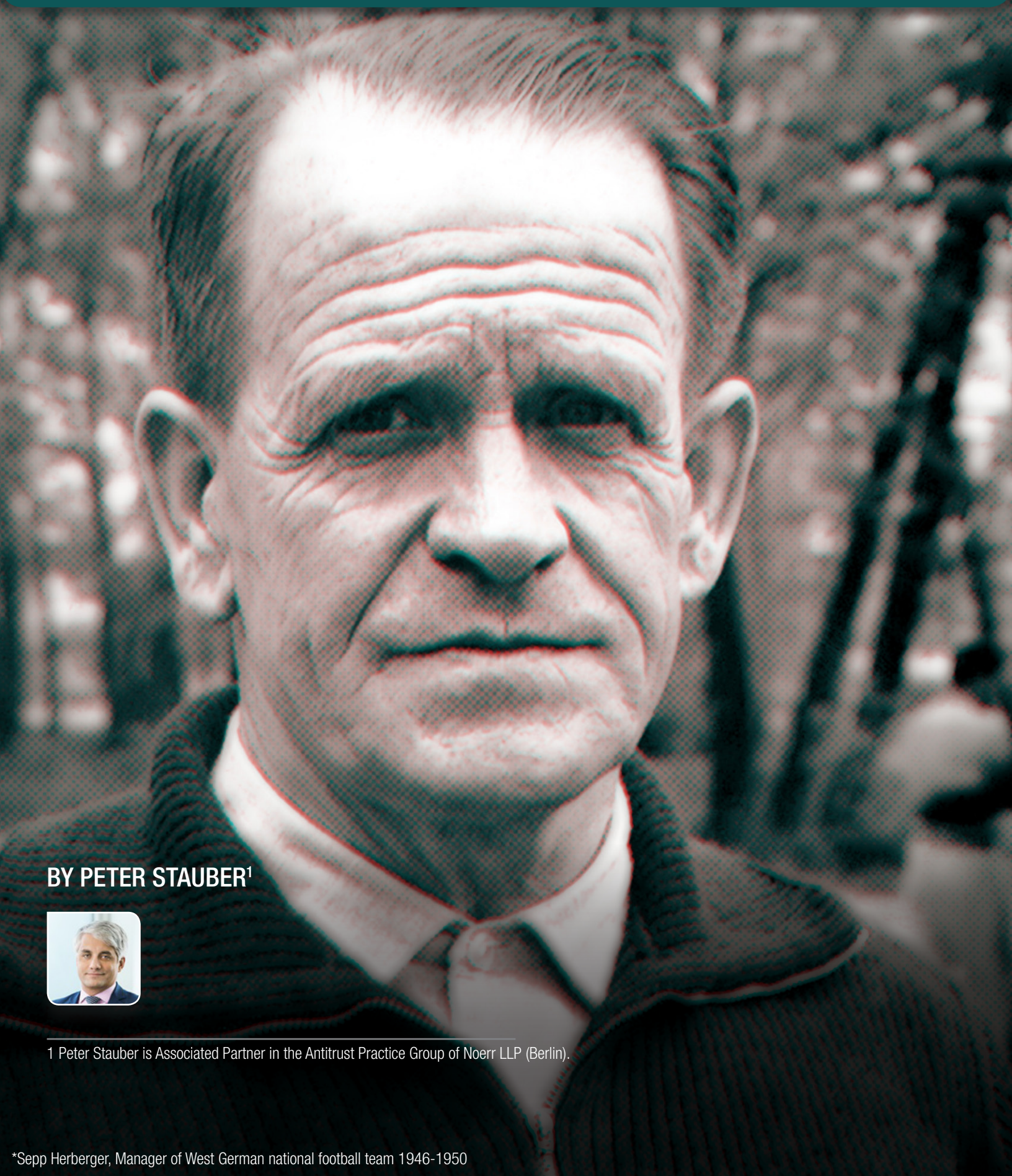
NEW RULES FOR MERGERS IN THE DIGITAL ECONOMY IN GERMANY



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I. INTRODUCTION

As early as 2010, the Federal Cartel Office ("FCO"), Germany's antitrust watchdog, started looking in more detail into business practices in the digital economy. One of the first major investigations concerned "best price" (most favored customer) clauses used by hotel reservation platforms.[2] Other investigations followed, *inter alia*, concerning Amazon's price parity clauses,[3] ASICS' prohibition of its distributors to use third-party platforms such as Amazon and eBay as well as price comparison websites for the distribution of ASICS running shoes,[4] and Booking.com's "best price" clause,[5] to name a few. These and other cases showed and highlighted some practical challenges arising from the digital economy, in particular from two- or multi-sided markets (platforms). In order to adequately respond to these challenges, the FCO established a "think tank" at the beginning of 2015 with the goal to review the latest economic and legal research, its applicability to practical cases, and to refine existing and develop new methods for analyzing cases from the digital economy.[6]

The FCO's think tank came to the conclusion that the existing statutory framework is generally adequate for assessing and adjudicating competition concerns arising from the digital economy, particularly the operation and effects of platforms and networks, but certain amendments and clarifications would be beneficial for enforcing competition policy in the digital age. The authority's suggestions were positively received by the Federal Government[7] and later also by the legislature for the latest update of the German Act against Restraints of Competition ("ARC").[8] This 9th Amendment Package to the ARC, which entered into force on June 9, 2017, brought the following changes to German antitrust law that affect mergers in the digital economy.

Most notably perhaps, the German legislature introduced new merger control thresholds that deviate from the turnover-only thresholds of the past and introduce a threshold based on the value of the transaction. In order to further develop the substantive review of mergers in the digital economy, a new provision clarifies that a "product market" may also be deemed to exist if services are provided free of charge to the users. Moreover, the criteria for assessing the market position of an undertaking and thus establishing the existence of market dominance have been extended with a particular view to multi-sided markets and networks.

II. NEW MERGER CONTROL THRESHOLD BASED ON TRANSACTION VALUE

Prior to the 9th Amendment Package to the ARC, a corporate transaction (concentration) was only subject to German merger control if the conditions for European merger control were not met and, in the last completed financial year:

