



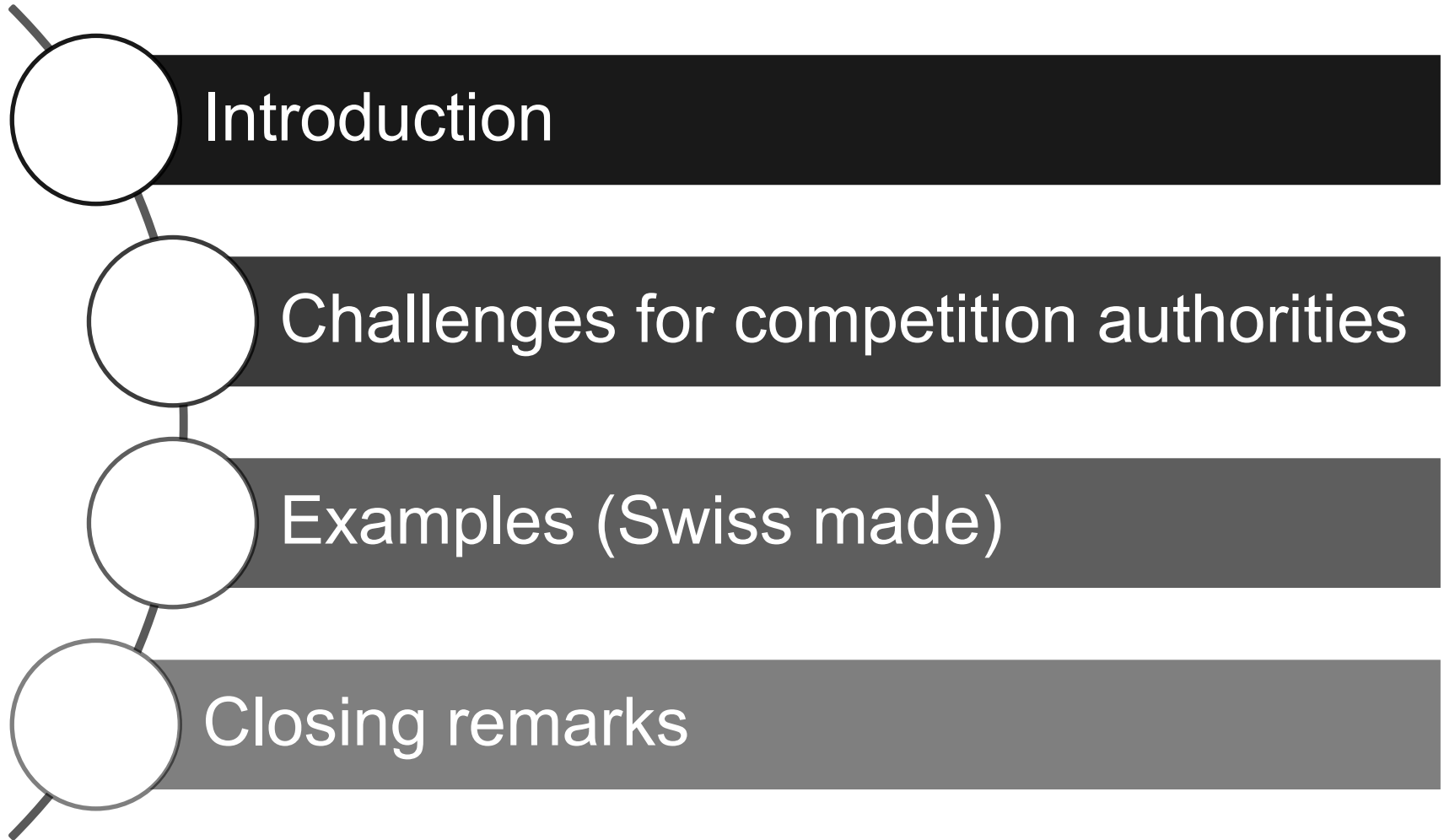
GAFAM - «David vs Goliath?»

How to deal with antitrust challenges for a (small) competition authority?





