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### ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Germany

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More documentation related to this discussion can be found at: [oe.cd/dmkt](https://oe.cd/dmkt).

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## *Abuse of dominance in digital markets*

### **- Contribution from Germany –**

This contribution addresses the pressing subject of abusive practices in digital markets. It provides a short introduction (I.), followed by an overview of key characteristics of the digital economy (II.). The focus lies on the decision practice (III.) and the prospect of an enhanced antitrust toolbox in Germany (IV.). The paper closes by drawing some general conclusions (V.).

### **1. Introduction**

1. The impact of digitalisation on the competitive landscape has been a major focus of competition policy discussions for some years. The characteristics of digital markets give rise to a variety of challenges for enforcers and legislators, ranging from the need to modernise current competition law by adapting existing analytical tools, to the need to introduce pro-competitive regulatory frameworks.

2. Under conditions of effective competition, a company's competitive behaviour is sufficiently restrained: As long as market participants have sufficient possibilities to switch to alternative suppliers or customers, a company's scope for action will be effectively limited. Some companies, however, are not exposed to effective competitive constraints. In particular, a dominant company is able to adversely affect effective competition on the relevant market as its position affords it the power to behave to an appreciable extent independently of its competitors, customers, suppliers and, ultimately, the final consumer. Under German law, it is not in itself illegal to hold such a position, the achievement of which is, in fact, often the result of a company's innovative activities, special expertise and willingness to take risks. The concept of abuse of dominance reflects the idea that the lack of competitive pressure and the corresponding level of market power may result in a unique position enabling the company to engage in unilateral anti-competitive exclusionary or exploitative behaviour. If market power is used to engage in certain types of conduct, this may harm competition and consumers.

3. It should be noted that the issue of whether a company holds a dominant position on the relevant market is to be examined in an overall assessment of all competition-related criteria; in particular, holding a large market share is in itself not sufficient proof of market power.

4. One of the reasons why abuse of dominance is often mentioned in debates about digital markets is that many digital markets exhibit characteristics that lead to a small number of firms gaining strong market positions; these characteristics include low variable costs, high fixed costs and strong network effects, which are potentially reinforced by access to data that are relevant for competition. In some cases, this can lead to "competition for the market" or "winner-takes-most" dynamics, which lead to a single firm capturing the vast majority of sales.<sup>1</sup>

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<sup>1</sup> Regarding the characteristics and structural challenges of the digital economy see: Federal Ministry of Economic Affairs and Energy, A new competition framework for the digital economy, Report by the Commission 'Competition Law 4.0', (2019), chapter 2; <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.html>

5. Competitive markets are key to well-functioning economies, and the benefits of the digital economy can best be realised if digital markets remain competitive. To that effect, it is important to rigorously enforce competition law in order to safeguard the trust in digital markets and ensure that the digital economy continues to deliver economic dynamism, competitive markets, consumer benefits, and incentives to innovate.<sup>2</sup>

6. Since the characteristics of digital markets can favour the above-mentioned market dynamics, comprehensive and swift abuse control is needed to address detrimental effects to competition before irreparable harm is done to markets.

## 2. Digital markets

7. Meeting the particular challenges associated with the substantive assessment of the market conditions in the digital economy has become a key priority in Germany. Digitalisation has revolutionised markets across all sectors of the economy. Fundamentally new business models have emerged and many traditional sectors are also changing at the same time. This creates new challenges for companies as well as for competition.

8. Investigations have shown that digital markets can be heterogeneous. Although business models and the competitive landscape might differ across markets, it is nevertheless possible to identify some general trends and typical characteristics shared by many digital markets.

### 2.1. Network effects

9. A common element of digital markets is the occurrence of network effects contributing to strong economies of scale. Network effects describe how the use of a good or service by one user affects the value the product has for other users. Such effects may be direct, i.e. the benefit gained by users of one group due to using a specific service depends on how many other users of the same group use the service. The more customers there are, the more valuable the service becomes for other users. Indirect network effects exist where the value of a service or product for a specific group of users increases (positive network effects) or decreases (negative network effects) depending on the number of users of another group. Network effects may spur a self-reinforcing positive feedback loop, i.e. a situation where success feeds success; this is an important factor in strengthening a company's market power and might even create a lock-in effect for its customers. Accordingly, the risk of 'market tipping' is related to the occurrence of network effects. Tipping can be understood as a process which ultimately results in a market being served by only one provider while other providers leave the market.<sup>3</sup>

10. In some scenarios, network effects may foster competition as they can contribute to the growth of a new market player. However, network effects can also raise switching costs incurred by users, thus benefitting incumbents. Switching costs not only include the costs associated with "connecting" to a different provider, but also opportunity costs, i.e. the loss of benefits of other alternatives when one alternative is chosen. Switching to

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<sup>2</sup> Common Understanding of the G7 competition agencies together with the European Commission; see Bundeskartellamt, press release of 18 July 2019, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/18\\_07\\_2019\\_G7\\_Erklaerung.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/18_07_2019_G7_Erklaerung.html).

