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Information Law and Economic Theory*

In today's age of the internet and globalisation, not only are the mergers of media companies of legal interest, but also and almost more so, the monopoly of certain providers as well.[1] I cannot and will not treat antitrust law in its entirety, but rather the part that concerns the sectors of media and information. However, this still very blurry delimitation does not help us much yet. This means that first of all, we need to look at the mergers of media companies. These kinds of mergers pose an additional problem, namely one that goes beyond "normal" antitrust law.

Normally antitrust law is marked by the containment of the market power and position of individual companies that monopolize their sectors. Whoever already has a strong market position should not be able to expand this position through mergers with other providers or through concerted actions when these measures too strongly reduce choices in the market for the consumer or in general for those on the buying side. In order to prevent this the state forbids cartels. In simple words, these are the conflicting interests, which however reflect a great theoretical dispute, namely between the traditional Harvard School and the Chicago School. We will come back to this later.

In as much as antitrust law concerns media companies the problem has a further reaching dimension. It is not only about the market for the consumer becoming narrower so that fewer providers dictate the prices. Much more important is

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* Teile des vorliegenden Textes wurden im Mai 2004 im Rahmen der Governance of Information Lecture Series gehalten an der John F. Kennedy School of Governance der Harvard Universität, der heutigen Harvard Kennedy School. Ich danke meinem Freund und Kollegen, Prof. Dr. Viktor Mayer-Schönberger, der seinerzeit als Professor an der Harvard University lehrte und heute Professor am Oxford Internet Institute ist, für die großzügige Einladung sowie vielfältige Anregungen – nicht zuletzt durch sein bahnbrechendes Buch „Information und Recht" (1999). Die vollständige deutschsprachige Fassung dieses Vortrags ist als kleine Monographie in den ‚Veröffentlichungen der Potsdamer Juristischen Gesellschaft' erschienen unter dem Titel „Medienrecht und Informationsrecht. Eine Standortbestimmung am Beispiel des Kartellrechts" (2005). Die Übersetzung verfasste Bartley Großerichter, der ich ganz herzlich danke!

1 See *Mayer-Schönberger,* Delete: The Virtue of Forgetting in the Digital Age, 2009.

that variety and diversity of opinion can be limited when a few media companies or even single persons control an entire market. We can then only draw a clear distinction between media antitrust law and classic antitrust law when we look at the theoretical foundations that make the special protective purpose of media antitrust law necessary.

In the German-speaking territories the reason given for a further limitation of concentrations than strictly dictated by antitrust purposes is largely due to the thoughts of Jürgen Habermas about "Öffentlichkeit", a German word that implies *the general public, general communication* and *publicity* all at the same time.[2] Öffentlichkeit and therefore open discourse are in his opinion vitally important in democracies. Because in mass media societies public discourse as an exchange between all the people together is not possible, Öffentlichkeit has to be mediated: As the recipient, the citizen must be offered a wide variety of opinions, which in themselves again represent a multitude of opinions through individual journalists. Open discourse is created therefore through journalists as representatives of the citizens and through the purchasing decisions of the citizens for a specific medium.

This means that as legal framework for the preservation of the mediated "Öffentlichkeit" on the one hand the journalists' freedom within a specific medium must be protected, and on the other hand a variety of mediums must be available. When this fails and the media market becomes concentrated, not only is the market disturbed, but there is a risk that the necessary open discourse in a democracy fails. The decisive significance of Jürgen Habermas for the theoretical foundation of media antitrust law has not been adequately appreciated, especially in his own country.

Even if media antitrust law seems to be but an extension of general antitrust law, one cannot ignore that it essentially builds upon the determining factors for the variety of opinions and freedom for those who create the media. While these factors do not necessarily give media antitrust law a specifically normative character, they are more than factual, as they affect the constitutionally guaranteed principle of democracy. Habermas deserves credit for his conclusion that the medium is not only the means of communication between individuals, but also mediates between state and citizen.

