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The Use of Structural Presumptions in Antitrust – Note by Germany

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1. Introduction

1. Antitrust law has always had to deal with very complex issues. However, the complexity of these issues, and in particular the speed in which they evolve, have increased considerably in the digital economy. In the recent past, various legal efforts have been undertaken worldwide to tackle special difficulties and challenges involved. As to Germany, the introduction of Section 19a[1] of the German Competition Act (GWB)[2] in 2021 and, with regard to Europe, the introduction of The Digital Services Act (DSA)[3] and the Digital Markets Act (DMA)[4] in 2022 should be mentioned in this context. However, this is not enough. In an increasingly complex and fast-moving world a more workable approach for antitrust law is indispensable. Structural presumptions can play a key role here. If they are well designed, balanced and, ideally, enshrined in law, they can significantly strengthen the enforcement of antitrust law and speed up proceedings in the interest of all parties involved, while both maintaining legal certainty and predictability and thereby striking an appropriate balance between Type I (false positive) and Type II (false negative) errors.

2. Fortunately, where the assessment of market dominance in the form of single firm or collective dominance is concerned, the German GWB provides for such rebuttable legal presumptions in merger and unilateral conduct proceedings. They are aimed at facilitating the decision-making practice in order to promote effective competition law enforcement (**Section II.**) These legal presumptions are helpful even if they are mainly used as an auxiliary consideration in the Bundeskartellamt's practice because the authority is legally obligated to investigate all the facts relevant to a case ex officio (*Amtsermittlungsgrundsatz*). Their main and still highly beneficial function is to provide a strong incentive for firms to submit to the Bundeskartellamt all the information required for a complete assessment of the case at an early stage of the investigation (**Section III.**).

[1] In 2021 the 10th amendment to the German Competition Act (GWB) modernised and extended the control of abusive practices. The Bundeskartellamt can now intervene more quickly and effectively against anti-competitive practices by large digital companies. It can prohibit companies which are of "paramount significance for competition across markets" from engaging in certain practices that are damaging to competition. Interventions are also possible in markets in which the companies are not (yet) dominant. This is a significant change from previous abuse control and enables the Bundeskartellamt to also intervene at an early stage in order to keep markets open, promote innovation and protect consumer choice. For further information see: https://www.bundeskartellamt.de/EN/Digital_economy/RulesDigital_economy/rulesdigitaleconomy_node.html.

[2] English version available at: https://www.gesetze-im-internet.de/englisch_gwb/index.html. Please note, the English translation includes the amendments to the Act by Article 1 of the Act of 25. October 2023 (Federal Law Gazette I. p. 294). Translations may not be updated at the same time as the German legal provisions displayed on this website. To compare with the current status of the German version, see: http://www.gesetze-im-internet.de/gwb/BJNR252110998.html.

[3] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), OJ L 277, 27.10.2022, p. 1–102.

[4] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

Another important function of the presumptions is to provide the courts with an instrument to keep the issues raised in the proceedings manageable (**Section IV.**). In addition, they enable and facilitate fact-finding in private enforcement in civil proceedings (**Section V.**). In view of these effects, the legal presumptions, while respecting the *Amtsermittlungsgrundsatz*, not only help to speed up and facilitate the Bundeskartellamt's proceedings as well as the ensuing appeal proceedings, but also, and even more so, private antitrust enforcement (**Section VI.**).

2. Legal Presumption: Market Dominance

3. In merger and unilateral conduct proceedings the German competition law regime provides for rebuttable legal presumptions of market dominance.

4. According to Section 18(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, it has no competitors, is not exposed to any substantial competition, or has a paramount market position in relation to its competitors.

5. A single undertaking is presumed to be dominant if it has a market share of at least 40 per cent (Section 18(4) GWB). The legislator raised the threshold for the presumption of single firm dominance with the 8th amendment of the GWB in 2013. The earlier version of the GWB presumed a single undertaking to be dominant if it had a market share of one third. The rationale for the change was to adapt the GWB to the developments in economic knowledge and the Bundeskartellamt's decisional practice. The authority's experience/practice had shown that single firm dominance with a market share of one third is the exception rather than the rule.

