the traditional agreements concluded in the smoke-filled rooms shift to the digital environment and new digital tools like algorithms are used to bring about anticompetitive effects. This situation begs a question, if the abovementioned cartel facilitator liability could serve as effective means for fighting the use of digital tools procured by third parties for collusive practices.

The first purpose of the dissertation is an in-depth analysis of the to date cases of cartel facilitation within the jurisdiction of the European Commission and the Court of Justice of the European Union. It also covers the cases of the so-called *hub-and-spoke cartels* and passive participation in anticompetitive agreements, as these share a common feature with the former, namely the fact that the main figure is not active on the relevant market concerned. The analysis of the chosen cases leads to identification of the factual and legal circumstances that in the view of the EC and the ECJ justify the attribution of antitrust liability to the cartel facilitators. The results of the analysis constitute basis for further review of the line of arguments the authorities present, where its weak points are highlighted and the deficits in terms of consistency with the previous practice of the EC and compliance with the fundamental rule of legal certainty are discussed. It is submitted in the dissertation that neither article 101 TFEU nor any other provision of the European law provide for a legal basis for extension of its scope on undertakings that do not realize directly the premises of the prohibited practice but merely support the actions undertaken by others. Furthermore it explains that the concept of liability for single and continuous infringement, that was adopted in cases of cartel facilitators, is not an adequate tool in such cases, as it serves as means for

the mutual attribution of liability among cartel participants and not for deciding if there was any infringement in the first place. The critical analysis of the sources also indicates that the competition authorities has shown little understanding for the economic background of the competition law, as they diminished the importance of the activity on the relevant market for the sake of full effectiveness of competition law enforcement.

Despite these observations the dissertations moves further to discussing the usefulness of the new liability concept for fighting anticompetitive cartels that exploit new technologies and digital tools. Firstly, the current developments in this area and potential hurdles for competition authorities are thoroughly depicted. Secondly, it is verified if a case of a cartel facilitator who delivers a digital tool to cartel participants could fulfill the premises of the liability test created by the EC. Finally, some reflections on the hypothetical scenario of one-sided anticompetitive practices supported by digital tools are presented.

The dissertation concludes that it is amply justified to question the lawfulness of the new concept of liability attribution to cartel facilitators and its compliance with the rule of legal certainty. As it would be hardly imaginable that the EC would now stop applying the analyzed concept, the dissertation calls for adjustment of the test of the cartel facilitator liability so that it would include an additional qualitative premise namely the appreciability of contribution to the common anticompetitive goal. It is also recommended in the dissertation that the competition authorities do not apply the new concept to hastily, especially in cases where a false positive could have a detrimental effect on the development of the innovative economy within the internal market.

Wiese