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Co-operative Antitrust in Remedy Design – Note by Germany

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Germany

1. Introduction

1. Simply identifying anti-competitive practices does little to protect competition. Effective remedies are crucial to undo the harm caused by anti-competitive conduct and prevent it from occurring again. However, designing remedies, particularly those intended to address the effects of infringements in highly technical markets, is not straightforward.

2. Markets are becoming increasingly complex, and digital markets in particular are constantly evolving and changing. Especially when dealing with large tech companies or digital services of any kind, competition authorities usually face substantial information asymmetries. This is due to the complexity of the markets and the types of abuse associated with them, which tend to originate in the design of the product or the structure of the business model and often go beyond contractual arrangements. These practical difficulties are making the work of competition enforcers increasingly challenging.

3. When designing remedies, it is important to ensure that the operative part of the decision is as precise as possible, while at the same time also making sure that the provisions cannot be easily circumvented. Competition authorities need to strike the right balance between proportionality and effectiveness. In addition, possible interdisciplinary intersections with data protection rules and other regulations beyond competition law, e.g. the Digital Markets Act (DMA), or other sector-specific regulations need to be considered. At the same time, it must be kept in mind that the longer it takes to intervene, the harder it is to restore competition.

4. Under these circumstances, coordination and cooperation with the parties involved and – where appropriate – with other market participants, authorities and experts is crucial for understanding the market dynamics, developing effective remedy proposals and ensuring their sound implementation.

5. This contribution aims to share the Bundeskartellamt's experience in this area, using four digital antitrust proceedings as examples. While describing these proceedings, this paper will also highlight the difficulties the case teams encountered in designing remedies, as well as the approach they took to overcome these difficulties. In doing so, this paper will focus on the cooperative aspects relevant to this working group discussion.

2. Remedy design in digital cases

6. When dealing with multisided markets in the digital world, remedies must take into account the impact on each side as well as the feedback effects between them. Speed is even more important in these proceedings as market power is more difficult to reverse in multisided markets due to network effects and the risk of market tipping. The pace of change is also faster, making even mid-term developments difficult to predict.

7. For more than 15 years, the Bundeskartellamt has been actively conducting proceedings focusing on the digital economy. Its investigation methods are continuously modernised and adapted. Furthermore, the Bundeskartellamt has been recruiting more data scientists and IT experts to help with data analytics. They are supported by internal specialist units such as the Chief Economist Team and the IT Forensics Unit.

8. Although proceedings involving data-related remedies are often complicated and resource-intensive, the Bundeskartellamt has successfully concluded several landmark proceedings against large digital companies. It also continues to expand its expertise in this area by engaging in regular dialogue with external experts and stakeholders. For example, in June this year, the Bundeskartellamt met with selected stakeholders in an expert group to discuss competition issues relating to the use of artificial intelligence (AI).

2.1. The Bundeskartellamt's Facebook case

9. The Bundeskartellamt's Facebook case addressed the company's data collection and processing practices as well as choice options provided to users in this regard. The Bundeskartellamt held that Facebook's practices of making the use of its services conditional on data processing across services without obtaining valid user consent constituted an exploitative abuse with exclusionary effects. This decision was based on national competition law resulting in the Bundeskartellamt issuing an order to terminate the infringement of competition law in 2019.

10. One of the more complex questions the Bundeskartellamt had to deal with in this proceeding was how the requirement not to combine data without valid user consent could be implemented in practice.

11. In order to overcome the information asymmetries, the Bundeskartellamt communicated closely with the company from the beginning, requiring Facebook to submit an initial proposal on how the infringements could be reasonably addressed. This approach has proven useful, especially in antitrust proceedings concerning technically complex issues where market tests are particularly challenging. It helps to find solutions that can be effectively implemented in practice, acknowledging that the company has superior case-specific technical and business knowledge. It can also help to avoid, or at least reduce, the risk of multiple rounds of protracted exchange.

