MODERNIZING THE LAW ON ABUSE OF MARKET POWER IN THE DIGITAL AGE: A SUMMARY OF THE REPORT FOR THE GERMAN MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY

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I. INTRODUCTION

In January 2018, the German Ministry of Economics and Energy commissioned us to prepare a study on options for competition law reforms regarding the abuse of market power in digital markets. While the study has been published in September 2018 in German only,[2] the executive summary has been also published in English.[3] The study's point of departure was the 9th amendment to Germany's competition law. In 2017, the German legislator introduced, among other things, a new set of additional criteria for determining the market power of platforms and networks. Germany's law against restraints of competition ("GWB") now specifies in Section 18 para. 3a that direct and indirect network effects, multi-homing and user switching costs, economies of scale, access to data relevant for competition and innovation-driven competitive pressures need to be considered when determining market power in platform markets. While this set of criteria certainly helps to assess a platform's market power, they do not address the question whether the current state of competition law is sufficiently well equipped to address potentially anticompetitive strategies that lead to market dominance in the first place.

Against this background, we have been asked to analyze the question of whether the intervention threshold is currently too high for competition authorities – either in general or with respect to certain types of firms' practices – so that competition agencies may intervene too late. Put differently, the aim of our study has been to examine whether current competition law provisions to protect against the abuse of market power are sufficiently clear and effective.

Our report is structured as follows: It starts, like many other reports on the topic, with a brief outline of the essential changes in the digital economy, namely the steadily increasing role of data as a critical resource and the emergence of platforms as widespread forms of intermediation. The changes in horizontal and vertical market structures, some of which have become highly concentrated, and in business strategies raise the question whether competition law can appropriately deal with the new challenges arising in the digital economy. As our report examines reform options of the (European and German) rules on the abuse of market power, but not on merger control and cooperation between firms, we have focused on Article 102 TFEU and its (rough) equivalents in German competition law, namely in Sections 18, 19 GWB.

2 See Schweitzer, H., Haucap, J., Kerber, W. & Welker, R. (2018), *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen*, Nomos Verlag: Baden-Baden.

3 See Schweitzer, H., Haucap, J., Kerber, W. & Welker, R. (2018) Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany), available at https://ssrn.com/abstract=3250742 or http://dx.doi.org/10.2139/ssrn.3250742.

A specificity of German competition law is that its provisions against unilateral conduct are not limited in their scope to firms with market dominance. In Section 20 para. 1 GWB, the abuse of "relative market power," a form of economic dependence or superior bargaining position, is prohibited. Relative market power exists where firms do not have sufficient and reasonable possibilities of switching to other firms ("outside options"). It is assessed by analyzing the imbalance of power between two specific firms and does not require any "market-wide" power. Relative market power has been found in four different constellations:

When retailers need to stock the branded products of a group of manufacturers to be competitive, they may be economically dependent on each of those manufacturers without them being dominant. In the same way, a manufacturer may be economically dependent to have his products stocked by non-dominant buyers. Firms may be dependent of other non-dominant firms insofar as they made transaction specific investments that result in hold-up risks. And, finally, firms may be dependent of other non-dominant firms insofar as they control access over a scarce resource.

Additionally, Section 20 para. 3 GWB prohibits the abuse of superior market power *vis-à-vis* small or medium sized competitors.

In our report, we have paid particular attention to the question of whether Section 20 GWB can become an effective instrument for closing any gaps in controlling the abuse of market power, in particular regarding the special challenges arising in the digital economy.

II. SO, WHAT IS NEW IN THE DITIGAL ECONOMY?

Digitization has transformed – and continues to transform – almost all business sectors and entire economies. Among the characteristic features of digitization are the increasing importance of (a) data as a critical input resource in production and distribution processes; and of (b) digital platforms as new players in the markets. New information intermediaries that collect, organize and rank information and firms' offers play a central role in a growing number of markets. These information intermediaries include search engines, but also trading platforms, price comparison sites, and booking portals. A characteristic feature of the digital economy is that platforms with information and matching functions increasingly obtain a central position in otherwise decentralized markets. These information intermediaries provide information about the quality of offers and the reliability of transaction partners and select and prioritize matching options on the basis of the evaluation of user data. Consumers in many markets use services of such information intermediaries. From an economic point of view, intermediation services can often be characterized as so-called credence goods, where customers can only evaluate the intermediation service's quality *ex post*, if at all.

