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**The Draft for the 10<sup>th</sup> Amendment of German  
Competition Law: Towards a new Concept of  
“Outstanding Relevance across Markets”?**

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# The Draft for the 10<sup>th</sup> Amendment of German Competition Law: Towards a new Concept of “Outstanding Relevance across Markets”?

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**Abstract:** The ministerial proposal for a 10<sup>th</sup> amendment of the German competition law particularly addresses abuse control and seeks to tighten this pillar of competition policy against the background of the challenges from the digital economy. Next to extending the classic policy instruments of abuse control, the reform proposal suggests to introduce an additional and novel type of market power: the outstanding relevance across markets (ORAM). From an economic perspective, such an institution is interesting as it emphasizes non-horizontal and less direct anticompetitive abuses of market power. We review what type of cases could be subject to such a concept of systemic market power. Furthermore, we address the question whether merger control could also benefit from an ORAM-style conception.

**Keywords:** competition policy, abuse control, digital economy, market power, merger control, antitrust

**JEL-Codes:** L40, K21, L41, L42, L49, K42, L81, L86, M21

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## 1. Starting-Point – The Draft for the „GWB Digitization Act“

Competition policy currently faces a number of challenges. Firstly, macro studies reveal an overall decline in the intensity of competition across a large number of sectors and industries (inter alia, Autor et al. 2017; Gutiérrez & Philippon 2018; Grullon et al. 2019; Affeldt et al. 2020; De Loecker & Eeckhout 2020a, b), for which the role of superstar companies and the concentration-increasing effects of platform markets are held responsible. Secondly, an impressive number of expert studies on the consequences of the digital economy for competition policy<sup>1</sup> derive, independently from each other, a number of similar conclusions (Kerber 2019):

- Serious market power problems can be observed among digital service providers (e.g. "GAFA"<sup>2</sup>).
- The combination of direct (Farrell & Saloner 1985; Katz & Shapiro 1985) and indirect (Rochet & Tirole 2003, 2006; Caillaud & Jullien 2003; Armstrong 2006) network effects leads to "tipping" (effects towards permanent dominance), especially when - natural or strategically created - incompatibilities and switching costs are added (Klemperer 1995).
- Data and connectivity advantages of incumbents open up scope for anti-competitive vertical and conglomerate leveraging, as the data collected is also relevant for other markets (inter alia, Farrell & Katz 2000; Zhu & Liu 2018; De Cornière & Taylor 2019, 2020; Hagíu et al. 2020). One example would be forms of self-preferential treatment (i.e. giving preference to one's own service and content offerings in adjacent markets, which then allows one's own services, regardless of their quality, to gain significant market shares in these markets through the leveraging of market power – like search and recommendation biases). Similarly, a digital company's "dual role" as platform operator and content provider on this platform allows scope for anti-competitive leveraging effects. For example, Amazon acts both as a classic retailer and as a virtual marketplace provider ("Amazon Marketplace") for other providers, so that Amazon operates a virtual shopping mall, so to speak, and in itself is the largest shop within this shopping mall.
- Control over exclusive data can generate market power even without classical market dominance, which is why in general a growing importance of situations of "economic

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<sup>1</sup> See Schweitzer et al. (2018); ACCC (2019); Barreto et al. (2019); BMWi (2019); Crémer et al. (2019); Furman et al. (2019); Haucap et al. (2019); Schallbruch et al. (2019); Schweitzer & Welker (2019); Scott-Morton et al. (2019); Steenbergen et al. (2019).

<sup>2</sup> This refers to the companies Google, Amazon, Facebook, and Apple.

dependence” of even large companies on certain platform or service operators can be observed (inter alia, Bougette et al. 2019).

