DIGITAL AVANT-GARDE: GERMANY'S PROPOSED "DIGITAL ANTITRUST LAW"

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I. INTRODUCTION

"Break up," "Investigation," or "Regulation" of tech players. Almost on a daily basis, we hear political statements on how to deal with overly powerful digital giants from Silicon Valley or China. According to a global study by international law firm Hogan Lovells on the regulation of technology markets, there were more than 450 political initiatives in the first half of 2019 alone which supported a tougher regulatory stance on "Big Tech." However, so far, most of these fairly populist proposals have not been implemented.

One reason for that may be that the proper tools in order to cope with digital firms are yet to be found. Be it the French digital tax, which has recently caused frictions between French president Emmanuel Macron and U.S. President Donald Trump, the recently introduced liability for user comments in online portals, or laws dealing with copyright infringements caused by content uploaded on video platforms, one thing is clear: the legal issues in the context of online business models tend to be highly complex and difficult to address with a single toolbox.

This article will provide an overview of recent global developments that have set the scene for the proposed draft German "digital antitrust" bill and which are continuing to drive global regulatory developments in digital markets (see section II.). Building upon this, we will provide an overview and initial analysis of the main proposed changes in relation to digital markets (see section III.). Finally, we conclude by analysing this proposal in the broader global policy context, also touching upon some of the obvious questions relating to potential EU-wide "digital antitrust" rules and possible enforcement activities in the near future (see section IV.).

In particular, the German draft Ministerial bill on the 10th amendment to the German Act Against Restraints of Competition (so-called "GWB-Digitalisierungsgesetz") provides for the following aspects, which we will discuss in more detail in section III:

- Access rights to "data relevant for competition," making such data a factor in determining a dominant market position and refusal of access to such data an abuse of market power;

- Stricter antitrust regulation of digital platforms through a mechanism that enables the German Federal Cartel Office ("*Bundeskartellamt*") to not only declare by order that large digital platforms are of "paramount significance for competition across the markets" but also to impose stricter antitrust rules on them in a second step;

- Specific regulation of so called "intermediaries," whereby multi-sided digital platforms whose business model is to collect, aggregate and evaluate data in order to reconcile supply and demand between user groups will be subject to specific antitrust rules;

- Right of intervention against so-called "tipping" of markets (i.e. the "overturning" of a market with several suppliers into a monopolistic or highly concentrated market) as well as new interim injunction measures that make it easier for the *Bundeskartellamt* to deal with possible violations of antitrust laws in the future;

- Broader protection against so-called relative market power, which– under the new law – will not only protect small and medium-sized enterprises, but also apply to any "B2B" situation where a company is dependent on another market participant. In the future, all market players, even large companies, will be able to rely on this protection mechanism; and

- More legal certainty for horizontal arrangements through new rules entitling companies to a decision by the *Bundeskartellamt* on the legality of a planned cooperation with a competitor (instead of reliance on self-assessment only) if the companies have a substantial legal and economic interest in such a decision.

II. SETTING THE SCENE – THE GERMAN DRAFT IN THE GLOBAL CONTEXT

In a political environment where regulating "Big Tech" has become one of the most prominently discussed topics, the German draft Ministerial bill is capable of creating legislative facts at a European and international level and placing Germany, if not at the forefront of "Big Tech" business in general, at least at the forefront of its regulation.

A. Antitrust Law – A Powerful Regulatory Tool

Over the last few years, antitrust law has transformed into a particularly powerful tool against market power in online markets. EU Competition Commissioner Margrethe Vestager made a name for herself by imposing billions in fines and tax reclaims against companies, especially from Silicon Valley. In her next term under the leadership of the newly elected President of the EU Commission, Ursula von der Leyen, Commissioner Vestager will also be given responsibility for the digital sector as a whole. This dual role will further strengthen the importance of antitrust law. In Germany, the *Bundeskartellamt* under its President, Andreas Mundt has been no less ambitious and has used its competences to deal with online marketplaces and social networks. In light of this, it does not come as a surprise that the global Hogan Lovells study on digital regulation found that around a quarter of the political initiatives opted for stronger regulation of tech companies.

By and large, these proposals have not made it through the discussion stage. However, with the now published draft German "digital antitrust" bill, Germany is focusing on an actual legislative project to endow the *Bundeskartellamt* with more competences and to place it at the forefront of global regulators.

