CPI's Europe Column Presents:

How to Reform the Law on Abusive Practices: The study that will serve as a basis for reform in Germany (and Europe?)

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Germany is starting to prepare the next major reform of its competition law. While the 9th amendment of the national Act against Restraints of Competition in 2017 introduced a couple of new norms for the digital age that were partly of clarifying character, it now looks as if there would be more substantial shifts. The first step in the process (expected to take up to two years) was to commission a study by renowned professors on the need to reform the norms on abusive practices. Rupprecht Podszun, professor for competition law at the University of Düsseldorf, gives a first impression of what new tools may come up in Germany – and on the EU level.

Politicians in Germany have always been more critical of the rise of the MAGAF-companies (Microsoft, Amazon, Google, Apple and Facebook) than elsewhere. As early as 2014, then Minister of Economics Sigmar Gabriel called for a tough European initiative against the power of Google. Yet, it took the Commission another three years to come up with *Google Shopping* (a decision that probably fell short of what Gabriel had wished for). The German national competition authority, the Bundeskartellamt, earned a reputation as a hard-to-beat watchdog for the digitals with cases against most favoured nation clauses for hotel booking platforms or Facebook. Now, the current Minister of Economics, Peter Altmaier, is following up in the project of "taming the tech titans" (as the Economist once put it). He commissioned a study from scholars that will serve as the basis for the next amendment of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB). The study on the modernisation of abuse control, available in German,[2] presents fresh ideas for a reform at the heart of competition law.

It is probably also some kind of blueprint for European reforms in this area: One of the authors is Heike Schweitzer who currently serves as one of three special advisors to Commissioner Vestager. On top, Peter Altmaier, a close ally of the German chancellor Angela Merkel, is tipped as a potential next Commission president. It would be a nice fit; Altmaier started his career in the Brussels administration and is highly respected in Germany for his expertise and his political skills. At least, one may expect that the study and the results of the discussion will form part of the briefing for the next competition commissioner – whoever writes the briefing will look into national experiences with competition law for the digital age.

The Study

The 173-page-study, at present only available in German, was authored by Schweitzer and her research assistant Robert Welker from Humboldt University Berlin, former chairman of the German Monopolies Commission Justus Haucap who is an Economics professor at Düsseldorf University, and Wolfgang Kerber, a professor of Economics with a focus on institutional and innovation aspects.

For understanding the proposals, it is vital to know that Germany has a provision equalling Art. 102 TFEU in § 19 GWB. Yet, there is also – as in some other countries – a special provision with a lower threshold for intervention. According to § 20 GWB, the prohibition to discriminate or hinder companies sets in when there is superior or relative market power, i.e. constellations of economic dependency. (Read the English translation of § 20 GWB here). This provision allows intervention in many cases and is an important feature, particularly in private enforcement of abuse control.

Filling the Gaps

The study starts with setting out the economic landscape in an economy that is changing (data, platforms, etc.). Of course, this has often been analysed in the past years, and thankfully, the authors keep it short. It is interesting to learn that (a) cited scholarship overwhelmingly stems from the U.S. and (b) important case law often comes from the German practice. It seems that *Google Shopping* did not leave a very strong mark on the authors while the (very well-argued) Bundeskartellamt case against *CTS Eventim* on abuses in ticketing serves as a benchmark in some aspects. The case provides a rigorous analysis of digital phenomena with state-of-the-art competition law application.

The authors also mention the initiatives that are undertaken in other fields of EU law on regulating the digital phenomena. This is a welcome reminder for competition lawyers to take off their blinkers – we tend to ignore that problems we cannot solve with our rules will be solved by others, most probably people with less commitment to free competition. Thus, the whole endeavour of the study is right: If we do not take care of developing the tools for antitrust, others will sharpen their weapons and fill the gaps.

So, where exactly are the gaps?

The general approach

The authors in principle recommend sticking with the traditional structure of abuse control. They neither recommend getting rid of market definition as the starting step of an investigation nor do they recommend lowering the threshold of the abuse provisions *in general*. Regarding market definition and the problems associated with it, it is stunning that the authors name all the problems identified with market definition nowadays, yet still conclude that competition authorities will be able to handle that and that courts will prove to be flexible enough. Throughout the text, they encourage the authorities to be more flexible with proof in abuse cases.

It is hard to achieve such an easing without any significant change in the law, and thus a major shift is proposed for § 20 GWB, the provision that protects from abuses in situations of dependency. At present, it only applies when the dependent undertaking is a small or medium sized enterprise (SME). The SME-criterion is to go. This means: Situations of dependency can arise in relations to big players (even if you may wonder who is not an SME in relation to Apple or Amazon these days…). If food producer Nestlé, for instance, needs food retailers like Edeka or Amazon, or if a large insurance company depends on access to a comparison portal, such undertakings may now rely on § 20 GWB despite their size and even if the other party is not dominant. (Unfortunately, illustrative examples are largely missing in the study, so it is hard to discern what cases the authors had in mind when devising such proposals.)

With the SME-criterion out of the way, § 20 GWB will no longer be a somewhat ordoliberal provision in favour of the good old German *Mittelstand*, as it has been seen in the past. It will instead be turned into a rule for the early protection against "aggressive competitive strategies with hindering effects against innovative, potentially disruptive undertakings", at least from a conceptual point of view. This kills two birds with one stone: The rule applies to more cases and still is better in line with international competition standards.

The extension of the provision on superior bargaining power to more constellations stands for the general approach that has been highlighted also by Minister Altmaier with regard to the study: It is necessary to stop the rise of monopolists; it is no longer enough to try to step in once the monopoly status has been achieved. This is a viable lesson from the *Google* cases that achieved too little too late.

