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Competition Law, Policy and Regulation in the Digital Era

Experiences of the Austrian Federal Competition Authority

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As competition authorities worldwide are currently dealing with very similar challenges in the new digital economy, the following paper highlights the factors that the Austrian Federal Competition Authority ("**AFCA**") believes are of general significance for the successful enforcement of competition law in the digital economy. In this context, we would like to provide a general overview on which of these factors were already implemented in European and Austrian competition law.

1 The current situation

Over the last few years, the emergence and rapid evolution of the "digital economy" have fundamentally transformed economic life, especially the basic understanding of what a "market" is, as well as how many such markets are structured. A look at the largest, most valuable undertakings shows that many corporate groups in the technology and Internet sectors have outperformed the conventional sectors of industry. Today the heavyweights, measured in terms of market capitalisation, are active in particular as e-commerce service providers, digital content providers, as well as the operators of platforms, and other online services such as search and comparison engines or social networks. What these corporations have in common is that they are based on technology and data-driven business models, whose individual aspects often reinforce each other and allow these corporations to advance into further fields of business. The impact of positive network effects[1] and the easy scalability of these business models due to their low marginal costs mean that, once positions of power have been established in these market segments, they are very difficult to contest ("**first mover advantage**").

These developments are also confronting European competition authorities with new challenges. Firstly, they result in a need to analyse how these new markets and the exchange relationships that exist in them function. Secondly, they raise the question whether the existing bodies of rules are sufficient or new or additional sets of legal regulations have to be enacted to counter these novel developments. Numerous competition authorities have already responded to this situation with investigations and studies looking into these issues, e.g. the **E-commerce Sector Inquiry** of the European Commission (**"EC"**),[2] the German Federal Cartel Office's working paper **Market Power of Platforms and Networks**,[3] the document on **Competition Law and Data** published jointly by the German Federal Cartel Office and the French Autorité de la Concurrence,[4] the UK Competition and Markets

[1] The positive network effect is a phenomenon where a good or service becomes more valuable when more people use it.

[2] Cf. https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf and the enclosed detailed working document https://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.

[3] Cf. https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf;jsessionid=266A9EF0F49190CEE05724C49C57B0E5.1_cid378?__blob=publicationFile&v=2.

[4] Cf. https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2.

Authority's **Digital Markets Strategy**[5] and the joint memorandum issued by the competition authorities of the Benelux states.[6]

Furthermore, the legislation includes extensive measures adopted in response to the challenges posed by the digital economy. For instance, a notification threshold based on the **value of the transaction** has been introduced in **Austrian merger control**[7] (as well as in Germany), and is intended, in particular, to enable the AFCA to control the acquisition of cutting-edge start-ups, even if their significance on the market is not yet reflected in corresponding levels of turnover. In addition, with the most recent 10th Amendment to the German Act against Restraints on Competition (ARC) titled **ARC-Digital Competition Act**, the German parliament expressly modernised and tightened the rules against abuse of market dominance, first and foremost in the form of new and far-reaching anti-abuse rules, targeted at "companies with overwhelming importance for competition across multiple markets".[8] With this, the German legislator wishes above all to restrict the market power of platforms like Google, Facebook and Amazon. In Austria, too, an attempt is currently being made to restrict the market power of big tech giants within the Cartel and Competition Law Amendment Act 2021 (Kartell- und Wettbewerbs-Änderungsgesetz 2021, in short: **KaWeRÄG 2021**), which was recently presented.[9]

At EU level, the EC released two new draft regulations in December 2020, one for the Digital Markets Act ("**DMA**") and one for the Digital Services Act ("**DSA**").[10] Both legislative proposals focus on fair competition and the handling of user data. The two main objectives of both the DMA and the DSA are to create a safer digital space in which the fundamental rights of all users

[5] Cf. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf.

[6] Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world, https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf.

[7] Section 9 para. 4 Austrian Federal Cartel Act (KartG) as amended by Federal Law Gazette (Bundesgesetzblatt, BGBl.) I No 56/2017.

[8] Cf. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

[9] See in particular the legislative materials on Sections 4 and 4a Cartel Act; available online at https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00114/fname_948851.pdf.