Information intermediaries may face incentives to systematically bias the display of information in their interest, as consumers may often not recognize whether information (such as an order of search results) is biased or not. Thereby, information intermediaries can induce user decisions and market developments which deviate from those which would be expected under undistorted competition. If the party with the information advantage (here: the information intermediary) systematically exploits this advantage and at the same time has market power, a market failure is likely to result. In addition, such practices can undermine users' confidence in information intermediaries more generally.

Consumers' growing use of information intermediaries has led to product and service providers increasingly becoming dependent on access to and visibility on intermediation platforms. A number of platforms have achieved a "gatekeeper" status in a whole range of contexts. This is accompanied by the power to define the rules of the platform. These rules create separate ecosystems aimed at optimizing the number of users on different market sides. The development of online platforms into central marketplaces and intermediaries on the Internet appears is in many respects efficient, as the platforms add value for all market sides involved. However, their emergence and growth can, at the same time, lead to new positions of power.

In principle, information intermediaries are not an entirely new phenomenon of the digital economy. They have always played a role in some markets, such as insurance brokers, travel agents, or real estate brokers. What is new is the almost universal importance of digital platforms as intermediaries on the Internet. Often these intermediaries are referred to as multi-sided platforms, which are characterized by indirect network effects. Quite generally, the exploitation of positive direct and/or indirect network effects is decisive for the success of multi-sided platforms. If the benefits of a platform result from the network effects across market sides, it is crucial that all relevant market sides participate in sufficient numbers to make the platform attractive for the other market sides. The "chicken and egg" problem, which newly established platforms have to overcome, is often described in this context. As a result, many digital platforms are resorting early to aggressive growth strategies ("scaling").

Markets in which digital platforms have become important players are often characterized by a tendency towards concentration.[4] Strong positive network effects between users or user groups can favor so-called "tipping," i.e. a transformation from a market with several providers to a monopolistic or highly concentrated market.

The concentration tendency associated with positive network effects between user groups can be strengthened by the fact that positive network effects between user groups in the new data economy often result in positive data network effects. High user numbers mean that platforms with a particularly large number of users can also access a particularly large data pool. On the one hand, this can be used to improve the services and/or to tailor them to special user needs (personalization of services). The positive network effects can also be combined with economies of scale: For example, a platform with many users can offer advertisers a much more attractive environment and generate higher advertising revenues. In Google and Facebook in particular, the market strength in user markets seems to have translated into a strong market position in advertising markets. Such profits can in turn be used to optimize services on the user side. Colloquially – and too sweepingly – platform markets are therefore often referred to as "winner takes all" markets.

III. GERMANY'S COMPETITION LAW REFORM OF 2017

Following recommendations by Germany's monopolies commission,[5] several changes have already been adopted for Germany's competition law. Apart from introducing a new merger threshold based on a proposed merger's value, the most notable addition has been Section 18 para. 3a of Germany's law against restraints of competition, which was introduced in 2017 and which provides that: "Especially in multi-sided markets and networks the following criteria have to be considered when evaluating a firm's market position: direct and indirect network effects, the parallel usage of multiple services and consumer switching costs, economies of scale in conjunction with network effects, access to competition-related data, innovation-driven competitive pressure" (author's own translation). This list of criteria reflects the criteria developed in the economic literature.[6]

While the new Section 18 para. 3a may be helpful for the Bundeskartellamt and the courts to assess a platform's *market dominance*, it neither expands the scope of application of the provisions against an abuse of market power, nor does it facilitate a finding of *abuse* or provide any new guidance or legal clarity on this subject. However, incentives to foreclose the market for online platforms are, as a regularity, much stronger than in "traditional" markets, as platforms operate in "tippy markets" or so-called "winner takes all markets." Due to the network effects and the chicken-and-egg problem described above, entry becomes rather difficult once a platform market has been monopolized.

