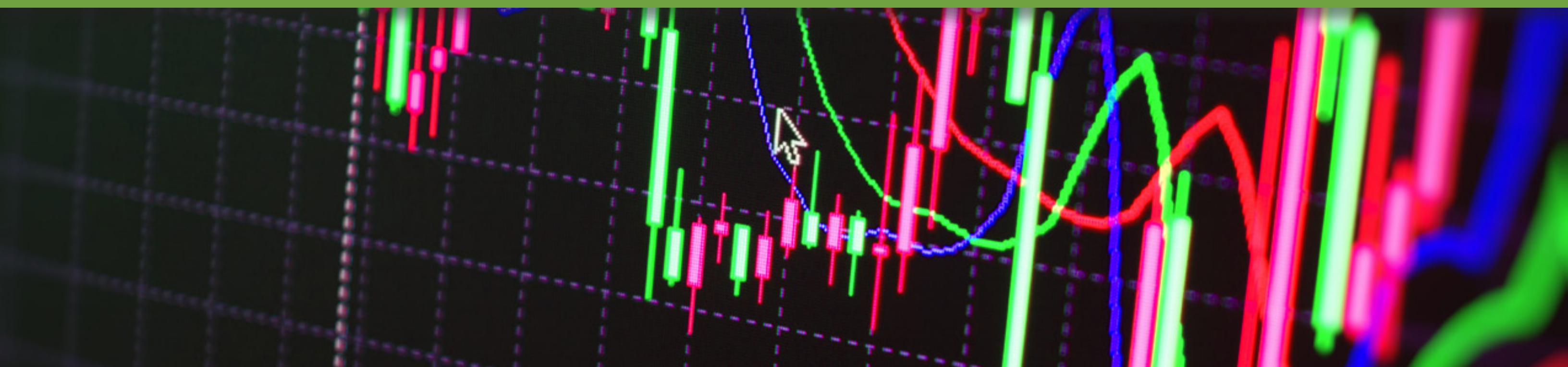
DIGITALIZATION REVOLUTIONIZES THE ECONOMY - AND THE WORK OF COMPETITION AUTHORITIES



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I. INTRODUCTION

Digitalization is revolutionizing all sectors of the economy. This is a challenging development not only for the business community but also for competition authorities. Digitalization and the competitive assessment of the global Internet giants is currently one of the most important issues for competition authorities around the world. There are many new questions on how competition law should be enforced in these days of digital revolution.

II. THE TOPIC

Digitalization has changed existing business models in many areas. There are innumerable examples: retailers have to recognize that more and more people want to buy products online; publishers struggle with E-books or self-publishing on the Internet; newspapers face new competitors in the form of news sites or the further distribution of news on social networks. The telecommunications companies are recording a sharp decline in the use of SMS and fixed-line telephony while the data traffic via WhatsApp, social networks and Skype explodes.

This enormous transformation process is challenging for the economy and, of course, for competition authorities. We have to deal with new markets, new players and new business models and we do not have many precedents for our decisions. There is hardly any jurisprudence – let alone from higher or supreme courts. Therefore, competition authorities are under the spotlight and have to pave the way. Another thing we are seeing is that, on the one hand, the Internet markets are often highly dynamic and business and consumers benefit from digitalization, innovative business models and high market dynamics. We are usually reluctant to intervene on highly dynamic markets. On the other hand, digital markets are often characterized by direct and indirect network effects and strong economies of scale. Therefore, they are often highly concentrated. Often, competition is rather "for the market" than "on the market." But sometimes even competition for the market is limited and high market concentration is persistent over long periods of time. That would speak in favor of intervening. Given this trade-off, it is not easy for us to judge whether or not to intervene.

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In addition, digital markets have certain characteristics that make their competitive analysis more complex. Digital business models are often organized as networks or multi-sided platforms with direct and indirect network effects. To fully capture the competitive effects on such markets, several interrelated markets have to be analyzed. Additionally, products and services are often financed by advertising and provided as zero-priced products. The standard tools of market analysis have to be adjusted to such effects.

Furthermore, in digital business models, data is often a highly relevant parameter of competition. Data – usually known as "Big Data" – often has many positive effects such as improving existing products and services and creating new ones. Nevertheless, it can also be a factor which contributes to market power and to competition concerns that are not seen in other markets. But concerns can also go beyond competition law and affect consumer, data protection and privacy rights.

Finally, in public debate the market power of some digital companies has reached a politically relevant dimension. Some of these companies are even starting to get actively involved in politics. Therefore, today we also have to take care that economic power does not turn into political influence.

