Dominance
2019

Contributing editors
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Cleary Gottlieb Steen & Hamilton LLP

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Cleary Gottlieb lawyers are the editors of this guide and authors of several country chapters.

We provide expert local insight in these and many other jurisdictions around the world and would be happy to answer any specific questions you have on dominance or antitrust matters more broadly.

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2005
Fifteenth edition
ISBN 978-1-83862-093-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Dominance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Colombia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb Steen & Hamilton LLP, for their assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
March 2019

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This article was first published in April 2019
For further information please contact editorial@gettingthedealthrough.com

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Germany

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GENERAL FRAMEWORK

Legal framework

1 What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Unilateral conduct by undertakings with market power is governed by sections 18, 19 and 20 of the German Act against Restraints of Competition (ARC), which prohibit an undertaking's abuse of a (single-firm or collective) dominant position, and specific types of abusive behaviour by undertakings that have 'relative' market power as compared to small or medium-sized enterprises (as trading partners or competitors). Germany has therefore made use of the possibility provided for under EU Regulation 1/2003 to enact national legislation on unilateral conduct that is stricter than article 102 of the Treaty on the Functioning of the European Union (TFEU).

Another distinct feature of German law on dominance is that there are (rebuttable) statutory market share-based presumptions of dominance (see question 2). The case law of the German Federal Cartel Office (FCO) and the German courts, notably the Federal Court of Justice (FCJ), provides guidance on the application of these presumptions and rules. The only source of formal general guidance on unilateral conduct is the FCO's – somewhat dated – notice on below-cost pricing (which has been under review by the FCO for years). Modernisation of the legal framework for unilateral conduct has been focused on digital markets in recent years. In this regard, the German legislator already introduced additional criteria for the assessment of market power on digital markets to the ARC in 2017 (see question 2). In addition, the German government continues to review whether the ARC still allows effective enforcement against abuse of market power in the digital economy.

Definition of dominance

2 How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Under section 18(1) of the ARC, single-firm dominance exists where an undertaking does not have competitors, is not exposed to significant competition, or has a 'superior market position' as compared to its competitors (which can exist even if there is significant competition in the market) on a particular market. The FCO's merger control guidelines (the principles of which can also be applied to unilateral conduct cases) define single-firm dominance broadly consistently with the EU standard, namely as a situation in which an undertaking's market power enables it to act without sufficient constraints from its competitors (ie, a situation in which an enterprise is able to act to an appreciable extent independently of its competitors, customers, suppliers and, ultimately, consumers (FCO, Guidance on Substantive Merger Control of 29 March 2012, paragraph 9)).

As per section 18(3) of the ARC, the following (non-exclusive) criteria may be taken into account in assessing whether a company has a 'superior market position': the enterprise's market share, its financial resources, its access to input supplies or downstream markets, its affiliations with or links to other enterprises, legal or factual barriers to market entry, actual or potential competition by domestic or foreign enterprises, its ability to shift its supply or demand to other products, or the ability of the undertaking's customers or suppliers to switch to other suppliers or customers.

In this respect, a somewhat static appraisal of market shares is still the most important factor in the FCO's and courts' analysis. In particular, section 18(4) of the ARC sets forth a (rebuttable) presumption of potential dominance where an undertaking's market share exceeds 40 per cent. An undertaking, however, may also be found dominant (exceptionally) if its market share remains below the presumption threshold. If a company's market share exceeds the presumption threshold, it is in practice often difficult (but not impossible) to rebut the presumption with economic arguments. This is because German law expressly stipulates that a dominant position can be based on a 'superior' market position, even if the company concerned faces significant competition from its rivals.

In a new section 18(3a) of the ARC, the German legislator recently introduced additional criteria for the assessment of market power in multisided markets and networks. Under the new provision, in particular direct and indirect network effects, potentially related economies of scale, the users' tendency for multi-homing and their ability to switch between offers, access to competitively relevant data, and innovation-driven competitive pressure are to be taken into account when determining whether an enterprise is dominant. By contrast, market shares should typically not provide a reliable yardstick for the determination of dominance on digital markets with free (eg, paid by advertisement) online services and multi-homing. The FCO applied these additional criteria in its decision against German ticketing system operator CTS Eventim, finding that it enjoyed a dominant position vis-à-vis event organisers and ticket offices on the two-sided platform market for ticketing services in Germany (decision of 4 December 2017, for more details see question 29). The new criteria also played an integral part in the FCO's proceedings against Facebook, where for the first time, the FCO based its abuse-of-dominance analysis on whether the dominant company complied with the EU General Data Protection Regulation (GDPR), and ultimately imposed limitations on Facebook's current practice of collecting and processing user data and prohibited using the related terms of service (decision of 7 February 2019; case report and press release available on the FCO's website). In assessing Facebook's dominance in the German market for social media networks, the FCO took into account in particular the direct network effects due to Facebook's large number of users (which enhance its position and lead to high entry barriers making it very difficult for users to switch to other social networks – the 'lock-in effect'), indirect network effects

