



The Feature: German Court Clarifies Scope of "Substantial Domestic Operations" for Asserting Jurisdiction Under Transaction Value Threshold

- The German Federal Court of Justice has confirmed that the Federal Cartel Office was right to conclude that processing of German end-customer data (on behalf of German business customers) constituted “substantial domestic operations” for purposes of the merger control transaction value threshold (TVT).
- The activities of the target are generally attributed to customer location, since that is where competition with alternative providers ordinarily takes place. However, the activity need not be attributed to the location of the target’s direct customer(s). It can be attributed to Germany if it is capable of having domestic competitive effects given its characteristics, regardless of the location of the target’s direct customers.
- The scope of the TVT was drawn “very broadly,” with only marginal domestic activities being excluded. Especially in the digital sector (which the TVT addresses), a service can have potential competitive significance in Germany if it is used by customers in Germany. The TVT is, therefore, broad enough to encompass data processing, even if it is conducted abroad on behalf of business customers based in Germany, if it concerns data of German end customers.
- Moving forward, transacting parties will have to grapple with applying the theoretical test set out by the court to a range of different targets with differing activities in Germany, and its differences to tests based on target activities which are applied in other jurisdictions.

Read our more detailed update on the judgment [here](#).

The Niche

Recent developments have had us pondering antitrust angles in [Defense Tech](#).¹ A few thoughts:

- Geostrategic rivalry begets market competition? Military tech has spawned smaller companies with software-enabled products (e.g., drones) not traditionally made by large defense companies.
- But new forms of market power? New defense tech has seen companies compete for the market (e.g., Starlink, Palantir).
- The distinction from industrial policy? Privatization and digitization of defense tech feeds concerns over critical raw materials, AI sovereignty, and public-private partnerships.

... and for the EU lawyers: how do you invoke national security as an ancillary restraint?

¹ See, e.g., [FT](#), [FT Tech Tonic](#), [Bloomberg Tech](#), [UK Ministry of Defence](#), [OpinioJuris](#), [EU Startups](#), [euronews](#).

Other Interesting Recent Antitrust in Tech Developments

US: A federal judge found that Apple had failed to comply with a court order in the high-profile Epic Games antitrust case, ruling that Apple’s ongoing restrictions on how app developers can direct users to alternative payment methods did not meet the original injunction’s requirements which prohibited Apple from retaliating against developers for communicating with users ([Read more](#)).

EU: Apple has [proposed](#) updated App Store rules in light of (1) an EC decision finding that Apple infringed Article 5(4) DMA by imposing restrictions on the ability of app developers to steer users to other distribution channels; and (2) a separate ongoing [investigation](#) into Apple’s business terms ([Read more](#)).

EU: The EU and member states are considering simplifying and streamlining the increasingly complex web of the EU digital rules with a view to enhancing the EU’s digital competitiveness and innovation ([Read more](#)).

UK: The CMA has [published](#) tips for businesses that use dynamic pricing, to “help them stay on the right side of the law and do the right thing by their customers,” as part of a wider project to consider how dynamic pricing is being used across different sectors of the economy.

Germany: The HRC Cologne [ruled](#) that Meta’s processing of data for AI training without user consent complies with the (1) Article 6(1) GDPR user consent obligation; and (2) Article 5(2) DMA data combination prohibition. In contrast, though rejecting a separate application regarding the same conduct on procedural grounds, the HRC Schleswig-Holstein [indicated](#) that Meta’s AI training process may infringe the GDPR as it involves the processing of sensitive and children’s data without the necessary user consent.

What’s in the Pipeline?

US: The DOJ settlement in HPE/Juniper has been alleged to be the result of politics rather than antitrust analysis, setting up a potentially contentious Tunney Act hearing (for more, see comments by a former DOJ Deputy Assistant AG).

EU: The Commission is [consulting](#) on the first review of the DMA, seeking feedback on how the DMA can support fair and contestable digital markets, including [regarding](#) the AI sector.

UK: The CMA has published its proposed decisions and “intervention roadmaps” in the [Google search and ad services](#) SMS investigation as well as the [Apple](#) and [Google](#) mobile ecosystem SMS investigations.

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