(a) all undertakings participating in the concentration had an aggregate worldwide turnover of more than 500 million Euro;

(b) one participating undertaking had turnover of more than 25 million Euro in Germany; and

(c) another participating undertaking generated turnover of more than 5 million Euro in Germany.[9]

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2 Federal Cartel Office, decision of December 20, 2013, B9-66/10 para. 54 – *HRS*.

3 Federal Cartel Office, decision of November 26, 2013, B6-46/11; see also the respective case summary at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf?__blob=publicationFile&v=2 (English version).

4 Federal Cartel Office, decision of August 26, 2015, B2-98/11; see also the respective case summary at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2 (English version).

5 Federal Cartel Office, decision of December 22, 2015, B9-121/13; see also the respective case summary at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B9-121-13.pdf?__blob=publicationFile&v=2 (English version).

6 Federal Cartel Office, B6-113/15, Working Paper – Market Power of Platforms and Networks, June 2016, p. 1 et seq.; available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2 (English version).

7 See Federal Ministry of Economics and Energy, Green Paper on Digital Platforms, May 2016; available at: https://www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/gruenbuch-digitale-plattformen.pdf?__blob=publicationFile&v=20 (German only).

8 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/11446.

9 Section 35(1) ARC.

An exemption applied for transactions involving an undertaking – on either the purchaser's or the target's side – with comparatively low turnover (so-called *de minimis* clause): Even if the above conditions were met, a transaction was not subject to German merger control if one of the undertakings involved generated worldwide turnover of less than 10 million Euro.[10]

These relatively simple triggers for German merger control are supplemented by an additional threshold according to which a concentration will also be subject to German merger control if the conditions for European merger control are not met and, in the last completed financial year:

(a) all undertakings participating in the concentration had an aggregate worldwide turnover of more than 500 million Euro;

(b) one participating undertaking had turnover of more than 25 million Euro in Germany;

(c) no other participating undertaking generated turnover of more than 5 million Euro in Germany;

(d) but the value of the consideration for the concentration is more than 400 million Euro; and

(e) the target company is active to a considerable extent in Germany.