encountered with Facebook as an advertising-funded service (thereby increasing the barriers to market entry) as well as Facebook's access to users' personal (ie, competitively relevant) data to determine the company's dominance. The new criteria are also relevant for the FCO's recently (in November 2018) initiated proceedings regarding Amazon's terms and conditions and its behaviour vis-à-vis the retailers on its German marketplace platform amazon.de. In contrast to the Facebook investigation, to assess Amazon's market power, the FCO's focuses on indirect networking effects created by Amazon Marketplace's role as an intermediary (due to which the Marketplace's benefit for retailers depends on an increasing number of customers using the platform and vice versa).

See question 7 for the definition of collective dominance and question 34 on the definition of relative dominance.

Purpose of the legislation

3 | Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The main purpose of the ARC is to prevent restrictions of competition. While other objectives may be taken into account if they are directly related to this main objective (eg, consumer welfare, efficiencies and in particular the protection of small or medium-sized undertakings as customers or competitors), German competition law does not take into account social or political goals in the assessment of potential abuses of dominance (such as labour market considerations) (see section 30 of the ARC; note, however, that the FCO has, so far, only slowly started to adopt the more sophisticated economic analyses used by the European Commission, and still continues to consider market shares as very important in its analysis). The FCO's recent investigation against Facebook has reignited debate over whether certain consumer welfare aspects should be taken into account when assessing dominant behaviour. To assess whether Facebook's terms and conditions constitute an abuse pursuant to section 19(1) of the ARC, the FCO's theory of harm took into account in particular the violation of data protection rules, which have the key objective to protect the fundamental right of informational self-determination and thus the private network users' control over how and for what purpose their data is used (see also question 22).

Sector-specific dominance rules

4 | Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Special rules apply to certain regulated industries, such as energy (electricity and gas), telecommunications, postal services and railways (most of these sectors have been liberalised only within the past few decades). The Federal Network Agency (FNA) monitors compliance with certain of these regulations in cooperation with the FCO.

Energy sector

Under section 29 of the ARC, dominant energy suppliers may not demand fees or other business terms that are less favourable than those of other energy suppliers or enterprises on comparable markets, or demand fees that unreasonably exceed their own costs. Note, however, that section 29 of the ARC will only apply until 31 December 2022 (the original deadline was 31 December 2012, but the legislature extended it twice, first to 31 December 2017, and then, under the ninth amendment to the ARC, again through to the end of 2022), because the German legislator considered its special rules to be necessary only for a transitional post-liberalisation period. Outside the ARC, sections 20 et seq of the Energy Industry Act (EnWG) oblige dominant energy network operators to grant other enterprises access to their electricity or gas grids on the basis of objective and non-discriminatory criteria. The EnWG also includes rules that are similar to sections 19 and 20 of the ARC (in section 30 of the EnWG).

Telecommunications sector

The Federal Telecommunications Act provides a detailed regulatory framework for the telecommunications market, taking into account in particular the role of incumbent telecommunication companies that have significant market power on particular pre-defined telecommunications markets. The FNA observes the implementation of these sector-specific regulatory rules and may in particular impose remedies to regulate the conduct of enterprises with significant market power, which may go as far as requiring the separation of the incumbent provider's service and network operations into independent legal entities.

Postal services

The FNA may also issue prohibition decisions against enterprises that are dominant in any market for postal services. In particular, dominant enterprises may be required to perform 'partial services' for competitors (ie, take over specific parts of the mail delivery for them, on non-discriminatory terms).

Railway sector

According to the German General Railway Act, all 'railway infrastructure enterprises' may have to grant access to their railway infrastructure, effectively irrespective of their market position. It also authorises the FNA to issue decisions specifically prohibiting railway infrastructure enterprises from impairing the right of 'non-discriminatory use of the railway infrastructure'.