<sup>3</sup> German OECD contribution on "Quality considerations in the zero-price economy" in DAF/COMP/WD(2018)130, p. 4.

another provider will only be attractive for users if the benefit created by the new network outweighs the switching costs. If the benefit generated by the installed base of the incumbent network is high, the benefit of a new network must be even higher. Low switching costs make digital markets more contestable.<sup>4</sup>

11. In a multi-homing scenario, users use several, possibly different, providers to cover similar demands. In turn, switching costs are lower when users are not locked into the network of a single provider. Furthermore, entry barriers might be lower if a new entrant does not have to convince customers to replace their entire existing source with its novel offer. Hence, multi-homing can be a countervailing factor against the self-reinforcing feedback effect of network effects and reduce the risk of market tipping, especially if multi-homing is performed to a great extent. All in all, the extent and relevance of network effects have to be evaluated on a case-by-case basis: Both their absolute and relative importance and the manner in which they evolve as new customers are gained can vary depending on the service under consideration.

## 2.2. Data-driven markets

12. Digital markets are often highly data-driven and in many cases data have become a factor contributing to market power. Successful companies in data-driven digital markets regularly benefit from a significant lead that is due to velocity, variety and volume in big data. The term has not been conclusively defined, but it basically refers to large amounts of different types of data generated at high speed from multiple sources whose handling and analysis require new and more powerful processors and algorithms.<sup>5</sup> Nowadays, big data technologies are used for various purposes, particularly with the aim of optimising business processes, increasing profitability through cost reduction and achieving greater customer orientation. Owing to big data it has become possible to discover new trends and market potentials.

13. In the digital economy, access to data also has the potential to simultaneously generate competitive advantages on several markets. This type of conglomerate effects across markets may contribute to the emergence of integrated digital ecosystems with strong barriers to entry. To ensure that the resulting positions remain contestable, the access to data for competitors can be essential<sup>6</sup>.

## 2.3. Platform economy

14. In many digital markets, multi-sided platforms are often key actors. They function as intermediaries between different user groups. Information intermediaries represent a specific type of such intermediaries. Where these intermediaries have market power, they might have the significant ability to steer consumers who rely on their information towards certain offers, thereby affecting – and possibly restraining – competition. Where information intermediaries integrate vertically, they may have incentives to exploit

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<sup>4</sup> Ibid., p. 5.

<sup>5</sup> Joint Working Paper by Autorité de la Concurrence and the Bundeskartellamt on “Competition Law and Data” (2016), p. 4; <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?nn=10321672>.

<sup>6</sup> Federal Ministry of Economic Affairs and Energy, A new competition framework for the digital economy, Report by the Commission ‘Competition Law 4.0’ (2019), p. 34; <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.html>.

information asymmetries in order to distort competition in neighbouring markets. Within the existing framework under competition law, the question whether intermediaries are dominant is currently assessed based on the established categories of power on the supply or demand side. However, intermediation often entails a hybrid aspect: It combines aspects of supplying intermediation services with the demand (or search) for content. Even if intermediation is categorised as the supply of intermediation services – in which case we would normally look for power on the supply side – the dependence from the intermediary may in some cases be better assessed by referring to criteria that are generally important for determining buyer power.<sup>7</sup>

15. The role of intermediation between different user groups is sometimes not the sole function of a digital platform. In the particular case of hybrid platforms (vertically integrated platforms), the operator itself uses the platform as a sales channel and is active on the procurement side. While this can lead to efficiency gains, e.g. by allowing the platform operator to respond more swiftly to changes on the market, it also creates scope for distortion as platform operators may favour their own products and services.<sup>8</sup>

## 2.4. Zero-price offers

16. The way in which platforms are structured allows for a variety of funding models. One particular platform type can be regarded as an “audience providing” platform where advertisers represent one user group. This forms the basis of many ad-financed business models. In many multi-sided digital markets, products or services are offered free of charge on one market side – often the one addressing consumers. If several competing platforms offer their services free of charge, the price is irrelevant for consumers when choosing between these platforms. Qualitative aspects become more important instead. Platforms in such markets primarily compete based on aspects other than price, such as the quality of their products and services, among others.<sup>9</sup>

## 3. Landmark cases

17. Possible externalities that market leaders could impose on their users, suppliers and vendors include leverage of market power, exploitation of a gatekeeper status and excessive exploitation of consumers. Many of those practices are well-known to antitrust enforcers whereas others seem to be novel features brought about by the digital transformation of our economies and as such might require updated concepts and a high degree of awareness from an antitrust perspective.

18. When it comes to large digital platforms, the Bundeskartellamt has a long-standing and varied enforcement record. Two of these proceedings are outlined below.

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<sup>7</sup> Schweitzer/Haucap/Kerber/Welker, Modernising the law on abuse of market power, Summary, para. 6.; [https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3).

<sup>8</sup> Federal Ministry of Economic Affairs and Energy, A new competition framework for the digital economy, Report by the Commission ‘Competition Law 4.0’ (2019), p. 17; <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.html>.