We will now compare this classical antitrust law of media companies to an area that can be described as antitrust law of information. This term is not yet commonly used, which makes it all together unclear what it really means. The term refers to the phenomenon of the "Information Society", which has become a

2 *Habermas,* Strukturwandel der Öffentlichkeit, 1962.

catchword in both political and media law discourse. This has developed into its own area of study, which is described as Information Law. The relationship of this so-called Information Law to Media Law is still largely unclear. The term itself implies that it is obviously not the medium – press, broadcast or internet – but rather the information transported through the medium that is in the foreground. In this respect, Information Law is more radical, as it is applied at the root level.

On the other hand, it is not without reason that the phenomenon of "Information Society" is sometimes said to be nothing more than a trendy term. This basic difference of opinion should not be decided here. More important is the specific question of whether the terminological addition of "Information" has a suitable area of application in antitrust law. A meaningful connection between information and antitrust law would be demonstrated if it could be explained that the term "Information" were related to antitrust law as such. If this can be shown, then the connection between information and antitrust law is not something arbitrary, based on a legal or political trend, but rather it would be an academic category that is not only based on fact, but also on theory.

The following study will firstly examine the importance of the phenomenon of information for antitrust law on the basis of various economic theories. The theories of competition of the various schools of thought in the United-States, but also Austria, play a significant role here. One of the key terms in antitrust law is that of the market. A market is defined as the economic location where supply and demand for specific goods meet. The question above all is what the connection between market structure, market conduct and market performance is. This is the subject of a fundamental disagreement in which three different schools of thought have formed and have developed different theories of competition.[3] The main opponents here are the Harvard School and the Chicago School.[4] Next to them is the more neoclassical Austrian School. In our context, all three conceptions are interesting, as they allow a conclusion about the understanding and importance of information.

For the Harvard School, amongst whose proponents were *Ross, Kantzenbach*[5] and *Scherer,* the concept[6] of workable competition is decisive.[7] This concept was developed in the 1940s by *John Maurice Clark.* As there is no optimal solution, a "second-best solution" should be attempted – one that balances the

3 *Triffin,* Monopolistic Competition and General Equilibrium Theory, Cambridge/Mass., 1940; *E. H. Chamberlin,* The Theory of Monopolistic Competition, 6th edition, Cambridge/Mass., 1950.
4 *Hovenkamp,* Antitrust Policy after Chicago, 84 Mich. Law Review 213 (1985).
5 *Kantzenbach,* Die Funktionsfähigkeit des Wettbewerbs, 1966.
6 *I. Schmidt,* Wettbewerbspolitik, 8. Aufl. 2005, pp. 49 ff.
7 *Kaysen/Turner,* Antitrust Policy, Cambridge/Mass., 1959, 1965, pp. 44, 82 ff.

sovereignty of the consumer with the decentralisation of economic power. These models should allow us to assess whether or not a specific economic state is desirable. If this is not the case, then a government regulation might be considered. The Workability concept is based on the assumption that an analysis between market structure and market conduct will yield conclusions about market performance.

The decisive factor for the Chicago School is efficiency. For its proponents, *Stigler*[8], *Bork*[9] and *Posner*[10], the main issue is not fighting economic power, but rather the largest possible benefit for the consumer. For this reason, they reject – for the most part – governmental intervention in the market and its structure. They trust the self-healing powers of the market to fight the barriers-to-entry by themselves.

The Austrian School, whose most famous proponent is *Friedrich August von Hayek,*[11] is also in direct conflict with the Harvard School. It is based upon the concept of freedom of competition and is therefore fundamentally against any state intervention in competition. In contrast to the Harvard School, this theory disputes that the results of processes of competition, especially market performance, can be predicted. If the state comes to the conclusion that government intervention is necessary, this implies a "presumption of knowledge" that the state inherently cannot have.[12]

The now famous phrase "presumption of knowledge" is already a step in the direction that leads to the phenomenon of information. While *Hayek* means up front a claim to have knowledge about market actions, it is only a little step away from the meaning of information and its role for the market participants. In this respect, it is not surprising that very different concepts of information are at the base of the different schools, especially the Chicago School as opposed to the Austrian School. The main difference between these schools of thought is the idea of what concrete role information plays in the market actions.