At the same time, demands from politics and society to break the "platform power" and/or to create regulation for powerful digital companies are increasing (inter alia, European Parliament 2014; BMWi 2019). With the 9<sup>th</sup> amendment to the GWB (June 2017), Germany has already attempted to adapt its national competition law to the challenges of the digital economy (reflections on this issue are provided, for example, by Budzinski & Stöhr 2019). Inspired in particular by the study results of the meanwhile established expert commissions of the Federal Ministry of Economics and Technology (Schweitzer et al. 2018) and the so-called Commission on Competition Law 4.0 (BMWi 2019), the planned 10<sup>th</sup> amendment to the Gesetz gegen Wettbewerbsbeschränkungen (GWB, Act against Restraints of Competition) is intended to further shape and complete the regulatory framework for the digital economy as the "GWB Digitization Act" (BMWi 2020). The far-reaching proposal focuses primarily on tightening abuse control for (digital) companies with market power and on facilitating merger control. From an economic point of view, this raises the question of whether the GWB Digitization Act actually creates an appropriate regulatory framework for the digital economy: Do the planned new competition rules improve the protection of the competition process by curbing the market power of digital groups?

According to the coalition agreement, the 10<sup>th</sup> amendment to the GWB is intended to "modernize cartel law with regard to the digitization and globalization of the business world" (CDU, CSU & SPD 2018). The aim is to speed up procedures and at the same time to strengthen legal certainty for (especially small and medium-sized) companies. Especially with regard to abusive behavior by platform companies, the coalition partners see the need for faster intervention by the competition authorities (CDU, CSU & SPD 2018; BMWi 2020). The harmonization of competition law in the European context is another overriding objective of the amendment.

Especially relevant for the economic discussion are the planned changes that shall reform abuse control and merger control.

- Already in the 9<sup>th</sup> Amendment to the GWB, adjustments were made to digital markets and their specific characteristics (network effects, multi-homing, economies of scale with network effects, access to data and competitive pressure through innovation dynamics) when a dominant position was identified (Budzinski & Stöhr 2019). The

list of criteria for market dominance is now to be extended by the 10<sup>th</sup> amendment to include "access to competition-relevant data" (§ 18 (3) GWB-MP).

- The draft contains a slight rephrasing of the fundamental substantive clause (§ 19 (1) GWB): instead of prohibiting *the abusive utilization of a dominant position*, the draft reads that *the abuse of a dominant position* is prohibited. While being difficult to grasp after the translation to a non-German language, the difference in wording refers to the causality of dominance and abuse. In accordance with mainstream economic thinking, *anticompetitive effects* of a strategy employed by a dominant company shall be prohibited irrespective of whether this strategy itself *requires* dominance to be executed (BMWi 2020: 72-74). The new wording is intended to be less ambiguous about this meaning which was always the underlying intention of the clause.
- The reform proposal suggests to extend and strengthen the substantive laws against abuse of dominance. We come back to this core aspect of our paper later.
- The number of mergers notified to the Bundeskartellamt has been rising continuously for years. In order to counteract this time- and resource-consuming development, the changes planned in the 10<sup>th</sup> amendment are intended to raise the thresholds for taking up mergers and thus reduce the workload of the authority (BMWi 2020: 3).

In addition to these reform elements, the draft bill contains a number of other proposed amendments (BMWi 2020):

- Companies acting as leniency witnesses in cartel cases should not only benefit from immunity from fines or reduced fines by the state, but also be exempted from private liability for damages. This should increase the incentive to uncover illegal cartels as grain witnesses in order to further destabilize cartels. From an economic point of view, this measure can be expected to increase the probability of detection and (related to this) to reduce the number of illegal cartels that come into existence.
- In order to speed up and sharpen the enforcement of cartel law, the ordering of interim measures is to be simplified (§ 32a of the GWB-MP).
- In order to create more legal certainty for interfirm cooperation (legal cartels), companies should be given the opportunity to obtain binding information on the legality of their project from the Bundeskartellamt (§ 32c of the GWB-MP). Until 2004, cartels generally had to be approved in advance by the Bundeskartellamt in accordance with the that-time exceptions to the general ban on cartels. Since then companies have had to assess the legality of their cooperation themselves and the

Bundeskartellamt only intervenes if it comes across illegal interpretations. This – at the time controversially discussed (inter alia, Budzinski & Christiansen 2005) – Europe-wide change from an ex-ante control to an ex-post legal exception system is now again supplemented by an element of ex-ante control (voluntary for the companies).