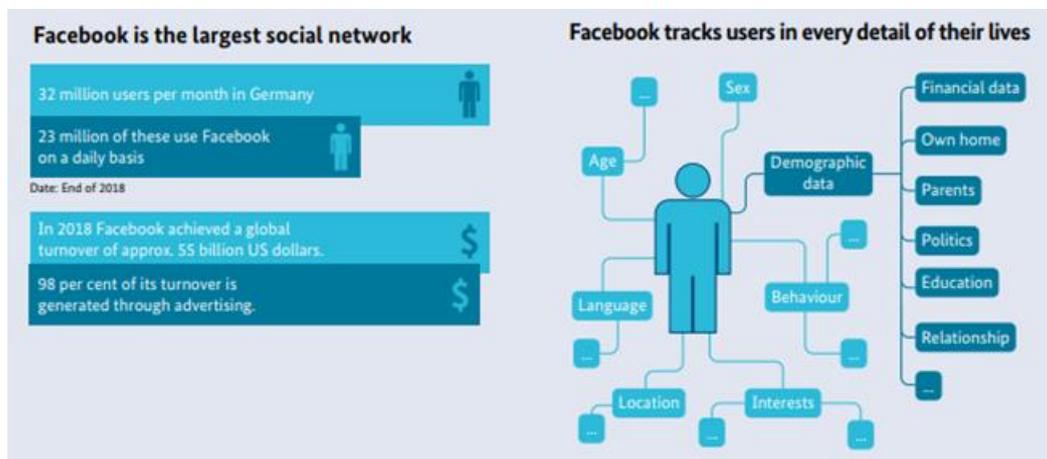
<sup>9</sup> Joint Working Paper by Autorité de la Concurrence and the Bundeskartellamt on “Competition Law and Data” (2016), p. 27.

### 3.1. Facebook

19. In 2019, the Bundeskartellamt imposed far-reaching restrictions on Facebook regarding the processing of user data, in particular Facebook's practice of combining user data from different sources.<sup>10</sup>

20. In this case, the Bundeskartellamt found that Facebook was dominant on the German market for social networks and that Facebook abused this dominant position by making the use of its social network conditional on the collection of user and device-related data outside Facebook's social network and by combining that information with the user's Facebook account. Sources outside Facebook's social network include, firstly, other services owned by Facebook, such as WhatsApp or Instagram, and secondly, third-party websites and apps with embedded Facebook APIs. The following illustration shows some important features of Facebook's social network:<sup>11</sup>

Figure 1. Facebook



21. The Bundeskartellamt made a distinction between user data generated through the use of Facebook and user data obtained from sources outside the social network. The use of data generated by the use of Facebook's social network itself was not part of the investigation.

22. The Bundeskartellamt found Facebook to be dominant on the national market for the provision of social networks. Based on the concept of demand-side substitutability, the Bundeskartellamt defined the relevant market as a national private social network market with private users as the relevant opposite market side. In the Bundeskartellamt's view, messaging services like WhatsApp formed a separate market due to their technical characteristics and applications. The investigations showed that although the services offered by YouTube to some extent overlapped with those provided by social networks, it

<sup>10</sup> Bundeskartellamt, decision of 6 February 2019, B6-22/16; [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/11\\_07\\_2019\\_decisionFacebook.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/11_07_2019_decisionFacebook.html).

<sup>11</sup> Bundeskartellamt, Annual Report 2019, p. 37; [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht\\_2019.html?nn=5808430](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2019.html?nn=5808430).

was not sufficiently comparable to a social network. Other digital players like Snapchat, Pinterest and Instagram were also excluded from the relevant market.<sup>12</sup>

23. The definition of the market as national in scope was based on the fact that the service was found to be used predominantly to connect with people in the users' own country, resulting in special national user habits and the lack of opportunities for supply-side substitution. The assessment of dominance revealed that with regard to various types of users (daily active users, monthly active users, registered users) Facebook held very high market shares on the relevant market. The number of daily active users was a key indicator in assessing the network's competitive significance and market success as a social network's success is measured by the intensity of use. Another crucial factor in determining dominance were the strong direct network effects of Facebook's business model and the difficulties associated with switching to another social network.<sup>13</sup>

24. The Bundeskartellamt deemed Facebook's conduct to be exploitative abuse combined with an anticompetitive impediment of competitors. Dominant companies may not exploit consumers. This applies above all if the exploitative practice also impedes competitors that are not able to amass such a treasure trove of data.<sup>14</sup> According to Facebook's terms of service, users were able to use the social network only under the premise that Facebook may also collect user data from online websites or smartphone apps outside the Facebook network and assign these data to the user's Facebook account. All data collected on the Facebook website, by Facebook-owned services such as WhatsApp and Instagram and on third party websites could be combined and assigned to the Facebook user account.

