

Germany suggests ramping up regulation of Digital Platforms by establishing a “Digital Agency” with a robust antitrust mandate

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Will Germany establish a “Digital Agency” to monitor compliance with competition law rules in digital markets? Will a German “Digital Antitrust Enforcer” become a role model for a European protectionist approach against American and Asian platform providers?

The German Federal Ministry for Economic Affairs and Energy seems to see a pressing need for regulation in digital markets. The White Paper “Digital Platforms”, published on the 20 March 2017, provides an outlook on possible forms of digital regulatory policy in Germany and potentially also in Europe. Of particular interest from a competition law perspective is the proposal to establish a new “Digital Agency”.

The White Paper aims at creating the foundation for fair competition conditions in order to strengthen competition in digital platform markets in Germany and Europe. The Federal Ministry therefore proposes the following measures:

- **Creation of a “Level Playing Field”** between the traditional telecommunication companies and Over-the-Top-Players (OTT-Players),

e.g. online messengers such as WhatsApp and VoIP providers like Skype. Through the introduction of an ePrivacy Regulation, as proposed by the European Commission in January 2017, especially non-EU OTT-Players providing their services in Europe, should be obliged to abide by the European data privacy standards. In addition, the White Paper considers the introduction of new regulation on consumer protection and security especially tailored to OTT-providers.

- **Implementation of a dual, proactive competition law** through the creation of a new “Digital Agency” for active and systematic market control through an “early warning system”. In view of the dynamics of digital markets, the Federal Ministry considers consistent control of digital platform markets necessary to guarantee compliance with competition law rules. For this purpose, ex-post competition law enforcement should be accompanied by an active and systematic market control by a still to-be-created “Digital Agency” which, complementary to the tasks of the German Federal Cartel Office (Bundeskartellamt) and the Federal Network Agency (Bundesnetzagentur), should be equipped with specific sovereign tasks and intervention powers. The systematic market monitoring should enable the “Digital Agency” to act proactively in the event of abusive behavior from established market players.
- **Acceleration of antitrust investigations** by lowering the threshold for the imposition of interim measures in antitrust investigations. The proactive application of competition law in digital markets should be further facilitated by faster intervention in case of suspected market abuse. Antitrust investigations in case of alleged abusive behavior should not depend on conclusive evidence of a company’s dominant position. In addition, it should be possible to prohibit any behavior which is suspicious from an antitrust or unfair competition law perspective before the closure of on-going investigations in order to prevent damage to consumers and competitors.

The White Paper aims to further push the European Commission’s Digital Single Market initiative. The proposed mechanisms should expressively strengthen the discourse on a European level and could, in the view of the Federal Ministry, serve as a role model for potential European regulations.

However, the proposals put forward in the White Paper deviate significantly from

the European Commission's position. In particular, the European Commission so far considers existing competition rules and enforcement agencies as being sufficient to address new antitrust challenges posed by platforms. The Bundeskartellamt itself criticized the proposal for a new "Digital Antitrust Enforcer" in its Position Paper on the precursor to the White Paper, the Green Paper. The Federal Ministry's initiative is particularly surprising on account of the fact that the legislative procedure for the 9th amendment of the German Act Against Restraints of Competition (GWB) aiming at adjusting the GWB to the needs of the digital economy has almost come to an end by now. These new proposals of the Federal Ministry played no role in the legislative procedure.

With concerns about increasing global protectionism and with German elections later this year the regulation of digital markets and platforms may become part of the political campaign. Market players should carefully monitor these developments and consider sharing their perspectives with decision-makers in Berlin and Brussels.