

Modernising the law on abuse of market power

Report for the Federal Ministry for Economic Affairs and Energy (Germany)

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Summary of the report's recommendations

- (1) Digital markets - and markets characterized by digital platforms in particular - pose new challenges to competition law when it comes to market definition. Hence, there are good arguments for more flexibility in the assessment of dominance. Instead of requiring competition authorities and courts to *always* define markets first, as is currently the case, it can make sense, in some cases, to simply infer dominance if it can be established that some unilateral conduct is not sufficiently disciplined by competition and this practice has an exclusionary effect. However, such an evolution of Art. 102 TFEU is to be left to the Union courts. The interpretation of § 18 GWB¹ should follow suit.
- (2) We do not advise to generally lower the intervention threshold for controlling abuse - neither by adopting a general prohibition of monopolisation nor by shifting to a SIEC test for establishing anti-competitive unilateral behaviour.
- (3) However, it is recommended to no longer restrict the scope of protection of § 20 para. 1 GWB ("relative market power") to small and medium-sized enterprises. It has long been recognised that relevant dependencies can also arise for large firms.
- (4) The prohibition of exclusionary conduct for firms with superior market power vis-à-vis small and medium-sized enterprises in § 20 para. 3 GWB has so far been regarded as a provision to be interpreted narrowly, since it can potentially have the effect to protect small and medium-sized enterprises against competition from larger, more efficient firms. Courts have therefore rightly been cautious in applying § 20 para. 3 GWB. In the digital economy, however, constellations are conceivable and not unlikely in which competitive pressure emanates in particular from innovative small and medium-sized enterprises. In such situations, protection against defensive strategies by firms with superior market power by which they strive to exclude smaller outside rivals by anti-competitive means can make sense. This suggests that § 20 para. 3 GWB should be applied more flexibly in relevant cases.

¹ „Gesetz gegen Wettbewerbsbeschränkungen“ = „Act against Restraints of Competition“.

- (5) Markets with strong positive network effects can tend to "tip", i.e. to turn into a monopoly. However, such "tipping" is often not the inevitable, "natural" outcome of competition on the merits, but can be actively facilitated or induced by certain practices of individual market actors. These practices may include unilateral behaviour such as a targeted obstruction of multi-homing or switching. Under competition law, such behaviour can currently only be addressed if the respective actor has a degree of market power relevant under competition law (i.e. a dominant position under Articles 102 TFEU / §§ 18, 19 GWB, or relative or superior market power under § 20 para. 1 or para. 3 GWB). Since "tipping" into monopoly – once it has happened – can hardly be reversed, we recommend allowing the Federal Cartel Office or the courts to intervene already below this threshold against unilateral behaviour that is not justified on grounds of competition on the merits and which is found to have a dangerous probability to promote "tipping". We therefore recommend the adoption of a new § 20a or § 20 para. 6 GWB, which prohibits platform providers in close oligopolies, or platform providers with superior market power not only vis-à-vis small and medium enterprises, to obstruct competition, insofar as the behaviour in question is found to have a dangerous probability to promote a "tipping" of the market. The obstruction of multi homing or switching should be included into the provision by way of example.
- (6) Information intermediaries have become central players in the digital economy. In case of market power, it implies a significant ability to steer "information consumers" to certain offers, and thereby to affect – and possibly restrain – competition. Where information intermediaries vertically integrate, they may have incentives to exploit information asymmetries in order to distort competition in neighbouring markets. Within the existing competition law framework, the question whether intermediaries are dominant is currently assessed along the established categories of power on the supply or demand side. However, intermediation often is of a hybrid nature: It combines aspects of a supply of intermediation services with the demand (or search) for content. Even if intermediation is categorised as a supply of *intermediation services* – so that we would normally look for power on the supply side – the dependence from the intermediary may sometimes better be assessed by referring to criteria that traditionally play a role in the determination of buyer power. In light of these special features of intermediation activities, in particular of platforms, we recommend that "intermediation power" be anchored as an independent, third form of power in German competition law. This could be done by way of slightly modifying the wording of § 18 para. 1 GWB ("An undertaking is dominant where, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market *or as an intermediary* on the relevant market..."). Additionally, the criteria mentioned in § 18 para. 3a GWB for assessing the market position of firms on

multisided markets could be amended with an additional criterion, taking account for the relevance of a platform in mediating access to sales or supply markets – in particular where the market power of platforms vis-à-vis retailers which are active on the platform is in question. At the same time, we do not consider a modification of the wording of § 20 para. 1 GWB to be needed. It already allows competition authorities and courts to capture "intermediation power" as it stands. It is a separate question whether "intermediation power" can also exist vis-à-vis firms that do not have a market relationship with the platform (e.g. firms listed on horizontal search platforms). We submit that this is an issue to be further discussed.