IV. FURTHER CHALLENGES FOR COMPETITION LAW

A. A More Flexible Approach towards Market Dominance

Given the specific and novel economic characteristics of the digital economy described above, our study started out by inquiring whether the existing rules on the abuse of dominance are fit to deal with the new challenges. Among those challenges are the well-known difficulties of delineating platform markets. If these difficulties cannot be solved conceptually, or if they are fraught with uncertainty at least in some cases, a response might be to apply the abuse of dominance rules in a more flexible manner: Instead of first defining the relevant market, competition authorities and courts could be allowed to find relevant market power by implication when anti-competitive behavior is not sufficiently controlled by competition and a subsequent foreclosure or displacement effect can be proven. Although there is no indication in the wording of Article 102 TFEU that prohibits such a flexible approach towards market dominance, the current interpretation and application practice of the European Courts calls for a two-step-analysis consisting of the definition of a market and a subsequent showing of market power on this market. While there are good reasons for adopting a flexible approach to market dominance in a small and distinct set of cases where market definition is especially difficult, such development would therefore be left to the Union Courts.

4 See Haucap, J. & U. Heimeshoff (2014), "Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?," *International Economics and Economic Policy* 11, pp. 49-61.

5 Monopolkommission (2015), *Sondergutachten 68: Wettbewerbspolitik: Herausforderung digitale Märkte*, Bonn.

6 See, e.g. Evans, D.S. & R. Schmalensee (2007), The Industrial Organization of Markets with Two-sided Platforms, *Competition Policy International*, 3 (1), pp. 151-179.

B. No need to Generally Lower the Intervention Threshold

We next asked whether the threshold for competition law intervention is currently set too high, such as to prevent timely intervention against unilateral conduct with potentially long-term negative effects on the structure of markets.

A general lowering of the intervention threshold could allow competition authorities to deal with threats to competition in the context of digitization at an earlier stage. In our report, four case constellations are considered in which competition law intervention may be warranted below the threshold of market dominance:

a) unilateral behavior by undertakings that are not (yet) dominant and that are active in markets with strong positive network effects, if that behavior is likely to substantially foster the probability of monopolization ("tipping")

b) non-coordinated parallel behavior in a tight oligopoly with market foreclosure effects

c) abuse of "conglomerate market power" as a (possibly) specific form of power which may significantly endanger competition even below the market dominance threshold

d) "Intermediation power" (see below) and information asymmetries

Yet, we argue that it is not advisable to address these issues by generally lowering the intervention threshold for controlling abuse of unilateral behavior. German (or European) competition law should not move towards a prohibition of monopolization (following the example of U.S. antitrust, which, however, has not proven to be more effective in addressing the relevant challenges to competition). Nor should it transition to a SIEC test in addressing the abuse of market power. One reason for this is the legal uncertainty that would necessarily accompany such a step. Another reason is that the gaps that we identify in the following are relatively limited and specific – and should therefore be addressed by more specific amendments of the law.

Germany's competition law already provides for a lower intervention threshold for certain cases: Section 20 para. 1 GWB prohibits abuses of relative market power, and Section 20 para. 3 GWB prohibits unfair impediments to small and medium- sized enterprises by firms with superior market power (see above). Hence, the threshold for intervention is already significantly lowered – which may, as we argue, be useful to address some kinds of anti-competitive behavior in the digital economy. Instead we propose to broaden the scope of protection of Section 20 para. 1 GWB: So far, it is limited to the protection of small and medium-sized enterprises against abuses of relative market power. This restriction to SME should be lifted, as relevant dependencies may also arise for large companies.

C. New Provisions to Specifically Address "Tippy" Markets and the Market Power of Intermediation Services

Since we have not recommended a more general lowering of the intervention threshold regarding unilateral conduct, our study also analyzed whether the law should be amended so as to allow for intervention against specific types of unilateral conduct in specific settings that may raise competition concerns – even below the threshold of dominance.

First, markets with strong positive network effects can "tip," i.e. turn into monopoly. However, such "tipping" into monopoly is not necessarily a "natural" market outcome, but can instead be actively promoted or induced by certain practices of relevant actors in the market. These practices include unilateral behavior such as a strategic obstruction of multi-homing or switching. Under existing competition law, such unilateral behavior can be addressed only if the respective undertaking possesses a degree of market power that is relevant under competition law (i.e. a dominant position under Article 102 TFEU/Sections 18, 19 GWB, relative market power under Section 20 para. 1 GWB or superior market power *vis-à-vis* small or medium sized competitors under Section 20 para. 3 GWB). In markets prone to "tipping," an intervention below that threshold may be desirable as a matter of competition policy. The main justification for lowering the intervention threshold would be that "tipping" – once it has occurred – can hardly be reversed. We therefore recommend to insert a new Section 20a or Section 20 para. 6 GWB, which prohibits platform operators in tight oligopolies, or platform operators with superior market power, to obstruct multi-homing or the changing of platforms, insofar as this strategic obstruction is suitable to promote a "tipping" of the market. We propose to frame those conduct rules as a

