

Unclassified

English - Or. English

30 May 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **The Evolving Concept of Market Power in the Digital Economy – Note by Germany**

22 June 2022

This document reproduces a written contribution from Germany submitted for Item 5 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm>

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### 1. Introduction

1. Characteristics of digital markets give rise to a variety of challenges for legislators and enforcers. Some legislators employ a two-pronged approach: on the one hand they update and modernise existing tools; on the other hand, new approaches which sometimes have a “regulatory touch” are developed in order to address, in particular, the special role of large digital companies that are active in a number of different markets, oftentimes orchestrating large ecosystems of different products and services.

2. This note will focus on how this approach deals with – and to some extent reconsiders – the role of market power. As will become clear below, digital markets have a number of specific and important characteristics (explained in more detail in ch. 2) which need to be taken into account when establishing the market power of a company. Importantly, however, it seems prudent to acknowledge that especially in digital markets, large companies can hold special positions of economic power which extend beyond one specific market, requiring the traditional concept of market power to be appropriately complemented to capture these specificities of digital markets.

3. Hence, in a number of jurisdictions around the world, legislators have introduced or are considering new tools for competition authorities to address the economic power held in particular by large digital platforms. This includes the Digital Markets Act in the European Union, the debate on a regime for firms which have “strategic market status” in the United Kingdom as well as proposals in the United States such as the American Choice and Innovation Act.

4. Germany has been one of the first countries to introduce new provisions into its competition act, such as Section 19a German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter “GWB”) which explicitly focuses on companies which are of *paramount significance for competition across markets*. In this concept, being dominant on one (or more) market(s) is only one of the factors potentially contributing to the status of paramount significance for competition across markets. Other factors include for example the intermediation power of the company as well as its vertical integration and its activities on otherwise related markets (for more on this, see ch. 3).

5. The Bundeskartellamt has already applied these new provisions in a number of cases (see ch. 4). Most notably, Google and Meta (formerly Facebook) have already been designated as being of paramount significance for competition across markets.

### 2. Factors Contributing to Market Power and Other Positions of Economic Power in Digital Markets

6. Digital markets have a number of characteristics which can be relatively more important to take into account when assessing market power compared to when looking at “traditional” markets. While some of these aspects fall well within the traditional approaches of measuring market power of companies or require only small but important modifications to be made to the existing approaches, other characteristics require broadening the somewhat narrow focus on a specific market and considering how they contribute to positions of economic power which extend across different markets.

## 2.1. Network Effects

7. A common element of digital markets is the occurrence of network effects contributing to strong economies of scale.<sup>1</sup> 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>2</sup>

8. 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 benefiting 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 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>3</sup>

9. 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. Role of Data

10. 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 can in particular be due to velocity, variety and volume in big data. The term has not been conclusively defined, but it basically refers

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<sup>1</sup> This and the following two sections are partly based on the 2020 OECD Contribution by Germany on "Abuse of Dominance in Digital Markets" in DAF/COMP/GF/WD(2020)32, p.3ff.; [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)32/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)32/en/pdf)

<sup>2</sup> German OECD contribution on "Quality considerations in the zero-price economy" in DAF/COMP/WD(2018)130, p. 4; [https://one.oecd.org/document/DAF/COMP/WD\(2018\)130/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)130/en/pdf)

<sup>3</sup> Ibid., p. 5.

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>4</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.

11. In the digital economy, access to data also has the potential to simultaneously generate competitive advantages on several markets. Companies which are active on a number of different markets and offer a variety of different products or services can oftentimes combine the data from these different sources in order to generate valuable additional information about users' needs and preferences.<sup>5</sup> This type of conglomerate effects across markets may contribute to the emergence of integrated digital ecosystems (see also ch. 2.4 below) with strong barriers to entry and significant lock-in effects. Moreover, data typically serve as a "shareable input" in the sense that data obtained via some specific product or service can be used for the development of new products or the improvement of existing ones, thereby benefiting from economies of scope.<sup>6</sup> To ensure that the resulting positions of companies, especially those orchestrating large ecosystems with enormous amounts of data, remain contestable, competitors' access to data can sometimes be essential.<sup>7</sup> In other situations, limits may be necessary as to how data can be shared across different products or services within an ecosystem.