According to the Minister of Economic Affairs and Energy, Peter Altmaier, the new law is going to "set some ground rules for dominant online platforms and [improve] market and data access for their competitors." This announcement only slightly reveals what is about to come; a program that has what it takes to make Germany a pioneer in the antitrust regulation of digital markets. Some parts of the current proposals will certainly attract focused attention in Silicon Valley and China.

B. The Global Context

The planned reform of the German antitrust law can be seen as one of the first regulatory results of a controversial international debate which has been fuelled by antitrust decisions of leading antitrust authorities worldwide as well as by the views of legal scholars.

Just over the last twelve months in particular, the following papers and studies have contributed to the ongoing debate: the Joint Memorandum of the Belgian, Dutch and Luxembourg Competition Authorities (October 2019); the Report by the German "*Kommission Wettbewerbsrecht 4.0*" (September 2019), whose recommendations have partially become part of the new bill; the Report prepared by the BRICS countries entitled "Digital Era Competition: A BRICS View" (September 2019); the "Stigler Report" prepared in the U.S. by the "Stigler Committee on Digital Platforms" (July 2019); the "Digital platforms inquiry" by the Australian Competition Authority (June 2019); the Report of the European Commission on "Competition policy for the digital era" (April 2019); and the "Furman Report" on "Unlocking digital competition" prepared for the British government (March 2019).

III. THE MAIN FEATURES OF THE NEW DIGITAL ANTITRUST LAW

For some years now, both at government level in Berlin and at the level of the *Bundeskartellamt* in Bonn, Germany has seen itself as a pioneer of state-of-the-art antitrust law regulation of digital markets. This understanding already existed when discussions on the last reform of the GWB, which introduced new merger control thresholds in June 2017, took place. Ever since, it has been necessary to take into account the value allocated to a company rather than simply its turnover in order to prevent so-called "killer acquisitions" of innovative start-ups, especially in the tech and pharmaceutical markets. Additionally, the last reform of the GWB shed some light on what amounts to a market within the meaning of German antitrust law and, in particular, clarified that a market can exist not only in respect of paid services, but also where free services are provided (e.g. online searches or social networks).

However, up until this point, none of these changes has been made with the goal in mind of creating some sort of a "digital antitrust law." The official title of the proposed 10th amendment of the GWB, by contrast, shows that the time has now come. The German Government has proposed nothing less than a "Competition Law Digitization Act." The GWB will of course continue to apply to all market sectors and will merely integrate the proposed amendments into the existing framework. In the area of digital markets, however, the *Bundeskartellamt* will be equipped with far more tools than most other competition authorities following the adoption of the proposed amendment.

At the same time, the draft bill will implement to a large extent the ECN+ Directive (i.e. the European Directive "to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market"), and increase the second merger control turnover threshold from € 5 to € 10 million. Finally, it intends to make slight adjustments to ministerial approval, cartel proceedings, as well as the private enforcement of antitrust laws, which are not dealt with in this article.

In the following sections we will shed some light on the main features of the proposed draft bill and analyse them in their context.

A. Access to "Data Relevant for Competition" as a Factor in Determining a Dominant Market Position

The new law expressly provides for access to "data relevant for competition" to be a factor in determining whether a company has a dominant market position in relation to its competitors (Section 18(3) no. 2 GWB draft bill).

The legislator's objective is to point out the significance of data not only for digital business models, but also for business models in general. The availability of large amounts of detailed data enables companies to tailor their products to the needs of consumers and to engage in targeted advertising, which is why data has gained increasing popularity among advertising companies.

The ever-growing importance of data for companies in all sectors is the reason why access to data is meant to become easier under the new law. Therefore, it also becomes clear why, for the purposes of German antitrust law, "an abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services 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" (Section 19(2) no. 4 GWB draft bill).

Additionally, the rule that deals with so-called relative market power below the level of dominance has been subject to changes. The new law introduces another possibility for a finding of a "dependent" position within the meaning of Section 20 GWB to arise, i.e. "the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities" (Section 20(1a) GWB draft bill).

Only time will show how these changes will affect the way companies deal with big data. In practice, it will be particularly important for those demanding access to data to provide substantive evidence of their dependence on getting access to it. As already indicated in the discussions leading to this draft bill, the issue of data access will not be immune from further scrutiny.