Exemptions from the dominance rules

5 | To whom do the dominance rules apply? Are any entities exempt?

The German dominance rules apply to all (dominant) enterprises, including all natural and legal persons engaging in economic activities.

No special rules apply in Germany to the public sector or state-owned enterprises. Section 185(1) of the ARC stipulates that the ARC will also apply to enterprises that are entirely or partially publicly owned or are managed or operated by public authorities.

Transition from non-dominant to dominant

6 | Does the legislation only provide for the behaviour of firms that are already dominant?

The ARC does not prohibit an enterprise's attempt to become dominant per se (ie, as long as the enterprise strengthens its market position without otherwise infringing the antitrust laws). In this context, section 20 of the ARC is particularly relevant – the prohibition may apply to enterprises that have not yet obtained a dominant market position, but attempt to use their 'superior market power' in relation to small or medium-sized competitors or customers by exclusionary or discriminatory conduct in order to further strengthen their market position (see also question 34).

Collective dominance

7 | Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Collective dominance is covered by the German dominance rules. Under section 18(5) of the ARC, two or more undertakings with superior market positions are dominant where no substantial competition exists between them and where they jointly are not constrained sufficiently

by competition from third parties. Section 18(6) of the ARC provides market share-based legal presumptions for collective dominance: Three or fewer companies are presumed to be collectively dominant if they enjoy a combined market share of at least 50 per cent; alternatively, five or fewer companies are presumed to be collectively dominant if they account for a combined market share of at least two-thirds. These presumptions can be rebutted by the companies by showing that substantial competition exists between them individually, or that they are jointly sufficiently constrained by competitors (or customers; although disproving the presumption is typically difficult in practice).

German courts have so far rarely addressed collective dominance issues outside of merger cases. The case law on collective dominance is increasingly influenced by the European Court of Justice (ECJ) and European Commission case law and legislation, and the FCO's merger control guidelines accordingly define collective dominance as companies in an oligopolistic setting engaging in tacit coordination or collusion with the result that they effectively do not compete with one another (FCO, Guidance on Substantive Merger Control of 29 March 2012, paragraph 81).

Dominant purchasers

8 Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The ARC's rules regarding abusive unilateral conduct generally apply equally to both dominant suppliers and purchasers. However, section 19(2), No. 5 of the ARC prohibits a specific type of abuse that is particularly relevant for dominant purchasers: a prohibition on a dominant undertaking using its dominant market position 'to invite or cause other undertakings to grant it advantages without objective justification'. German courts have, historically, been very reluctant to find that a dominant purchaser indeed abused its market position by asking suppliers for advantages, such as special rebates. The FCO, however, intervened against food retail chain Edeka based on article 19(2), No. 5 of the ARC, because Edeka had inter alia insisted on suppliers retroactively granting it the same preferential conditions and benefits that they had previously granted to another retail chain that Edeka had acquired ('wedding rebates', see the FCO's decision of July 2014). While the Düsseldorf Court of Appeal overturned the FCO's decision (see the decision of 18 November 2015), the FCJ reinstated it in key points, agreeing in particular that Edeka's retroactive demand for more favourable price components of certain products without regard to the price structures otherwise in use ('cherry picking' of rebates that had previously been granted) was abusive (see the FCJ's decision *Hochzeitsrabatte*, 23 January 2018).

The most recent amendment of the ARC abolished the previously required exploitation of a dominant position from section 19(2), No. 5 of the ARC, which should make it easier to establish an abuse by a dominant purchaser. This will likely result in increased enforcement activity, in particular given the FCO's apparent concerns regarding the market power of German retail chains. In this respect, the FCO already intervened against furniture retailer XXXLutz for requesting unjustified wedding rebates (XXXLutz asked suppliers to grant retrospective discounts to purchases that Möbel Buhl had made before it had been acquired by XXXLutz) from its suppliers, albeit without launching a formal investigation (the FCO dropped its proceedings after XXXLutz had committed to abandon its demands for such rebates).

Market definition and share-based dominance thresholds

9 How are relevant product and geographic markets defined? Are there market-share at which a company will be presumed to be dominant or not dominant?