[10] Cf. EC (2020). Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act); COM/2020/842 final and Proposal for a regulation of the European Parliament and the Council on a Single Market for Digital Services (Digital Services Act; COM/2020/825 final.

of digital services are protected and to establish a level playing field to foster innovation, growth, and competitiveness, both in the European single market and globally.[11]

Nevertheless, European legislators are still at the very beginning of their attempt to address the digital transformation with new legislative initiatives.

2 Areas for action

2.1 Clear objectives

In principle, the goals pursued with the application of competition law to digital markets are the same as in conventional sectors of the economy. First and foremost, the maintenance of functioning competition is intended to create investment incentives that will allow the potential of the digital economy to be exploited to the full for the benefit of consumers. To this end, it is necessary to keep markets open by upholding transparency and removing entry barriers against innovations, and to ensure the equal treatment of all market participants.

In this context, a competition authority has to take an open-minded approach to technological change and progress, but at the same time treat both existing and novel business models with neutrality. It is the forces and mechanisms of a competitively structured market that will ultimately decide whether a particular offer is a success or not. However, transformation processes of this kind have to take place in accordance with clear, fair, uniform and transparent rules that are applied equally to all market participants.

2.2 Resourcing and deployment of funds

As a matter of principle, (competition) authorities will only be able to perform the tasks assigned to them if they are equipped with **adequate staffing and resources**. This is true in particular regarding the need to build up relevant technical expertise, especially forensic expertise, and to put in place the technological infrastructure for the evaluation of large volumes of data. For example, an abuse taking the form of a self-preferencing practice requires an in-depth analysis of the algorithms involved, which requires dedicated technical terms.[12] Therefore, some competition authorities are already specifically addressing digital markets

[11] Cf. https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

[12] Cf. https://www.institutmontaigne.org/en/blog/digital-markets-act-new-role-competition-authorities.

and have specialised departments in place exclusively responsible for digital cases. The UK Competition and Markets Authority, for example, has set up a **Digital Markets Taskforce** to advise the British government on the possible design and implementation of pro-competitive measures for unlocking competition in digital markets.[13]

Pursuant to Article 5 para. 1 Directive 2019/1 (ECN+ Directive)[14] EU member states shall ensure at a minimum that national competition authorities have a sufficient number of **qualified staff** and **sufficient financial, technical and technological resources** that are necessary for the effective performance of their duties, and for the effective exercise of their powers for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). This provision had to be transposed into national law by 4 February 2021.[15] Furthermore, these resources need to be used efficiently. This is to be done by granting competition authorities the **independence to decide how they spend the budgetary funds allocated to them** (Article 5(3)), and **making it possible for them to set their own priorities for their enforcement work** (Article 4(5)).

3 Requirements concerning the legal framework

3.1 Cartels and market abuses

Repeatedly the demand was voiced that competition law provisions ought to be adapted to the circumstances of a changed economic environment. Calls were made for earlier intervention with **competition law instruments**, **real-time supervision of the major technology** and **Internet groups' activities** as well as by taking **corrective measures** as a last resort. Therefore, it was predictable that digital gatekeepers would have to be at the centre of the recent European legislative initiative in antitrust law, and thus also in the Austrian KaWeRÄG 2021.

[13] Cf. https://www.gov.uk/cma-cases/digital-markets-taskforce.

[14] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

[15] Austria is late with the implementation of the ECN+ Directive. The current legislative process on the KaWeRÄG 2021, which largely serves to implement the directive, is scheduled to enter into force in the second half of 2021.

In this context, it has to be noted that existing Austrian competition law regulations are formulated **openly** and **neutrally**. This means they offer a degree of flexibility for application to novel circumstances.