25. According to the Bundeskartellamt, the company abused its position by making the private use of the network dependent on the authorisation to combine the data relating to users and their devices generated outside facebook.com with the personal data generated by the use of Facebook itself without voluntary consent given by users, which is contrary to the rules of the General Data Protection Regulation (GDPR).<sup>15</sup>

26. Facebook appealed the prohibition decision rendered by the Bundeskartellamt. The Düsseldorf Higher Regional Court initially suspended the prohibition temporarily as requested by the plaintiff but the Federal Court of Justice annulled this interim decision handed down by the previous instance and declared that it had no serious doubts as to the legality of the decision.<sup>16</sup> According to the Federal Court of Justice, the key aspect to be examined here was the scope of choice that Facebook's terms of service conceded to private Facebook users: Choice as to whether they wish (i) to use the network in a more personalised way linking their user experience to Facebook's potentially unlimited access to characteristics also relating to their "off-Facebook" use of the internet, or (ii) to only

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<sup>12</sup> Bundeskartellamt, decision of 6 February 2019, Case Summary B6-22/16, p.5; <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3591568>.

<sup>13</sup> Ibid., p. 6.

<sup>14</sup> Bundeskartellamt, Annual Report 2019, p. 37.

<sup>15</sup> Bundeskartellamt, decision of 6 February 2019, B6-22/16, Case Summary, p.7.

<sup>16</sup> Federal Court of Justice, decision of 23 June 2020, KVR 69/19.

agree to a level of personalisation which is based exclusively on the data they themselves share on facebook.com.<sup>17</sup>

27. The finding of the abuse of dominance was based on the following deliberations: The Court stressed the two-sided nature of Facebook's social network and highlighted that Facebook promises its users a personalised experience and the provision of communication contents that go beyond the mere function of a platform, leading to the fact that the services rendered to users overlap and blend seamlessly with the refinancing of the platform through various forms of online advertising.

28. Referring to the special antitrust responsibility a dominant firm has with regard to the residual competition, the great economic significance attached to accessing data is to be taken into account. The Federal Court of Justice emphasized that users were faced with "lock-in effects" to Facebook's benefit as the lack of choice exploited users in a manner which is relevant under competition law since, due to Facebook's dominant position, competition was no longer able to effectively exercise its controlling function. If competition on the market for social networks were effective, sufficient choices could be expected to be available to users. Those users considering the scope of data disclosure to be a key criterion in their decision could switch to other alternatives.

29. Lastly, the Federal Court of Justice held that Facebook's data lead resulting from its abusive practice could also harm the competitive process in both the advertising market and the market for social networks as a larger data base enhances the possibilities to finance the social network using the profits generated from advertising contracts. In that regard, the Federal Court of Justice held that the anti-competitive effects may also occur on a third market not dominated by the infringer.<sup>18</sup>

30. The case has been referred back to the Düsseldorf Higher Regional Court for the main appeal proceeding and is therefore still pending.

### 3.2. Amazon marketplace

31. Amazon is the largest online retailer and operates by far the largest online marketplace in Germany. Many retailers and manufacturers depend on the reach of Amazon's marketplace for their online sales, especially in terms of access to customers. Its hybrid role as the largest retailer and largest marketplace has the potential to hinder other sellers on its platform.

32. In November 2018, following a large number of complaints, the Bundeskartellamt initiated an abuse proceeding against Amazon to examine its terms of business and practices towards sellers on its German marketplace amazon.de. The terms of business and related practices under antitrust scrutiny concerned liability provisions to the disadvantage of sellers, in combination with choice of law and jurisdiction clauses, rules on product reviews, the non-transparent termination and blocking of sellers' accounts, withholding or delaying payment, clauses assigning rights to use the information material which a seller has to provide with regard to the products offered and terms of business on pan-European dispatch.<sup>19</sup>

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<sup>17</sup> Courtesy translation of Press Release No 080/2020 published by the Federal Court of Justice on 23 June 2020 provided by the Bundeskartellamt: [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungn/2020/23\\_06\\_2020\\_BGH\\_Facebook.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungn/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v=2).

<sup>18</sup> Ibid., p.4.

<sup>19</sup> Bundeskartellamt, press release of 29 November 2018; [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29\\_11\\_2018\\_Verfahrenseinleitung\\_Amazon.html?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html?nn=3591568).

33. In July 2019, the Bundeskartellamt terminated its proceedings following amendments made by Amazon that led to far-reaching improvements in the terms of business for sellers on Amazon’s online marketplaces. The amendments were implemented on Amazon marketplaces worldwide.<sup>20</sup>