Relevant product market

The FCO defines relevant product markets primarily based on demand-side substitutability considerations, such as the relevant products' intended use, characteristics and price. In some cases, the FCO has also referred to the 'small but significant and non-transitory increase in price' test as an additional, but not the only or the principal, criterion for market definition (eg, decisions of the FCO in *ÖPNV-Hannover*, 12 December 2003, and in *Loose/Poelmeyer*, 2 July 2008; decision of the FCJ in *Soda-Club II*, 4 March 2008). Under certain circumstances supply-side substitution (ie, other manufacturers being able and willing to adjust their production within a short time and without significant cost) may also be relevant (eg, decision of the FCJ in *National Geographic II*, 16 January 2007). In particular with respect to retail markets (ie, the usual product range of a retailer may be considered to form a single market), portfolio markets have been accepted. Section 18(2a) of the ARC now clarifies that in analysing whether a company may hold a dominant position, the provision of free services does not preclude the finding of a relevant market on which market power can be abused (this clarification has been implemented as part of the recent ninth amendment to the ARC, and acknowledges the FCO's recent decisional practice).

Relevant geographic market

The FCO's starting point for geographic market definition is demand-side substitutability. As under EU law, the relevant geographic market comprises the area in which the enterprises concerned compete, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because of appreciably different competitive conditions (decision of the FCJ in *Melitta/Schultink*, 5 October 2004).

In practice, the FCO will tend to take a somewhat narrower view on market definition in ex post behavioural enforcement (such as in dominance cases) than in merger control cases, as the perspective of specific customers or competitors potentially harmed by the conduct at issue may sometimes influence the FCO's assessment.

Regarding the rebuttable presumption of dominance and the thresholds applicable in this context under German law, see questions 2 and 7.

ABUSE OF DOMINANCE

Definition of abuse of dominance

10 How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 19(1) of the ARC prohibits the 'abuse of a dominant position.' This general prohibition does not include a precise legal definition of the term 'abuse'. Instead, section 19(2) of the ARC provides for five non-exhaustive examples of prohibited abusive behaviour (exclusionary conduct, discriminatory behaviour, exploitative abuse, structural abuse and refusal of access). Section 20 of the ARC extends the prohibition to exclusionary and discriminatory behaviour by enterprises that are dominant only in 'relative terms' by enjoying relative market power with respect to small or medium-sized undertakings (see questions 1, 6, 8 and 34).

At least in theory, there are no per se abuses of dominance. While all relevant unilateral conduct may – theoretically – be justified, the FCO, as a practical matter, will not generally conduct an in-depth economic effects analysis in order to establish a prima facie abuse, but only determine whether the conduct at issue may be categorised in broad terms

as abusive. It is then up to the companies concerned to provide an objective justification for their conduct, eg, cost efficiencies as justification for rebates.

Exploitative and exclusionary practices

11 | Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. German antitrust law prohibits exclusionary conduct (section 19(2), No. 1 of the ARC), notably including predatory pricing and offers below cost, as well as exploitative abuses (section 19(2), No. 2 of the ARC), notably 'imposing prices or other trading conditions that differ from those likely to exist on a market with effective competition'.

Link between dominance and abuse

12 | What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The FCO does not need to prove that an enterprise's dominant market position actually enabled it to conduct its abusive behaviour to establish an infringement under sections 19 and 20 of the ARC (ie, no strict causal link between the existence of the dominant position and the abusive measure is necessary). But a dominant position in a specific market must be the position that is being abused. Moreover, the abusive conduct needs to occur at a time when the company holds a dominant position. For instance, it is not sufficient if a contract that includes terms that may be considered abusive for a dominant company and is concluded between non-dominant parties, even if one of the parties subsequently becomes dominant and then asserts its contractual rights (see Düsseldorf Court of Appeal in *Kabelschachtanlagen*, 14 March 2018).

With respect to adjacent markets, abusing a dominant position in one market by leveraging it into another market (eg, through anticompetitive tying or bundling) is prohibited. The German legislator explicitly intended to extend the prohibition of abusive behaviour under section 19 of the ARC to the prohibition of leveraging a dominant position into another adjacent market to also cover abusive behaviour on non-dominated markets, as long as there is a sufficient link between the dominant position on one market and the abuse or anticompetitive effects on the adjacent, non-dominated market (for further details and case law see question 15).

Defences

13 | What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

As per question 10, unilateral behaviour may in principle always be objectively justified by means of a comprehensive analysis of all relevant circumstances and a balancing of the conflicting interests. However, the burden of proof with respect to an objective justification lies with the dominant company (ie, it must show that its behaviour was justified by an overriding interest outweighing the interest of companies affected by the conduct (see section 20(4) of the ARC)).