- Within the framework of the implementation of the EU Directive to strengthen the competition authorities of the Member States with a view to more effective enforcement of competition rules and to ensure the smooth functioning of the internal market, powers of investigation are to be extended, administrative assistance improved and tougher sanctions imposed for procedural violations, among other things.
- Finally, there are plans to modify the ministerial approval (“Ministererlaubnis”) procedure in the context of merger control (Konrad 2020). Here, on the one hand, the linking of the public interest reasons justifying a ministerial approval of an otherwise prohibited merger shall be changed. The phrasing *macroeconomic advantages "or" overriding public interest* is to be replaced by *macroeconomic advantages "and" overriding public interest*, so that both would have to be fulfilled in the future in order to justify a ministerial approval. In the explanatory section accompanying the draft bill, the ministry emphasizes the importance of the criterion of overriding public interest (BMW 2020: 102), which means that the proposed amendment does go in the right direction – but distinctively not far enough (Budzinski & Stöhr 2020). Secondly, a new requirement for a ministerial approval is introduced: at least one of the two options for temporary appeals against the Bundeskartellamt's prohibition decision must have been rejected as unfounded (§ 42 (1a) GWB-MP) before merging companies can address the minister. This is to prevent companies from seeking ministerial approval *instead* of challenging the Bundeskartellamt's decision.

Combatting the abuse of market power represents an important pillar of competition policy next to the enforcement of anti-cartel laws and merger control. Since companies can reach positions of market power through very different ways including procompetitive and welfare-enhancing internal growth through breakthrough innovation or superior efficiency, most competition policy regimes do not prohibit market power as such. However, the anticompetitive abuse of market power is commonly prohibited and competition authorities take action to enforce the respective laws by enjoining exploitative and exclusionary business strategies as well as issuing fines on abusive practices. From an economic perspective, three types of market power are usually distinguished:

- (a) absolute market power, referring to companies dominating a single market with quasi-monopoly effects,
- (b) relative/superior market power, referring to companies enjoying considerable power vis-à-vis other companies because without single-firm dominance because the other companies' business activities depend on the relatively powerful company (economic dependence), and
- (c) collective market power, referring to a number of companies dominating a market in a quasi-collusive equilibrium without significant internal competition (coordinated effects).

Most competition laws reflect these three types of market power and so does the German Act against Restraints of Competition (GWB): § 19 GWB prohibits the abuse of absolute and collective market power and § 20 GWB enjoins the abuse of relative market power.

In the context of the currently discussed update of the German competition laws in order to make them better suitable for the challenges from the digital economy, amendments of the two existing rules against the abuse of market power are suggested by the German government (BMW<sub>i</sub> 2020) and, furthermore, a new and additional type of market power is suggested. With respect to absolute and relative market power, the reform proposal focuses on the addition of data-related issues. It suggests adding to each paragraph an additional example of abusive behavior: the refusal or denial to access competition-relevant data by competitors (as a special version of refusal-to-deal). This shall account for the increasing relevance of access to data in the digital economy as a precondition to compete at all. Furthermore, it is intended to strengthen the combat against relative market power by deleting the hitherto restriction to small and medium-sized enterprises as possible victims of such abuses (§ 20 GWB). In the digital economy, larger companies may also be exposed to abuse by another company with relative or superior market power without the abusing company being directly dominant.