- (7) Today's large digital corporations are characterised by their conglomerate structure. This has led to a renewed discussion about threats to competition that may result from conglomerate power. However, conglomerate strategies such as the exploitation of new types of economies of scope and of advantages from the cross-market collection and use of data can already be dealt with under existing German and European competition law if the company is dominant in at least one market. Remaining protection gaps are sufficiently addressed by § 20 para. 1 and para. 3 GWB.
- (8) Assessing the future effects on competition of the acquisition of relatively small innovative start-up companies poses particular challenges for competition authorities and courts. Many such acquisitions – also by large digital firms – are a legitimate part of the competitive process. At the same time, some of these acquisitions can have anti-competitive effects, in particular if firms that are already dominant succeed to systematically identify and acquire potential future rivals at an early stage. Competition in already heavily concentrated markets can then be dampened for a long time. It is difficult for competition authorities and courts to identify such cases, however – also because potentials for future competition will frequently originate in niche markets. At the time of acquisition, there may not necessarily be a clear horizontal overlap. With a view to keep markets open and contestable, we suggest that an attempt to strengthen the German competition authority's capacity to address such acquisitions is worthwhile. § 36 para. 1 GWB could therefore be supplemented by a sentence which would allow the competition authority to consider, when assessing the existence of a significant impediment to effective competition, the existence of an overall strategy of a dominant company to systematically acquire fast-growing companies with a recognizable and considerable potential to become competitors in the dominated market in the future. It may be an indication for such future competition that the company to be acquired – while only being a niche competitor to the dominant firm – is active in a market that addresses the same basic needs as the acquirer. Instead of looking at relatively narrowly defined markets, the

Federal Cartel Office could therefore look at a broader category of competitive relationships which may better capture the reality of fast-changing markets in the presence of potentially disruptive activities.

- (9) In the digital economy, control over data has gained new significance for the market position and competitive strategies of companies. This fact can already be taken into account under existing competition law, however. § 18 para. 3a GWB, as newly inserted with the 9th amendment to the GWB in 2017, expressly mentions access to competitively relevant data as a criterion to be taken into account when determining market power in multilateral markets and networks. Access to data can also be taken into account beyond § 18 para. 3a GWB (and in applying Article 102 TFEU). An adjustment of § 18 para. 3 GWB is therefore not needed.
- (10) The refusal to supply data over which a firm has exclusive control and which is essential for engaging in a given activity in an adjacent market can already be qualified as abusive under German (and European competition) law. In Germany, the legal basis for prohibiting such an abuse is § 19 para. 1 in combination with § 19 para. 2 No. 1 GWB. The finding of an abuse requires a balancing of legitimate interests – to be performed in the light of the goal of protecting competition (including incentives to compete). There are good reasons to think that, depending on the exact setting, the threshold for finding that a refusal to supply data constitutes an abuse may be somewhat lower than the threshold for finding an abuse in cases of a refusal to grant access to infrastructures or to intellectual property rights. This is true in particular if and to the extent that the refusal to grant access relates to data which is generated virtually incidentally and without special investment. Obviously, the requirements of the GDPR must be observed where personal data is concerned.
- (11) A discussion has recently emerged whether – in order to facilitate access to large amounts of data for the purpose of training self-learning algorithms and thus to neutralize competitive advantages of particularly data-rich companies – a market-share-based "data-sharing obligation" should be introduced ("data-for-all" law / "data sharing" obligations as proposed, *inter alia*, by Victor Mayer-Schönberger). We consider this to be an important discussion. Yet, the way in which such a data-sharing-duty could be structured (and limited) in concrete legal terms is still a completely open issue.
- (12) An economically legitimate and important interest in access to machine-generated usage data can and will often arise in vertical relationships in the IoT context (for example when using certain machines and services). Such interests are primarily to be acknowledged and managed within the framework of contract law, including the law on unfair contract terms. If the undertaking in control of the data is, at the same time, dominant or possesses relative market

power, there may also be an antitrust basis for data access claims. Yet, we consider that it is primarily for the field of contract law (including the law on unfair contract terms) to ensure an adequate protection of the legitimate interest of contract parties to have access to data that is generated by their own usage pattern.

- (13) If, in the context of value creation networks, third-party providers require access to data that is exclusively controlled by a participant in this network and that is necessary for substantial value creation in this network, § 20 para. 1 GWB may already now provide a legal basis for data access claims – in particular if the relevant third party can show to be in a position of "company-specific dependency". However, in balancing the relevant legitimate interests, the courts have so far required that the resource to which access is to be granted is "normally accessible" in the course of typical market transactions. This requirement is not necessarily met when it comes to data: In many areas, data markets are still relatively weak. It may therefore be useful to clarify in § 20 para. 1 GWB that a relevant form of dependency may also result from an undertaking being dependent, in order to achieve a substantial value creation within a value creation network, on access to automatically generated machine or service usage data that is exclusively controlled by another company; and denial of access to data can constitute an unreasonable exclusionary conduct, even if markets for such data do not yet exist.