### 2.3. Multi-Sided Platforms and their Intermediation Power

12. In many digital markets, multi-sided platforms are often key actors. They function as intermediaries between different user groups. Information intermediaries, such as search engines, e-commerce platforms or price comparison websites represent a specific type of such intermediaries. Where they have market power, these intermediaries 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 information asymmetries in order to distort competition in neighbouring markets. In some cases, the role of intermediation between different user groups is 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

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<sup>4</sup> Joint Working Paper by the 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>5</sup> Cremer/deMontjoye/Schweitzer, Competition Policy for the Digital Era, 2019, p. 33

<sup>6</sup> Bourreau/de Streel, Digital Conglomerates and EU Competition Policy, 2019, p. 11; <http://www.crid.be/pdf/public/8377.pdf>

<sup>7</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>

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>

13. The concept of intermediation power can be usefully extended to also include cases in which there is not necessarily a direct business relationship between the intermediary and the respective user group(s). Rather, platforms can unilaterally set specific rules regarding platform access, for example through design choices, or exert a strong influence on the way third parties go about their business by prohibiting users from engaging in a certain conduct. In extreme cases, third parties' business models depend on having a particular kind of access to a specific platform. Naturally, the effects of such a form of "rule setting power" that a platform wields over third parties are not restricted to a specific market. A platform may in fact act as a "gatekeeper" for third parties across different markets.

14. A company which has sufficient power to set the rules governing access to its platform(s) or behaviour of third parties in its ecosystem may use this power to distort information or prohibit certain business practices in ways that itself benefits most from it. This can include situations where third parties are prohibited from offering certain products or services which compete with those offered by the platform in question or where their price setting decisions are restricted .

## 2.4. Digital Ecosystems

15. Large digital companies are typically active on a number of different markets. Crucially, these markets are often interlinked in some way or another. In some cases, these links come in the form of vertically integrated products or services; in others, connections between them extend beyond a specific value chain. As a whole, the strong connection and interaction between the different products and services of one large digital company is often referred to as constituting a "digital ecosystem".<sup>9</sup>

16. Companies can benefit from economies of scope through activities on different but related markets, for example by making use of the modular design of many products and services in the digital economy: Hardware and software products consist of independent components which interact through standardised interfaces.<sup>10</sup> Economies of scope exist in particular in situations where companies can make use of "shareable inputs". On the one hand, in a more traditional sense, they can play an important role in product development, e.g., when processors are used and re-used across product lines or when a server infrastructure can be easily adapted to form the basis for different products.<sup>11</sup> On the other hand, data represent a specific "shareable input" which is arguably important to the digital economy. If companies can combine data from different sources, they obtain information,

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<sup>8</sup> Ibid, p. 17.

<sup>9</sup> For an in-depth discussion of the concept of digital ecosystems, see the OECD Hearing on Competition Economics of Digital Ecosystems 2020 and the accompanying materials; <https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm>.

<sup>10</sup> Bourreau/de Streeck, Digital Conglomerates and EU Competition Policy, 2019, p. 9; <http://www.crid.be/pdf/public/8377.pdf>.