In this paper, however, we focus our analysis on the concept that is supposed to be newly introduced into German competition law: the concept of “outstanding relevance across markets” (ORAM) (§ 19a GWB-MP). In chapter 2, we first discuss the pros and cons of adding such an additional concept of market power from an economic perspective before, in chapter 3, we propose (how and why) to include the concept into merger control as well. Chapter 4 concludes.



## **2. The Concept of “Outstanding Relevance across Markets” in Abuse Control**

### **2.1 The Reform Proposal**

With the proposed introduction of a new § 19a GWB-MP, the German government adds a new instrument to abuse control with the aim of especially targeting large platforms and digital companies (BMW<sub>i</sub> 2020: 75). The provision hands the Federal Cartel Office (FCO; Bundeskartellamt) the power to declare an "outstanding relevance across markets" (ORAM) of a company according to a non-exhaustive list of criteria (§ 19a (1) GWB-MP):

- (i) a dominant position in one or more markets,
- (ii) financial strength and access to other resources,
- (iii) vertical and conglomerate integration/activity,
- (iv) access to competition-relevant data, and
- (v) significance for/influence on third-party business activities, in particular on upstream or downstream market access.

While these criteria by and large match those determining single-firm dominance, they are applied across markets here. A company may be dominant in market A, enjoying data resources in market B, and relative power towards upstream companies in a market C – and it all may count together for identifying ORAM. Furthermore, ORAM is possible without being dominant on one identifiable and clearly delineated goods market. The new concept seeks to assess the overall importance of a company within a so-called digital ecosystem.

Developments over the last two decades have shown that in the digital databased economy, companies like GAFA (Google, Amazon, Facebook, and Apple – named exemplary for more firms with similar roles in their ecosystems) exert influence on competition in a kaleidoscope of markets, which are horizontally, vertically and in conglomerate way interconnected. Accordingly, the expert studies summarized in the introduction (see chapter 1) derive an increase of anticompetitive market power problems in such environments, spreading all around the respective digital ecosystem without necessarily being rooted in one clearly delineated market with single-firm dominance. The ORAM concept seeks to upgrade competition policy with regard to such vertical and conglomerate exploitations of market, which traditional competition policy tends to neglect but which represents a significant phenomenon in the digital economy.

If a company is found to enjoy ORAM, the reform proposal for German competition law stipulates that the FCO can put special obligations on the ORAM-company including a prohibition of the following activities (§ 19a (2) GWB-MP):

- (i) preferential treatment of its own services and goods (ban of self-privileging),
- (ii) tipping of markets,
- (iii) leveraging market power across markets, particularly by means of data (barriers to market entry)
- (iv) creating or promoting interoperability of products or services as well as constraining the portability of data, and
- (v) providing insufficient information to other companies as well as strategically creating non-transparency.

These practices are not abusive if they can be justified objectively. The burden of proof of objective justification lies with the ORAM-company. Altogether, the reform proposal will tighten and sharpen abuse control.