34. During its investigation, the Bundeskartellamt gained some insight into the e-commerce landscape in Germany. In 2018, more than 300,000 third-party sellers were active on the marketplace amazon.de. Considering the sales volume of third-party sellers on the amazon.de marketplace, German sellers accounted for 60-65 percent, non-European sellers for 20-25 percent and sellers from other European countries for 10-15 percent. In 2018, more than 300 million different items (ASIN) were offered on amazon.de and approx. 1.3 billion products were sold. The (net) volume of sales on the German marketplace in 2018 amounted to well over 20 billion euros. Amazon.de is therefore by far the largest of Amazon’s five marketplaces in Europe, accounting for 40-50 percent of the sales volume, followed by the British and then the other three marketplaces (amazon.fr, amazon.es, amazon.it). Of the 37 million customers who purchased at least one product on the German marketplace in 2018, over 80 percent were from Germany and 5-10 percent from Austria. 40-45 percent of the sales volume on amazon.de was achieved by Amazon’s own retail business and 55-60 percent was achieved by third-party sellers. In 2018, Amazon blocked more than 250,000 seller accounts permanently and over 30,000 accounts temporarily. Amazon cited fraud as the main reasons for blocking the accounts but also the violation of industrial property rights and product counterfeiting.<sup>21</sup>

35. The services associated with online marketplaces constitute a two-sided market. Online markets serve both sellers (including manufacturers) wishing to sell their goods and consumers (end customers) looking for goods to purchase. Amazon’s significance as a “gatekeeper” for customer access is high due to its large customer base, some of which use the Amazon marketplace either primarily or exclusively for their purchases. According to studies published in particular by industry associations, a large part of German online sales of well over 40 percent is generated via the amazon.de marketplace.<sup>22</sup> Since the case was closed at a relatively early stage, the Bundeskartellamt did not carry out a fully-fledged investigation providing a market definition and an assessment of dominance. Both of these aspects required for an infringement decision were ultimately left open.

36. The Bundeskartellamt’s overall assessment was based on the rationale under national law that exploitative abuse exists if the business terms no longer reflect a balance of interests protected under national antitrust law and other areas of law. Violations of legal provisions not relating to antitrust norms were deemed exploitative if they also contradict antitrust considerations.<sup>23</sup> That does not imply that every clause of the terms of business that is potentially disadvantageous to sellers, or possibly even very burdensome for them, can as such lead to an antitrust law infringement.

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<sup>20</sup> Bundeskartellamt, press release of 17 July 2019; [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/17\\_07\\_2019\\_Amazon.html](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html).

<sup>21</sup> Ibid., p.3.

<sup>22</sup> Bundeskartellamt, decision of 17 July 2019, B2-88/18, Case Summary, p.10; [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/17\\_07\\_2019\\_Case\\_Summary\\_Amazon.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/17_07_2019_Case_Summary_Amazon.html).

<sup>23</sup> Ibid., p.7.

37. Rather, the relevant benchmark was whether, on the basis of an overall assessment, the terms of business in question restricted sellers substantially in their competitive activity on the marketplace. Since Amazon imposed such business terms without objective justification, the Bundeskartellamt also considered such a conduct a violation of the prohibition to demand unjustified benefits from suppliers (“Anzapfverbot”).<sup>24</sup>

38. The authority concluded that in view of the improvements Amazon had committed to, in particular with regard to the general terms and conditions for its marketplace business, it would not be appropriate to continue its abuse of dominance proceedings since the concessions largely eliminated the abuse concerns and a monitoring process was put in place.

#### 4. The antitrust toolbox

39. Adjusting competition law to keep up with the developments on digital markets is a very demanding task for legislators. Over the last years, advisory groups and committees from several countries presented comprehensive reports examining the characteristics of digital markets and proposing measures to foster competition.<sup>25</sup> This includes the Commission ‘Competition Law 4.0’ that was set up by the German Federal Ministry for Economic Affairs and Energy in order to develop specific suggestions for adapting the European competition law framework.<sup>26</sup> With regard to the European level, some EU member states<sup>27</sup> have also put forward proposals at an early stage of the discussion. The European Commission responded with a roadmap for a Digital Markets Act (DMA). The DMA is supposed to consist of a new competition tool addressing structural problems on digital markets and an ex-ante regulation of very large gatekeeper platforms (containing a list of prohibited behaviours). A legislative proposal is expected for December 2020.<sup>28</sup>

40. On a national level, the 9<sup>th</sup> amendment to the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter “GWB”), which entered into force in 2017, already provided *inter alia* some additional criteria for the assessment of market power particularly aimed at digital markets.<sup>29</sup> As keeping track of the pace and scope of the digital economy is an ongoing task, the Federal Ministry for Economic Affairs and Energy already published a draft proposal for the 10<sup>th</sup> amendment to the GWB in January 2020<sup>30</sup>

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<sup>24</sup> Ibid., p.8.

<sup>25</sup> Such as the UK Digital Competition Expert Panel, the Stigler Committee on Digital Platforms, the BRICS-Report “Digital Era Competition” and the EU Special Advisors on Competition Policy in the Digital Age.

<sup>26</sup> The committee ‘Competition Law 4.0’ consisted of legal experts, economists, and members of the German federal parliament (Bundestag) and published its final report in 2019: <https://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2019/20190909-commission-of-experts-on-competition-law-40-presents-final-report-to-minister-altmaier.html>.

<sup>27</sup> For instance, France, Germany, and Poland in 2019.