At a very general level, for instance, Article 20 of the Federal Cartel Act stipulates that circumstances are to be judged according to the actual substance of business and not according to its external manifestations (principle of substance over form). Although the new factors concerning the analysis of a dominant position can therefore already be taken into account under the current rules, the Austrian legislator intends that they should also be explicitly mentioned in the competition law amendment currently discussed (Austrian KaWeRÄG 2021) due to the growing importance of digital markets.[16]

This proposed amendment to the Austrian Federal Cartel Act intends to introduce a number of factors to be considered in analysing a dominant position, some of which specifically address the market conditions in digital markets. These include **access to data relevant to competition** as well as **benefits derived from network effects**. In addition, the Austrian Cartel Court would be enabled to determine whether a company in a multi-sided market holds a dominant position.[17]

3.2 Merger Control

In 2017, both Austria and Germany introduced **notification thresholds based on transaction values** into their merger control provisions.[18] Herewith, they took account of the fact that, in the digital economy, an undertaking's value is often no longer measured in terms of its turnover figures, but in terms of a valuable stock of data, high user numbers, or an innovative technology or business idea with a great deal of competitive potential on the market. Financially strong, market-leading corporations in the digital sector regularly take over aspiring (potential) competitors at an early stage of their development in order to integrate such competitors into the market leader's own businesses, alter the acquired corporation's original activities or even discontinue them completely ("**killer acquisition**"). From a competition-policy perspective, such acquisitions may demand preventive scrutiny under

[16] See also the legislative materials on Section 4 para. 1 Cartel Act.

[17] See Section 28a KaWeRÄG 2021.

[18] Section 9 para. 4 Cartel Act - see also the joint Austro-German guidance (the English version is available online at https://www.bwb.gv.at/en/news/news_2018/detail/news/final_joint_guidance_on_new_transaction_value_threshold_in_the_merger_control_has_been_published/).

merger control law, in particular with a view to the protection of the potential for innovation and innovation-based competition on technology markets.[19]

For the time being, however, it does not look as if other jurisdictions within the EEA or the EC will follow Austria and German's lead, and introduce transaction value thresholds. The EC, for example, has chosen a different path in its DMA, by instead of introducing new thresholds, directly requiring gatekeeper platforms to inform the EC about any proposed acquisition in a digital market in the future.[20]

While the Austrian merger thresholds remain untouched by the new KaWeRÄG 2021, there will be changes in the **substantive examination of mergers**:

The KaWeRÄG 2021 intends to introduce the **SIEC test** (*significant impediment of effective competition* test), which also applies in European merger control. The amendment would make it possible to examine whether a merger could also lead to a significant impediment of effective competition aside from a dominant market position.[21] The SIEC test was introduced into European merger control with the **EC Merger Regulation**[22] and has been adopted in identical or similar forms by almost all European Member States. The academic literature suggests that the SIEC test has increased the predictability of merger control decisions for the corporations concerned, and better reflects circumstances on the market.[23] European merger control allows for balancing factors such as the **failing company defence**, the **efficiency defence**, **market entries** and **countervailing market power**, which appear to be an important toolbox regarding the assessment of mergers in digital markets.

For the near future, there is foreseeable development towards more comprehensive merger control, which also considers a kind of a sustainability check. This would make it possible to

[19] Although it appeared that tech start-ups were the primary focus of the new rules, the ambit is wider and the aim was to also apply to other comparable start-ups, like, eg, such in the pharmaceutical field.

[20] See Art 12 para. 1 DMA: „A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules."

[21] It is to be noted, that the legislative materials of the KaWeRÄG 2021 underline that the dominant market position is to remain the central anchor for Austrian merger control. This aspect thereby continues to differ somewhat from European merger control.

[22] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the „EC Merger Regulation").

[23] Duso, T., Gugler, K. and Szücs, F. (2013), "An empirical assessment of the 2004 EU merger policy reform", The Economic Journal, 123(572), F596-F619.

take account of further factors, such as the impacts on consumers or a region. The EC is also currently addressing this issue as part of its **European Green Deal**.[24]

3.3 European digital strategy

The EC is determined to strengthen Europe's digital sovereignty and set standards with a clear focus on data, technology and infrastructure. This so-called **European digital strategy** is, in principle, nothing new in European antitrust enforcement. While many national competition authorities are still at the very beginning of this digital transformation, the EC has tried to take on big tech giants for years. So far, the EU executive body has fined Google about $10 billion for antitrust violations related to its shopping, mobile and advertising services.[25] The last two years, the EC launched numerous competition probes into Apple[26] and Amazon.[27] At the legislative level, the **Online Platforms Regulation**,[28] in particular, as well as the DMA in the future, should provide remedy.