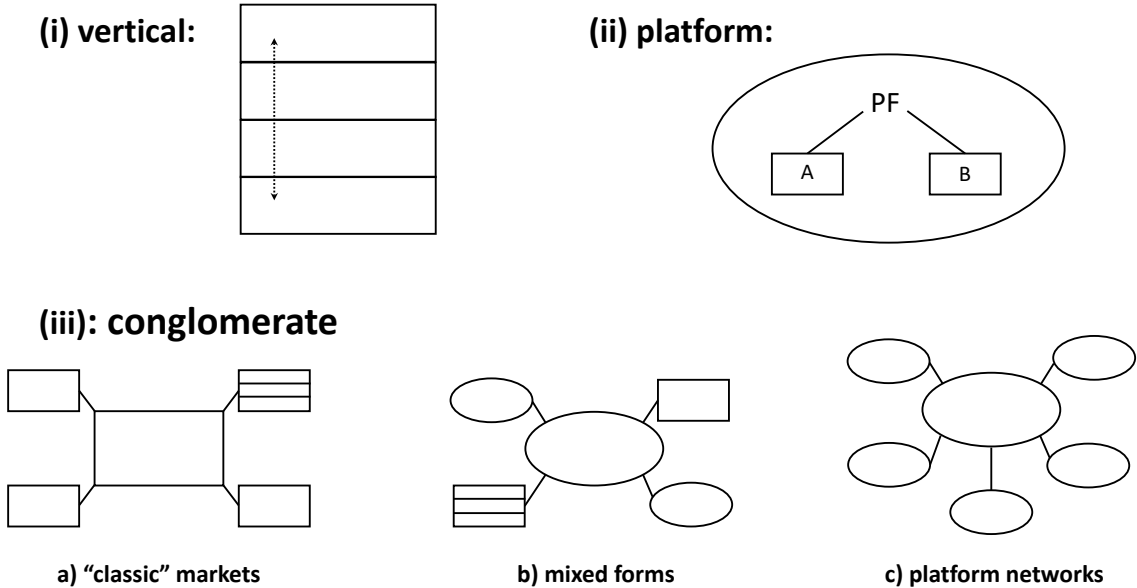
In the literature, this new regulation is referred to as a regulatory approach that prohibits ex-ante practices (Haucap 2020), although the explanatory memorandum of the draft shows a two-stage process (as is also known in the traditional case of abuse of market power): (i) Establishment of an ORAM and, based on this, (ii) abuse of this position (BMW<sub>i</sub> 2020). Thus, according to the ORAM concept, certain conduct is abusive ex-nunc and can therefore have an ex-ante effect, since the companies concerned are informed about the prohibition of conduct, which would not be problematic in a "normal" competitive relationship and can comply with the legal restrictions. The new concept of ORAM has not yet been implemented in German competition law, so the identification process poses a new challenge. The list of criteria for the identification of an ORAM includes actual dominant positions and henceforth mixes classical single market dominance criteria (e.g. financial strength) with elements of economic dependence or relative market power. The extent, to which the criteria, some of which are quite general, would be operational and justiciable, will probably only become apparent in legal practice. In any case, in addition to absolute and relative market power, a third category is created, which could be described as systemic market power.

## 2.2 What Could Be the Economic Content of ORAM?

ORAM represents a new type of market power, complementing the three traditional ones (see chapter 1). However, what are possible gap cases, i.e. cases that traditional market power

concepts would not cover but that fall under the ORAM concept? The domain of traditional market power concepts are direct horizontal (exclusionary abuse) and direct vertical (exploitative abuse) effects. That would leave the cases shown in Figure 1 as potential candidates for ORAM.

Figure 1: Overview of potential ORAM-types



- i. Companies may enjoy vertical cross-market importance in a classic value chain (without platform character). Direct vertical cases involving a dominant position or relative power vis-à-vis direct up- or downstream companies should fall under the classic abuse control (§ 19-20 GWB). However, at least two case constellations are conceivable which may exceed traditional market power concepts and better fit to ORAM. First, the anticompetitive effect does not occur in a market directly upstream or downstream to a dominated market level, but rather skips at least one stage and impedes competition on other stages of the value chain. The unique presence of one company on several market stages as well as the control over sensitive data that is relevant for competition on several market stages may allow for using market power indirectly in a far away stage of the value chain. As the ORAM-concept can cover the whole value chain, it could empower competition authorities to (better) handle such gap cases. Second, a company may not have a dominant position at any level, but it may still have an ORAM for the entire value chain and, therefore, enjoys scope for conducting

anticompetitive strategies. This would hardly be covered by classical abuse control. The merger of AT&T and Time Warner, which has led to black-outs of competing television services (Stöhr et al. 2020), represents an example case.