<sup>28</sup> The initiative of the European Commission is not further addressed as this contribution focuses on the national level. More information with regard to the EU initiative is available at: <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>.

<sup>29</sup> The English translation of the 9th Amendment to the German Competition Act is available at <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.html>.

<sup>30</sup> Government’s Draft Proposal for the 10th Amendment to the German Competition Act; [https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?\\_\\_blob=publicationFile&v=6](https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile&v=6) (in German only).

following conceptual groundwork that dates back to 2018<sup>31</sup>. The Government's draft proposal which followed from this contains important further developments regarding the competition law framework in order to deal with the challenges posed by the digital economy. A key aim of the planned amendment currently debated in the federal parliament (*Bundestag*) is to modernise the control of abusive practices. This will enable the Bundeskartellamt to act more quickly and effectively against the abuse of market power by large digital platforms.<sup>32</sup>

41. Regarding the control of abusive practices, the following improvements in particular are being discussed under the provisional reform package:

- Codifying the concept of intermediation power
- Modernising the essential facilities doctrine with regard to access to data
- Introducing a new provision on abusive conduct of undertakings of paramount significance for competition across markets
- Amending the established rules on prohibited conduct of undertakings with relative market power, explicitly relating to multi-sided markets as well as data-driven dependencies
- Prohibiting certain practices that may contribute to market tipping
- Lowering the requirements for interim measures.<sup>33</sup>

#### 4.1. Intermediation power

42. Beyond the established concepts for market power from the seller and buyer perspectives, the explicit reference to intermediation power is meant to address novel forms of dominance in the multi-sided platform economy. Although it is already possible under the applicable law to take into account the “gatekeeper” role, intermediation power is to be added to the criteria for market dominance according to the draft bill.

43. The new provision enshrines in national law the criterion for assessing the market position of firms on multi-sided markets based on intermediation power as an independent type of market power, taking account of the relevance of a platform mediating access to sales or supply markets. This may be of particular importance to reflect the market power of platforms vis-à-vis retailers which are active on the platform. Their business model is particularly based on the collection, aggregation and analysis of the data streams from their different user groups. Retailers are often particularly reliant on their listing and ranking on those platforms. As a result, the platform might act as a regulator for market access and market success.

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<sup>31</sup> E.g. Schweitzer/Haucap/Kerber/Welker, Modernising the law on abuse of market power, Summary; [https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3).

<sup>32</sup> Bundeskartellamt, press release of 25 February 2020 with regard to the Bundeskartellamt's comment on the draft of the Federal Ministry for Economic Affairs and Energy of the 10th Amendment to the German Competition Act of 24 January 2019; [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/25\\_02\\_2020\\_Stellungnahme\\_10\\_GWB\\_Novelle.html?nn=3591286](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/25_02_2020_Stellungnahme_10_GWB_Novelle.html?nn=3591286).

<sup>33</sup> Federal Ministry of Economic Affairs and Energy, Summary of the Draft Proposal for the 10th Amendment to the German Competition Act, p. 1; [https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gwb-digitalisierungsgesetz-zusammenfassung.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gwb-digitalisierungsgesetz-zusammenfassung.pdf?__blob=publicationFile&v=4) (in German only).

44. The introduction of this third concept of market power is in particular a reaction to the rise of hybrid digital platforms that offer marketplace services for retailers but are also active on the purchasing and sales side themselves. In such a position, the different factors of market power might have a reinforcing effect beyond their mere sum. Hence, the clarification that the notion of intermediation power entails is much appreciated, in particular in light of a possible self-preferential access to the upstream or downstream markets of hybrid platforms.<sup>34</sup>

#### 4.2. A nuanced essential facilities doctrine

45. The novel Section 19(1) no. 4 GWB recalibrates the concept of the essential facilities doctrine (“EFD”) under national law. It adds further nuances to the established concept of anti-competitive refusal to supply by including access to data situations and further opens the scope of application to include essential interfaces and IP in the digital platform economy.<sup>35</sup>

46. Digital markets might be prone to scenarios where a dominant firm is in control of the data streams of a user or a machine and where another firm seeking to provide complementary services to the owner of the machine or the user requires access to the individual user data to adapt its services to the user’s needs. Another scenario for the applicability might be the refusal to provide aggregated user data.<sup>36</sup> It is important to mention that access to data under the refined antitrust EFD needs to respect the privacy law framework and does not seek to create an exemption for personal data under privacy laws.<sup>37</sup>

#### 4.3. Cross-market competitive relevance of digital platforms

47. One of the most innovative elements of the provisional reform package is the novel Section 19a GWB that could bring antitrust enforcement in digital markets to the next level under German law. It seeks to afford the Bundeskartellamt enhanced control over the market activities of the Big Tech giants.<sup>38</sup> It is designed around a two-step mechanism that differs from traditional abuse control.

48. In a first step and irrespective of the existence of abusive practices, the Bundeskartellamt may declare by order that an undertaking which is active to a significant extent on multi-sided or network markets is of paramount significance for competition across markets. As a result, the Bundeskartellamt may prohibit the addressee from engaging in certain behaviour.