With the Online Platforms Regulation, which has been in effect since 12 July 2020, rules were put in place for operators of online mediation services and online search engines, governing their relationships to their business users. For instance, the form and minimum content of their general terms and conditions, obligations to provide information about particular aspects of providing their services, and dispute resolution mechanisms are now prescribed. The creation of greater transparency and the comprehensive description of services are intended, inter alia, to prevent the arbitrary or discriminatory treatment of business users, for instance by the imposition of restrictions on the provision of services or the discrimination against such users compared to users linked to the platform operator. The provisions of the Online Platforms Regulation are intended to give guidance for the equitable delivery of services of this kind and therefore represented the first steps towards a regulatory framework for the platform economy.

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[24] Cf. https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[25] EC (2017) AT.39740 Google Search (Shopping); EC (2018) AT.40099 Google Android; EC (2019) AT.40411 Google Search (AdSense).

[26] For example, see https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2061.

[27] It is to be noted, that in parallel with the EC and other national competition authorities such as the German Federal Cartel Office, the Italian and the Luxembourgian Competition Authority, also the FCA has started proceedings on an alleged abuse of a dominant position by Amazon in 2019. After negotiations with the competition authorities, Amazon agreed to change its terms and conditions in order to comply with the concerns raised in the investigations. Further complaints are still being investigated by the EC; see https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2077.

[28] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

Nonetheless, the Online Platforms Regulation does not seem to be sufficient. While this regulation mainly provides for **transparency rules,** the new DMA draft of the EC includes **much stricter rules** for so-called **gatekeeper online platforms**.[29]

Similar to the German ARC-Digital Competition Act and the Austrian KaWeRÄG 2021, the DMA intends to ensure a higher degree of competition in the European Digital Markets, by **preventing large companies from abusing their market power** and by **allowing new players to enter the market**.[30] The proposal defines the legislative criteria for the qualification as a gatekeeper.[31] These criteria will be met if a company:

- has a strong economic position, significant impact on the internal market and is active in multiple EU countries,
- has a strong intermediation position, meaning that it links a large user base to a large number of businesses and
- has (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time.

Companies identified as gatekeepers will need to **proactively implement certain behaviour** and will have to **refrain from engaging in unfair behaviour**.[32] Gatekeeper platforms will for example have to

- allow third parties to inter-operate with the gatekeeper's own services in certain specific situations,
- allow their business users to access the data that they generate in their use of the gatekeeper's platform,
- provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper and

[29] The term gatekeeper covers companies that dominate certain (digital) markets to such an extent that their market position is effectively unchallenged by competitors or new market participants. see Article 3 of the DMA.
[30] Aamro, Silva (15th December 2020) https://www.cnbc.com/2020/12/15/digital-markets-act-eus-new-rules-on-big-tech.html. Retrieved 18 May 2021.
[31] See also fn 29.
[32] Cf. https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

- allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform.

Furthermore, Gatekeeper platforms will be prohibited from

- treating services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform,

- preventing consumers from linking up to businesses outside their platforms and

- preventing users from uninstalling any pre-installed software or app if they wish so.

Companies violating the rules of the DMA shall face **penalty payments** of up to **ten percent of the company's total worldwide annual turnover**. As an ultimate sanction the draft also provides for **structural remedies**, e.g. in case of systematic infringements of the DMA obligations to the divestiture (unbundling) of the gatekeeper's business. The EC was designated as the most competent entity to enforce the DMA. Nonetheless, there are some calls for the DMA to decentralise the application of the DMA, along the lines of European competition laws, which can be implemented by national competition authorities since the adoption of Regulation 1/2003.[33] It remains to be seen which way the DMA will venture.

3.4 Procedural law

As hinted at in the previous section, the question of access to the law is essential both for public and for private law enforcement – especially if economically dominant corporations or groups contest such action. The Austrian Federal Cartel Act takes account of this fact by ruling out the reimbursement of legal expenses to a great extent[34] and setting procedural costs in the form of a capped fee.

