Monopolkommission

Data, platforms, and competition laws – State of play and the way ahead

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This presentation reflects only the speaker's own views

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Overview

- Monopolies Commission (§ 44 Comp. Act)
- Merger control & platforms
- Algorithms and data analysis
  - Collusion using algorithms
  - Abuse of dominant position using algorithms
  - Abuse of dominant position using data

Monopolies Commission (§ 44 Comp. Act)

- Independent body that advises the German government and legislature on issues of:
  - Competition policy,
  - Competition law, and
  - Regulation
- 5 commissioners, 15 staff employees
- Opinions in:
  - Biennial reports (re Internet: XIV §§ 331 ff.; XX. §§ 1 ff.; XXI §§ 1174 ff.)
  - Special reports (ministerial auhorization of mergers, regulated industries, on order/own motion) (re Internet: 68 §§ 1 ff.)

Merger control & platforms

- Monopolies Commission (Spec. Rep. 68)
  - Substance
    - Need to consider interdependency of platform sides when defining separate markets
    - Need to distinguish concentration due to platform from concentration due to merger
    - Combining data may allow to identify and occupy new markets (harm to innovation?)
  - Procedure
    - When platform markets tend towards concentration, are notification criteria based on past turnover meaningful?
    - Recommendation of transaction-value based merger threshold (FCO: 15 cases/8 notifications until end of 2017)

Algorithms and data analysis

- Who owns the data (German law)?
  - No absolute economic right in data
  - Data protection rules protect personal rights, but not market value of data
    - Problem: value often depends on combination of data
- Algorithms allow processing of data:
  - Ranking algorithms (Google shopping)
  - Price algorithms (another big case?)

Collusion using algorithms

- Collusion under EU/German law – need to show:
  - Communication of a joint intention (agreement)
  - Market conduct that can only be explained by the existence of a joint intention (concerted practice).
- Not covered: parallel behavior without agreement/concerted practice

Collusion using algorithms

- Need to prove that cartel participants colluded such that market conduct cannot be explained through unilateral rational adaptation to the market.
  - Using price algorithms <u>complicates</u> proof because price decision is not based solely on human decision but (also) on algorithm.
- Examples where proof is difficult:
  - Several companies use price algorithms calculating prices based on similar parameters, including competitor price decisions, and the companies know that calculated prices are interdependent.
  - In an existing cartel, price algorithms are calculated such as to simulate unilateral price-setting, thus concealing the cartel.
- Imputation of liability may be difficult as well, e.g., where price algorithms are self-learning and autonomously start collusion with competitors or their algorithms (liability for allowing the algorithm to collude?).
- However, no problem of finding a cartel where price algorithms are used to implement an existing collusion scheme on the market.

Abuse of dominant position using algorithms

- Ranking algorithms have been subject to competition investigations already (Google Shopping)
- Price algorithms can be used by dominant companies to exploit information advantages towards competitors or consumers.
  - Example: Personalized prices may be problematic where a dominant company is able to analyze price sensitivity whereas other customers are not able to understand or effectively counter the relevant strategy.
- However, imputation of liability may be difficult where a company buys a standard price tool, which calculates excessive prices only after a market change leaving the company in a dominant position.

Abuse of dominant position using data

- FCO Facebook
  - Dominance?
    - German market for social networks (excluding professional networks)
    - High market share, switching costs, indirect network effects to the benefit of advertisers
  - Abuse?
    - Exploitative use of third-party data. Exploitation indicated through breach of protective statutes, e.g., data protection statutes (BGH VBL Gegenwert II)
    - Cf. also ECJ C-457/10 P – AstraZeneca: „unlawful grant of exclusive rights“ (but: foreclosure case!)

Thank you!

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- For the discussion

FinTech platforms

- Most FinTechs don’t grow like Google, Facebook – why?
  - Distinguish intermediaries:
    - Digital platform: interest of users to interact with users on other platform side (network effects)
    - Financial intermediary: interest of users to interact with platform (trust-based)
  - Financial products are often product bundles (complex)
  - Multi-homing to diversify risk (exception: payment systems)
- Banking regulation does not fit for crowd-funding platforms – why?
    - Bank: financial intermediary trust-based (→ capital buffers)
    - Crowd-funding: financial market infrastructure, i.e. transactions between platform users (→ transparency)