49. The provision does not primarily refer to a dominant position on relevant markets but rather broadens the perspective to ensure that the process of competition can be preserved also for markets that are not yet dominated by the addressee of the order. This novel form of abuse control is based on the rationale that the markets of the digital economy might require an earlier stage of antitrust intervention. It reflects the widespread

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<sup>34</sup> Bundeskartellamt, comment on the draft of the Federal Ministry for Economic Affairs and Energy of 24 January 2019, p.3-4; [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Stellungnahmen/Referentenentwurf\\_10\\_GWB\\_Novelle.html?nn=3591286](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Stellungnahmen/Referentenentwurf_10_GWB_Novelle.html?nn=3591286) (in German only).

<sup>35</sup> Government’s Draft Proposal for the 10th Amendment to the German Competition Act of September 2020, p. 83.

<sup>36</sup> *Ibid.*, p. 84.

<sup>37</sup> Bundeskartellamt, comment on the draft of the Federal Ministry for Economic Affairs and Energy of 24 January 2019, p.4.

<sup>38</sup> Government’s Draft Proposal for the 10th Amendment to the German Competition Act, p. 9 and 63.

phenomenon in the digital economy that some individual companies hold key strategic positions of relevance across markets that result in a multitude of dependencies for the other market participants and enable those companies to distort the competitive process to their benefit and to the detriment of innovation and competition on the merits.<sup>39</sup>

50. As a result of the conglomerate structure of the companies in such key strategic positions, the provisions follow a more holistic perspective on the competitive landscape across markets. Factors that are taken into account in the assessment of the cross-market significance of a company include *inter alia*:

- A dominant position on one or several markets
- The financial strength or the company's access to other resources
- Its vertical integration and its activities on otherwise related markets
- Its access to data relevant for competition
- The importance of its activity for third parties' access to supply and sales markets and its related influence on third parties' business activities.<sup>40</sup>

51. Once the Bundeskartellamt has established and declared paramount cross-market significance, the addressee can be subject to a specific set of prohibitions imposed by the authority which are then applicable in addition to the traditional control of abusive practices for dominant firms. The range of prohibited practices under the novel provision includes

- Giving preferential treatment to its own offers when providing access to supply and sales markets
- Directly or indirectly impeding competitors on a market in which the addressee can rapidly expand its position
- Using data relevant for competition as entry barriers or to impede other undertakings or to permit the use of data
- Impeding competition by hampering interoperability or data portability
- Insufficiently informing other companies about the scope, the quality or the success of their performance.<sup>41</sup>

52. The first possible prohibition draws inspiration from the *Google Shopping*<sup>42</sup> decision of the European Commission and seeks to address the potentially detrimental effect the implementation of self-preferencing strategies by a company with paramount cross-market significance has on competition.<sup>43</sup>

53. The second prohibition is aimed at leveraging strategies like exclusive dealing, bundling or predatory prices and seeks to prevent rapid "takeovers" of markets on which a dominant company is not yet active. The company with paramount cross-market

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<sup>39</sup> Ibid., p. 63.

<sup>40</sup> Ibid., p. 9.

<sup>41</sup> Government's Summary of the Draft Proposal for the 10th Amendment to the German Competition Act; [https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gwb-digitalisierungsgesetz-zusammenfassung.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gwb-digitalisierungsgesetz-zusammenfassung.pdf?__blob=publicationFile&v=4) (in German only).

<sup>42</sup> Case AT.39740 Google Search (Shopping), European Commission, decision of 27 June 2017.

<sup>43</sup> Government's Draft Proposal for the 10th Amendment to the German Competition Act, p. 87.

significance might use its edge based on its access to its customer base or the data about consumer preferences on a large scale to gain an advantage.<sup>44</sup>

54. The third category of abusive practice reflects the data-driven nature of the digital economy. As illustrated above under the discussion of the *Facebook* case, the exploitative data policy of a dominant firm may fall under traditional abuse control. Still, the cross-market relevance and use of data entail a severe potential to stifle innovative offers by competitors, raise entry barriers and enshrine the paramount significance of the order's addressee.<sup>45</sup>

55. The protection of interoperability and data portability sought by the fourth prohibition is meant to foster the option of multi-homing. The first alternative is intended to cover measures that prevent the seamless functioning and interaction of different products. Interoperability can serve as a counterbalancing force to the reinforcing feedback loop of network effects. The second alternative covers data portability. It reflects a common feature of the digital economy that competing offers are a useful outside option for companies and consumers only if the own data legacy that is under control of the incumbent can be transferred to the competitor.<sup>46</sup>

56. The last prohibition category seeks to establish a minimum level playing field against the background of information asymmetries to the advantage of the addressee. This concerns certain types of information relating to the provision of the respective addressee's services. The prohibition is intended to ensure that the addressees do not gain any advantage by creating, perpetuating or exacerbating information deficits related to their performance without objective justification.<sup>47</sup>

57. The special set of prohibitions does not apply if the practice in question is objectively justified. The burden of proof regarding the objective justification is placed on the addressee in four of the five cases mentioned above. From an enforcement perspective, such an approach appears warranted since the circumstances justifying the practices in questions typically originate from the sphere of the addressee, which would otherwise have a decreased incentive to provide all the necessary information for the objective evaluation in a complete and timely manner.<sup>48</sup>

#### 4.4. Further development of Section 20 GWB

58. Since not only SMEs can be dependent on other companies, the draft bill intends to extend the scope of protection under Section 20 (1) GWB (abuse of relative market power) to companies that are not SMEs.