Summary

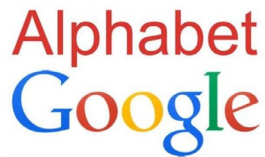




Introduction

- Initially → consumer focus (demand side): a chance for consumers first!
→ «laisser-faire»
- More recently → new focus (supply side) → dangers for competition?
 - New paradigm in the USA (accentuated by the Trump presidency and then Biden) → Opening of investigations against GAFAM

→ 27 major antitrust cases against Google since 2010 (EU, USA, FR, IT, ESP, South Korea, UK, AUS, DE)



New "Alphabet / Google" decision by the Bundeskartellamt at the beginning of 2022 based on Art. 19a GWB.

→ «erlaubt ein früheres und effektiveres Eingreifen»

→ Is it a new paradigm?



Challenges for (small) competition authorities (1/2)

- New and very dynamic markets → intervention may only be justified for a limited period of time, **intervening too early or too late could negatively impact competition**
- Markets often larger than Switzerland → limited impact in case of an investigation only in Switzerland
- Need to optimize the use of competition authorities' resources → proceedings against GAFAM are very resource-intensive
- Very long appeal procedures → example: Google Shopping currently still in appeal procedure



Question for later maybe: Are the interventions of competition authorities sufficiently dissuasive for GAFAMs?



Challenges for (small) competition authorities (2/2)

COMCO's approach to a restriction of competition in a digital market:

The issue is international :

Opening of an informal procedure as a first step (“Marktbeobachtung”), if commitments are applied abroad → these commitments must also be applied in Switzerland!

→ **No automatic opening of an investigation (Art. 27 LCart)**
→ **Art. 26/2 could be a pragmatic solution?**

The issue is mainly Swiss

Analysis of the issue as any other restriction on competition



Google Shopping (1/4)

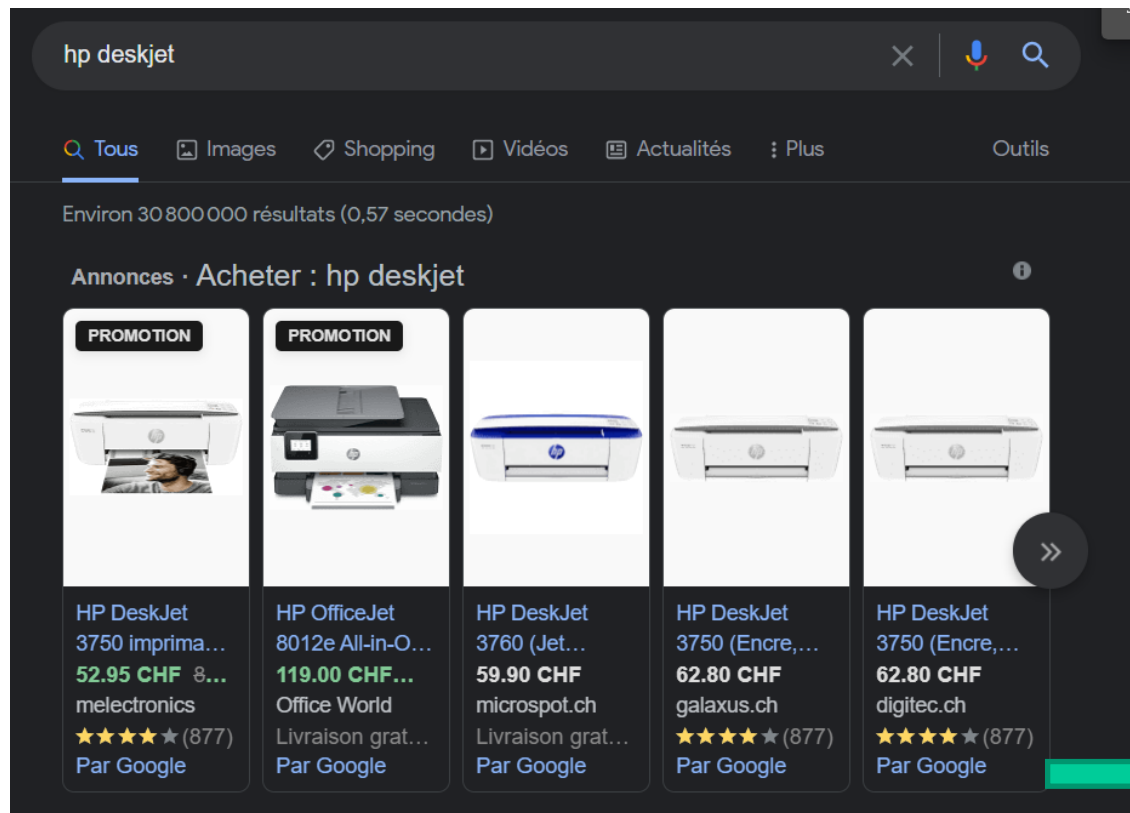
- European Commission investigation (sanction of 2.4 million):
https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784
 - CH: From 2015, meeting with Google and then opening a preliminary investigation. Sending out questionnaires.
 - No formal investigation necessary (Art. 27 LCart) → the commitments requested by Brussels were directly applied in Switzerland at the request of the Secretariat.
 - Preliminary investigation was suspended until the end of the appeal procedure.

