Federal Competition Authority

Proposition Paper Digitalisation and Competition Law

Vienna, 2020

Imprint

Owner, publisher and editor:
Austrian Federal Competition Authority (Bundeswettbewerbsbehörde)
Radetzkystraße 2, 1030 Vienna
Vienna, 2020

Feedback: If you would like to comment on this publication, please e-mail us at wettbewerb@bwb.gv.at.

Contents

- Strengthen the institutional framework
- Further develop existing instruments in cartel law
- Integrate new regulatory instruments harmoniously into existing systems
- Reorient merger control
- Speed up proceedings
- Strengthen the exchange of information and cooperation between authorities

1 The current situation

Over the last few years, the emergence and rapid development of the "digital economy" have fundamentally transformed economic life, the traditional understanding of the market and the structure of numerous markets. A look at the development of the largest, most valuable undertakings shows that many technology and Internet groups have outperformed the traditional sectors of industry. Today the heavyweights, measured in terms of market capitalisation, are active in particular in e-commerce, the provision of digital content, the operation of platforms, and other online services such as search and comparison websites or social networks. What these undertakings have in common is that they are building on technology and data-driven business models, whose individual aspects often reinforce each other and allow these undertakings to advance into further fields of business. The impact of positive network effects and the easy scalability of these business models attributable to their low marginal costs mean that, once positions of power have been established in these fields, they are very difficult to contest ("first mover advantage", "winner takes all").

These developments are also confronting competition authorities with new challenges. This is true, firstly, of the need to analyse how these new markets and the exchange relationships that exist on them function and, secondly, of the question of the applicability of the existing bodies of rules to novel circumstances. Numerous competition authorities have already responded to this situation with investigations and studies that have looked at these issues. As examples, mention may be made here of the European Commission's E-commerce Sector Inquiry,[1] the German Federal Cartel Office's working paper *Market Power of Platforms and Networks*,[2] the document on *Competition Law and Data* published jointly by the German Federal Cartel Office and the French Autorité de la Concurrence,[3] the UK Competition and

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

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

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

Markets Authority's *Digital Markets Strategy*[4] and the joint memorandum issued by the competition authorities of the Benelux states.[5]

The legislation too includes piecemeal measures adopted in response to the challenges of the digital economy. For instance, a notification threshold based on the value of the transaction has been introduced in Austrian merger control[6] (as well as in Germany), and is intended, in particular, to make it possible 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 to this, with the most recent Ninth Act Amending the Act against Restraints on Competition, the German parliament expressly clarified that, for the purposes of controlling abusive practices, markets relevant under cartel law may also exist when the service in question is provided free of charge, and explicitly laid down specific criteria for the identification of market dominance in areas related to the digital economy.[7] At the level of the European Union, two pieces of legislation specifically tailored to the patterns of behaviour that occur in the digital economy have been adopted: the Geo-blocking Regulation[8] and the Online Platforms Regulation.[9]

---

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

[5] *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.

[6] § 9 para. 4 Austrian Federal Cartel Act (KartG) as amended by *Federal Law Gazette* (*Bundesgesetzblatt*, *BGBl.*) I No 56/2017.

[7] Section 18 German Act against Restraints of Competition (GWB) as amended by the Ninth Act Amending the Act against Restraints of Competition of 1 June 2017 (*Federal Law Gazette* (*Bundesgesetzblatt*, *BGBl.*)) I, p. 1416).

[8] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0302&from=EN.

[9] 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, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN.

2 Areas for action

Against this background, the following section discusses the factors that are also of significance for the successful enforcement of competition law in the digital economy.

2.1 Clear objectives

In principle, the aims pursued with the application of competition law to digital markets are the same as in conventional sectors of the economy: the maintenance of functioning competition is intended to create the incentives for investment that will allow the digital economy's potential 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 ultimately decide whether a particular offer meets with success or failure. However, transformation processes of this kind have to take place in accordance with clear, fair, uniform, transparent rules that are applied equally to all market participants.

2.2 Resourcing and deployment of funds

As a matter of principle, it is to be noted that (competition) authorities will only be able to perform the tasks assigned to them if they possess **adequate staffing and resources**. This is also true in particular of the need to build up relevant **technical expertise, especially forensic expertise**, and put in place the technological infrastructure for the evaluation of large volumes of data.

For the application of Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU), the Member States are obliged by Article 5(1) Directive 2019/1 (ECN+

Directive),[10] which is to be transposed by 4 February 2021, to ensure their national competition authorities have the staff, and the financial, technical and technological resources to carry out these tasks. Furthermore, it is also to be ensured that these **resources** are 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)).

These ideas and fundamental principles are also to be applied expediently to those areas of enforcement that do not fall directly within the scope of Directive 2019/1, primarily **national merger control**. Here, a **critical evaluation of the existing notification thresholds** and criteria for intervention should make it possible for competition-relevant circumstances to be examined in a better targeted fashion (on this point, see the discussion further below).