ii. Platforms with outstanding cross-market importance for the different sides of the market are also embraced by the concept of ORAM. This case is also discussed in the literature under the term *intermediation power* (Schweitzer et al. 2018), since the platform operator has control over the mediation service and acts as a gatekeeper. Thus, intermediation power actually is a special case of the more general ORAM-concept. Intermediation power combined with market dominance represents a more classical case, however, intermediation power may also occur without dominating a delineated market. Interestingly, the reform proposal for German competition law embraces the concept of intermediation power directly and indirectly as a criterion for identifying market dominance (through a new § 18 (3b) GWB-MP). From an economic point of view, this may lead to some redundancies (which however may not be harmful in effect).

iii. The paragon cases for ORAM are conglomerate manifestations of somehow interrelated markets that form a complex system with diffuse power structures (described, for example, by the term "digital ecosystems"). The systemic market power within such structures is particularly and notoriously difficult to grasp under the classic market power concepts. The power does not result from an identifiable dominance of a goods market that can be soundly delineated. Instead, the power derives from a net of dependencies from one and the same company and a multi-market influence of that company covering all relevant elements of the ecosystem. While the nature of the digital economy considerably increases the occurrence and relevance of such phenomena, examples can also be found in more classical markets like the roles of companies such as Siemens or Bosch in special technological ecosystems or chemistry-pharmacy conglomerates like Bayer-Monsanto (III.a in fig. 1). In this area, gap cases for abuse control always existed where the abuse of economic power was not subject to effective competition policy.

Mixed systems of platform markets and non-platform markets (in which a platform does not always have to be at the center; III.b in fig. 1) would be Alphabet/Google or Apple, for example. Platform networks (III.c. in fig. 1) could include social media ecosystems such as Facebook, Instagram, YouTube,

Snapchat, messenger services, etc. Here, the individual platform operators may already enjoy intermediation power within the platform and, in addition, gain scope for cross-platform power, e.g. Facebook with Instagram, WhatsApp and Facebook Messenger. The ORAM arises, for example, from the fact that only the ORAM company is involved in all areas of the ecosystem or that all other actors within the system are dependent on the activities of the ORAM company due to (strategically created) incompatibilities with other horizontally competing ecosystems. In the latter case, it would be a system of multiple economic dependencies. In such ecosystems, from an economic point of view, anti-competitive strategies (such as self-privileging in search and recommendation systems, arbitrary delisting, artificial incompatibilities, boycotts, raising rivals' costs through discriminatory fees and prices, enforcement of asymmetric data use agreements, etc.) may be possible without the existence of a dominant position of the ORAM company in any of the individual markets involved. It is also conceivable that effects may occur indirectly and in a conglomerate manner, which is why they are difficult to grasp by classical abuse control.

Of course, platforms and submarkets in (ii) and (iii) may also be vertically integrated. In particular, markets involving platforms as well as the combination of intermediation power and cross-market structures are susceptible to abuse. Digital information or data power quickly generates systemic power due to the typical market characteristics (network effects, tipping, incentives to obstruct interoperability, etc.) and companies with a considerable data advantage (GAFA & Co) can acquire a persistent power position that is hardly contestable anymore. Companies may employ their data advantage for sophisticated data analysis as well as for the feeding of artificial intelligence and algorithms, which develop their power through learning processes based upon data input. Thereby, companies with data advantages may create comprehensive conglomerates through diversification as well as vertical and horizontal integration. Once successful, they reduce transaction costs for consumers (in the sense of "one-stop shopping") within their ecosystems, at the same time benefitting and locking-in the consumer since the company has the data of the consumer and, thus, everything is already "paid for" anyway. These features reduce transparency and make it difficult to distinguish between legitimate service competition and abusive behavior in the many (supposedly) different markets (Schweitzer et al. 2018). However, anti-competitive behavior can lead to more far-reaching damage here precisely because of these characteristics, as these markets

tend to "tip over" more easily in the direction of one (or a few) suppliers and show stronger concentration tendencies.