Two new abuse constellations

The experts recommend a much tougher stance against MAGAF and the like. The core idea is to have tools not only when companies are dominant but also when they are on their way to build monopolies that will be hard to contest. Either you stop a new Amazon at an early stage or you have to live with a data-based monopoly for a while. Still in the existing framework, the authors propose two new constellations as typical examples of abuse. They wish to see these cases addressed in the law:

The first constellation relates to platform markets with a tendency for tipping, i.e. strong positive network effects. A new provision shall provide that the abusive hindering of competitors is prohibited if this may foster tipping. Examples would be the thwarting of multi-homing and switching to other platforms.

The second constellation of "early abuse" refers to markets that are not characterised by power in demand or supply, but "power in intermediation". "Power in intermediation" is a concept that the authors see as a clarification, yet it may overcome practical problems that are, for instance, discernible in the cases involving Google or Facebook. They point out that dominance may not just result from a strong position in supply or demand, but also from the privileged position as a strong intermediator. This would even open up the field for showing abuses regarding information. Manipulating information could become a major issue for abuse control.

Shoot-out acquisitions

Another pillar of stopping companies marching to monopoly is a tougher system of merger control. This is an issue that may even trouble MAGAF now, since – with deep pockets – they are able to buy off competition once it is detected on the horizon.

Germany introduced a transaction-value based merger rule in 2017 (with a 400 million Euro threshold that could be lowered in the future). So, the problem is no longer to get the case at all for investigation, but: What do you do once you have a *Facebook/WhatsApp* deal on your desk?

The idea put forward in the study is to give an extra-possibility to stop acquisitions that shoot out potential rivals. If a dominant company acquires an undertaking that could become a potential rival in the future and if this is part of a larger identifiable strategy to fight off competition through acquisitions, such an acquisition may constitute a significant impediment of effective competition (SIEC). This is a charming new interpretation that may well put a stop to the shopping tours of MAGAF companies.

Refusal to grant access to data

One distinct chapter is dedicated to the question what constitutes an abuse in matters of access to data. There is little doubt these days that access to data is key for participating in the economy, yet competition law seems to lag behind a bit with regard to questions of data sharing or access. The study is on the more exploratory side here, considering options, and strongly encouraging further reflections on data sharing obligations. Three issues of current antitrust law are identified as important elements of a competitive data order:

The essential facility doctrine already can help, so the authors say, but courts and authorities should be more flexible in trying the rather tough criteria for an essential facility. No modification by legislation is recommended.

With all the smart connections, be it in cars, homes or machines, where different players may claim access to data once they are generated, the question arises who owns the data. This question is left to civil law treatment. Yet, the owner of a smart machine may still find himself in a lock-in situation without access to data that could be vital for production. § 20 GWB may help in this regard.

In such situations, it is not just the user of a smart machine or car, but also third parties who may be in need of access to data. Again, § 20 GWB may help, in particular with a view to rulings of the *Bundesgerichtshof* in Germany on the rights of independent repair garages for cars needing access to information from OEMs.

Some clarification in the law seems advisable, in particular since others are pressing ahead like Andreas Nahles, head of Social Democrats in Germany, who proposed a "data for all" statute in August 2018. The study proposes to assume that there is an abusive hindering if an undertaking needs access to automatically generated machine- or service-data for some substantial value creation in a value-creating network. This is an interesting wording and it may open up the field for exciting cases, once connectivity clashes with exclusivity.

No gaps

The proposals – if ever put into the law – may turn out to be powerful tools, but you never know what competition practice makes out of it and whether the courts are willing to follow. In the study, they are all based on a thorough economic analysis of current shortcomings. This analysis puts the authors into the position to say where there are no gaps at present: There is no need for lowering the threshold regarding non-coordinated behaviour in tight oligopolies. They also think that there is no need to address "conglomerate power" as a distinct issue. The professors have a strong belief in the flexibility of the general clauses in Art. 102 TFEU and the German equivalents. It depends, however, on the decisional practice whether problems can be remedied. They also point at the role of consumer law, contract law and other fields – a statement that is a bit in conflict with the approach that competition law should play a more active role in addressing deficits in markets.

The missing link

The authors did not deal with enforcement issues. The key criticism of *Google Shopping* was that it took the Commission far too long. The burden of proof in abuse cases (for dominance as well as for

abuse) seems unsatisfiably high. Private enforcement is incredibly difficult in matters of abuse. Interim measures that quickly remedy a problematic development have never been tried. Picking the right case for public enforcement seems more or less arbitrary. The handful of abuse proceedings against Google, Facebook and Amazon (is it a handful at all?) is just too little to make Art. 102 TFEU a considerable factor for shaping the economy. A reform of enforcement is the missing link if the thoughtful proposals are to take effect. All hopes would lie with private enforcement of § 20 GWB in the new version, in particular since stronger companies may now bring actions in this regard. Yet, you still have to decide whether you really want to take Amazon to court.

Conclusion

The study has a strong focus on the contestability of markets. This is the key lesson to be learned from the past years and the literature on multi-sided markets: Keep markets open, otherwise intervention may be too late. The proposals are based on thorough analysis and aim for a gentle development of competition law, strongly adhering to well-established principles. Having said that, it may be doubted whether this is enough – once lobbying sets in, the watering down of the proposals will start anyway. Yet, Heike Schweitzer, Justus Haucap, Wolfgang Kerber and Robert Welker can only be commended for their effort – this is an excellent basis for the discussion how to overhaul German and European competition law in the 21st century.

[1] Rupprecht Podszun is a full professor for civil law and competition law at the University of Düsseldorf and director of the Institute for Competition Law.

[2] See https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.html (last accessed 7 September 2018).