2.3 Requirements concerning the legal framework

a.) Cartels and market abuses

Again and again the demand is to be heard in the ongoing discussions that competition law provisions ought to be adapted to the circumstances of a changed economic environment. Calls are made for earlier intervention with competition law instruments, real-time supervision of the major technology and Internet groups' activities and, as a last resort, the option of taking corrective measures.

On this point, it is initially to be noted that the existing competition law rules are, in principle, formulated openly and neutrally. This means they definitely offer a degree of flexibility for application to novel circumstances, even if the legislature that originally adopted them is unlikely to have had this aim in mind.

[10] 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.

At a very general level, for instance, § 20 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**).

Similarly, § 4 para. 1 subpara. 2 Federal Cartel Act also allows **broad scope for discretion** when it comes to the assessment of whether an undertaking has a dominant market position, since (all) circumstances that restrict market entry for other undertakings are to be taken into consideration. Here, it is easily possible for the assessment to be informed by all those factors, such as network effects, switching barriers, access to user data etc., on which the position of the major technology and Internet groups is founded. The general clause of § 5 Federal Cartel Act (like Article 102 TFEU) also prohibits any abuse of a position of this kind, irrespective whether it is committed in an analogue or digital context. What is decisive is that the concrete patterns of behaviour are likely to influence the structure of a market on which competition is already weakened by the very presence of the undertaking in question and, as a result of the use of methods that are not consonant with the methods of normal competition in products or services, these patterns of behaviour are likely to hinder the maintenance of the competition that still exists on the market or its development.[11]

The Commission Notice on the **definition of relevant market**[12] may also foreground recognisably traditional product and service markets, with a focus on market actors' pricing decisions, but also refers to other crucial factors such as entry barriers or customers' capacity to react. All this is done with a view to the main purpose of market definition, namely the systematic identification of the competitive forces that participant undertakings have to contend with. In principle, there is therefore nothing that stands in the way of consideration being given to the specific circumstances of the digital economy.

It is therefore likely that, in many cases, the practical difficulties that arise when the existing provisions are applied result less from the lack of appropriate instruments than the fact that, in the absence of precedents, the concrete enforcement pathways are still not yet signposted to the same extent as for traditional situations. Far more justificatory effort is therefore usually required in order to persuade the adjudicating

[11] Cf. the established case law of the Austrian Supreme Court of Justice (OGH) acting as the Supreme Cartel Court (KOG), RIS-Justiz RS0063530.

[12] Commission Notice on the definition of relevant market for the purposes of Community competition law, *OJ C* 372/5, 9 December 1997.

courts of the evidence that an infringement has been committed in these scenarios as well. In this context, the **inclusion of exemplary model situations** in statutory provisions (as has been done, for instance, in Section 18 German Restraints of Competition Act) or soft-law instruments (e.g. Commission notices) might help to facilitate, and speed up, the accumulation of practical experience of applying the legislation, even though it would not in any way modify the substance of the existing rules.

b.) Merger control

With the introduction of notification thresholds based on transaction values into merger control, account was to be taken 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 undertakings 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 undertaking's original activities or even discontinue them completely. From a competition-policy perspective, such acquisitions may demand preventive scrutiny under merger control law, in particular with a view to the protection of the potential for innovation and innovation-based competition on technology markets.

Even though it is still too early for a conclusive assessment of the Austrian arrangements, initial conclusions can be drawn from the experience gained to date. On the one hand, it is to be remarked that the new notification threshold has not primarily picked up the transactions for which it was intended. This may also be a consequence of the fact that so many deals exceed the turnover-based thresholds that have been set anyway, particularly because **there is no second, domestic threshold**. On the other hand, the question also arises of whether, and to what extent, the Austrian competition authorities appear especially well-suited to carry out the substantive examination of cases of this kind that involve transactions of global significance. In many such cases, the undertakings concerned and their immediate customer bases are domiciled outside Austria or indeed the EEA. Even if the criterion of "substantial domestic operations" is satisfied, the extent to which the Austrian market is affected is then merely secondary or indirect compared to the overall context of these transactions. One solution is supplied here by the **referral system** of

the Merger Regulation,[13] in particular Article 22, according to which a concentration that is notifiable under the law of one or more Member States may, subject to certain preconditions,[14] be examined by the European Commission.

Certainly, any future evaluation should look at **improving the interplay between the various notification thresholds** and how to increase their precision. Ultimately, what is also important here is the efficient deployment of resources, that is to say relieving the competition authority of the burden of dealing with evidently unproblematic proposed concentrations, so that it can concentrate on the significant cases that genuinely raise competition concerns. It would also be desirable for national merger control to be better integrated into a Europe-wide regime. It remains to be seen, in particular, whether other jurisdictions within the EEA or the European Commission will follow Austria and Germany's lead, and introduce transaction value thresholds.

