

E.CA Economics

# Modernising competition law in light of digital markets

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## The German debate

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# On platform markets

## Platform markets are specific...

- Multisided platform
- Tipping and winner takes all
- Relevance of multi-homing/ switching costs
- No physical capacity constraints
- Transparency

## ...but, potentially, bring tremendous benefits to society!

- In Germany alone, digitalizing industry could open up potential additional cumulative added value of 425 billion EUR
  - Efficiency increase
  - Improved cooperation between companies and start-ups
- Formerly regional markets have been opened up
- Availability of an unmatched portfolio of products

## The German approach, status quo

- **Recent additions in the GWB on platforms** (multisided markets and networks)
  - Direct and indirect network effects, multi-homing & switching costs, bundling, access to data, innovation
  - Merger notification threshold: 400 Mio.€ transaction value
- **“The German Clause”, Article 20, GWB** – relative or superior market power
- Persisting strong litigation activity, in particular on Article 102 TFEU cases
- **Pro-active competition authority**
  - Guidance paper on two-sided markets and big data, internet working group
  - Recently opened sector inquiry in online advertisement by newly formed consumer protection unit
- **Merger cases:** Parsipak/Elip/Partner, CTS Eventim/ FKP Scorpio; etc.
- **Article 101/102 TFEU cases**
  - Best price clauses and vertical distribution systems
  - Steam trading platform, cement trading platform
  - CTS Eventim
  - Traditional food retail; information exchange cases

Already high intervention activity in Germany

# The German approach, the way forward

- Study on how to **reform the law on abuse of market power in light of digital markets** by Heike Schweitzer, Justus Haucap, Wolfgang Kerber and Robert Welker
- Published: **August 2018**
- Study commissioned by the German Ministry of Economic Affairs
- To prepare the 10<sup>th</sup> amendment of the GWB, due in 2 years
  
- Focus is on **abuse of dominance** (and, to a lesser extent, merger control)
- Part on **access to data** is, to some extent, more explorative
- **Enforcement issues**, e.g. injunctions, not addressed

## Policy proposals, general issues

The authors **do not advise to lower the dominance threshold generally**, but see a need

- **To address company-specific dependencies** even if large firms are affected
  - general issue, but gatekeeper role of platforms and access to automatically generated data
  - Extend the provision of “relative market power” (Art 20 para 1 GWB) to large enterprises; clarify wording regarding data
- To define **intermediation power** as an independent, third form of market power
  - Combination of buyer & supplier power
  - Information asymmetry
  - Adjust wording Art 18 para 1 GWB; amendment to Art 18 para 3a GWB

## Policy proposals, situation specific issues

**According to the authors, amendments or clarifications of law are required for specific groups of cases**

- Behavior that is capable of **tipping a market to monopoly**
  - The obstruction of multi-homing or switching should be singled out explicitly
  - New Art 20a or Art 20 para 6 GWB
- Strategies to **exclude smaller outside rivals** by anti-competitive means
  - Google shopping type of conduct
  - Apply the provision of “superior market power” (Art 20 para 3 GWB)
- Strategy to systematically **acquire fast-growing companies** with a potential to become competitors in the future
  - Conglomerate strategies -> Facebook/ WhatsApp merger
  - Extension of the SIEC test (Art 36 para 1 GWB)
- **Regarding access to data:** Threshold for finding that a **refusal to supply data** constitutes an abuse **should be lower** than in cases of a refusal to **grant access to infrastructures or to intellectual property rights**

To be discussed:

**Do we need changes to competition law enforcement in light of digital markets?**