In the context of this new transaction value-based threshold, the above mentioned *de minimis* clause does not apply.

When designing the new threshold, the legislature had one particular transaction in mind: the acquisition of the messaging service WhatsApp by Facebook in 2014. Since WhatsApp did not generate turnover in Germany of more than 5 million Euro (while the other two turnover-related thresholds were met by Facebook), the transaction was not subject to review by the FCO. Although the European Commission reviewed the *Facebook/WhatsApp* transaction, this was made possible only because of a specific referral request by the parties to the transaction.[11] This is possible if the transaction would otherwise be subject to parallel national merger control procedures in three or more EU Member States.[12] The FCO – and then the federal legislature – therefore reasoned that the time-honored turnover thresholds of German merger control laws are not capable of catching competitively significant transactions, particularly in new, digital markets where services are provided free of a monetary charge, but users' data forms "payment" for the services. Thus, in order to avoid that such transactions escape pre-merger antitrust scrutiny, the transaction value was thought to be a prudent basis to indicate whether the acquisition of a company with low turnover concerns a market participant with high innovation potential and thus a considerable risk that the concentration will result in a dominant market position of the acquirer.

A. Transaction Value

The key term of the new threshold is "value of the consideration [for the concentration]." This term comprises all assets and other benefits in kind (purchase price) plus the value of any liabilities assumed by the purchaser.[13] According to the legislature's explanatory memorandum, the concept of assets is broad and also includes those kinds of consideration that are linked to the occurrence of particular conditions. This includes consideration based on earn-out clauses, additional payments for achieving turnover or profit targets and payments related to non-compete agreements.[14]

Naturally, the undertakings participating in the concentration will have to carry the burden of calculating the value of the consideration and, if necessary, choosing a method for determining the goodwill. In the opinion of the legislature, an additional certification by an auditor will not

10 Section 35(2) 1st sentence ARC.

11 European Commission, decision of October 3, 2014, M.7217 para. 10 et seq. – *Facebook/WhatsApp*.

12 Art. 4(5) Council Regulation (EC) No. 139/2004 of January 20, 2004 on the control of concentrations between undertakings, OJ 2004 L 24, p. 1 et seq. ("EMCR").

13 Section 38(4a) ARC.

14 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 77. This mirrors the practice in the US (16 C.F.R. §§ 801.10-801.15 Valuation Rules), see also Federal Trade Commission, Valuation of Transactions Reportable under The Hart-Scott-Rodino Act (https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/valuation-transactions-reportable-under).

be necessary, as a general rule.[15] In contrary to these expectations, the new threshold generated considerable legal uncertainty since it entered into force, albeit in areas which were not the focus of the debate before the 9th Amendment Package was enacted.

Determining the value of consideration seems simple when the parties agree on a fixed purchase price, or on a certain number of shares to be transferred to the seller (or an indefinite number of shares with a certain stock market value on a certain reference date). However, the law requires that – in addition to the agreed purchase price – also the value of any liabilities assumed by the buyer shall be taken into account.[16] This will not always be an easy task.

First, there is the question of whether the statutory term "liabilities" is to be taken literally and thus only those items must be taken into account that are shown as liabilities in the target company's balance sheet.[17] If so, "provisions"[18] could probably remain outside the scope although this term encompasses also "uncertain liabilities." It appears plausible including these type of liabilities since they too are assumed by the purchaser as a result of the transaction. On the other hand, uncertain liabilities do not necessarily reduce the company's value (at a later stage). Thus the amendment to the ARC leaves uncertain how to handle, in practice, instance provisions for (supposedly or actually) unlawful conduct by the target company which were created to cover (more or less probable) future compensation claims and fines.