SPECIFIC FORMS OF ABUSE

To what extent conduct is considered abusive

14 | Rebate schemes

As rebates can often provide lower prices to customers and enhance competition, dominant undertakings are not generally prohibited from granting them. This is the case, in particular, for volume-based and functional rebates (granted for specific services that the business partner provides; 'pay for performance') if they reflect cost savings connected to economies of scale and are applied in a non-discriminatory fashion. In contrast, dominant undertakings may, as a general rule, not grant rebates that create an incentive for customers to purchase their entire, or close-to entire, demand of products or services exclusively from the dominant enterprise, thereby foreclosing competitors. This may be the case in particular with respect to the following types of rebates:

- loyalty rebates (ie, given under the condition that the customer purchases its entire demand or, at least, a significant portion of it from the dominant supplier);
- retroactive rebates (ie, rebates that are granted retroactively if a customer has exceeded a specific purchasing threshold and therefore have a loyalty enhancing effect); and
- product range-related rebates (ie, rebates that are only granted if the customer purchases the entire product range from one supplier).

15 | Tying and bundling

German antitrust law prohibits dominant enterprises from using their market power on one market to leverage their position onto other (neighbouring) markets in which they do not enjoy a dominant position, regardless of whether this occurs via contractual or economic tying or bundling (see, for instance, the judgments of the FCJ in *Der Oberhammer*, 30 March 2004, and in *Strom und Telefon*, 4 November 2003). These types of behaviour might in principle be justifiable by special requirements (eg, technical reasons), or if the practice is limited to a short period of time and only intended to provide customers with an incentive to try out the tied product.

16 | Exclusive dealing

Dominant undertakings may, in principle, employ exclusivity agreements, but are subject to more stringent restrictions than non-dominant companies in this respect. While the use of exclusivity clauses is therefore not per se prohibited, the interests of the dominant undertaking, the company bound by the exclusivity clause and third parties (in particular alternative suppliers) must be considered and balanced carefully (as with respect to section 1 of the ARC or article 101 of the TFEU). Important factors in this analysis include the term and scope of the exclusivity clause. The Düsseldorf Court of Appeal has found an exclusivity clause requiring the customer to procure 50 per cent of its demand for a period of four years from the dominant enterprise to be abusive (judgment of the Düsseldorf Court of Appeal in *E.ON Ruhrgas*, 20 June 2006).

17 | Predatory pricing

Strategies aimed at driving competitors out of the market or at increasing market entry barriers by lowering prices (predatory pricing) are in general prohibited as exclusionary conduct falling under sections 19 and 20 of the ARC. However, the case law suggests limited practical relevance of this prohibition – with the exception of cases concerning sales below cost (see the decision of the FCO in *Lufthansa/Germania*, 19 February 2002). In this respect, pursuant to section 20(3), sentence 2, No. 2 of the ARC, dominant trading companies may not – except occasionally or with objective justification – sell products below the price for which they themselves bought those products. Promotions lasting more than three weeks may not be considered merely 'occasional'. With regard to the food retail space, section 20(3), sentence 2, No. 1 of the ARC prohibits even occasional unjustified offers below cost. The (somewhat

dated) FCO notice on below-cost pricing provides some guidance on which costs are relevant for the assessment of exclusionary below-cost pricing (although this notice is currently being considered for revision by the FCO).

18 | Price or margin squeezes

A price or margin squeeze occurs if a vertically integrated dominant enterprise sells products to its downstream competitors at a (wholesale) price that is either higher than the price that it charges itself on the downstream market, or so high that its downstream competitors are left with a profit or margin that is too small to effectively compete with the dominant enterprise's product on the downstream market (the relevant question is whether the margin between the dominant undertaking's wholesale price on the upstream market and its retail price on the downstream market would suffice for the dominant undertaking to operate profitably on the downstream market, decision of the FCO in *MABEZ-Dienste*, 6 August 2009).

Under section 20(3), No. 3 of the ARC, such behaviour is expressly prohibited for vertically integrated undertakings with relative market power with respect to small or medium-sized undertakings. However, the same prohibition applies to all enterprises that are dominant within the meaning of section 19 of the ARC either on the upstream market or on both the upstream and the downstream market (the FCO considers dominance on the upstream market to be sufficient, but will scrutinise the dominant enterprise's behaviour more closely if it is also dominant on the downstream market), irrespective of the size of the affected competitors. The FCO has investigated potential margin squeeze issues in particular in petrol (station) markets (see, eg, decision of the FCO in *Freie Tankstellen*, 9 September 2000; judgment of the Düsseldorf Court of Appeal in *Freie Tankstellen*, 13 February 2002).