In addition, companies with ORAM in digital ecosystems often experience scope and particularly strong incentives for engaging in anticompetitive leveraging. For example, Amazon's dual role as a marketplace provider and a shop owner within the marketplace generates incentives to use its own resources and information for self-privileging (and/or handicapping competitors in the marketplace). Similarly, ORAM positions may be employed to extend its market power to adjacent markets, as in the cases of Google Search and Google Shopping (Schweitzer et al. 2018). Here, for example, algorithms can give preference to their own offers in search or recommendation results or competition-relevant data can only be passed on to subsidiaries but denied to the competitors of these subsidiaries, etc. (Bougette et al. 2019).

From an economic point of view, however, ORAM phenomena are not limited to digital ecosystems, but can also occur within classical value chains or in classical conglomerate structures (types (i) and (iii a) in Fig. 1). Examples could be multimarket industrial firms such as Siemens, Bosch or Bayer, where it can be difficult to detect dominance in a single delimited market, but which have exploitable systemic market power through leading positions in various related markets. Such a broad understanding of the ORAM concept may not be intended by the authors of the German competition law reform proposal (BMWi 2020: 75-81), but from an economic point of view it would nevertheless improve the effectiveness of competition policy - not only with regard to the digital economy.

### **3. "Outstanding Relevance across Markets" in Merger Control?**

Overall, the implementation of an ORAM-style concept into abuse control is justified from an economics perspective. However, what about merger control? Can ORAM be helpful here as well?

In competition policy, ex-post abuse control and ex-ante merger control work together systematically: merger control is intended to prevent the emergence of market power through external company growth, while abuse control is intended to sanction the exploitation of market power that has nevertheless been created (e.g. through internal growth). It would therefore follow the logic of competition policy systems if the addition of the ORAM-concept to abuse control was accompanied by a corresponding addition to merger control. If ORAM represents a problem for competition, particularly (but not only) in the digital economy, it

would make sense if abuse control sanctioned the anticompetitive use of an ORAM caused by internal growth, while merger control prevented the emergence of an ORAM through external company growth. However, any extension of ORAM to merger control is missing from the ministerial reform proposal for the GWB.

A driving-force for introducing an ORAM-style concept – and also its economic value – is to improve the options to address more indirect and more systemic abuses of market power next to the horizontal and directly vertical abuses (see chapter 2). Similar to abuse control, merger control is also experiencing enforcement deficits with respect to non-horizontal mergers and acquisitions with more systemic/conglomerate anticompetitive effects (inter alia, Budzinski 2010). As it is now, the prohibition criterion of merger control, "significant impediment to effective competition" (§ 36 (1) GWB – similar to the respective provision in European competition law), is specified by the example “through the creation or strengthening of a dominant position”, thus targeting to prevent mergers and acquisitions that contribute to market power in a traditional sense. Embracing the peculiar characteristics of the digital economy, a second example could be added to the prohibition criterion, e.g. the creation or strengthening of an ORAM.

From an (data) economics point of view, an addition to the first example (market dominance), which has predominantly horizontal effects, by introducing a second example (ORAM), which is focusing vertical and conglomerate effects, would be welcome (Salop 2018; Stöhr et al. 2020). It would also lead to a (re)harmonization of ex-post and ex-ante rules within the German competition law system. As a welcomed side effect, the relevance of an exact market definition could decrease – as leading economists have long demanded (Farrell & Shapiro 2010; Kaplow 2011, 2015). This may help to prevent the failure of cases in which anticompetitive effects have been convincingly demonstrated with economics instruments, but in which the legal accuracy of the market definition has brought the cases down (e.g. on the European level Tetra Laval/Sidel; Oracle/PeopleSoft). With the ORAM concept it would no longer be of such great importance whether a merger is horizontal (e.g. if beverage packaging constitutes the relevant market) or conglomerate (e.g. if glass, carton and PET beverage packaging each constitute separate markets); in the first case the classical SIEC criterion would apply, in the latter case ORAM could be used. Possibly this might also extend to the problem of common ownership of investment companies, venture capital firms, and banks, who may hold minority shares in all companies of a given industry (Schwalbe 2020a, b). This could also be some form of outstanding relevance across markets (ORAM). Consequently, it

may be an avenue to introduce a merger control responsibility for this problem if that represents an appropriate solution (which is beyond the scope of this paper).

