MARKENVERBAND

POSITIONSPAPIER DES MARKENVERBANDES

SHAPING COMPETITION POLICY IN THE ERA OF DIGITIZATION

I. Introduction and General Remarks

1 Markenverband represents the interests of brand-oriented businesses in Germany. Founded in Berlin in 1903, the federation has approximately 400 members, which in Germany account for a turnover of more than 300 billion euros in branded consumer goods and around 200 billion euros in the services sector. This makes Markenverband the largest federation of this kind in Europe.

Member companies come from sectors including foodstuffs, pharmaceuticals, fashion and textiles as well as telecommunications. Members include Beiersdorf, Hugo Boss, Coca-Cola, Deutsche Bank, Deutsche Post, Falke, Nestlé, Procter & Gamble, Dr. Oetker, Volkswagen and many other highly respected firms. Directly or indirectly, numerous members of Markenverband use platforms, including online platforms, for communication or commercial transaction purposes.

Markenverband is registered under Reg. 2157421414-31 in the Transparency Register of the European Union.

2 Markenverband's general approach to policy design with respect to digitization is that regulatory arbitrage between the offline and online worlds should be prevented. With respect to the evaluation of obligations for e-commerce activities, agreed between companies, the European Commission observes in § 56 Vertical Guidelines that it "considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction. This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes." Such equivalence requirement should not only apply to supply agreements between companies, but also to economic and competition policy. Digitization is an instrument that opens up numerous and often unimagined possibilities and naturally also carries risks. But precisely because it is

and remains nothing but an instrument, it does not justify general exemptions or special rules but only adaptations of general law or principles to the specifics of the instrument.

3 Moreover, the Commission should consider the global situation as digitization and the internet lead to global competition. Local disadvantages and distortions caused by EU legislation are critical. On the one hand, regulation and, on the other hand, the promotion of EU-wide initiatives, in particular on platforms, could be a way of balancing the market power of US and Chinese platforms.

II. Competition, Data, Privacy, and AI

A. Artificial Intelligence and Algorithms

4 Markenverband understands algorithms as clear rules of action for solving a problem or a class of problems that converts a particular input into a particular output. It seems necessary not to confuse conceptually the output of such rule-based transformation of symbols (data) with actions or decisions of human beings. Terms such as "room for manoeuvre", "decision", "conclusion", etc. have a completely different meaning when they refer to electronic data processing than in everday language when e.g. the word "decision" is attributed to an action of a human being with a free will. This seems to be central to any further debate on who bears responsibility and liability for the outcome of data processing

Algorithms are the machines processing the raw materials of the digital world. They produce individual offers not only for consumers but also for "upstream" business partners. The fact that the offers are highly individualized and subject to immediate change may impede mechanisms that traditionally ensure efficient market outcomes. In fact, information itself is turned into a credence good and in many cases even the price paid in consideration for this good is not transparent. Some consequences are set out below (§ 13).

5 Data is the raw material of artificial intelligence but differs from other raw materials in that, theoretically, data (as a single set) can easily be multiplied. The Commission should consider revising current requirements to determine "essential facilities". It may be the case, that while a single date is not an essential facility, its combination with others may change the situation.

Beyond competition policy, another approach to enhance competitiveness in data-driven businesses may be to

- establish a general "data sovereignty" (comparable to "data ownership" but not necessarily granting an exclusive right, compared to IP or traditional ownership concepts in tangible goods) that allows for portability of one's data beyond Art. 20 GDPR.
- increase efforts to establish open access data pools at least for some classes of (non personal) data.

6 To some extent, recent discussion has focused on the question whether specific use of algorithms and especially artificial intelligence with "learning" algorithms may facilitate (inefficient) collusive outcomes. Markenverband firmly believes in the individual's freedom to act as the basis for an

open society and market. Specifically in determining competition policy, the market participant's freedom to act must prevail over an outcome-oriented, closed econometric model, even if the model aims at showing how efficiencies can be gained.

B. Data Protection

7 Fair competition on the merits certainly requires full compliance of market participants with the applicable law, including data protection law. Systematic infringements of the law should be prevented and effectively sanctioned. Markenverband doubts that infringements of the law, even if systematic, should be regarded as impediments of competition to be prosecuted by competition authorities. This applies to data protection law as well as to other areas. At the same time, amicus curiae intervention of competition authorities, their support and potentially even a request for investigation to data protection and other competent authorities might be helpful to ensure appropriate consideration of the effects that non compliance with other laws than competition law might have on competition.

C. Privacy

8 Markenverband's concerns regarding recent developments in European privacy law and its effects on competition are mentioned under § 14

III. Digital Platforms' Market Power

9 Markenverband strongly believes that competition inherently requires a level playing field for participants. Open markets cannot unleash their positive, welfare-enhancing potential where market participants are not legally and economically free to walk away from an individual negotiation or transaction and through this freedom ensure fairness of the outcome. A level playing field is not only at stake in situations of market dominance but also in cases of individual economic dependency.

10 Markenverband supports recent thinking that fairness in business is essential for any business relationship to meet its ultimate objective to contribute to the overall welfare of citizens in their different roles, companies and societies. It is necessary to understand that unfair practices impede efficient communication and transactions and accordingly deprive markets, companies and consumers of the welfare-enhancing potentials of a fair environment, leading to unjustified short-term benefits and profits for the unfair actor. This fundamental rule applies equally in the online and the offline world. It is as true in situations where companies provide to their partners facilities like digital platforms, essential for access to consumers, as it is in the situation of a gatekeeping supermarket.

