

/ Digital economy and antitrust law – challenges, legal issues, need for EU action?

GRUR meets Brussels Workshop

Towards a connected Digital Single Market – what about a new ‘industrial data protection right’ for companies?

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/ Overview

- EU agenda: create a “Digital Single Market” in Europe to maximize the growth potential of the digital economy.
- Specifics of markets within the digital economy:
 - Markets are very innovative and differ from „classic“ markets, e.g. no (monetary) charges for consumer services.
 - Markets are often very fast-paced or even disruptive, SMS v. WhatsApp-Messages.
 - Innovation is beneficial as it increases dynamic efficiencies. However, it is difficult to measure these gains.

/ A few examples of challenges for antitrust law

- Art. 102 TFEU and merger:
 - How to assess big data within the context of market power?
 - How to determine markets for goods sold free of monetary charge (e.g. markets involving multi-sided platforms)?
 - How to calculate market shares or market power in such markets?
 - Should there be more thresholds in merger control to ensure antitrust scrutiny (e.g. WhatsApp/Facebook)?
- Art. 101 TFEU:
 - New digital business models make distinction between vertical and horizontal cooperation more difficult.
 - How to deal with new forms of restrictions (e.g. geo-blocking)?

/ EU actions required (1)?

Digitalization triggers new questions, but does not require significant legislative modification, because:

- EU law is sufficiently abstract to tackle new issues, e.g. in a more connected industry SEPs will become more important. ECJ clarified the impact of antitrust on SEPs (FRAND problems remain as of now).
- „Soft-Law“ (e.g. Guideline) are a good tool to offer additional support and provide more legal certainty.
- Sufficient cases on national and EU level to „test“ new issues and create guidelines, e.g. Facebook investigation by German Federal Cartel Office.

/ EU actions required (2)?

Important:

- EU-wide solution is preferential to a national and thus fragmented solution.
- In order to set good precedents, the EU-Commission has to ensure that it truly decides all cases within ECN framework that raise novel legal questions.
- No need for „more economics“ on a case by case basis, because it is too difficult and costly to assess dynamic efficiencies, however, more need of economics to:
 - better understand the new markets in general,
 - rethink helpful existing tools (for example, SSNIP Test will not work if consumers do not pay for services).

/ EU actions required (3)?

- Cartel authorities should prioritize cases dealing with fast-paced digital markets.
- Future enforcement activities should pay particular attention to market barriers. If platform economy presents major innovation opportunities for undertakings to develop new business models, access is crucial and unjustified barriers are harmful. The same holds true for access to Big Data. An EU-wide approach, stating exactly under which circumstances access has to be granted, is necessary.