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Antitrust Group Client Alert: German Competition Authority Publishes Working Paper on Market Power of Digital Platforms and Networks

On 9 June 2016, the German Federal Cartel Office ("FCO") published a working paper on "The Market Power of Platforms and Networks" in which it analyzes the competition law concepts used to delineate markets and determine market power in the context of digital platforms and networks. This working paper complements the German and French competition authorities' recent report on "Competition Law and Data" (see our Client Alert dated 17 May 2016) and is further proof of an increasing relevance of competition law in the digital economy.

WORKING PAPER ON MARKET POWER OF PLATFORMS AND NETWORKS

European competition authorities including the FCO currently devote significant efforts to applying traditional antitrust laws to the digital economy. According to Andreas Mundt, president of the FCO,

> *"[t]he digital economy ticks differently. Large and powerful companies which dominate the digital economy benefit from network effects. These heavyweights can make use of big data to gain a competitive lead; newcomers, on the other hand, find it difficult to keep up with them. Therefore, protecting competition in the Internet means above all keeping markets open for competitors, newcomers and new business models."*

In order to better understand the challenges to traditional antitrust laws, the FCO set up a "Think Tank" in early 2015 that is designated to develop models which enable the FCO to quickly and efficiently assess cases involving the digital economy. The working paper summarizes the results of such Think Tank to date and proposes ways to delineate markets and assess market power with regard to digital platforms and networks.

As regards market definition, the working paper essentially proposes two adjustments to the application of traditional antitrust laws in the digital economy:

- Whilst the use of digital platforms and networks is often free of charge, it may nevertheless constitute a market under the applicable competition laws. Therefore, the general "no payment, no market" rule should no longer be applied to such form of digital economy.
- In an M&A context, innovative start-ups may enjoy significant economic importance for established acquirers even if the turnover they generate may be low. In order to be able to review these kinds of transactions, merger filing requirements should not only be triggered if the parties meet certain turnover thresholds but also if the transaction value itself is particularly high.

Given that digital markets are often characterized by a high degree of innovation dynamics, the working paper takes the view that competition authorities should not (solely) focus on market shares of digital platforms and networks in absolute numbers to assess market power. Rather, in the overall assessment the following factors should be given particular weight:

- the relevance of direct and indirect network effects;
- the return on scale;
- the prevailing types of use on the opposite market side (single-/multi-homing) and the degree of differentiation;
- the accessibility of data; and
- the innovation potential of digital markets.

CONCLUSION AND OUTLOOK

The publication of the working paper on market power of digital platforms and networks coincides with the FCO's ongoing proceedings in the digital sector, such as regarding booking platforms, Facebook's data policies, Amazon's audiobook sales policies and others, as well as with the legislative process to amend German antitrust laws later this year (*9th amendment of the German Act against Restraints of Competition*). Against this background, it becomes clear that the FCO's working paper is as much an analytical competition law paper as a policy paper. Therefore, established companies as well as innovative start-ups in the digital sector should be prepared for increased antitrust and merger control scrutiny by the FCO in the digital economy.

This development is by no means limited to Germany. Competition authorities around the globe – in particular in France and in the U.S. – are currently increasing their scrutiny of the digital sector and are adapting or even ramping up their legal instruments to the challenges of the digital economy.

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