In its provisions on abuse of market power, the legislator has made (refutable) presumptions concerning the existence of a market-dominant position and/or the abusive nature of the sale of goods below cost price.[35] In these cases, the burden of proof shifts to the economically

[33] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[34] Pursuant to Section 41 Federal Cartel Act, an obligation to reimburse costs is essentially only provided for in cases where the unsuccessful party's action or defence has been frivolous.

[35] Section 4 para. 2 and para. 2a, and Section 5 para. 1 subpara. 5 in conjunction with Section 5 para. 2 Federal Cartel Act.

dominant undertaking. The AFCA holds the view, that any future provisions on groups of cases directed at the digital economy on the national level should be integrated into these existing procedural systems.[36]

Another instrument that in the future might gain in significance on account of the dynamism of the digital economy is **interlocutory relief**. What is central here is the recognition that - once it has been inflicted - damage to the structure of a market can hardly be rectified, and rapid intervention is therefore essential. A first step in this context is the provision of the German and Austrian legislators that the market position of a company operating on a multi-sided digital market can be established in the form of a **limited injunction**.[37] On this basis, the undertaking(s) concerned may quickly be prohibited from anti-competitive behaviour.

In various cases, it may also be necessary to adapt the investigative powers held by competition authorities to the specific challenges of digital markets. Information gathering methods (in particular, requests for the provision of information) have so far primarily been directed at undertakings. However (end-)user groups, and their preferences, views and purchasing behaviour are increasingly becoming the focus of attention in many digital business models. For instance, pursuant to Article 8 ECN+ Directive, the power to demand information also from natural persons has to be transposed into national law. It would be expedient for this to be extended to merger control and sector inquiries too. The option that already exists of bringing in experts to carry out market research is a less chosen approach, but one that would allow information to be gathered more extensively.[38]

4 International and interdisciplinary cooperation

The unease with which the big technology and Internet groups' presence and conduct on the market are viewed is typically due to several causes. While this paper has so far discussed topics in competition law in a wider sense (that is to say cartel and unfair competition law), it is not to be overseen that, in many cases, these topics go hand in hand with other legal issues. In essence, one of the key questions is whether gatekeeper platforms are able to secure themselves unjustified advantages over their competitors in the traditional economy, or undertakings that merely operate at the regional or national levels.

[36] This has already been done in Germany; see Section 18 German Competition Act (GWB).

[37] The Austrian draft provides for the determination of a dominant position, whereas Section 19a para. 1 German Competition Act (GWB) refers to the determination of an "overwhelming importance for competition across multiple markets ", for which a dominant position is a criterion to be taken into account but not a necessary one.

[38] Section 11 para. 2 Austrian Federal Competition Act (WettbG).

In this context, issues in tax and/or state aid law have to be mentioned, especially questions about tax-efficient cross-border corporate structures or the privileged treatment given to some undertakings by the states in which they are established, thereby violating the principle of competitive neutrality. Another central topic relates to the handling of, and compliance with, data protection legislation such as the General Data Protection Regulation ("**GDPR**").[39] After all, many digital undertakings' outstanding positions are founded not least on the gathering, processing, linkage and forwarding of user data.

Some employment law topics also have been raised. For example, the unclear classification of employment relationships (cf. the discussions about "**bogus self-employment**" and the "**gig economy**") or the continued existence of precarious employment conditions. From a commercial law point of view, the classification of certain services and, leading on from this, the question of the requirement for such services to be licensed by the authorities occasionally cause difficulties.

This patchwork of issues makes clear that, at the level of the public authorities, the macroeconomic challenges posed by the digital economy have to be tackled by deepening cooperation and simplifying the exchange of information. In particular, authorities have to make sure there is clarity about which issues are to be dealt with by which procedures. In this respect, it will sometimes be helpful to call on the expertise of other national agencies.

What is true for cooperation at the national level is true just as much for international cooperation. Intensive ad hoc dialogue takes place among competition authorities under the patronage and with the resources of the European Competition Network ("**ECN**") are one example of good cross-border cooperation. Further international fora, such as the International Competition Network ("**ICN**") and the United Nations Conference on Trade and Development ("**UNCTAD**") as well as bilateral cooperation among competition authorities will be key to tackle the global challenges digitisation brings about.

[39] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).