As the representative of the Austrian School, *Hayek* is principally interested in how the information is disseminated and what the consequences of this dissemination are for the exchange of goods. His premise is based upon the assumption that it is exactly the unequal dissemination of information that creates the

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8 *Stigler,* The Organization of Industry, Homewood/Ill. 1968; *ders.,* Monopolistic Competition in Retrospekt, Five Lectures on Economic Problems, 1950.

9 *Bork,* The Antitrust Paradox, New York, 1978.

10 See *R. A. Posner,* The Chicago School of Antitrust Analysis, 127 University of Pennsylvania Law Review 925 (1979).

11 *Hayek,* The Use of Knowledge in Society, in: Individualism and Economic Order, 1948, pp. 77 ff.

12 *Hayek,* Die Anmaßung von Wissen, Ordo 26 (1975), 12 ff.

market, so that the supply and demand of information are constitutive for market events. The market therefore presents itself as the use of knowledge.[13]

The Chicago School sees information less as an object than as a condition for the market. According to this school, without information the market cannot even exist – Information is a prerequisite for the market to function. According to the famous Coase Theory, supposing ideal information about the market and therefore the best possible conditions, the goods go to the one who can use them the best.[14] The lack of a uniform concept of information in economics is founded in the dispute between the different schools and their differing premises.

For this reason, their points of view needed to at least be outlined above. For us and for our context, this means that a general information antitrust law is accordingly difficult to outline. We not only have the question of what information is in the context of antitrust law, but also and especially what role information plays in an antitrust concept. We cannot give a definitive answer to these questions here, but it is important to pose them, so that at least the basic problem of information antitrust law is outlined.

Referring to the above outlined dispute between the different schools of thought, the outcome of a merger of media companies can be best explained using the basic thesis of the Harvard School: The analysis made by the antitrust authorities of the combination of market structure and market conduct seems to permit the conclusion of a certain market performance. Following this thought, an unregulated approval of the merger would run the risk of negatively affecting the sovereignty of the consumer as well as driving competitors out of the market. Regulation by the state could therefore legitimately be considered and was carefully applied.

The information antitrust aspect only really becomes apparent to us when we look at the different concepts of the Chicago and Austrian Schools. Are the market participants, as the Chicago School supposes, making their decisions based upon all available information, or is it, as *Hayek* thinks, that the information itself is determining the market? It is not easy to apply this very abstract question to the concrete case. Here we see very clearly just how vague the term "Information" is. On the surface, this illustrates how *Hayek's* thesis of the imbalance of information can explain the market.

If we understand information as object of the exchange of goods, then we can regard the multiplication of music and film content, for instance, with the possibility of internet access as a conglomerate of information that is in need of regu-

13 *Hayek,* Individualism and Economic Order, 1948, pp. 77 ff.

14 *Coase,* The Problem of Social Cost, 3 Journal of Law & Economics 1 (1960); *ders.,* Essays on Economics and Economists, 1994.

lation and possibly even control.[15] This perspective is based upon the facts; this understanding of information would be so to speak descriptive and would be subject to the same criticism as classical media antitrust law, namely that it is in the end superficial.

We can, however, also apply a normative concept of information. Complete information as understood by the Chicago School would then be knowledge of all market conditions in legal respect.[16] These conditions would include, for example, existing contractual relationships or peculiarities of the corporate structure. From this we can conclude that the term information has, with regards to antitrust law, a normative aspect. This normative component includes the legal relationships that the merging companies have with each other. The competing market participants can only make meaningful decisions about supply and demand when and if they know what other companies their competitors are legally obliged to – for example through distribution agreements or joint ventures, etc.