Finally, thought should also be given to a **transition from** the material criterion of the **market dominance test**[15] to the **criterion of the significant impediment to effective competition (SIEC) test**[16] for the examination and prohibition of concentrations in merger control. The SIEC test appears better suited as a means of reflecting and assessing situations in which it is less a matter of undertakings directly taking over current or future market shares than the establishment of parameters that favour or consolidate positions of power with prejudicial effects on competition. In this respect, against the background of the multimarket commercial strategies that are frequently to be observed in the digital sector, what is at stake may, in particular, be the management of, and influence over, the innovation process, as well as incentives to obstruct or close off access to the market or customers, and the capabilities to take action of this kind.

The SIEC test was introduced into European merger control with Regulation (EC) 139/2004 (revised Merger Regulation) and has in the mean time been adopted in identical or similar forms by all the European Member States except Italy, Luxembourg and Austria. The academic literature suggests that the SIEC test has

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

[14] Referral requires a request from the authority of (at least) one Member State in which the concentration is notifiable. Substantively, the concentration must affect trade between the Member States, and threaten to significantly affect competition in the Member State that submits the request.

[15] § 12 para. 1 subpara. 2 Federal Cartel Act; a merger is to be prohibited if it is to be expected that a dominant position on the market will be established or strengthened due to the merger.

[16] Cf., for instance, Article 2(2) and (3) Merger Regulation.

increased the predictability of merger control decisions for the undertakings concerned, and better reflects circumstances on the market.[17] European merger control allows for balancing factors such as the failing company defence, the efficiency defence, market entries and countervailing market power, which now tend to be cited by those who advocate concentrations in Austrian merger control proceedings, and are taken into consideration with other factors in the market dominance test, since they relate to the actual substance of business (§ 20 Federal Cartel Act) in the circumstances on the market. In this connection, however, it would appear expedient to make it clear that the decisions delivered by the European Court of Justice (ECJ) and the guidelines that have been derived from those decisions are directly applicable to Austrian merger control.

Furthermore, a development towards more comprehensive merger control is to be considered which, as a kind of a "sustainability check", would also make it possible to take account of further factors, such as the impacts on consumers or a region.

c.) Fair trading law

With the **Online Platforms Regulation**, which will take effect from 12 July 2020, rules will be put in place for the 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 the provision of services, and dispute resolution mechanisms will be prescribed. The creation of greater transparency and the comprehensive description of services are intended, among other things, 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 therefore set out guidance for the equitable delivery of services of this kind. Conversely, any deviation from, or contravention of, these provisions may be deemed to be an unfair commercial practice. On account of the typical economic balance of power in this sector, the rules in question will apply for all operators of the specified online services, and not merely for undertakings that are dominant on the market. In view of this intention, the provisions are therefore comparable to those on "good business conduct" in the **Austrian Local Supply Act**

[17] 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.

(NVG)[18] and the explanatory notes about them in the *Guidance for fair conduct in business* published by the Austrian Federal Competition Authority (BWB).[19] This legislation too prohibits behaviour by undertakings that is likely to endanger competition on the merits – although it falls below the threshold of abuse of a dominant market position. The procedure before the Cartel Court regulated in the Federal Local Supply Act could therefore be taken as the point of departure for the provisions to be adopted for the national enforcement regime of the Online Platforms Regulation. Since this procedure entails cases being referred to non-contentious proceedings, it allows the reimbursement of legal expenses by the unsuccessful party to be ruled out (§ 7 para. 1 NVG), while the modified rules on court fees (§ 7 para. 8 NVG) allow the requirements imposed by procedural law to be relaxed for official and private applicants.

In the interests of completeness, the point may be made that many of the topics addressed here for the B2B sector, in particular concerning obligations to provide information, unfair commercial practices or dispute resolution mechanisms, are similarly relevant for undertakings' relationships to consumers. There is a large number of acts that address this issue at the European level, in particular directives that are transposed into the various national legal systems. By way of example, mention may be made of the Electronic Commerce Directive,[20] which has been transposed by the Austrian E-Commerce Act,[21] or the Unfair Commercial Practices Directive,[22] which has been transposed by the Austrian Federal Act Against Unfair Competition.[23] At the same time, the Consumer Protection Cooperation Regulation[24]

[18] §§ 1 to 3 Federal Act on Improvement of Local Supply and Competitive Conditions.

[19] https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB-Guidance_Fairness_in_business.pdf.

[20] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L* 178/1, 17 July 2000.

[21] Federal Act Governing Certain Legal Aspects of Electronic Commercial and Legal Transactions, *Federal Law Gazette* I No 152/2001 as amended by *Federal Law Gazette* I No 34/2015.