B. Stricter Antitrust Regulation of Companies with "Paramount Significance For Competition Across the Markets"

Another important change can be found in Section 19a GWB draft bill, which has been introduced to allow for a better regulation of digital companies with "paramount significance for competition across the markets." It enables the *Bundeskartellamt* to declare by order that a company operates "*to a significant extent*" on multi-sided markets or networks.

In the legislator's view, such companies are at any time capable of expanding their market power to dynamic new markets simply because of their strategic position and their access to superior resources. Ways to do so are, for example, competitive pricing strategies, exclusivity agreements, bundling or the use of data in parallel markets. Moreover, network effects, a typical feature of digital markets, can lead to accelerated market concentration.

The current law, in principle, only allows for sanctioning abusive conduct where a company already had certain market shares in the relevant market. The new rules, by contrast, endow the Bundeskartellamt with the competence to prevent a company with a dominant position in one market from engaging in certain particularly harmful practices in another market, provided that it has previously declared by order that any such dominant market position exists. This new provision appears to be targeted directly at the biggest global tech players concerning their activities in Germany.

C. Special Regime for Digital Platforms

The new law deals specifically with digital platforms. Section 18(3b) GWB draft bill makes it clear that so-called "intermediaries" can also be dominant market players; a view that has already been expressed in the German study on "Modernising the law on abuse of market power" published on August 29, 2019.

The term "intermediary" should be construed as referring to an undertaking which "*acts as an intermediary on multi-sided markets.*" These intermediaries – typically digital platforms – mostly function as "gatekeepers" in that they decide on the market entry of product suppliers who wish to trade their goods on the intermediaries' websites. For these suppliers, how they are listed and ranked on the websites is critical, particularly if there are no real alternative options. Consequently, the new rule emphasizes that, in the assessment of a firm's market position "account should be taken in particular of the importance of the intermediary services it provides for access to supply and sales markets."

D. Relative market power: Now not only in relation to small and medium-sized companies (Section 20 GWB draft bill)

With the proposed changes in Section 20(1) GWB, the draft bill introduces another topic that has already been discussed in the German study on "Modernising the law on abuse of market power." The study concluded that, under certain circumstances, there might be too high a threshold for anti-trust authorities to stop the abuse of market power in digital markets. That being said, the new law wants to make sure that there is a possibility to monitor the conduct of digital companies which are about to obtain a dominant position for potential abuses of market power.

According to the authors of the study, digital markets are prone to being easily "tilted," leading to markets without real competition. Reasons for that might include network effects as well as uncomplicated scalability of services in digital markets. However, once markets are "tilted," there is usually no way back.

Under the old law, the *Bundeskartellamt* acted well within its competences when taking actions against a company that abused its market power insofar as that behaviour was directed against companies dependent on it. However, it was only regarded as an abuse of market power within the meaning of Section 20 GWB, where this behaviour affected small or medium-sized companies. Within the new framework, there is no such requirement, therefore also covering situations where large companies are pressurized by digital companies. However, this new rule should only be applied when "because of a clear asymmetry, the dependence is not offset by corresponding countervailing power of the suppliers or customers of the undertaking with a strong market position" (Section 20(1) GWB draft bill).

E. Lowering the Conditions for Interim Injunctions

Additionally, Section 32a(1) of the GWB draft bill provides for relaxing the conditions for the application of interim injunctions by the Bundeskartellamt. The reason being, that due to complex and lengthy investigations, it sometimes takes the *Bundeskartellamt* months or even years to reach a final decision. However, digital markets in particular are very dynamic and can quickly "tilt" into a market where competition is largely eliminated. In such cases, the *Bundeskartellamt* should be able to react quickly and effectively, so as to minimise the risk of irreversible changes during the course of years of investigations.

F. New Assessment Options for Horizontal Cooperation

Although the planned changes are all about providing the *Bundeskartellamt* with stronger intervention powers against dominant digital companies, they also introduce new possibilities for certain forms of cooperation between horizontally aligned (potential) competitors. The objective behind this change is to create legal certainty in situations where potential competitors of large digital companies try to cooperate in order to compete with the major players on the market.

At the moment, any form of cooperation between (potential) competitors carries the risk of violating antitrust rules, especially where cooperation takes place between (potential) competitors who have already gained a significant market share. For competition agencies any such form of cooperation includes a significant risk of anticompetitive effects, concerted practices and exchange of strategic information.

However, not every sort of cooperation between competitors should raise concerns from an antitrust perspective. This is particularly true for those forms of cooperation that merely allow companies to enter the market. Examples in the relevant field of the digital economy include the joint use of data and the cooperation of (potential) competitors in establishing platforms.