Second, another set of challenges arises in connection with the calculation of the value of consideration including the assumed liabilities. As far as the assumed liabilities are concerned, the values used for preparing the target's balance sheet will be a natural reference point. However, numerous questions can be expected to arise in connection with calculating the value of the consideration in case of deferred or contingent payments. For example, a share purchase agreement may provide for a payment of a basic purchase price on the signing date and a deferred payment that is to be calculated based on market developments at a later date, e.g. on the closing date. If the signing and closing date are not far apart and it appears probable that the conditions for the deferred payment will be fulfilled, the deferred payment will obviously have to be included into the value of consideration. Thus, if the basic purchase price plus assumed liabilities amounts to 395 million Euro and the deferred payment may amount to 10 million Euro, the new 400-million-Euro threshold should be considered as fulfilled. However, neither the statutory provisions nor the legislative memorandum provide guidance on how to proceed if the probability that the purchaser will have to make the deferred payment is uncertain or considered as low. Although practitioners may look to the practice of the U.S. FTC for guidance,[19] it is not a given that the FCO and German courts will come to similar conclusions and adopt the same stance as the FTC has developed in previous years.

Since the new threshold entered into force, this issue has become relevant in transactions involving the acquisition of IP rights, particularly the acquisition of rights to pharmaceuticals that are yet under development. In such transactions the parties often agree on payments that are contingent on reaching certain milestones, e.g. successful conclusion of clinical trials, obtaining approvals for marketing the drug for specific uses or by specific authorities, exceeding certain turnover thresholds. These milestones may usually be reached years after signing and closing the initial transaction, if at all. Thus the question arises how parties shall account for such contingent payments if the initial fixed payment is well below the 400 million Euro threshold and it would be exceeded only if the latter of the agreed milestones are met. In the U.S. practice, such contingent payments may be qualified as "undetermined" requiring the parties to assess the fair market value of the assets to be transferred,[20] unless there is a reasonable, non-speculative basis for estimating the contingent payment amount.[21] Such decision practice has yet to develop in Germany.

Precedents from the U.S. may be of help to practitioners in construing and applying the new German merger control threshold. However, caution should be exercised when doing so. If the value of consideration is calculated differently than the FCO (and later the courts) believes the calculation should have been made, the transaction parties may mistakenly think that their transaction does not need pre-merger approval even though the conditions of the transaction value-based threshold were met. In this case, closing the transaction without obtaining prior approval

15 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 78.

16 Section 38(4a) no. 2 ARC.

17 Section 266(3) lit. C. German Commercial Code ("GCC").

18 Section 266(3) lit. B. GCC.

19 Cf. the informal interpretations of the FTC, available at: https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations.

20 16 C.F.R. §801.10(b), (c)(3).

21 Pre-Merger Notification Practice Manual, 54-55.

would qualify as "gun jumping," i.e. as an infringement of the prohibition to consummate a reportable transaction prior to obtaining merger clearance.[22] Such an infringement may be sanctioned with a fine of up to 10 percent of the participating undertakings' worldwide turnover.[23] Moreover, the executives and other individuals responsible for the infringement may be hit with an individual fine of up to 1 million Euro.[24] In order to avoid these risks, the transaction parties may approach the FCO to obtain their view whether the parties' preferred approach to calculating the value of consideration will be accepted. The FCO is open to such informal discussions and these can usually be set up on relatively short notice. However, the amount of information that might be requested by the FCO to have a meaningful pre-notification discussion may be very close to the amount of information that is necessary for an actual merger filing. Thus, particularly in cases that do not raise serious competition concerns, it might be less burdensome and lead to a quicker clearance if the parties just file a (precautionary) merger notification with the FCO even if it appears doubtful whether the value of the consideration for the transaction exceeds 400 million Euro and the other conditions of this threshold are also met, respectively.

The seemingly clear threshold for the value of the consideration is thus not at all simple to deal with and can be a source of uncertainty in a transaction. With this in mind, the German legislature suggested in its explanatory memorandum that the FCO may have to consider the publication of guidelines or other informational material concerning the calculation of the value of consideration.[25] This suggestion was taken up by the FCO very fast once it was confronted with more requests for clarification and guidance than it had expected. The new transaction value-based threshold was mirrored by the legislature in Austria,[26] and the FCO is drafting these guidelines in cooperation with the Austrian Federal Competition Authority. The comparison with other FCO guidelines, e.g. on the issue of analyzing domestic effects, highlights the limits of these kinds of "soft laws." The guidelines cannot cover all conceivable cases and, especially for the most difficult ones, do not necessarily contain sufficiently clear statements or only advise to make a precautionary filing. Thus, such guidelines might not provide clarity to the extent sought after by companies.