"*per se*"-prohibition open for an objective justification or an "efficiency defense." This amendment to Section 20 GWB may ultimately not prevent tipping altogether – in fact, if firms can demonstrate that multi-homing jeopardizes efficiency, the market will still tip into monopoly. However, such a clause would provide at least some backstop against tipping and help to preserve competition when multi-homing is feasible – while also reducing the risk of over-enforcement imminent with "*per se*" prohibitions that do not allow for an "efficiency defense." It should be noted here that, with multi-homing in place, competition between platforms does not automatically imply a loss of network effects.

Of course, lowering the threshold for intervention may potentially lead to over-enforcement. Even leaving aside that many researchers are currently concerned about past under-enforcement in antitrust and consider this to be one of the reasons for the growing mark-ups and increasing market concentration observed in some countries, erring on the side of over-enforcement rather than under-enforcement appears to be justified in this case, as the welfare losses caused by under-enforcement are difficult to reverse since it is difficult to reinstall competition once a platform market has tipped to monopoly, due to the tippy nature of these markets. In contrast, the welfare costs of over-enforcement appear to be lower, as prohibiting strategies that impede multi-homing may possibly reduce competition between firms, but such a prohibition could easily be reverted.

Second, certain business strategies in markets characterized by tight oligopolies may have a foreclosure effect even if they are not coordinated. Under EU competition law, such unilateral conduct may be difficult to address if no single or collective dominance can be shown. However, we do not find a legal loophole under German competition law: Relevant cases can be addressed either by the prohibition of abuse of market dominance (in particular considering the legal presumption for collective dominance under Section 18 para. 6 GWB) or under Section 20 para. 1 or para. 3 GWB (relative or superior market power). If neither vertical dependency nor horizontal superior market power can be established, the risk is low that an undertaking's non-coordinated parallel behavior could pose a significant threat to competition.

Third, we find that, due to the increased importance of information intermediaries, consideration should be given to the question whether an independent form of "intermediation power" should be recognized as a third and separate form of market power alongside supplier and buyer power. The main service that an intermediary offers – whether by means of resale or brokerage – is access to a specific sales channel or access to a specific customer group. The degree of power that a reseller or an intermediary possesses *vis-à-vis* undertakings that are active on that platform depends on the proportion of demand that the reseller or intermediary bundles and on the presence or absence of viable alternative options for those undertakings in distributing their goods or services. If, for example, the structure of a relevant market is that of a tight oligopoly of platforms that are not collectively dominant, providers of goods and services may depend for their economic survival on being present on each and any of those platforms, or at least on the majority of them if the same customers cannot be served in a similarly effective way otherwise and if it is essential to reach a large proportion of potential customers. A provider of goods or services may therefore be dependent on a digital platform under similar conditions as – conventionally – on a reseller, such as a food retailer.

Given this, a greater degree of legal clarity and predictability can be achieved if the conceptual particularities of the assessment of market power in cases where the activity in question consists in intermediation were fully recognized from the start – by way of recognition of a concept of "intermediation power" (usually P2B). Such legal recognition of the concept could be achieved, under German law, by supplementing Section 18 para. 1 GWB ("A company is dominant if it is a supplier or buyer of a certain type of goods or commercial services *or an intermediary...*"). At the same time, the aspects mentioned in Section 18 para. 3a GWB as being relevant for the assessment of the market position of a platform could be supplemented to clarify the importance of a platform as an intermediary for access to sales and procurement markets. In substance, the recognition of a concept of intermediation power would clarify that in these cases the qualification of a platform's activity as an "offer of brokerage services" or "demand for supply services on the platform" is not decisive for assessing its market position. In contrast to a purely commercial agency activity, the brokerage service of a platform will often have hybrid characteristics. It does not depend on the individual service itself – i.e. the provision of brokerage services – but on an overall view of the circumstances that are decisive for a platform intermediary's position of power, with special consideration of the platform's market position on the various platform sides.