Under the current law, the principle of self-assessment applies. It requires corporations to check and decide all by themselves whether the prospective cooperation complies with rules of antitrust law. In this assessment, companies need to take into account the market shares of the respective participants to the cooperation as well as possible efficiency gains being the result of the planned cooperation. Such an examination is usually complex and there is always a residual risk that companies might make mistakes in their self-assessment.

If later on a competition agency were to come to a different conclusion, there would be a high risk of fines being imposed on the companies involved. It is precisely this risk which leaves companies with no choice but to refrain from cooperating with (potential) competitors in the first place. Although, under the current law, the *Bundeskartellamt* can already informally advise companies on the legality of their planned cooperation, it is not required to do so within a fixed period of time and there is no formal decision. Under the new law, companies are entitled to the *Bundeskartellamt's* rubber-stamping "if they have a substantial legal and economic interest in such a decision" (Sec 32(c) GWB draft bill). According to the draft bill, such an interest may exist, for example, where there are new complex legal issues to be decided or where there is an unusually high investment volume and expenditure.

IV. ANALYSIS AND OUTLOOK – DIGITAL TRENDSETTING OR NATIONAL SOLO?

Germany breaks new ground with the proposed draft bill to regulate digital markets. Irrespective of whether one supports the German government's objective (i.e. more regulation of the online market), it raises plenty of questions that require answers. Unlike many other markets, the online market is truly global. Big players are represented in almost all markets in America, Europe and – with a few exceptions in China, South Korea, and Japan – also in Asia. That being said, what is the reason for a German rather than a European solution? Is the European Commission with its ambitious Competition Commissioner Vestager and her newly expanded digital portfolio not equally or even better equipped to create a Union-wide "level playing field"?

In recent years, the *Bundeskartellamt* in particular has left no doubt that the enforcement of antitrust laws in digital markets needs to be coordinated between the European Commission and the national competition authorities. There is good reason for that, as the effects of digital markets are not restricted to the internet, but are experienced in real life markets. There is a limitation, however, which is the lack of uniform rules across the European Union, especially as the UK, an important and innovative digital market, will likely no longer be part of the internal market in the foreseeable future. This fragmentation would affect not only large online platforms, but also smaller German and European start-ups, whose biggest problem compared to U.S. competitors is the lack of scalability of the markets.

But perhaps things will turn out quite differently and the German draft – if it proves itself in practice – will become a blueprint for regulators in other European and non-European countries. The example of the European General Data Protection Regulation perfectly illustrates that the first legal system to adopt a binding framework for the regulation of conditions in the online market can set standards for similar projects. California, for example, has just recently adopted similar data protection standards.

Although Germany has been making quite some progress with the proposed draft bill in the area of the antitrust regulation of digital markets, there is certainly more regulatory activity to be expected in this field in the foreseeable future. The draft neither fully mirrors the views expressed in the ongoing global debate, nor does it mark its end. In fact, the legislator has also pointed out that further adjustments, especially in the context of access to data, might be necessary in the future.

In any event, the draft bill provides some ideas on what Germany and the world can expect in the context of antitrust enforcement in digital markets. Companies should take this as an opportunity to review not only the impact on their business model, but also their antitrust compliance systems and, if necessary, adjust them accordingly. What becomes clear is that the draft bill aims at creating new ground rules for digital giants. As plenty of industrial companies and service providers have now turned into tech companies in one way or another, in its practical application, the new law might therefore face the challenge of dealing with these digitized industrial companies appropriately.

It will be interesting to see how the German government, during its Council Presidency in the second half of 2020, will pursue this issue at a European level. The reason being that key decisions concerning the enforcement of European and international antitrust laws will require not only domestic but also European solutions. As a basis for that, the German Federal Ministry of Economics asked the "*Kommission Wettbewerbsrecht 4.0*" to provide some recommendations for the future development of European competition law in the context of the digital economy. In their September report, the authors urged regulators, among other things, to further empower consumers to decide about their own data and to be more decisive when it comes to monitoring strong digital platforms.

If Germany, with its ambitious digital antitrust law, succeeds in setting the standards for appropriate competition law tools, and the *Bundeskartellamt* manages to employ them in a reasonable and successful way, Germany may soon belong to the digital avant-garde albeit in regulating "Big Tech" companies rather than attracting them.