<sup>11</sup> Ibid, p. 10.

e.g. for the development of new products, which goes beyond what they could infer from a separate analysis of the different data sets (see already ch. 2.2 above).<sup>12</sup>

17. It is, however, not only on the supply side where increased integration – vertical or otherwise – can lead to competitive benefits. Also on the demand side, the joint use of the different products of an ecosystem can lead to synergy effects for users. For example, transaction costs may be lower when different products are bundled together or search costs for the individual products are reduced.<sup>13</sup> At the same time, companies may benefit from actively investing in increasing the complementarities between the different products of an ecosystem, often leading to incentives to make the joint use of products beneficial or even compulsory.<sup>14</sup> The resulting compatibility of products and their interoperability leads to a product offering that a user will often prefer to using the different products individually. These synergy effects are further increased if products are bundled to share some of their functionalities. Examples of this are unified log-ins using a single identification method, potentially leading to reduced multi-homing and increased user lock-in within an ecosystem.<sup>15</sup>

18. Moreover, network effects play a special role in digital ecosystems. In addition to market-specific or platform-specific network effects (see ch. 2.1 above), network effects can play out across individual products and markets. Synergies between the different products can lead to direct and indirect network effects that further increase the competitive advantage of a company orchestrating a whole ecosystem of different products and services because network effects are now ecosystem-specific.<sup>16</sup>

### 3. Recent Legislative Changes in Germany

19. The German legislator has amended the German competition act in light of the new challenges posed by digital markets, inter alia by establishing a new concept of “paramount significance for competition across markets” (Section 19a) in the 10<sup>th</sup> amendment to the GWB in January 2021 (ch. 3.1). In addition, both the 10<sup>th</sup> amendment and also the previous 9<sup>th</sup> amendment to the GWB in 2017 contained new criteria designed, in particular, for digital markets, that have to be taken into account when carrying out the “traditional” assessment of market power (ch. 3.2).

#### 3.1. Section 19a

20. As stated in the German Government’s statement of legislative intent, the new Section 19a seeks to afford the Bundeskartellamt enhanced control over the market

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<sup>12</sup> Cremer/de Montjoye/Schweitzer, Competition Policy for the digital era, Report for the EU Commission, 2019, p. 33; <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

<sup>13</sup> Bourreau/de Streeck, Digital Conglomerates and EU Competition Policy, 2019, p. 12; <http://www.crid.be/pdf/public/8377.pdf>.

<sup>14</sup> Ibid.

<sup>15</sup> Fletcher, Digital competition policy: Are ecosystems different?, Note for the OECD Hearing on Competition Economics of Digital Ecosystems, December 2020, p. 6; [https://one.oecd.org/document/DAF/COMP/WD\(2020\)96/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)96/en/pdf).

<sup>16</sup> Ibid, p.6.

activities of the Big Tech giants.<sup>17</sup> It is designed around a two-step mechanism that differs from traditional abuse control.

21. 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 then, in a second step, prohibit the addressee from engaging in certain behaviour.

22. Importantly, Section 19a does not require the addressee to hold a dominant position on a specific market. Instead, dominance on one or several market(s) is only one of the factors informing the assessment and potentially contributing to the status of paramount significance for competition across markets. Other factors include the addressee's financial strength or its access to other resources, its vertical integration and its activities on otherwise related markets, its access to data relevant for competition, the relevance of its activities for third party access to supply and sales markets and its related influence on the business activities of third parties. It should be noted that this list of factors is neither conclusive nor do all of these factors have to be met cumulatively.<sup>18</sup>

23. This novel form of abuse control is based on the rationale that digital markets might require earlier antitrust intervention. As laid out in more detail in ch. 2 of this note, this reflects the widespread phenomenon in the digital economy —that some individual companies hold key strategic positions of economic power across markets that result in a multitude of dependencies for the other market participants (compare ch. 2.3 of this note). It is also considered that these companies have created ecosystems characterised by heavily integrated products and services, increasing lock-in of consumers as well as business users and leading to economies of scope (compare ch. 2.4 of this note). Together with superior access to data (compare ch. 2.2 of this note) these features enable the companies to distort the competitive process to their own benefit and to the detriment of innovation and competition on the merits. The two-step mechanism and the fact that a dominant position is not a precondition for a position of paramount significance for competition across markets ensure that the process of competition can be preserved also for markets that are not yet dominated by the addressee of the order.