However, despite the need to adjust and sharpen the sword of competition authorities, it should not be overlooked that the commercial use of digitized data is by no means fundamentally detrimental to welfare. On the contrary, it generates considerable welfare gains for consumers and society. It must, therefore, always be considered whether extended powers of intervention by the competition authorities go too far and threaten to restrict competitive business strategies. Therefore, a presumption like ORAM leading to anticompetitive effects of, for instance, denial of access to competition-relevant data as well as mergers and acquisitions needs to be rebuttable. From an economic point of view, it is appropriate that the burden of proof for any objective justification of presumably anticompetitive conduct based on ORAM lies with the company enjoying the ORAM position. Without the objective justification, there may be a risk that the application of the ORAM-concept, for instance in the form of data disclosure obligations, may be too far-reaching and weaken incentives for procompetitive strategies. Moreover, there may be an incentive for a weaker company to strategically claim an anticompetitive effect and thus create procedural costs. If this is only done in order to gain an advantage because one has fallen behind in performance competition or in order to occupy the stronger company and bind its forces, then the subsequent costs represent social welfare losses.

#### **4. Conclusion**

The ministerial draft for the 10<sup>th</sup> amendment to the GWB focuses on improving competition policy against the background of the special features of the digitized economy and especially digital platform markets. Among a number of reform proposals to virtually all sections of the German competition law (see chapter 1), the plan to extend the combat against market power in digital ecosystems stands out. Four types of market power can be identified:

- (a) absolute market power, referring to companies dominating a single market with quasi-monopoly effects,
- (b) relative/superior market power, referring to companies enjoying considerable power vis-à-vis other companies because without single-firm dominance because the other companies' business activities depend on the relatively powerful company (economic dependence),



- (c) collective market power, referring to a number of companies dominating a market in a quasi-collusive equilibrium without significant internal competition (coordinated effects), and
- (d) systemic market power, referring to cross-market power in (digital, data-driven) ecosystems.

While the first three types are subject to the conventional abuse control rules, the fourth type requires a novel concept of abuse control. The ministerial proposal for a 10<sup>th</sup> amendment of the GWB attempts to embrace systemic market power by suggesting *outstanding relevance across markets* (ORAM) to constitute a new form of dominance with its own abuse control rules.

Overall, the concept is designed to give the authorities the possibility to better address competition problems and anticompetitive behavior of firms on (especially, but not only) digital markets and platforms. Combating the abuse of systemic market power is relevant in the digital economy from an economics perspective. Therefore, we think that better covering vertical and conglomerate competition relations decreasing in the importance of exact market delineation, would represent important and appropriate steps for German competition policy (if the proposal is implemented). However, in order to harmonize the interplay between ex-ante and ex-post control of systemic market power, we propose to introduce the ORAM concept both in abuse control and in merger control.

Furthermore, addressing systemic market power in the digital economy is a task for all competition authorities and regimes in Europe and the world. Complementing abuse control and merger control by an ORAM-style concept would help to give antitrust authorities the necessary ground to deal with the peculiar economics of the digital economy. Notwithstanding, the positive welfare effects of digital and databased services, platforms, and industries must not be overshadowed by the resulting novel challenges to protect competition. In contrast to sector regulation, extending competition policy competences highlights the mostly beneficial character of the digital innovation by a crucial two-step procedure: (i) identifying (absolute, relative, collective, systemic) market power, (ii) deriving special obligations and case-individually preventing abusive exploitation of the power. This case-oriented procedure better maintains the innovative potential of the digital economy than a one-size-fits-all sector regulation.

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