12. In order to allow for an in-depth understanding of Facebook's proposal, the case team at the Bundeskartellamt consisted of colleagues particularly familiar with the legal frameworks for data protection and consumer protection as well as internal IT experts with appropriate experience.

13. Following the initial proposal, the Bundeskartellamt continued to engage in detailed talks with Facebook regarding the implementation of the decision in order to understand the specific changes Facebook was planning to make and to see whether these changes would achieve the desired result. All this occurred despite pending litigation. When Facebook introduced a new Accounts Center to address one of the major issues in the implementation process, the Bundeskartellamt considered the first version of this solution to be insufficient. It neither informed customers about their options in a neutral way nor presented all relevant pieces of information in a transparent and easily accessible form. Following another round of intensive talks, Facebook made significant changes to the Accounts Center.

14. As this new Accounts Center addressed only some of the data processing practices, the Bundeskartellamt discussed a number of further issues with Meta resulting from its 2019 decision. As a result, Meta introduced "cookie" settings that allow users to decide how their Facebook data are combined with data from third-party websites or apps using the Facebook business tools or Facebook Login. These changes, which were very important for users and for Meta alike, also required intensive debates.

15. In its Facebook proceeding, the Bundeskartellamt worked particularly closely with the competent German data protection agencies. In addition, the Bundeskartellamt was

supported on technical issues by the Federal Office for Information Security (Bundesamt für Sicherheit in der Informationstechnik, BSI). The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband, vzbv) was also involved in the proceeding as a third party.

16. In October 2024, the negotiated package of individual measures was deemed sufficiently suitable to allow the Bundeskartellamt to terminate its enforcement action and close the case against Meta/Facebook at its discretion. The results achieved may also serve as a basis for other authorities that have effective and appropriate tools at their disposal to achieve further improvements for users of Meta services in the European Union, if necessary. For instance, the European Commission now has the power to take action against the practice of combining data across different services of so-called gatekeepers if users have not given their valid consent; this is set out in Article 5(2) of the DMA, which draws on the issues underlying the Bundeskartellamt's Facebook decision. In applying the General Data Protection Regulation, data protection authorities can check the extent to which consent is in fact freely given and whether data processing, including within individual services, is excessive. Consumer protection rules could also be applied to how Meta designs its user dialogues.

17. Meta has withdrawn the appeal pending before the Düsseldorf Higher Regional Court (OLG Düsseldorf) against the Bundeskartellamt's decision. The decision is thus final.

2.2. The Bundeskartellamt's Google cases: Google Data and Google Automotive/Google Maps Platform

18. In the Google cases, the Bundeskartellamt made use of another legal instrument introduced in early 2021: Section 19a of the German Competition Act (GWB). In a first step, the Bundeskartellamt established in December 2021 that Google is of "paramount significance for competition across markets" – meaning that Google is subject to Section 19a GWB. In a second step, the Bundeskartellamt opened investigations relating to specific practices employed by Google. One of these concerned the processing of personal data across different Google services, which involves combining personal data from one Google service with personal data from other Google services or non-Google sources, or using these data in Google services which are provided separately.

19. The economic theory of harm applied in the Bundeskartellamt's Google data case was very similar to that used in the Facebook proceeding. According to the Bundeskartellamt's preliminary assessment in the Google data case, Google did not give end users sufficient choice as to whether, how and for what purpose their personal data are processed across services. The Bundeskartellamt identified various deficiencies: the setting options lacked granularity as well as sufficient transparency and, in some cases, Google users were not given the option to choose at all. When creating a new Google account, the options for consent and rejection were not equivalent.

20. Following intensive discussions with the Bundeskartellamt, Google offered commitments that were declared binding by the Bundeskartellamt. Their key principle is that Google has to offer users choice options that allow them to make free, specific, informed and unambiguous decisions about the use of their personal data across services. However, Google is not required to offer users such a choice if their data are not (or no longer) processed across services and this is made explicitly clear in Google's data processing terms.