24. Conduct that the Bundeskartellamt can prohibit includes for example the self-preferencing of a group's own services or envelopment strategies. The Bundeskartellamt is now able at a much earlier stage to prohibit companies of paramount significance for competition across markets from engaging in certain types of conduct. It can take measures that are, in a certain sense, preventive and that can contribute decisively to curbing the power of large digital ecosystems that extend across various markets.

25. The German lawmaker has also reinforced the effectiveness of the new provision by shortening the legal process. Appeals against decisions issued by the Bundeskartellamt under Section 19a will be brought directly to the Federal Court of Justice as the first and last instance on all disputes in this regard. The court is called upon to reassess the substance of a case to uphold the legal right to be heard.

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<sup>17</sup> German Government's statement of legislative intent on the 10<sup>th</sup> amendment to the GWB, Bundestag printed paper. 19/23492, p. 9 and 63.

<sup>18</sup> Ibid, p. 75.

### 3.2. Other Legislative Changes Concerning Digital Markets

26. Already with the 9th amendment to the GWB in 2017, the German legislator took important steps to adapt the competition law regime to the increasing digitalisation of markets. In particular, this amendment clarified that the assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge (Section 18(2a) GWB). It also introduced a list of factors that shall be taken into account in assessing market positions, in particular in cases of multi-sided markets and networks, including network effects, single-homing vs. multi-homing, economies of scale arising in connection with network effects, access to data relevant for competition and the competitive pressure driven by innovation (Section 18(3a) GWB).

27. In the 10<sup>th</sup> amendment, the concept of intermediation power (compare ch. 2.3 of this note) was not only introduced in Section 19a but was also added as an additional factor to be considered when establishing market dominance. The new provision Section 18(3b) GWB enshrines in national law the criterion for assessing the market position of firms on multi-sided markets based on intermediation power as a specific factor contributing to market power, taking account of the relevance of platforms mediating access to sales or supply markets. This may be of particular importance for reflecting the market power of platforms vis-à-vis retailers which are active on them. Retailers often depend in particular on how they are listed and ranked on those platforms. As a result, the platform might act as a regulator for market access and market success.

28. The explicit introduction of this additional 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. Specific threats to competition can occur through possible self-preferential access to the upstream or downstream markets of hybrid platforms.

29. Apart from an update of the rules on prohibited conduct of undertakings with relative market power, also in light of the platform economy, another new feature is that under certain preconditions the Bundeskartellamt can order in favour of dependent undertakings that access to data must be granted in return for adequate compensation. In this context, it is explicitly stated that relative market power may also arise from the fact that an undertaking depends on accessing data controlled by another undertaking in order to carry out its business activities. The GWB also affords the Bundeskartellamt special competences to intervene in cases where an undertaking with superior market power on a platform or network market impedes the independent attainment of network effects by competitors, which might create a serious risk of a market “tipping” towards a larger supplier. Both amendments in particular reflect the special importance of network effects and access to data as factors of market power.

## 4. Applying the New Tools

30. Based on its new competences pursuant to Section 19a GWB, the Bundeskartellamt has initiated designation procedures against Facebook (now Meta), Amazon, Google and Apple. For Google and Meta, these designation procedures have already been completed (see ch. 4.1 and ch. 4.2, respectively). In addition, there are a number of ongoing cases based on Section 19a (see ch. 4.3).

31. Based on the Bundeskartellamt’s experience gathered from the proceedings pursuant to Section 19a GWB, the concept of digital ecosystems, and thus the idea of taking



a holistic, cross-market perspective when assessing the economic power of large digital companies, is highly relevant. The completed designation procedures as well as those that are still ongoing show how these concepts can be meaningfully applied in practice.

#### 4.1. Designation Decision against Google based on Section 19a(1)

32. In December 2021, the Bundeskartellamt issued its first decision based on Section 19a(1) GWB against Alphabet, Inc., the parent company of Google. In its decision the Bundeskartellamt concluded that Google is of paramount significance for competition across markets because it has a position of economic power across markets that allows for a scope of action across markets that is not sufficiently controlled by competition.

