Germany publishes report on modernizing the law on abuse of market power in the digital economy

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On September 4, 2018, the German Ministry for Economic Affairs has published a report by economic and legal experts analyzing some key issues of abuse of market power in the digital platform economy (see an English summary here.)
The report provides an overview of the *status quo* and recommendations, and is understood to be the starting point for the next competition law reform in Germany. (Some of the experts are also members of the digital expert panels of Germany and the European Commission, so the report will likely have an impact at both levels.)

The report reviews whether the current EU and German rules still allow effective and timely enforcement against abuse of market power in the digital economy, notably in light of some large digital players and the critical role of data as input material to production and distribution.

I. More flexible abuse of dominance review?
Market definition is usually the starting point of the analysis, but can also be a challenge, the report notes. It refers to the debate that the concept of market definition may fail in multi-sided digital platform markets and should therefore be abolished. A more flexible review process could focus on the theory of harm from which dominance might be inferred, if the conduct in question is not restrained by sufficient competition and has exclusionary effects. Ultimately, however, the report concludes that it is up to the EU and national courts to develop a more flexible review approach.

II. No general lowering of the threshold for intervention required in Germany
The report rejects the idea that a general change is required to capture unilateral conduct of not yet dominant companies in digital markets which could lead to monopolization. The report refers to the prohibition of ***"an attempt to monopolize"*** under US rules (Section 2 Shearman Act), pointing out that this alternative has faced too many difficulties in practice to serve as an example.

The report also rejects the idea to switch from abuse of dominance to a more general ***SIEC test*** for unilateral conduct. The reason is the risk of too many false positives and difficulties in determining the boundaries between legitimate aggressive competition and prohibited impediment of effective competition.

Ultimately, the report concludes that generally lowering the threshold for abuse of dominance intervention is not necessary in Germany. German law does not only prohibit the abuse of dominance but in Section 20 ARC also the abuse of ***relative market power*** in vertical relations. Relative market power requires that a small or medium-sized enterprise (SME) is dependent upon another company as supplier or customer without adequate alternatives, in which case in the bilateral relation with the SME the company with relative market power is subject to dominance rules. In addition, companies with ***superior market power*** must not unfairly impede SME at horizontal level. The report provides an overview of the relevant caselaw relating to these rules and concludes that they may well play a more important role in digital platform markets in the future. It recommends, however, abolishing the limitation to SME in both provisions.

III. Suggestion to lower the threshold for intervention for specific cases

1. Preventing tipping

The report finds that there is a need to introduce a lower threshold for intervention in specific cases, namely in digital markets with ***high indirect network effects prone to tipping***. The reason is that once tipping has occurred in such markets, it seems very difficult to reverse. The report argues that there is a current legal gap for these types of cases, as Art. 102 TFEU requires dominance, which may well be too late for intervention, and Section 20 ARC (relative market dominance or superior market power) is limited to conduct vis-à-vis SMEs.

In the type of markets described, the report suggests prohibiting unilateral conduct that may induce tipping and that is not based on competition on the merits. Regulatory examples of such conduct should be ***unjustified impediment of multihoming and of platform switching***. The report also suggests to possibly limiting the range of addresses to "the largest players in the relevant market" which it seems to equate with players with superior market power, and to the members of a tight platform oligopoly.

2. Intermediation power

The report recommends that the legislator should explicitly acknowledge the concept of intermediation (platform) power in the national provisions on abuse of dominance. The concept captures the position of platforms providing intermediation services between suppliers and users, *i.e.*, on the ***P2B side of digital platforms***. The report notes that the concept can already be used and further developed in the provisions on abuse of relative market power (notably in terms of dependency).

IV. Conglomerate and vertical strategies of digital platforms sufficiently covered by current abuse rules
The report analyzes the potential issues and relevant caselaw in this area and does not see a need to amend the current abuse of dominance rules. It notes that non-merits-based conglomerate and/or vertical integration strategies can generally be captured by existing EU and German law, mentioning the European Commission's Google cases and the FCO's Facebook case as examples. If the digital platforms are not yet dominant, the report points out the possibility to apply German rules on relative market power. The report also notes that some concerns expressed might require ***new consumer protection and civil law rules***.

IV. Amending merger control rules on buying small potential future rivals
The report sees the risk of abusive foreclosure strategies when large digital companies systematically buy start-ups as potential future rivals at an early stage of their development. It concludes that these strategies cannot be adequately captured by the SIEC test, because in these scenarios there are often start-ups are often no proper overlaps based on traditional market definitions and given the limited prognosis period (three years), which would not allow to sufficiently demonstrate negative effects. The report thus suggests amending the SIEC test under German law. The FCO should be able to take into account ***"an overall strategy of a dominant company to systematically acquire fast-growing companies with a recognizable and considerable potential to become competitors in the dominated market in the future"***. A possible indication of future competition could be that the target is active in a market addressing "the same basic needs" as the acquirer.

V. Control over and access to data
The report notes that the refusal to supply data is covered by existing EU and German abuse of dominance rules, notably under the essential facilities doctrine. The report argues that it should speak in favor of an access claim if the relevant ***data is a mere by-product and the collection did not require special investment***. The report stresses that the current discussion on a general market-share based data sharing obligation ("data for all") is important, but decides it is too early to take a firm view. Refusal of access to machine generated usage data in the context of IoT (Internet of Things), for example data in net-enabled vehicles, can in some cases constitute an abuse of dominance or relative market power under German law, but the report notes that these issues should be best dealt with by contract law.

VI. Comments
The report provides a very interesting and comprehensive overview of the key topics, including the status quo of the caselaw. It certainly raises relevant concerns, and its proposals are excellent food for thought.

The concept of relative market power, which does not feature in EU law, is very important as a fallback option in the report's conclusions. So one question is ***how the EU should deal*** with the competition concerns that obviously do not stop at national borders. Leaving enforcement in this field to Germany would not seem an option. Maybe the idea of lowering the intervention threshold or of introducing something like relative market power will now be discussed at EU level. (This may well be an intended side-effect of the report.)

The report's proposed legislative changes deal with serious issues, but ***implementation in practice could be a major challenge***. (The need for practicability was a general comment by Andreas Mundt, head of the FCO, on the proposals at a recent conference.) That applies *e.g.*, to the rule to prevent the tipping of a market absent dominance or relative market power. Just determining whether the market is close to tipping may prove complex and time-consuming. Moreover, the provision is not only a legal basis for the enforcer, but should also serve as sufficiently clear rule for companies. It is doubtful whether an individual company would be able to carry out the requisite analysis.

The proposed changes to ***merger control rules may prove controversial with practitioners***. It is important that the mere possibility of negative effects is not sufficient for a prohibition, but that the agency needs to demonstrate a likelihood of these. The new rule risks to undermine that, in particular if – like the new transactional-size threshold in Germany – it is not explicitly limited to the digital economy. The FCO would not have to show any likely effects, as long as it concludes on a strategy to buy potential future competitors. (It is unclear how to demonstrate such a strategy.) In addition, it would mark a departure from the same merger test as at EU level and thus from a level playing field.