21. The Google data decision complements the DMA, which entered into force during the proceeding and contains obligations for the cross-service processing of data relating to core platform services in Article 5(2) DMA. The Bundeskartellamt worked closely with the European Commission to facilitate an effective interplay between competition law and the DMA. As a result of this cooperation, the Google data decision extends the scope of Article 5(2) DMA to apply to combinations of Google services with a significant user base in Germany. The commitments do not cover the core platform services listed in the European Commission's designation decision (namely Google Shopping, Google Play, Google Maps, Google Search, Youtube, Google Android, Google Chrome and Google's online advertising services). Instead, they cover the processing of data across services involving more than 25 other services (including Gmail, Google News, Assistant, Contacts and Google TV). Furthermore, the requirements for the choice options to be deemed sufficient pursuant to the Bundeskartellamt's decision are essentially the same as those under the DMA. The commitments therefore make it possible for Google to proceed in a uniform manner and introduce a choice screen that meets the requirements of both regimes. The Bundeskartellamt and the European Commission are committed to continuing their cooperation with regard to implementing the commitments and applying Article 5(2) DMA.

22. This proceeding is a good example of beneficial cooperation between competition authorities and demonstrates the effectiveness of a well-functioning mechanism that ensures coherence across regimes and promotes competition and fair markets in the digital sector. During the proceeding, the Bundeskartellamt also exchanged information with the German data protection authorities.

23. Similarly, in the Google Automotive and the Google Maps Platform case, Google offered commitments to end several restrictions, which the Bundeskartellamt declared binding.

24. Google Automotive Services, consisting of Google Maps, Google Play and Google Assistant, is an offering enabling the use of such services in in-vehicle infotainment systems. According to the commitments, Google will license the services as separate stand-alone versions in the future and remove certain contractual provisions, which create incentives for customers to use Google services, including provisions on default settings.

25. With regard to Google Maps Platform, the Bundeskartellamt found in its preliminary assessment that a large number of businesses, including logistics, mobility and delivery services providers, use B2B maps services. However, combining Google's various maps services with third-party services was only possible to a limited extent. Google committed to remove contractual provisions that restrict the combined use of Google's map services and those of other providers (such as HERE, Mapbox or TomTom).

26. To ensure the correct implementation of the commitments with regard to Google Automotive Services, the Bundeskartellamt decided to involve a monitoring trustee. This approach has proven particularly useful in cases where the remedies are complex, require time for their implementation, and go beyond the removal of a contractual clause or one-off termination rights for customers.

27. The implementation of commitments in the Google Automotive Services case included the development or adjustment of services. More precisely, Google committed to provide APIs and standalone services which still had to be developed. In order to fulfil these commitments regarding the development of standalone services, Google had to achieve three consecutive milestones within a given period of time: developing a prototype version, an integration ready version and a series production version.

28. To implement these commitments, Google appointed a monitoring trustee in accordance with the Bundeskartellamt. Although appointed by Google, the monitoring

trustee is not bound by Google's instructions and reports to the Bundeskartellamt. In addition, the trustee serves as a point of contact for market participants that suspect Google's non-compliance with the commitments. If necessary, the monitoring trustee may appoint a technical expert. In order to oversee Google's implementation of the commitments, both the trustee and, where necessary, the technical expert have access to confidential information. The implementation of the commitments in the Google cases is ongoing.

2.3. The Bundeskartellamt's Deutsche Bahn case

29. The Bundeskartellamt's recent proceeding against Deutsche Bahn AG (DB) concerned, among other things, the requirement for access to real-time data.

30. DB is the state-owned German incumbent rail operator and has a dominant position in the market for ticketing applications for rail passenger services in Germany. Third-party mobility platforms also use DB applications to issue train tickets for multimodal journeys involving different means of transport. In its decision of 26 June 2023, the Bundeskartellamt held that DB was violating competition law by abusing its market power in relation to mobility platforms. The Bundeskartellamt ordered DB to change several of its practices and contractual clauses and to grant competitors access to real-time data. The starting point for this proceeding was that third-party mobility platforms cannot function without including DB's offerings and real-time traffic data, which are generated and controlled by DB as the owner of the majority of the German rail network. Relevant information includes delay data for passenger rail services, data on train cancellations or cancelled or additional stops, reasons for delays or cancellations, additional runs or replacement transport services, up-to-date information on platforms or platform changes, as well as data on major disruptions.