59. Section 20 (1a) GWB entails a new regulation on limited data access taking into account that dependence can also result from the fact that a company is dependent on access to data controlled by another company for its own activities. Refusing access to such data may also constitute an unreasonable hindrance if no commerce has been opened for such data yet.<sup>49</sup>

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<sup>44</sup> Ibid., p. 88.

<sup>45</sup> Ibid., p. 88.

<sup>46</sup> Ibid., p. 89.

<sup>47</sup> Ibid., p. 89.

<sup>48</sup> Bundeskartellamt, comment on the draft of the Federal Ministry for Economic Affairs and Energy of 24 January 2019, p.6.

<sup>49</sup> Government's Draft Proposal for the 10th Amendment to the German Competition Act, p. 93.

60. Thus, the hurdles for claims to data access are significantly lowered. In addition, access to data relevant for competition is explicitly mentioned as a criterion for market power and dependence.

#### 4.5. Risk of market tipping

61. Section 20 (3a) GWB of the provisional draft of the reform package contains a prohibition of practices prone to facilitate market tipping. If an undertaking with superior market power according to national law impedes the independent attainment of positive network effects by competitors and thereby risks a considerable restriction of competition on the merits, antitrust enforcement may now intervene absent the finding of a dominant position. The provision is of relevance for the digital platform economy as it applies to multi-sided markets that have been identified as particularly vulnerable to market tipping.<sup>50</sup> The prohibition is guided by the principle of precaution as the risk of restricting competition on the merits does not require actual effects in that regard.

#### 4.6. Interim measures

62. The pace and the scope of anti-competitive practices in digital markets call for a swift response by antitrust enforcement. The provisional reform package addresses this need by adjusting the framework for interim measures. The current version of the provision basically mirrors the EU legal framework for interim measures under Article 8 of Regulation 1/2003. The requirements of the current version lack practicability and are perceived to be too high as it has actually not been applied so far.<sup>51</sup>

63. Under the amended Section 32a) GWB, the Bundeskartellamt may order interim measures *ex officio* if an infringement appears predominantly likely and the order is necessary to protect competition or because of an imminent threat of serious harm to another undertaking.

64. Interim measures are not possible if the undertaking concerned credibly presents facts according to which the order would result in an unfair hardship not required by overriding public interests.

65. The main aim of the provision is to protect the undistorted process of competition at an earlier stage. Lowering the requirements for application from the risk of serious and irreparable damage to competition to the lower standard of a predominant probability paves the way for swift antitrust intervention at least in certain cases. The other alternative that requires an imminent threat of serious harm to another undertaking entails a higher standard of likelihood. It concerns scenarios where the potential harm to the company targeted by the abusive practices is sufficiently concrete and severe. A possible example may be the market exit of the target absent interim intervention.<sup>52</sup>

66. At the same time, it should be pointed out that the scope for application will only be gradually altered under the reform package. It appears likely that interim measures are most suitable for cases with relatively clear facts and established theories of harms and less

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<sup>50</sup> Government's Draft Proposal for the 10th Amendment to the German Competition Act, p. 95.

<sup>51</sup> Government's Draft Proposal for the 10th Amendment to the German Competition Act, p. 97.

<sup>52</sup> *Ibid.*, p. 98.

likely to apply in complex cases with novel legal questions at stake that may have a substantial impact on the business model of the undertakings concerned.<sup>53</sup>

## 5. Conclusions

67. As much as competition policy advocacy and conceptual ground work matter, this needs to be embedded in the willingness to pursue pioneer cases in digital markets. Antitrust enforcement in digital markets requires the constant ability to adapt to unprecedented and severe threats to competition. The central prerequisite for this is an up-to-date competition law that which provides a “well-equipped antitrust toolbox”.

68. Public interest in effective abuse control in digital markets is high. A comprehensive theory of harm that entails novel elements requires a high level of flexibility by the authorities and the judicial control. The pace and scope of digital markets and the often grave consequences of abusive practices require new means to be used by agencies enabling them to react before distortion of competition becomes irreversible.

69. The Government’s draft proposal for amending the German Competition Act is a significant legislative step in order to keep up with the developments on digital markets. Assessing and updating competition law is a continuous task for the (European and national) legislator.

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<sup>53</sup> Bundeskartellamt, comment on the draft of the Federal Ministry for Economic Affairs and Energy of 24 January 2019, p.8.