Fourth, particularly the large digital companies are characterized by conglomerate structures. This has triggered a new discussion about the question whether new conglomerate strategies based upon new types of large economies of scope of digital platforms and of advantages from the cross-market collection and use of data (consumer data profiles) can lead to new kinds of market-transcending anticompetitive effects. Particularly in combination with systemic, infrastructure-like services (as cloud services and data analytics software) as well as superior capabilities in data analytics, AI, and algorithms new market-transcending gatekeeper positions might arise that also lead to advantages for disruptive innovation. If these digital companies are dominant in at least one market, then the European and German provisions about abusive behavior

can be applied for dealing with strategies of foreclosing competitors or leveraging market power on other markets. However, there can be gaps if the conglomerate power is the result of the aggregation of market power positions below the threshold of dominance on these markets. The provisions about firms with relative market power (Section 20 GWB) might help to close these gaps but still many open questions remain about the economic power of digital conglomerates.

D. Adequate Merger Control for "Killer Acquisitions"

Assessing how the acquisition of relatively small innovative start-ups effects competition in the future poses particular challenges for competition authorities and courts. Many such acquisitions – also by large digital firms – are a legitimate part of the competitive process. At the same time, some of these acquisitions can have anti-competitive effects, in particular if firms that are already dominant succeed to systematically identify and acquire potential future rivals at an early stage. Competition in already heavily concentrated markets can then be dampened for a long time. It is difficult for competition authorities and courts to identify such cases, however – also because potentials for future competition will frequently originate in niche markets. At the time of acquisition, there may not necessarily be a clear horizontal overlap. With the objective to keep markets open and contestable, we suggest that an attempt to strengthen the German competition authority's powers to challenge such acquisitions is worthwhile. Section 36 para. 1 GWB (as the main provision of German merger control) could therefore be supplemented by a sentence which would allow the competition authority to consider, when assessing the existence of a significant impediment to effective competition, the existence of 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. It may be an indication for such future competition that the company to be acquired – while only being a niche competitor to the dominant firm – is active in a market that addresses the same basic needs as the acquirer. Instead of looking at relatively narrowly defined markets, the Federal Cartel Office could therefore look at a broader category of competitive relationships which may better capture the reality of fast-changing markets in the presence of potentially disruptive activities.

E. Assessing Data-Related Abusive Strategies and Data Access Claims

Control over data may establish positions of market power. With the newly inserted section 18 para. 3a GWB (in the 9th amendment of the GWB) access to competition-related data can already be taken into account when determining market power in multi-sided markets and networks. In our report we analyzed whether the exclusive control over data can be used for abusive strategies, and whether therefore the refusal to grant access to data can be an abusive behavior of a dominant firm or a firm with relative market power.

Since, from an economic perspective, data is non-rivalrous in its use, access to data for other firms can lead to more innovation, competition, and efficiency. However, the incentives for the production of data also have to be taken into account, which might be very different depending on the size of their costs. Also, compliance with the requirements of the EU data protection law (the "GDPR") is necessary. The report distinguishes different groups of cases with respect to the question whether data access rights should be granted. One important option for dealing with the economically legitimate interest in access to machine-generated usage data, which often arise in vertical relationships in the Internet of Things (or "IoT") context (e.g. when using certain machines and services), is the use of contract law, including the law on unfair contract terms. If however the undertaking in control of the data is, at the same time, dominant or possesses relative market power, there may also be an antitrust basis for data access claims.

Especially in cases of IoT ecosystems (and aftermarket constellations) such as, e.g. smart agriculture, and smart connected cars, the problem might arise that one firm, usually the manufacturer of a smart device (as agricultural machines or connected cars), might use the exclusive control of the data produced with this device for foreclosing independent firms on markets for aftermarket and other complementary services that need access to these data. This would allow the data-controlling firm to leverage its market power to adjacent secondary markets within this ecosystem. This case group is seen as an interesting candidate for applying the competition law provisions about abusive behavior, especially if buyers are locked-in with primary products. With regard to other case groups, as, e.g. access to large data sets for training algorithms in AI contexts, we would recommend solutions outside of general competition law.

A discussion has recently emerged whether – in order to facilitate access to large amounts of data for the purpose of training self-learning algorithms and thus to neutralize competitive advantages of particularly data-rich companies – a market-share-based "data-sharing obligation" should be introduced ("data-for-all" law/"data sharing" obligations as proposed, *inter alia*, by Mayer-Schönberger & Ramge, 2018).[7] We consider this to be an important discussion. Yet, the way in which such a data-sharing-duty could be structured (and limited) is still a completely open issue.