Google Shopping



Google Shopping (2/4)

Prior to the EU commitments:



Google only!



Google Shopping (3/4)

After the commitments:

canon imageprograf pro-300

Tous Shopping Images Vidéos Actualités Plus Outils

Environ 1150 000 résultats (0,57 secondes)

Annonces · Acheter : canon imageprograf pro-300

Product Name	Price (CHF)	Seller	Rating	Source
Canon imagePROGR...	777.00	digitec.ch	★★★★★ (24)	Par Google
Canon imagePROGR...	859.00	MediaMarkt	★★★★★ (24)	Par Blue Sho...
Canon imagePROGR...	777.00	galaxus.ch	★★★★★ (23)	Par Google
Canon Fotodrucker...	830.00	Brack.ch	★★★★★ (24)	Par Google
Canon Pixma Pro-200...	469.00	microspot.ch	Livraison grat...	Par comparis

other price comparison services!



Google Shopping (4/4)

Why not open a formal investigation under 27 LCart? - pro and contra:

Pros:

- better allocation of the Secretariat's resources
- same market outcome if the foreign commitments are also applied in Switzerland
- no appeal procedure

Contra:

- If no sanction is imposed, it would be possible to make Google pay the costs of the proceedings in the context of a preliminary investigation (Art. 26 LCart)