III. EFFECTIVE ENFORCEMENT IN DIGITAL MARKETS

This is the context in which the competition authorities are acting today. The competitive challenges of digitalization call for effective competition law enforcement. If companies break the competition rules, we need to intervene. What does all this mean for our work? It means that our daily work and our approach to cases is also changing and that competition authorities have to adapt to this new economic environment. Our task is not changing, but our focus is. One focus of our case work will be to keep markets open *vis-à-vis* powerful or dominant companies. In this respect, and due to the internal growth of some digital players, the control of abusive practices – the "Mount Everest" of competition law – will probably become an increasingly important topic. Another focus is merger control. Here we need to assess effects on digital and data-driven markets. Moreover, we all have to consider if competition law is flexible enough or if new legislative measures necessary.

The Bundeskartellamt has addressed these challenges in conceptual projects and in its case work. As regards conceptual work, it was one of the first competition authorities to answer questions on how to deal with the digital economy. We have established a working group – internally labelled as a "Think Tank" – to develop concepts and tools, which developed a key policy paper on the market power of Internet platforms published by the Bundeskartellamt in June 2016. Also, we conducted, together with our colleagues from the French competition authority, a study on the interrelation between "Big Data" and competition law which was published in May 2016. Furthermore, we have successfully concluded a large number of proceedings in the digital economy dealing with the questions laid out in our various reports. All this aims to further develop existing examination concepts and, where necessary, develop new ones to enable the Bundeskartellamt to quickly and efficiently assess cases involving the digital economy.

As regards enforcement activities in digital markets, the Bundeskartellamt became active early and is an active enforcer in digital markets in Europe. The Bundeskartellamt and the former OFT in the UK were among the first authorities to initiate proceedings in cases of so called "Best Price Clauses" ("BPCs"). This was the case with hotel booking platforms in cases like *HRS* and *Booking*. Another example of effective intervention was the "Price Parity Clause" ("PPC") of Amazon with regard to suppliers who made use of the Amazon Market Place. Best Price Clauses are a wide spread instrument in the Online Economy. While BPCs, at first view, suggest to be beneficial for consumers – they seem to benefit from the "best price" without search cost – in fact they are often the opposite. They often restrict competition and lead to higher prices. They reduce incentives for competitors to engage in price competition, they eliminate consumers' incentive to search for better offers and they can make the market entry of new platforms considerably more difficult. In the *Hotel Booking* cases, these BPCs ultimately prevented the offer of lower hotel prices elsewhere and thus restricted competition between existing online portals. Moreover, they made the market entry of new platforms considerably more difficult because they prevented new platforms from offering hotel rooms at lower prices.

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A similar example of what a National Competition Authority can achieve in the digital economy was the proceeding against Amazon with respect to the PPCs of the Amazon Market Place. Price Parity Clauses can have similar effects as BPCs. They prevent competitors from offering lower prices. Under Amazon's PPC, sellers were prohibited from selling products they offer on Amazon cheaper through any other sales channel. Suppliers who made use of the Amazon Market Place were not allowed to sell their goods cheaper on other platforms. Again, the Bundeskartellamt initiated proceedings – in close cooperation with the OFT. Finally Amazon decided to abandon the PPC not only for Germany and the UK but for all of Europe. This case illustrates the role of national competition authorities in applying European Competition Law and setting standards in these markets.

An example for close co-operation of a National Competition Authority and the European Commission in digital markets are proceedings against *Audible/Amazon* and *Apple*. These proceedings relate to exclusivity agreements in the supply of digital audio books. The German Publisher and Bookseller Association had lodged a complaint at the Bundeskartellamt and the European Commission. The complaint was about an exclusivity arrangement between the two companies. Following the investigation of the Bundeskartellamt and the Commission, the parties abandoned these exclusivity clauses in a long term agreement on digital audiobooks. With the removal of the exclusivity agreement, Apple will now have the opportunity to purchase digital audiobooks from other suppliers. And Audible can supply other purchasers as well. This will enable a wider range of offers and lower prices for consumers. After conducting intensive market investigations and due to the close cooperation with the European Commission in this case, we were able to close these proceedings without a formal decision.

The specific characteristics of digital markets also change the assessment of merger cases. While in traditional markets market share is often a good proxy for market power, it can be a less reliable proxy in digital markets. Direct and indirect network effects, multi- or single-homing, market tipping and access to data can be relevant factors and can change the results of the analysis compared to traditional markets. For example, recent merger cases between large Internet platforms in the area of real estate or partnership platforms were cleared despite high market share on the basis of the criteria mentioned above.