[22] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ L* 149/22, 11 June 2005.

[23] Federal Act Against Unfair Competition, *Federal Law Gazette* No 448/1984 as amended by *Federal Law Gazette* I No 109/2018.

[24] Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *OJ L* 364/1, 9 December 2004.

and the Consumer Protection Cooperation System (CPCS) created by this legislation[25] facilitate the prosecution of cross-border contraventions of consumer law.

d.) Procedural law

As hinted at in the previous section, the question of access to the law is essential both for public and private law enforcement – especially if such action is contested by economically dominant undertakings or groups. The Federal Cartel Act takes account of this fact (in ways similar to the NVG) by ruling out the reimbursement of legal expenses to a great extent[26] and setting procedural costs in the form of a capped fee.

In its provisions on abuse of market power, the legislator has posited (refutable) presumptions concerning the existence of a market-dominant position and/or the abusive nature of the sale of goods below cost price.[27] In these cases, the burden of proof is shifted onto the economically dominant undertaking.

Any future provisions on groups of cases that are typical for the digital economy should be integrated into these existing procedural systems. It seems justified to use the **device of the reversal of the burden of proof** (potentially in combination with instruments of interlocutory relief; see immediately below) in particular where there appears to be an abusive or unfair pattern of behaviour, it is difficult for an applicant to reconstruct what has been going on within an undertaking, or official investigations rapidly come up against natural or technical limits. Here, it would be a matter for undertakings to draw on the data they have at their disposal in order to explain why, contrary to its outward appearance, a particular practice or pattern of behaviour does not have any anti-competitive effects.

Another instrument that might gain in significance in future on account of the tremendous 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. Although the preconditions for the granting of an interlocutory injunction are formulated

[25] The revised version of Regulation 2017/2394, which has been in force since 17 January 2020, further expands this system and explicitly refers to the necessity of effective law enforcement in the digital environment.

[26] Pursuant to § 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.

[27] § 4 para. 2 and para. 2a, and § 5 para. 1 subpara. 5 in conjunction with § 5 para. 2 Federal Cartel Act.

relatively broadly in § 48 Federal Cartel Act – for instance, it is enough for a court to find that the conditions for the termination of an infringement are fulfilled, and there is no necessity to demonstrate an impending threat of irreparable damage –, the experience gained to date shows that, especially in cases with economically or technically complex circumstances, it has not been possible for proceedings to be speeded up sufficiently. Here, it is incumbent upon Parliament to tighten up the law and make it easier for the adjudicating courts to take decisions, for example by **introducing time limits for the delivery of decisions and/or presumption rules**.

In various cases, it may also be necessary to adapt the investigative powers held by competition authorities to the specific challenges of digital markets. While information gathering methods (in particular, requests for the provision of information) have primarily been directed at undertakings to date, (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 from natural persons as well is to be provided for in 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 strongly targeted approach, but one that would allow information to be gathered more extensively.[28] Corresponding budgetary provision would need to be made for this in future.

2.4 International and interdisciplinary cooperation

The unease with which the big technology and Internet groups' presence and conduct on the market are viewed is typically inspired by several sources. While this paper has so far discussed topics in competition law in a wider sense (that is to say cartel and fair trading law), it is not to be overseen that, in many cases, these topics go hand in hand with other legal issues. In essence, everything revolves around the question of whether the actors that have been mentioned 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. It may not be competition authorities' job to engage with or resolve these aspects of the matter

[28] § 11 para. 2 Austrian Federal Competition Act (WettbG).

but, as factors that influence an undertaking's market position, they may certainly inform its examination under cartel law.

In particular, mention is to be made in this connection of issues in tax and/or state aid law, especially questions about tax-efficient cross-border corporate structures or the privileged treatment given to some undertakings (for tax purposes) by the states in which they are established. Another central topic relates to the handling of, and compliance with, data protection legislation such as the **GDPR**.[29] 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** are also to be addressed here, such as 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 too, 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.

It will be clear from this patchwork of issues 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, the authorities have to rapidly make sure there is clarity about which issues are to be dealt with by means of which procedures. In this respect, it will sometimes be helpful to be able to call on the expertise of other agencies.

What is true for cooperation at the national level is true just as much for international cooperation, first and foremost European cooperation. Intensive ad hoc dialogue takes place among competition authorities under the auspices, and with the resources, of the **European Competition Network** (ECN). Yet interdisciplinary cooperation should be expanded and consolidated at this level as well. International cooperation will be indispensable if the global challenges faced in this sector are to be overcome.

[29] 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).

Austrian Federal Competition Authority
Radetzkystraße 2, 1030 Vienna
+43 1 245 08 - 0
wettbewerb@bwb.gv.at
bwb.gv.at