Boycott of Twint by Apple Pay





Twint : bluetooth – QR code





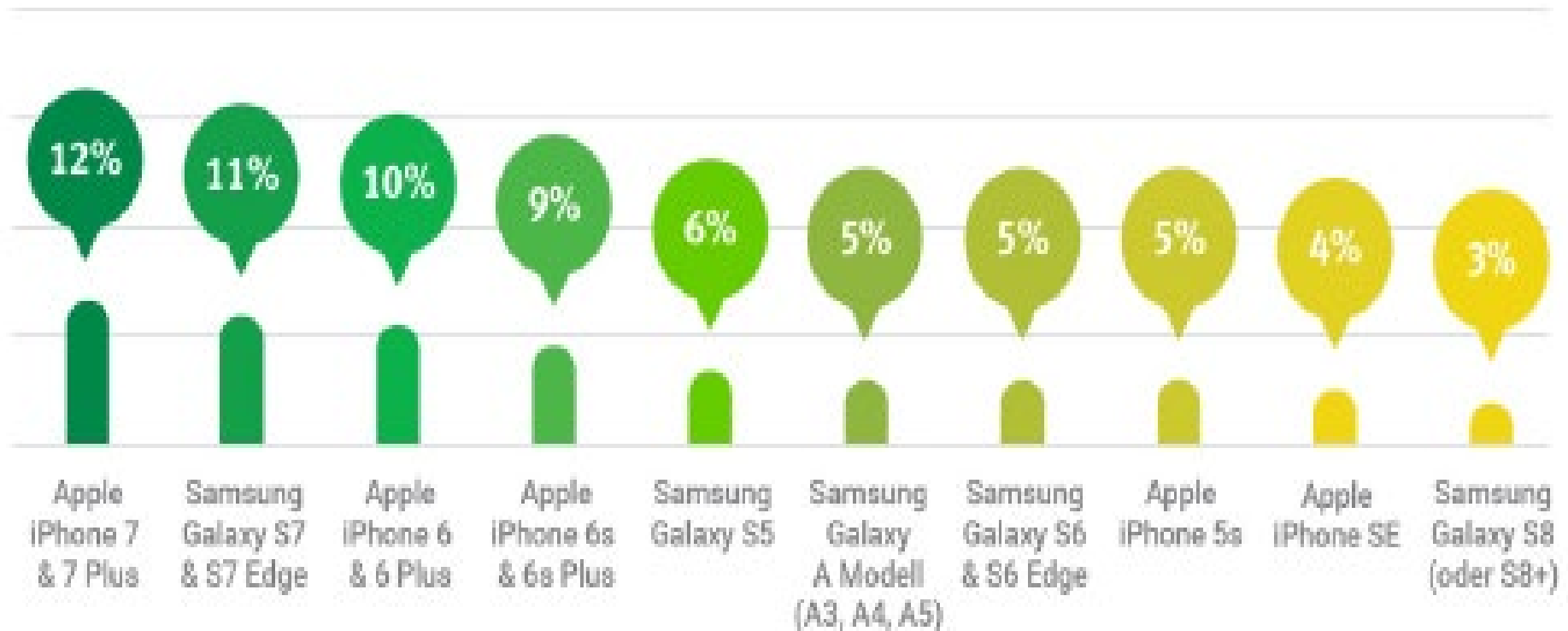
Apple Pay: NFC System





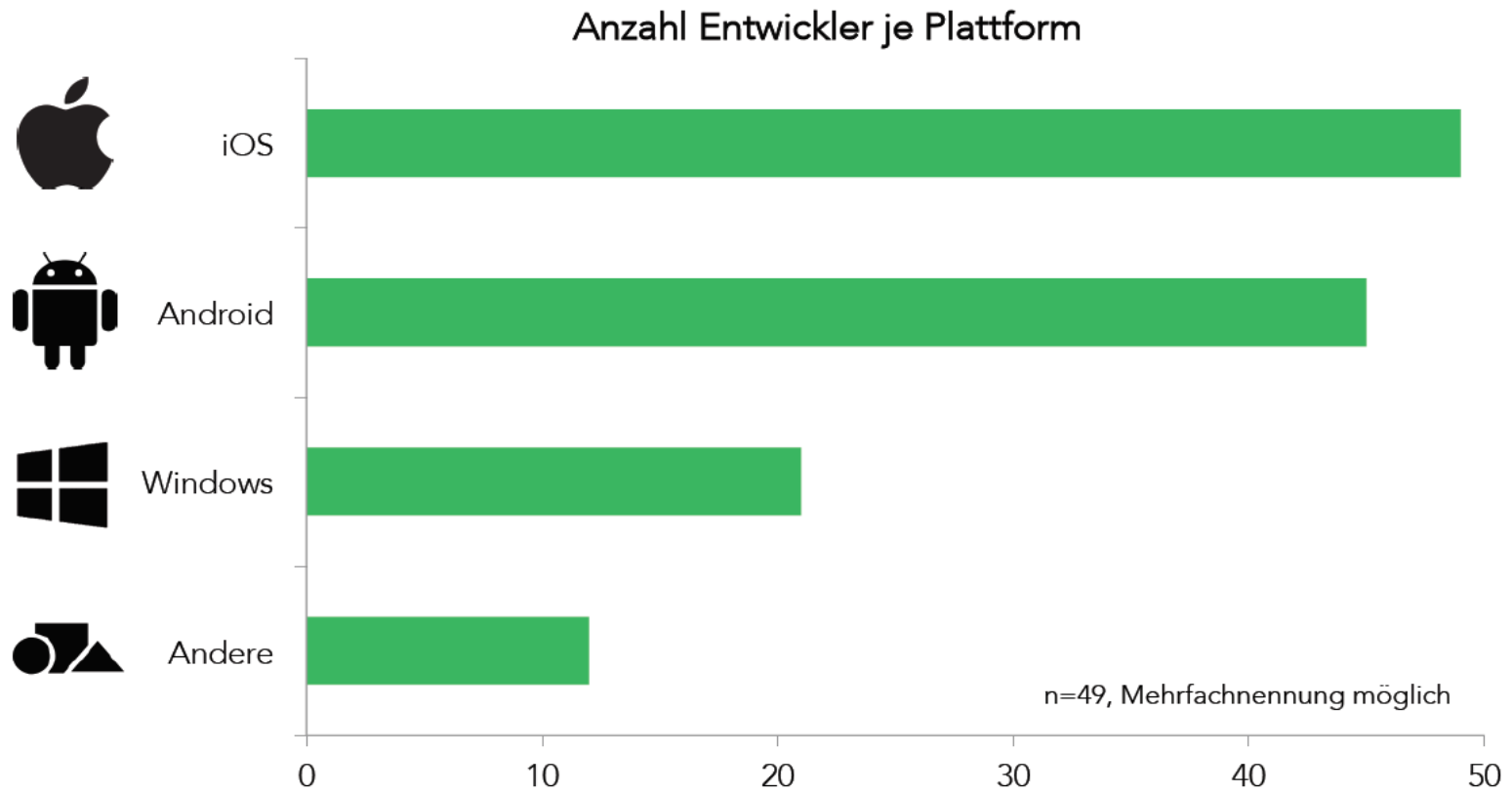
Market situation in 2017

Top 10 Smartphones





Die Mehrheit der Entwickler entwickelt für iOS und Android. Aber auch Windows und andere Plattformen spielen eine beachtliche Rolle

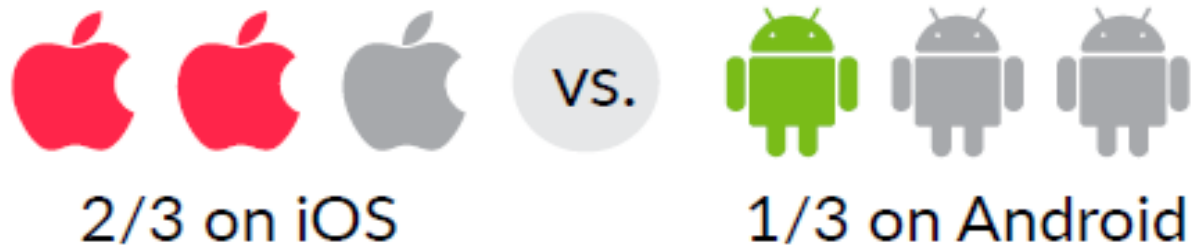




Switzerland is still an iPhone country.

Actual Usage

iPhone users are more active using apps. Our smama members² report average usage numbers of





Twint



- Initial Issue → Twint "blocked" to favour Apple Pay
- The COMCO was about to open an investigation
- Apple's 2018 "last minute" commitment with a new technical solution

→ **No investigation, but a pragmatic and efficient solution (Art 26/2 LCart): Twint is now well established on the market**

→ **Note that Twint may not have been faultless...**



COMCO launches investigation into several Swiss financial institutions

Bern, 15.11.2018 - On November 13, 2018, the Swiss Competition Commission (COMCO) has launched an investigation into several Swiss financial institutions. The object of this investigation is a suspected boycott of mobile payment solutions from international providers such as Apple Pay and Samsung Pay.

