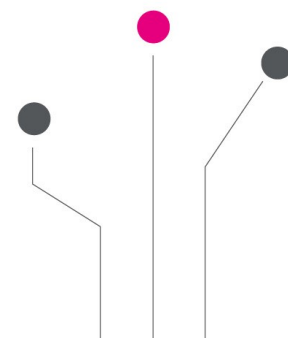


to the point technology & digitalisation



April 2020

Preface

The relationship between technology and antitrust law is special. Undoubtedly, technology is one of the key drivers for smart, sustainable and inclusive growth (cf "Europe 2020"). Advances in technology have transformed society by a myriad of improvements and innovations.

At the same time, big tech is under heavy antitrust scrutiny. In the past three years alone, the EC has fined Google over EUR 8bln for breaches of competition law. Investigations by the European Commission, for example into the practices of Amazon, as operators and players on marketplace platforms ("player/referee problem") are ongoing.

There is a growing belief among some regulators and policymakers that competition may not be working effectively in technology markets, to the detriment of consumers. Several policymakers are demanding a radical overhaul of competition law; others are even saying that platforms need to be broken apart from downstream businesses (Apple Music; Google Shopping; private-label products). We at Schoenherr think no such radical change is needed. For example, with regard to the frequently mentioned restrictions of competition in technology markets by the imposition of third-party platform bans, bans of price comparison portals, most-favoured nation clauses and resale price maintenance in e-commerce, there is already ample case law (sometimes from other industries) to provide guidance. As regards "self-preferencing" in "player/referee situations", case law will soon be developed by the pending investigations. The existing rules and analytical tools are flexible enough to ensure that effective competition can be maintained in technology markets.

If at all, a "modernising" of antitrust law by clarifying substantive provisions is desirable. Such clarification might be needed particularly regarding the concepts of market dominance (a company might also be dominant if it possesses data that others rely upon for their business) and certain abusive practices (intervention might already be warranted if platform providers engage in practices that prevent multi-homing or switching to other platforms and consequently tip a market into a monopoly).

Ensuring effective competition in the digital

economy requires practical measures rather than substantive changes. We expect the willingness of competition authorities to bring cases against alleged anti-competitive practices of technology companies to rise in the future. The relationship between technology and antitrust law will therefore remain a special one.

News corner

- 17 July 2019 [Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon](#)
- 20 March 2019 [Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising](#)
- 18 July 2018 [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#)
- 27 June 2017 [Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service](#)
- 4 May 2017 [Antitrust: Commission accepts commitments from Amazon on e-books](#)

Schoenherr's "technology & digitalisation" group (tech.schoenherr.eu) is made up of specialised lawyers from all over CEE, striving to improve the way technology-related challenges can be tackled. With our newsletter we want to give a brief outline of the current and important topics in this area. If you are interested follow us on [LinkedIn](#).



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To the Point:

- **Innovation in times of crisis – virtual capital increase**

The COVID-19 situation presents a lot of challenges across all business sectors, but also bears potential for innovation. Schönherr and the notaries of nhp Notare led through what was likely the first virtual capital increase in an Austrian limited liability company under the Austrian COVID-19-GesG. All parties participated remotely in the virtual meeting. In addition to the resolved capital increase, a managing director has been appointed and the company's articles of association have been changed. The reading and digital signing of the documents took about 15 minutes in total, which is equivalent to a physical meeting. The requirements and the procedure of holding an electronic shareholders' meeting are similar to the digital foundation of an Austrian limited liability company. We hope that these COVID-19 related measures will survive the pandemic and remain in place for our convenience, speed and efficiency. Reach out to [Thomas Kulnigg](#) or [Maximilian Nutz](#) who are happy to assist you in preparing and holding your virtual shareholders' meetings. [Thomas Kulnigg & Maximilian Nutz](#)

- **Austria: EUR 150m Start-Up Rescue Scheme**

The Austrian government presented its EUR 150m Start-up COVID-19 rescue scheme: (i) the government will guarantee 50 % of the losses of a newly established VC fund (up to EUR 50m) and (ii) EUR 100m will be provided by way of repayable contributions (*Zuschüsse*) directly to start-ups. The Austrian angel investor Michael Altrichter has been appointed "Start-up Officer" of the government. Details will follow. [Thomas Kulnigg](#)

- **E-commerce as a lifeline in the COVID-19 crisis**

The COVID-19 crisis has forced many businesses, especially retail stores and restaurants, to resort to selling their goods and services online. But the legally correct implementation of an e-commerce presence is complex. Businesses are burdened with massive pre-contractual and post-contractual information obligations. A successful online store must comply with a number of legal requirements that extend deep into its visual design and processes. For more information, check out our [Legal Insight](#) on this topic. [Wolfgang Tichy & Serap Aydin](#)

- **Non-material damages: Are courts ATMs for alleged suffering?**

Claims for non-material damages are increasing. Plaintiffs are arguing that alleged unlawful behaviour of Defendants has led to psychological pressure being placed on them, or has simply made them feel bad. Can a court hear a Plaintiff's testimony, find that the Plaintiff felt bad because of the unlawful behaviour and then award compensation for non-material damages?