IV. BIG DATA AND COMPETITION LAW ENFORCEMENT

The increasing collection, processing and commercial use of data in digital markets has prompted a broad debate about the role of data in corporate strategies and the application of competition law to such strategies. The Bundeskartellamt has not only done conceptual work on the interrelation of Big Data, data protection and competition law. Data and data protection issues also play a vital role in cases.

In this context, the Bundeskartellamt has recently initiated a proceeding against Facebook. This case could serve as an example of how competition law and data protection law can be interrelated. We are investigating whether Facebook has abused its alleged dominant position in the market for social networks. Facebook's terms and conditions on the use of user data may constitute an exploitative abuse. Facebook's terms and conditions violate German data protection rules and German law on general terms and conditions. According to German competition case law, the use of unfair contract terms by a dominant undertaking can constitute an abuse. This could be a promising way forward in dealing with infringements of law by companies with a dominant position in digital markets.

V. REFINING THE LEGAL TOOLBOX

Adapting the case practice is important. But just as important is reassessing the respective competition law provisions and to look for ways to improve the instruments and tools. We know from our experience that tackling threats to competition in digital markets needs a particularly thorough but at the same time speedy analysis. This is because products and services are often complex and markets are new and rapidly evolving.

That requires us to develop concepts and tools that are workable in practice to deal with Internet cases in a fast and efficient way. For exactly that purpose, we work intensively on legal and economic concepts to deal with digital platforms and networks, as those are the typical business models in digital markets.

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Legal provisions need to allow us to apply these new concepts. In Germany, with the upcoming amendment to the German Competition Act (Act against Restraints of Competition, "GWB") criteria like network effects, access to data, multi- and single-homing are explicitly mentioned as important factors in assessing market power in the German law. The amendment will also clarify that a market may also be assumed where no monetary payments occur. This conclusion is – especially in two-sided markets – already part of the competition authorities' practice, but one which until now was not clearly provided by the German competition law. Alternatively we could have gone forward striving for confirmation by court, which may have taken too long in such a dynamic environment.

Furthermore, the amendment will contain important adjustments with regard to the notification of merger cases that do not meet the established turnover thresholds. A new transaction volume threshold is to be introduced into German competition law, a consequence of the takeover of WhatsApp by Facebook for more than $19 billion USD as one example. There were only three jurisdictions in the entire EU that were competent to review this merger due to WhatsApp's extremely low turnovers. This was in obvious contrast to WhatsApp's market position in the EU. It is not unusual in the digital economy for important companies to start with a very low turnover. The transaction volume threshold will allow the Bundeskartellamt to look at such important deals.

VI. NO "ONE-SIZE-FITS-ALL" REGULATORY SOLUTION

However, even if the legislators make these adjustments to the amendment of the GWB, competition law still is not likely to solve every problem in the digital economy. There are plenty of examples of infringements of consumer rights on the Internet where thousands or even millions of consumers are affected. Consumer protection in Germany is a civil law matter. But in such cases it is often not likely that individual consumers sue for injunction or claim for compensation. The damages suffered are often relatively small for the individual person. Especially in new and fast-moving markets, legal uncertainty prevails.

Competition authorities principally have the tools to address many of these problems. But competition law, as it stands today, addresses a certain behavior by dominant companies. Establishing dominance – in particular in digital markets – usually is complex and requires time consuming investigations. In addition, especially in the Internet economy, thousands or millions of consumers might be harmed by a certain behavior of companies that are not dominant. To address these manifold problems prevailing within the digital economy, some call for the establishment of a special regulatory agency for digital markets. But when it comes to regulatory oversight, it will hardly be possible to develop a standardized set of rules, which would capture the specific problems raised by complex, highly differentiated and quickly changing business models. Therefore, there is no "one-size-fits-all" solution that can be applied by a single "super authority" – as it is sometimes discussed in the political debate.

While there might not be need and room for a regulatory "super authority" for the digital economy, a micro-invasive, targeted public enforcement of consumer rights in digital markets appears useful. We have to acknowledge that there can be difficulties for individuals to enforce their rights. If private enforcement reaches its limits, a certain degree of public consumer rights enforcement could be a useful supplement. It is currently being discussed whether the Bundeskartellamt should be given additional competences in the future to enforce consumer protection in the digital economy. The aim of introducing public enforcement in this area is to take up widespread violations and to focus on fast-moving areas of the digital economy. It should be a supplement to the well-established private enforcement system in Germany, which is working well in most cases. In our view, the examples of many other countries which have extended the powers of their competition authorities to include comparable competences show that competition authorities are well placed to deal with consumer protection issues.

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