B. Activities in Germany to Considerable Extent

Further practical issues arise from the criterion of the new threshold that the target company must be active in Germany to a "considerable extent." This aims to ensure that only transactions with sufficient connection to the German market are subject to merger control in Germany.

In practice, the ambiguity of the term "considerable domestic activity" causes interpretation difficulties as well. The legislature's explanatory memorandum only lists as an example of domestic activity that the company's services are used in Germany and the existence of domestic R&D activities.[27]

With regard to cases from the digital economy, the number of active monthly users or the number of unique visits to a website may be taken into account. In this respect, the legislature's explanatory memorandum uses a messaging application for smartphones as an example. If the app is marketed to the general public, one million users are deemed as sufficient to assume a considerable domestic activity, while fewer users might render the same result in the case of more focused apps.[28] Since approximately 50 million individuals used smartphones in Germany in 2016,[29] the example seems to imply that a penetration rate of 2 percent would be sufficient for establishing a "considerable domestic activity." It remains unclear, however, whether this is the minimum or whether a lower penetration rate could fulfill the criterion too.

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22 Section 41(1) 1st sentence ARC.

23 Section 81(2) no. 1, (4) 2nd sentence ARC.

24 Section 81(2) no. 1, (4) 1st sentence ARC.

25 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 78.

26 The transaction-value based threshold introduced into Austrian law is almost identical to the German provision: a merger has to be notified if the combined worldwide turnover of the undertakings exceeds 300 million Euro, the combined Austrian turnover of the undertakings exceeds 15 million Euro, the value of the transaction exceeds 200 million Euro and the target has significant activities in Austria (Section 9(4) Austrian Cartel Act).

27 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 75.

28 Ibid.

29 https://de.statista.com/statistik/daten/studie/198959/umfrage/anzahl-der-smartphonenutzer-in-deutschland-seit-2010/.

Moreover, the legislative materials seem to contain a contradictory statements on the relevance of turnover generated by the target company: on the one hand, the legislative memorandum states that "all objective, quantifiable criteria for establishing the local nexus that are tied to the target's turnover have to be ruled out."[30] Surprisingly, the same paragraph then goes on to elaborate that it will cause less problems for the transaction parties to establish whether the target is active and, respectively, whether it generates turnover in Germany. Furthermore, the example which is used to explain when activities in Germany do not qualify as considerable also centers on the target's turnover. In this example, a Canadian conglomerate sells its special engine manufacturing business to a German competitor for a purchase price in excess of 400 million Euro. Both the purchaser and the target each generate turnover of more than 300 million Euro worldwide, with the purchaser generating turnover of more than 25 million Euro and the target of around one million Euro in Germany.[31] The legislature concludes that in a market of high turnover volumes and a long history of trading goods for consideration, a company with domestic turnover of one million Euro does not pass the test of having considerable domestic activities. Although one can derive from the example that the volume of the market for special engines exceeds 600 million Euro worldwide, the example does not discuss the volume of the German market. Thus, this example does not actually assess the significance of the target's activities in Germany, but in essence tries to limit the applicability of the new merger control threshold "through the backdoor." However, if the German market for special engines had a volume of 70 million Euro, the purchaser's market share would amount to approximately 35.7 percent. This would be quite close to the threshold of 40 percent at which market dominance is presumed under German law[32] and thus one would expect that the addition of the target's 1.4 percent market share is significant enough to warrant at least a (cursory) merger control review.

In addition, the stated aim of the new threshold is to catch transactions involving companies with innovative business ideas with high market potential where the classic turnover thresholds are not suitable to identify transactions of high competitive relevance.[33] Against this backdrop, it is even more surprising that the legislative memorandum does not mention the aspect of innovation potential in the assessment of the above examples. One might presume that a messaging app with one million users in Germany only justifies a purchase price of more than 400 million Euro if the app is indeed innovative and offers corresponding market potential. The latter might also be true for a manufacturer of special engines who just entered the German market a short time ago, and because of its innovative products managed to obtain a market share of 1.4 percent against overwhelming competition by a market leader having a market share of 35.7 percent.