31. DB offered several sets of remedies. The Bundeskartellamt discussed each of these in detail with the company and other market participants, who were also asked to evaluate DB's proposals as part of a market test. However, as the commitment proposals did not dispel the Bundeskartellamt's concerns and no agreement could be reached with DB despite all efforts, the Bundeskartellamt ultimately terminated the proceeding by issuing a prohibition decision and imposing remedies on DB.

32. One of the most technically challenging and crucial questions regarding the remedies' design was how to impose a data access obligation that would ensure a level playing field between DB and third-party mobility platforms. Real-time data only offer genuine added value for journey optimisation, travel information and other uses if they reflect the current situation. Against this background, it was important to formulate remedies that would not only stipulate access to relevant data, but also determine the extent and manner of such access. The Bundeskartellamt furthermore had to establish how to calculate an adequate remuneration for developing the necessary interfaces to grant access and provide additional services (help desk, technical support, etc.). In this regard, the results of the market test as well as the input offered by interested third parties were essential.

33. The key principle applied by the Bundeskartellamt was that providers in the integrated mobility services market must not be placed at a disadvantage compared to DB. In terms of quality, this meant that the data must match the real-time data used by DB itself in its own digital distribution and information channels. Furthermore, the data must be transmitted electronically and continuously via an interface or an equivalent technical alternative that matches the one used by DB for its own services.

34. Due to a lack of transparency regarding the quality of the data access for mobility platforms, the Bundeskartellamt is closely monitoring the implementation process. An

integral part of this process is that DB is required to regularly report to the Bundeskartellamt on the implementation progress.

35. In August 2024, DB concluded its first agreements with mobility platforms regarding access to real-time data after a preliminary court ruling had upheld the Bundeskartellamt's decision regarding the data-related remedies. Building on this access, mobility platforms can now provide passengers with live information on delays or train cancellations during their journey, recommend alternative connections or even propose adjusting travel plans by using different means of transport. The Bundeskartellamt continues to closely monitor the implementation of the remedies. Further litigation is still pending.

36. While the DB proceeding was ongoing, the EU Passenger Rights Regulation entered into force. The Bundeskartellamt's competition law decision imposes obligations on DB as a dominant company which go beyond those laid down in the EU Passenger Rights Regulation applicable to all rail companies. DB has to grant access to real-time data from third-party rail operators and is responsible for meeting the additional commercial and technical requirements for transmitting the data. Therefore, the proceeding is another good example of the positive interaction between different regulatory regimes. During the proceeding, the Bundeskartellamt also cooperated closely with the European Commission.

3. Conclusion

37. Enforcers have learned from past proceedings that the devil is often in the detail. Questions such as "What constitutes a free and informed choice?" and "How should adequate renumeration for granting access to data be calculated?" can be difficult to answer, and the solutions need to be case-specific. To achieve the best possible results, competition authorities must not only strengthen their own expertise. Where necessary, they also have to cooperate with the parties involved, other stakeholders and each other to ensure that their complementary tools and jurisdictions are used wisely and without avoidable conflicts. In addition, interdisciplinary intersections with data protection and other regulations beyond competition law should be kept in mind.

38. Requesting remedy proposals from the parties at an early stage of the antitrust proceedings can help to avoid or mitigate the risk of lengthy discussions. Furthermore, compliance with such remedies should be monitored, where necessary. Although this is an onerous and resource-intensive process, it is well worth the effort. It should be noted that especially online platforms often operate at different levels within an ecosystem, and can achieve the same anti-competitive result by pulling different levers. Appointing a monitoring trustee can help to ensure that remedies are not only implemented but also achieve their intended effect.

39. Enforcing competition law in technically complex cases, especially in the digital world, can be challenging. However, it is possible to overcome existing information asymmetries and to design remedies that are effective and fit for purpose.