6. Section 18(6) GWB stipulates that a body of undertakings is presumed to be dominant if it consists of three or fewer undertakings reaching a combined market share of 50 percent, or consists of five or fewer undertakings reaching a combined market share of two thirds. This presumption can be refuted if the undertakings demonstrate that the conditions of competition are such that substantial competition between them can be expected, or that the body of undertakings has no paramount market position in relation to the remaining competitors (Section 18(7) GWB).

7. Both presumptions (single firm dominance and collective dominance) are applicable in merger control proceedings as well as in abuse of dominance proceedings.[5]

3. Main function of presumptions in the Bundeskartellamt's proceedings

8. The main rationale for these presumptions is to promote effective competition law enforcement by facilitating merger control and unilateral conduct proceedings. The presumptions do not replace an assessment of the market situation as they do not supersede the Bundeskartellamt's obligation to investigate ex officio (*Amtsermittlungsgrundsatz*). Rather, they modify this obligation. Therefore, when taking a decision, the Bundeskartellamt mainly uses legal presumptions as an auxiliary consideration in addition to its market assessment. Their main function is to provide the undertakings concerned with a strong incentive to submit to the Bundeskartellamt all the information that it needs for the

[5] This concerns antitrust administrative proceedings (Section III.), appeal proceedings (Section IV.) and civil proceedings (Section V.) to which the contribution relates exclusively. In fine proceedings, on the other hand, the presumptions are not applicable in view of the in dubio pro reo principle.

purpose of providing a complete assessment of the case at an early stage of the investigation. Particularly within the tight timeframes of merger control,[6] investigations can be considerably facilitated if the companies concerned do not merely react to requests for information, but - due to the presumption rules - have a considerable interest in the Bundeskartellamt obtaining a timely and comprehensive picture of market conditions. Otherwise, they run the risk that market dominance will be deemed to have been established on the basis of the presumption thresholds in cases where the Bundeskartellamt, despite carrying out the necessary investigations, is unable to confirm or disprove market dominance within the review periods.

9. The presumption of single market dominance (Section 18(4) GWB) only assigns the substantive burden of proof (*materielle Beweislast*) to the undertaking concerned. In contrast, the burden of producing evidence (*Darlegungslast*) remains with the Bundeskartellamt due to the principle of ex officio investigation (*Amtsermittlungsgrundsatz*). This means that, despite the presumption, the Bundeskartellamt is obligated to fully investigate all the facts that are relevant for the substantive assessment of the case and use all the evidence it has, including evidence that is favourable to the undertakings concerned. Thus, the mere fact that the thresholds for the presumption have been reached or exceeded is not in itself sufficient proof of high market power or even dominance. The presumption only applies if, after a thorough investigation, neither the existence nor the absence of dominance can be proved (*non liquet*). Nevertheless, simply because of the risk that the Bundeskartellamt may overlook refuting facts, the presumption causes the undertakings to put forward and prove such facts on their own initiative, to the extent that this does not presuppose the authority's possibilities of investigation. In this way, the presumption of single dominance does not create a (legal) burden for undertakings to produce evidence, but a considerable incentive to present facts that are favourable for them.

10. This is reflected in the decisional practice of the Bundeskartellamt where the legal presumption for single firm dominance is mainly used as an auxiliary consideration in addition to the results of the Bundeskartellamt's investigations and market assessment. Even if the presumption threshold is exceeded, the Bundeskartellamt regularly examines whether dominance is to be assumed on the basis of a case-by-case overall assessment of all relevant circumstances, considering various market dominance criteria (see Section 18 (3), (3a), (3b) GWB).[7] Conversely, a market share below the threshold of the presumption of dominance does not immediately lead to the conclusion that a dominant position is excluded. It is merely not presumed to exist in a case of *non liquet*.[8]

[6] The timeframe of German merger control proceedings is very tight (5 months after notification) and prenotification discussions are not mandatory.

[7] See for example Bundeskartellamt, decision of 8 March 2007 – B9 – 520/06, p. 25 f. (German version available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2007/B9-520-06.pdf?__blob=publicationFile&v=1; confirmed by Higher Regional Court Düsseldorf, decision of 26 February 2009 – VI-Kart 7/07 (V) – *Douglas*, paras. 63 ff. See also: Bundeskartellamt, decision of 5 November 2008 – B5 – 25/08, confirmed by Higher Regional Court Düsseldorf, decision of 21 October 2009 – VI-Kart 14/08 (V), paras. 109 ff.; Bundeskartellamt, decision of 4 December 2017 – B6 – 132/14-2 – *CTS Eventim*, paras. 149 ff. (German version available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2018/B6-132-14-2.pdf?__blob=publicationFile&v=4).