Summarizing the above, the legislative materials are not very helpful in explaining the notion of "considerable activities in Germany." The apparent wish of the legislature and the FCO to limit the new threshold's application to transactions in the digital economy does not have a clear basis in the statutory provision and is thus achieved only at the expense of clarity and unambiguity. Perhaps the guidelines currently being drafted by the FCO and the Austrian competition watchdog will bring additional and more plausible examples and explanations.

III. PRODUCT MARKETS WITH PRODUCTS AND SERVICES FREE OF CHARGE

The 9th Amendment to the ARC brought a small but profound change to the traditional notion of defining product and service markets. In the past, the FCO as well as German courts held that a product (or service) market requires the exchange of a product (or service) for consideration.[34] A new provision explicitly states that a market may also exist if a product (or service) is provided free of charge.[35] This might be understood as if the motivation to generate income is of no relevance anymore. However, the legislative memorandum clarifies that only a direct monetary exchange is not strictly necessary anymore for assuming a market, i.e. the service provider still needs to have commercial motivation for his activities by generating income from other sources and using these proceeds to cross-finance the "free of charge" services.[36] This clarification is clearly designed to cover two-or multi-sided markets (platforms) where the platform may generally be used free of charge by consumers, while

30 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 75.

31 Ibid.

32 Section 18(4) ARC.

33 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 71.

34 Cf. Higher Regional Court Duesseldorf, decision of January 9, 2015 – VI Kart 1/14 (V) para. 43 – *HRS*; Federal Cartel Office, decision of January 19, 2006, B6-103/05 p. 23 – *Springer/Pro7Sat1*.

35 Section 18(2a) ARC.

36 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 47 et seq.

the platform operator generates income from advertisements and/or fees charged to commercial users or for premium services.[37] In its more recent decision practice prior to the 9th Amendment Package to the ARC, the FCO concluded that two- or multi-sided platforms may be qualified as a single product market instead of limiting the product market to the market side on which the platform operator receives a remuneration from (commercial or premium) users or advertisements.[38] These more recent decisions will remain relevant since the new provision only makes it *possible*, but does not require to establish the existence of a product market even if the actual product or service is exchanged free of charge. Thus, two- or multi-sided markets may still be qualified as one separate product market if this approach is better suited to assess the market and competition dynamics.

IV. ADDITIONAL ASSESSMENT CRITERIA FOR DOMINANCE IN THE DIGITAL ECONOMY

Digital markets have already been under closer inspection by the FCO in the past, including mergers involving platform operators.[39] Furthermore, the FCO and the French Autorité de la Concurrence published a joint paper on "Competition Law and Data," where the two authorities examined the significance of "big data" as an instrument for market power.[40] The 9th Amendment Package extended the analytical framework by explicitly listing certain criteria in Section 18(3a) ARC that will have to be taken into account in the assessment of market power, particularly of platforms and networks.

A. Network Effects

Network effects exist where the value of the platform service for one user group increases or decreases depending on the size of the other user group. Network effects can influence competition in various ways. First, network effects can result in a monopoly, since users tend to choose platforms that are already popular, i.e. a network or platform may become the "industry-standard" simply by its network effects (market tipping). Second, and countering the foregoing effects, network effects can facilitate market entry and rapid growth of newcomers. Assessing direct and indirect network effects will be particularly relevant for determining market power of a platform that certain user groups may use free of charge since the lack of a fee (price) the traditional SSNIP test would be difficult to apply.[41] In case of a merger of digital platforms, the parties will have to explain, for example, if and to what extent the transaction will reduce (or increase) the risk of market tipping due to the merging platforms' combined network effects.