The Supreme Court ruled in January 2020 that an employee whose company car was tracked, without his consent, by his employer via GPS, during working hours and free time, may claim non-material damages due to infringement of his private sphere under Austrian civil law. The Supreme Court held that only a substantial infringement warrants compensation of non-material damages and not just any infringement of the private sphere. Therefore, the courts are not automatically awarding compensation purely because a Plaintiff claims that a specific unlawful behaviour of a Defendant made them feel bad. The alleged infringement must pass a threshold.

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[Sara Khalil](#)

- **One step towards virtual dispute resolution: hearings via videoconference**

Court hearings via videoconference were unimaginable in Austrian courts pre-COVID-19. Witnesses could testify via videoconference in Austrian court proceedings only under certain circumstances, but they still had to attend court – just not the court in which the proceedings were pending. Instead, witnesses were summoned to the court at their place of residence, where they would testify via videoconference. Due to the COVID-19 crisis, the Austrian Parliament is amending a provision of the previous COVID-19 legislation, now allowing the courts to hold hearings via videoconference until the end of the year.

[Visit our blog to learn more!](#)
[Sara Khalil](#)

- **Amazon-Marketplace: mere storage of goods is not trademark infringement**

In a recent decision, the Court of Justice of the EU (CJEU) ruled that the mere storage of trademark infringing goods by online sales platform operator Amazon in the context of its "Amazon-Marketplace" does not constitute a trademark infringement. The CJEU noted that to find trademark infringement by the company providing the storage of infringing goods, the company must additionally pursue, like the seller, the aim of offering the goods for sale or putting them on the market, which Amazon did not. Thus, Amazon was not considered to be a direct infringer. However, under the rules on e-commerce and the enforcement of IP rights, such a storage facility provider may be liable as an intermediary under certain circumstances. The full text of the decision can be found [here](#). [Michael Woller](#)

- **E-mail and IP addresses are not "addresses", says CJEU Advocate General**

Under the EU Enforcement Directive, IP rightsholders have the right to request information about IP infringers from platform operators such as YouTube, including "names and addresses" of copyright infringers. In a case between Constantin Film and YouTube currently pending at the Court of Justice of the EU (CJEU), the question at stake is whether "address" only means physical addresses (if

stored by the platform operators at all) or whether the right to request information also covers e-mail and IP addresses. The Advocate General of the CJEU recently advised the court to limit its interpretation of the term "address" to physical addresses. If the CJEU were to indeed follow this advice in its eagerly awaited decision, it may be seen as a major setback for IP rightsholders in their quest to prevent and pursue online IP infringements. Read the Advocate General's full opinion [here](#).
[Michael Woller](#)

- **Austria: Limit for contactless payment raised to EUR 50**

Under the regulatory rules on strong customer authentication (SCA), full two-factor authentication (including a PIN entry when paying via a payment terminal in a shop) is required for payments above a certain threshold. In response to the COVID-19 pandemic, Austrian payment service providers have raised the limit for credit and debit card payments without having to enter a PIN from EUR 25 to EUR 50. In effect from 13 April 2020 and for the duration of the pandemic, this measure aims to reduce physical contact to help prevent the spread of the virus in line with the recommendations of the European Banking Authority (EBA) and the Austrian Financial Market Authority (FMA). The Payment Services Directive 2 (PSD2) and the Austrian Payment Services Act allow for such a limit increase. It is worth noting, however, that the maximum aggregated amount for contactless payments, before a PIN has to be entered again, has not changed (i.e. EUR 125).

[Matthias Pressler & Viktoria Stark](#)

- **ProteGO and Home Quarantine – a digitalised way to chase coronavirus in Poland**

In March 2020 the Polish government introduced a new app called "Home Quarantine" for use during the compulsory home quarantine enforced by the government. "Home Quarantine" allows its user to confirm the place where he or she is staying, to do a basic health assessment, and to direct a notification of threat of having contracted the virus to the user. It also makes it easier to supply the most necessary items to people who are not able to do so themselves. "Home

Quarantine" is not the only application the Polish government is working on. In April 2020 it was revealed that another app – "ProteGO" is in the works. While "Home Quarantine" has already proven useful, "ProteGO" has not been as warmly received as it is, basically, a tracking app, similar to what Apple and Google are currently working on as well. How will it work? A person with a confirmed case of the coronavirus should indicate it in the app so that the data about devices encountered by his/her phone during the last two weeks will be sent to a special server and subsequently to users of such devices.

As the result of cooperation between Apple and Google could help overcome certain obstacles (e.g. related to Bluetooth), works on "ProteGO" are currently suspended until further notice (in practice, until the app created by the two giants is available and it will be possible to make "ProteGo" compatible with it).

More information on both apps (currently only in Polish) can be found under the following:

<https://www.gov.pl/web/koronawirus/kwarantanna-domowa>

& <https://www.gov.pl/web/cyfryzacja/zycie-pokwarantannie--przetestuj-protego>

[Daria Rutecka](#)

For further information, please contact any of the individuals named above, your usual contacts at Schoenherr or any member of our [technology & digitalisation group!](#)



This newsletter includes various updates in connection with the COVID-19 pandemic. For more legal information arising from the pandemic please visit our [coronavirus info corner](#).