The refusal to grant access to data over which a firm has exclusive control and which is essential for entering into an adjacent market can already be qualified as abusive under German (and European competition) law. In Germany, the legal basis for prohibiting such an abuse is Section 19 para. 1 in adjunction with Section 19 para. 2 No. 1 GWB for dominant firms. The finding of an abuse requires a balancing of legitimate interests. Since the costs of producing data can also be very low, a larger flexibility exists for granting access to exclusive sets of data than in other cases of access to physical infrastructure or intellectual property rights. Therefore, we recommend that the competition authority and courts should use this greater flexibility for data access claims with respect to dominant firms.

Claims about data access can also be based upon the provisions of Section 20 para. 1 GWB (relative market power). If, in the context of value creation networks (as, e.g. in the ecosystem of connected driving), third-party providers require access to data that is exclusively controlled by a participant in this network and that is necessary for substantial value creation in this network, Section 20 para. 1 GWB may already now provide a legal basis for data access claims – in particular if the relevant third party can show to be in a position of "firm-specific dependency." However, in balancing the relevant legitimate interests, the courts have so far required that the resource to which access is to be granted is "normally accessible" in the course of typical market transactions. This requirement is not necessarily met when it comes to data. We therefore recommend to extend Section 20 para. 1 GWB for clarifying that a relevant form of dependency may also result from an undertaking being dependent, in order to achieve a substantial value creation within a value creation network, on access to automatically generated machine or service usage data that is exclusively controlled by another company; and denial of access to data can constitute an unreasonable exclusionary conduct, even if markets for such data do not yet exist.[8]

F. Compatibility of a Stricter National Competition Law with EU Competition Law

The recommendations made in our report consist mostly of a tightening of the German provisions on an abuse of market power. They are in compliance with EU competition law, which allows for national competition rules on unilateral conduct to be stricter than the EU competition rules (Article 3 para. 2 of Reg. 1/2003).

V. GERMANY'S COMPETITION LAW REFORM OF 2020

A number of the suggestions developed in our report have been incorporated into the current draft of Germany's next competition law reform package, which is expected to be enacted in 2020.[9] In particular, among a number of other suggested changes, (a) the threshold for third-party access to data is proposed to be lowered; (b) the anti-competitive impediment of multi-homing is proposed to be prohibited for firms with superior market power (which may not yet be dominant); and (c) a concept of intermediation power is proposed to be introduced in addition to buyer and seller power.

With respect to intermediation power, the current Section 18 which defines market dominance is proposed to be supplemented by a new para. 3b of the following form: "When assessing the market position of an undertaking acting as an intermediary on multi-sided markets, account should be taken in particular of the importance of the intermediary services it provides for access to supply and sales markets."

7 See Mayer-Schönberger, V. & T. Ramge (2018), *Reinventing Capitalism in the Age of Big Data*, 166-171.

8 For an analysis of these data access problems from a competition law perspective, see Kerber, W. (2019), Data Sharing in IoT Ecosystems and Competition Law: The Example of Connected Cars, forthcoming in: *Journal of Competition Law and Economics*.

9 A non-official English-language summary of the draft reform proposals is available at https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-Übersicht-2019-11-15.pdf.

Regarding third-party access to data, a change of Section 19 which defines prohibited conduct of dominant undertakings is proposed so that "an abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services (...) (4) refuses to supply another undertaking with this product or commercial service against adequate remuneration, including access to data, networks or other infrastructure, the supply is objectively necessary in order to operate on an upstream or downstream market and the refusal to supply threatens to eliminate effective competition on that market, unless the refusal to supply is objectively justified." In addition, Section 20 which describes prohibited conduct of undertakings with relative or superior market power is proposed to be augmented by the following para 1a: "Dependency in the meaning of para. 1 may also arise from the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities. The refusal of access to such data may constitute an unfair impediment even if there is not yet a commerce opened for such data."

Finally, the impediment of multi-homing is also proposed to be addressed in Section 20 on relative and superior market power, as, according to a newly proposed para. 3a, "it shall also be an unfair impediment within the meaning of para. 3 sentence 1 if an undertaking with superior market power on a market in the sense of section 18 para. 3a impedes the independent attainment of positive network effects by competitors and thereby creates a serious risk that competition on the merits is restricted to a not inconsiderable extent."

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