33. The Bundeskartellamt found that Google has a dominant position on the market for general search services with a market share of more than 80 percent and that it is the main search advertising provider. Other Google products and services, like YouTube, Chrome, Android or the Play Store also reach a large number of users in Germany.

34. Moreover, Google is highly vertically integrated and its various services are linked with each other across different markets. This can be seen, for example, when considering the connection between the Android mobile operating system and the Play Store. Google also offers advertising services with a wide reach, covering the entire value chain.

35. In its digital ecosystem Google also has significant influence over other companies' access to its users and advertising customers and can set rules and conditions for other businesses across markets. In this respect, these services can be described as "infrastructure" since, for one thing, a large number of other services can to a great extent only be offered using Google's services and, for another, Google's services are of great importance for the business activities of third parties.

36. The Bundeskartellamt also found that Google has excellent access to data relevant for competition. Its large user base, its widely used advertising services and the large number of user data it can collect across services, and partly also across devices, allow Google not only to market targeted adverts but also to continuously develop its services. The competitive advantage resulting from this access to data and other resources can be used as shareable inputs in many ways across markets.

#### 4.2. Designation Decision against Meta based on Section 19a(1)

37. In May 2022, the Bundeskartellamt issued its decision against Meta Platforms, Inc., formally declaring Meta's paramount significance for competition across markets based on Section 19a(1) GWB.

38. Meta, which is known in particular for its services Facebook (including Messenger), Instagram and WhatsApp, operates a strong social media ecosystem and continuously expands its range of services, e.g. with features like "Stories" and "Reels" or offers like "Watch" or "Shops". As major project for the future Meta invests in particular in hardware and software for a "metaverse", i.e. an extensive virtual reality (VR) world. Meta's efforts in this regard include its acquisition of Oculus (now: Meta Quest), a manufacturer of VR headsets and technology.

39. Meta's services are used by more than 3.5 billion people worldwide. Its services are also widely used in Germany. Owing to its large user base and the user data available to the company, Meta is also the leading provider of social media advertising, which is the company's almost exclusive source of revenue. In 2021 Meta's profit increased again in year-on-year comparison by more than a third to almost USD 40bn.

40. Taking into account the factors described above (ch. 3.1), in its overall assessment the Bundeskartellamt found that Meta has a position of economic power across markets that allows for a scope of action across markets that is not sufficiently controlled by competition.

#### 4.3. Ongoing Cases

41. The designation procedure against Amazon was initiated in May 2021 in order to investigate whether Amazon can be considered to be of paramount significance for competition across markets. Amazon might fall under Section 19a because of its online marketplaces and many other, above all digital offers.

42. In June 2021, the designation procedure against Apple was initiated. The Bundeskartellamt examines whether with its proprietary operating system iOS, Apple has created a digital ecosystem around its iPhone that extends across several markets. In addition to manufacturing various hardware products, the tech company also offers other services such as the App Store or Apple Music as part of its services business. Besides assessing the company's position in these areas, the Bundeskartellamt examines Apple's extensive integration across several market levels, the magnitude of its technological and financial resources and its access to data. A main focus of the investigations will be on the operation of the App Store as it enables Apple in many ways to influence the business activities of third parties.

43. Currently there are three ongoing cases which are based on Section 19(2). In one of them, the Bundeskartellamt undertakes an analysis of Google's data processing terms. One aspect of this proceeding is to investigate whether consumers who want to use Google's services have sufficient choice as to how Google uses their data. In a second proceeding, also against Google, the authority takes a closer look at the Google News Showcase service and examines whether the announced integration of the Google News Showcase service into Google's general search function is likely to constitute self-preferencing or an impediment to the services offered by competing third parties. Thirdly, in an investigation against Meta, the Bundeskartellamt investigates the link between the Oculus (now Meta Quest) virtual reality products and the social network Facebook.