The antitrust concept of information cannot be content with this. For if this knowledge alone were information in the sense of antitrust law, the fact that we deal with media companies trying to distinguish themselves by distributing film and music content over the internet would – in the end – be meaningless. There must therefore be a relation between this normative perspective and the factual approach that we rejected above, a relation that specifically characterizes information antitrust law.

As a hypothesis, the following thought should connect the two possibilities of purely factual and normative perspectives: the relevant criterion for information antitrust law could lie in the material alliance of information about legal relationships and actual content. The essential point is to what extent the concrete legal relationships are geared toward the actual exchange of information. The legal relationship by itself does not make a case a problem of information antitrust law. Should a contractual relationship however be entered in to, for example to supply an information infrastructure with concrete content, then a real alliance is created between the two companies.

It is then not about the concrete medium, for example internet, TV or press, but rather about the information that they convey. Should a merger then be carried through in such a way that a company on the demand side needs content, in the end information, in order to sensibly fill its own infrastructure, it is at least a necessary condition for information antitrust law. The sufficient condition is that the concrete legal regulations are designed in such a way that the legally regulated

15 See *Lessig,* Code and Other Laws of Cyberspace, 1999.

16 *Jacobs,* An Essay on the Normative Foundations of Antitrust Economics, 74 N.C.L. Review 219 (1995).

demand and disposal of information – for example through contractual non-competition clauses to other information providers – is designed for a substantial improvement of their own market position.

Until now, we have distinguished information antitrust law from media antitrust law based on the classic merger. Once in a while, however, a company becomes so powerful by itself that it downright crushes the market. The question then arises if the state should not intervene on its own initiative in order for other suppliers to have any chance at all at fair competition.[17] At any rate it is obvious here that we are no longer dealing with the traditional media antitrust law that is directed primarily against an endangerment of the citizens' liberty of opinion.

It is replaced by an information antitrust law that is marked by business and corporate law, because in the end the accumulation of trade knowledge leads to an information cartel. Here, information itself is the object of demand. The market is hampered through a cartelisation of information. *Hayek's* description of supply and disclosure of information as a constitutive characteristic of market transactions comes closest to this.[18] The market participants do not have the complete information to form a basis for making their decisions, as the Chicago School assumes as a premise.

This brings us to our summary. The first basic conclusion of our reflections may be a surprise: the information law with its relations to antitrust law seemed at first glance to be only a trendy phenomenon as opposed to media antitrust law. In reality both expressions of the same area of law, namely antitrust law, concern two different objects of protection. According to its specific protection purposes, media antitrust law can be derived from the works of Jürgen Habermas in the field of communication theory. It puts the disseminating function of the medium in the foreground and in the end deduces this function from the principle of democracy, which implies an informed public.

The information law accentuates an aspect that is of central importance for market activities and therefore is a key term in antitrust law. While the antitrust law of media companies is lastly only an aspect of the world around us with the goal to prevent excessive power of opinion, the emphasis of information is, for antitrust law, a factor that is relevant already at the level of economic theory. Complex antitrust cases can no longer be treated exclusively under the aspect of concentration in the media sector, but rather by reverting to the economic foundations and, at the same time, developing a more precise concept of information.

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17 *Cooper,* Antitrust as Consumer Protection in the New Economy, 52 Hastings Law Review 813 (2001).

18 See *Mayer-Schönberger,* Information und Recht, 2001, p. 13.

Meanwhile, this concept is ambivalent: With regard to mergers relevant for antitrust law, information can nether be understood in a purely factual way nor is it sufficient to look at it only in a normative way by considering the legal relations between the companies. Antitrust law in its proper sense is best understood as a functional relation between the corporate structure and the transfer of information intended. With regard to monopolies information can, on the other hand, also be understood in a purely factual way, because here it is the object of demand and determines the market as defined by *Hayek.*[19]

19 *Petersen,* Freiheit unter dem Gesetz. Friedrich August von Hayeks Rechtsdenken, 2014.