[8] Bundeskartellamt – B9 – 520/06, ibid., p. 21.

11. The legal quality of the presumption of collective dominance set out in Section 18(6) GWB differs from the presumption of single firm dominance.[9] In principle, it leads to a full shift of the burden of proof, which includes the companies having to come forward with all the necessary facts available to them and produce evidence if needed. However, with regard to proceedings before the Bundeskartellamt, the restrictions following from the principle of ex officio investigation (*Amtsermittlungsgrundsatz*) must also be observed. In this respect, the interaction of the qualified legal presumption in Section 18(6) GWB with the Bundeskartellamt's obligation to investigate ex officio was clarified by the Düsseldorf Higher Regional Court in the Cargotec Case.[10] In its decision the Court found that the presumption of collective dominance involves a "*genuine reversal of the burden of proof*" and in this regard differs significantly from the presumption of single dominance. However, at the same time it also stated that, despite the genuine reversal of the burden of proof, the Bundeskartellamt still has an obligation to investigate any facts that are substantial for the assessment of collective dominance insofar as the undertakings concerned cannot reasonably be aware of or have access to them. Moreover, the Bundeskartellamt has to conduct further investigations if they appear crucial on the basis of its special knowledge of the facts. The presumption can be refuted under Section 18(7) GWB. In this respect, it is up to the undertakings to demonstrate that the conditions of competition are such that substantial competition between them can be expected, or that the body of undertakings has no paramount market position in relation to the remaining competitors.[11] Further, also in the examination of the conditions necessary for the rebuttal under Section 18(7) GWB, the application of the collective presumptions may, in case of doubt, have an effect to the detriment of the undertakings which are responsible for proving the rebuttal conditions.[12]

[9] This follows from the different wording in Section 18(4) and (6) GWB, the explanatory notes from legislative procedure and the historical genesis of the law. The difference in the wording is not reflected in the unofficial English translation of the GWB.

[10] Higher Regional Court Düsseldorf, decision of 7 May 2008 – Cargotec – VI-Kart 13/07 (V), BA p. 21. See also: Higher Regional Court Düsseldorf, decision of 26 November 2008 – *Phonak II* – VI-Kart 8/07 [V], para. 63; decision of 3 December 2008 – Kart 7/06 – *Springer/ProSieben*, para. 33 f.

[11] For the acceptance of the presumption against the background of its unproven refutation, see: Higher Regional Court Düsseldorf, decision of 3 December 2008 – *Springer/ProSieben* – Kart 7/06, paras. 34 ff.; confirmed by Federal Court of Justice, decision of 8 June 2010 – *Springer/ProSieben II* – KVR 4/09, para 18. And for the successful refutation of the presumption, see: Higher Regional Court Düsseldorf, decision of 4. August 2010 – VI-2 Kart 6/09 (V) – paras. 36 ff. While the Higher Regional Court Düsseldorf held that the presumption had not been refuted (decision of 26 November 2008 – *Phonak II* – VI-Kart 8/07 [V], paras. 64 ff.), this assessment did not stand up to the scrutiny of the Federal Court of Justice as appellate court (decision of 20 April 2010 – Phonak/GN Store, Phonak I/GN Store I – KVR 1/09, paras. 54 ff.).

[12] For example, in its decision of 6 December 2011 – KVR 95/10 –, BGHZ 192, para. 58, the Federal Court of Justice stated with regard to its examination of substantial competition between the undertakings: "*If […] the observed behaviour is ambiguous, this cannot call into question the assumption of uniform behaviour based on the structural analysis, excluding substantial competition, at least in the area of application of the collective presumptions […]"* [translation by author].

4. Main function of presumptions in appeal proceedings against decisions of the Bundeskartellamt

12. It should be noted at the outset that in Germany, in appeal proceedings against decisions of the Bundeskartellamt, the court has to take its own decision on all the issues, and, if necessary, the court has to conduct its own investigation. In principle, the presumptions in the court proceedings thus have the same effect as in the proceedings of the Bundeskartellamt.[13]

13. However, in the decisional practice of the courts the presumptions often play a more important role, especially where complex factual questions are concerned. In this context, the rebuttable presumptions provide the court with a tool enabling it to keep the issues raised in the proceedings manageable. The presumptions can be used by the court as an instrument to limit excessive investigation suggestions and attacks on the investigation results by those involved in the merger and to concentrate on the substantiated and potentially viable points of attack. They also allow the court to leave questions open about individual complex issues.