Digital platforms operate in highly dynamic markets. They should be compared to bricks-and-mortar grocery retailing, where the retailer is a platform bringing together brand manufacturers and consumers. Due to the dynamics, competitive environments are constantly changing and market participants need to continuously adapt their market behaviour. Only a few, fundamental

principles remain valid and unchanged, which for grocery retailing are described in the "Principles of Good Business Practice" of the Supply Chain Initiative[1].

11 Two fundamental requirements follow from the above:

- Economic, including competition, policy should effectively and efficiently prevent unfair practices and allow for remedies in a timely manner .
- Economic, including competition, policy needs to have sufficient flexibility to allow market participants to appropriately (and fairly) adapt their market behaviour to new situations and requirements.

12 Market power of online platforms specifically vis-à-vis their business partners, often is comparable to buyer power. Markenverband welcomes efforts to fight anticompetitive effects of market and buyer power. Unfortunately, to date they are not fully appreciated in European competition law enforcement, specifically in the offline world.

In spite of similarities in the market power of digital platforms and e.g. bricks-and-mortar retailers, differences continue to exist and need to be addressed:

13 As recent case law in Germany[2] shows, digital platforms are easily able to hide their interest and involvement, making it hard for users to judge objectively the honesty and performance of the platform . While in grocery retailing the performance of the retailer (i.e. his decision to list specific products and sell them at defined prices) can be detected on his shelves, the same does not apply to online platforms. The lack of transparency of algorithms is not only part of competition between different platforms (to the extent it exists), but also an open door for unfairness both in P2B- and P2C-relationships. It is regulation that in this case needs to strike the right balance between protecting commercial secrets of the platforms, i.e. their algorithms, while at the same time ensuring that the commercial interests influencing for example search results (such as payments for rankings etc.) are transparent to platform-using businesses. This transparency is required to ensure effective competition between players on the platform, potentially including vertically integrated operations of the platform itself. Regulation and probably competition law should be in a position to ensure that algorithms are not designed to serve the commercial interest of process owner in anything but the result of the process, i.e. in a specific output, because rational or uninformed apathy (they cannot know what the cost/Price difference is) of consumers may cause market failures. The more technology develops from search to suggestion e.g. through voice-commerce, the more important de-bundling search results from other commercial

[1] The Principles are published in the Library of the Supply Chain Initiative under www.supplychaininitiative.eu

[2] BGH, Judgment of April 27, 2017, ECLI:DE:BGH:2017:270417UIZR55.16.0

interests becomes. Therefore competition authorities must be able to understand what algorithms do and how.

14 In addition, companies selling their products via platforms should be able to interact with their customers by having access to the same set of data as the platforms. Walled gardens, currently established by big online players, prevent businesses from both interacting effectively with their customers and evaluating the performance of the platform, in turn inhibiting the fair negotiation of advertising agreements . Unfortunately, recent regulatory efforts in the E-Privacy Regulation, specifically Art. 10 of the latest draft, do not strengthen competition but rather the position of dominant gatekeepers that control access to online communication with consumers.

15 Concepts of data sovereignty as outlined above (§ 6) may help to limit lock-in effects. Furthermore, specific prohibitions to impede multi-homing or other behaviour mitigating network-effects or at least preventing market-tipping should be considered.

IV. PRESERVING DIGITAL INNOVATION THROUGH COMPETITION POLICY

16 Markenverband firmly believes in IP protection. Patents, designs, copyright and, not least, trade marks and their effective and efficient protection are necessary conditions for innovation. Obviously, competing products help to increase the benefit of innovation for consumers. Yet, copycat products have the potential to deprive the innovator of his first mover advantage. It is therefore essential in both the bricks-and-mortar and the digital worlds that large players, including platforms, cannot use their dual role as platform/customer and (potential) competitor (competing retailer or competing as manufacturer with private label products) to obtain and abuse competitively sensitive information for their own commercial advantage. Markenverband therefore welcomes the Commission's investigation into Amazon's practice but also urges the Commission to subject bricks-and-mortar retailers to comparable scrutiny. The anti-competitive effects are not limited to the digital world.

17 From Microsoft/Skype and Intel/McAffee to Dow/DuPont, European merger control has already brought forth numerous cases in which innovation or effects of the merger on innovation were decisive to the outcome of the individual case. And rightly so: the legal framework requires a loss of innovation to be considered as an impediment of competition. The innovative potential of free markets, including their ability to gather and combine more knowledge than any single entity or person can ever accumulate and thereby acquire even more and new knowledge, is one of the major justifications of free markets and competition. This case law certainly should be discussed and developed further as innovation in markets itself changes and brings about new conditions under which it occurs. But as the case law also shows, innovation is not a privilege of the digital world and it has yet to be proven that, apart from the speed of scaling effects, digital innovation is significantly different from traditional bricks-and-mortar innovation.

18 It should however be noted that in the business plans of many start-ups, the exit scenario de facto is limited to "sale to Google" or other digital giants, rather than sale to a strategic industrial

partner, private equity firm, IPO or simply keeping the business. The obvious task to develop realistic and attractive competing exit opportunities certainly cannot be dealt with by competition authorities. But because of their knowledge of the M&A markets, competition authorities could play an important role in the broader discussions needed to address this question.

19 While sale of an innovative start-up to one of the digital giants may be an "easy" and attractive exit strategy for the innovators and founders, competition authorities still need to ensure that this does not lead to market failure by allowing the digital giants to absorb competition before disruption affects their business. This requires in-depth knowledge of the potential acquirer's business, both economically as well as commercially.

Berlin, den 29.09.2018

gez. Dr. Andreas Gayk