B. Single-homing/Multi-homing

Single- and multi-homing is another important factor for determining market power. If users prefer to use a single platform or network for a specific task (single homing), the risk of monopolization increases since new market entrants will have more difficulties and thus higher costs attracting users from existing platforms. In the case that users have a propensity to multi-homing, platform and network operators might be under higher pressure to differentiate their services. A higher degree of differentiation may result in a decrease of multi-homing uses if a platform operator is particularly adept at satisfying changing customer needs and thus making the continuous use of alternative platforms less attractive. On the other hand, multi-homing may also be encouraged by new entrants if and to the extent they manage to lower switching costs for the user. The relevance of single-/multi-homing for the competitive assessment of a corporate transaction is closely linked to the (direct and indirect) network effects of the parties' platform or network services. In case of single-homing, the parties' combined operations may not need to show particularly strong network effects to raise competition concerns and vice versa.

37 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 48.

38 Cf. Federal Cartel Office, decision of April 20, 2015, B6-39/15 – *Online Real Estate Platform*; decision of October 22, 2015, B6-57/15 – *Online Dating Platform*.

39 Ibid.

40 Federal Cartel Office and Autorité de la Concurrence, May 10, 2016, Competition Law and Data, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2.

41 Federal Parliament Document (*Bundestags-Drucksache*) BT-Drs. 18/10207, p. 49.

C. Economies of Scale in Combination with Network Effects

Another aspect to be taken into account are economies of scale arising in connection with network effects.[42] Online services are less exposed to capacity restrictions than products or services offered offline. Online platforms and networks often generate high economies of scale, as their setting up and operation have high fixed costs but low variable costs. On the other hand, economies of scale may also bolster specialization and learning processes by the platform operator, which may be difficult to reproduce by market entrants at acceptable costs and/or within an acceptable period of time.

D. Access to Competitively Relevant Data

Pursuant to Section 18(3a) no. 4 ARC, the transaction parties' access to competitively relevant data shall also be reviewed in the course of the dominance assessment. Such access to competitively relevant data must not be confused with the term "competitively relevant information" known from cartel investigations. Instead, this criterion aims at covering competition concerns arising from the ever increasing amount of personal data generated by the use of online and particularly mobile services, which may be further compounded by network effects (big data). Difficulties in reproducing or acquiring personal data of similar breadth and depth may result in high barriers to enter the market and, respectively, in the marginalization of competitors. Nevertheless, the mere control over user data is not a decisive factor for the existence of market power. The FCO has to make a case-by-case assessment including other factors such as the nature of the data collected, their significance for competition and the possibility to duplicate them.

E. Competitive Pressure Due to Innovation Potential

A further factor to be taken into consideration is the competitive pressure generated by high innovation potential. This is of particular relevance in digital markets where innovation cycles tend to be shorter, and innovative newcomers may disrupt or even terminate existing markets and generate new markets. Nevertheless, the abstract innovation potential of the internet and the possibility of disruptive changes in the market are not sufficient to exclude the possible emergence of market dominance in digital markets. Similar to the "old economy," transaction parties will have to plausibly demonstrate that the parties' current market position can (and probably will) be contested in the forecast horizon of 3-5 years usually applied in merger review.

V. CONCLUSION

The most prominent change of the 9th Amendment Package to the ARC, which is already affecting transactions in both the digital as well as the analogue world, is the introduction of a new transaction value-based merger control threshold. Even more lasting effects may arise from the additional criteria that have been introduced for assessing potential dominance of multi-sided markets and platforms. Although these changes to German antitrust law went into force merely six months ago, further changes are already on the horizon. In their exploratory negotiations for a new coalition government, the Christian Democratic CDU/CSU and the Social democrats of the SPD agreed that "a further modernization of antitrust laws with respect to digitalization and globalization is necessary."[43] Germany's former national soccer coach Sepp Herberger once said: "After the game is before the game." This apparently also applies to adapting German antitrust law to the challenges of the digital economy.

42 Section 18(3a) no. 3 ARC.

43 CDU/CSU/SPD, Results of Exploratory Negotiations, Final Version, January 12, 2018 available at: https://www.cdu.de/system/tdf/media/dokumente/ergebnis_sondierung_cdu_csu_spd_120118_2.pdf?file=1&type=field_collection_item&id=12434 (German only).