5. Main function of presumptions in private enforcement

14. In principle, the presumptions in private enforcement have the same basic effects as in the proceedings of the Bundeskartellamt and in appeal proceedings against decisions of the Bundeskartellamt. However, they also go beyond this in certain respects. This is because the principle of ex officio investigation (*Amtsermittlungsgrundsatz*) does not apply, i.e. any restrictions on the effect of the presumption derived from this are inapplicable. In addition, the parties to the civil proceedings generally have to establish and prove the facts that are in their favour. Nevertheless, unlike the Bundeskartellamt in administrative proceedings or the court in appeal proceedings against decisions of the Bundeskartellamt, they do not have any special powers of investigation. It is therefore much more difficult for them to establish the facts.

15. The function of presumptions in civil proceedings must therefore be seen in the light of this, and especially in view of the limited information normally available to the parties to the dispute. Much of the information relevant in the context of market dominance is held by the potentially dominant undertaking. Facilitating access to evidence is essential for undertakings that are potential victims of abusive behaviour as this enables them to prove a potential violation in court proceedings relating to unilateral conduct. In order to take account of this asymmetry of information, the presumptions in civil proceedings, to the extent that their requirements are met, lead to an obligation for potentially dominant undertakings to present exculpatory facts in their favour. Thus, they cannot simply deny the existence of their dominant position, but must substantiate why they are not dominant

[13] See Section III. above and the case law provided in footnotes 6 ff. Additionally, in relation to the presumption of single market dominance: Higher Regional Court Düsseldorf, decision of 15 December 2010 – VI-Kart 6/09 (V) –, paras. 113 ff. Even if the Higher Regional Court seems to attach particular importance to the presumption of single market dominance due to the high market shares when it states: "*already this enormously high market share, which far exceeds the presumptive threshold [...], speaks for a dominant market position*," (ibid. para 113 [translation by author]), it also considers other market dominance criteria.

even if the presumption is fulfilled (secondary burden of producing evidence, "*sekundäre Darlegungslast*").[14]

16. Furthermore, the civil courts seem to attach particular importance to the fulfilment of the presumption requirements. For example, the Hanseatic Regional Court Hamburg, following the Federal Court of Justice, essentially confirmed the defendant's dominant position based on Section 18(4) GWB by stating that the defendant had a market share of 60 per cent in the relevant market, thus exceeding the legal presumption of single firm dominance.[15]

6. Conclusion

17. Legal presumptions of dominance have proven to be an effective and fair instrument in merger and other antitrust proceedings. As they have been enshrined in law they provide a consistent and reliable point of reference for authorities, courts and practitioners, which due to their concretisation by practice and case law, preserves legal certainty and predictability: In this respect legal presumptions do not constitute simple mathematic formulas that overrule or replace complex economic facts established in the Bundeskartellamt's proceedings or appeal proceedings. They rather form a clearly defined starting point for the parties to support the investigations of the authority and therefore enhance the fact-finding process. Only if this process does not lead to clear findings, legal presumptions can have a decisive effect and function as proof of dominance. Legal presumptions thus play an important role in accelerating and facilitating proceedings without removing the authority's duty to investigate or the party's rights to supply evidence. In addition, in civil proceedings they can compensate for the difficulties of procuring evidence that the parties face as these proceedings do not involve any authorities with investigative powers. Insofar as the presumptions incentivise or, with regard to civil proceedings, even legally obligate undertakings to provide information, they make an important contribution to establishing the relevant facts and thus to avoiding not only Type I (false positive), but also Type II (false negative) errors.

[14] Federal Court of Justice, decision of 23 February 1988 – Sonderungsverfahren, NJW-RR 1988, 1069 (1070); Higher Regional Court Munich, decision of 17 June 2010 – U (K) 1607/10 –, para. 56.

[15] Hanseatic Regional Court Hamburg, decision of 12 January 2023 – 15 U 29/21 Kart – *Radio Cottbus II*, paras. 38 and 40; following up: Federal Court of Justice, decision of 24 November 2020 – KZR 11/19 – *Radio Cottbus I*, para. 21.