The investigation is aimed at clarifying whether several Swiss financial institutions have reached an agreement to boycott mobile payment solutions of international providers such as Apple Pay and Samsung Pay. Several Swiss financial institutions are suspected of having jointly agreed not to enable their credit cards for use with Apple Pay and Samsung Pay, in order to protect TWINT, their own Swiss payment solution.

The investigation has been launched against (listed in alphabetical order): Aduno Holding AG, Credit Suisse (Switzerland) AG, PostFinance AG, Swisscard AECS GmbH, UBS Switzerland AG. COMCO carried out on-site inspections at the premises of the target companies.



Amazon, quid?



- The Secretariat has closely followed the Austrian and German case (similar issues in both countries) and continues to follow the ongoing DG Comp procedure.
- In Switzerland for the moment there is no "amazon.ch" site.
- A different constellation in Switzerland with the strong presence of Galaxus / Digitec!

→ For the moment no complaints have been received concerning Galaxus / Digitec





Closing remarks

→ Digital markets: an area of great concern to competition authorities at the moment

Many challenges for competition authorities: resources, know how, poorly adapted legislation?, international companies to deal with.

But also challenges for legal practitioners: know how, complexity of economic issues (big data, multisided markets). And for companies: compliance program to be implemented, use and safety of data.



Thanks for your attention

Philippe Jolliet

Philippe.jolliet@weko.admin.ch

0041 58 465 37 33