19 | Refusals to deal and denied access to essential facilities

According to section 19(2), No. 4 of the ARC, an abuse may also occur if a dominant enterprise refuses to grant another enterprise access to its network or other infrastructure facilities entirely, or only in exchange for unreasonably high fees, if the facility constitutes an essential facility (without access it is impossible for the other enterprise, for legal or practical reasons, to be active on the upstream or downstream market as a competitor of the dominant enterprise). Access to an essential facility may, however, be refused if the joint use is impossible for legal reasons, eg, a necessary public authorisation is not granted. Where the possibility of joint use of an essential facility by both parties is unclear, the dominant enterprise bears the burden of proof.

20 | Predatory product design or a failure to disclose new technology

Product design

A dominant company's product design has only been found to be abusive in exceptional circumstances. This has been the case where the design had no value in itself, but was only intended to exclude competition (ie, where a design had been introduced solely to render rivals' products incompatible or to exclude rivals from the market). Another scenario in this respect might be a dominant company using its product design to create barriers that hinder rivals from reaching customers through their own means (however, there is no specific German case law on this subject).

Failure to disclose new technology

German courts have found that the intentional and deceptive failure to disclose intellectual property rights (essential patents) during a standard-setting procedure might lead to an abuse (patent ambush). An abuse, however, occurs only if an undertaking actually claims royalties for the use of the intellectual property after the intellectual property is incorporated in the standard. This is because the undertaking does not hold a dominant position at the time of its failure to disclose, but only achieves dominance once its intellectual property is (deceptively) incorporated into the standard (see, for instance, the judgment of the Regional Court of Düsseldorf in *MPEG 2-Standard*, 30 November 2006, where the court, however, ultimately did not find an abuse).

21 | Price discrimination

According to section 19(2), No 3 of the ARC, a dominant undertaking may not apply different prices (or business terms) to customers that are active in the same market, unless there is an objective justification for the differentiation (ie, in particular if the differentiation becomes arbitrary and is solely based on non-economic considerations). In contrast, a distinction in pricing or terms between separate markets may be justified more easily, in particular if the distinction is necessary for the dominant undertaking to enter a new market.

In Germany, there is no other legislation regarding price discrimination outside the (absolute and relative) dominance rules pursuant to sections 18 to 20 of the ARC.

22 | Exploitative prices or terms of supply

Under section 19(2), No. 2 of the ARC, an enterprise abuses its superior market power if it demands prices or other business terms that exceed those prices that would have applied if effective competition existed. The provision explicitly provides that the dominant enterprise may be a supplier or purchaser. However, in both cases, the difference between the hypothetical prices or business terms and the actual prices or business terms must be significant (judgment of the FCJ in *Valium*, 16 December 1976). In order to determine which prices or business terms would have applied hypothetically on a competitive market, the situation on other comparable markets with effective competition is taken into account.

Exploitative abuses may further arise under the more general provision of section 19(1) of the ARC. In particular, an extreme difference between production costs and revenue (judgment of the FCJ in *Netznutzungsentgelt*, 18 October 2005), but also a price that exceeds the average prices of other comparable dominant enterprises (or even only one other) for similar products or services (judgment of the FCJ in *Wasserpreise Calw*, 15 May 2012), can be regarded as an indication of such prohibited exploitative conduct. Inappropriate contractual terms and conditions may also constitute an exploitative abuse under the general provision of section 19(1) of the ARC. In its recent Facebook decision, the FCO considered Facebook's terms and conditions exploitative business terms under the general provision of section 19(1) of the ARC because they violated European data protection rules (decision of 7 February 2019; case report and press release available on the FCO's website). The FCO relied on German case law under which general clauses under civil law (including section 19(1) of the ARC) should be applied to outbalance bargaining power in cases of an imbalanced negotiation position where on party can dictate the terms, and the other party lacks any contractual autonomy. The FCO stressed that European data protection rules have the key objective to protect the fundamental right of informational self-determination and thus the private network users' control over how and for what purpose their data is used. The FCO found that Facebook's terms and conditions provided it with access to large amounts of personal data from its users, which – given Facebook's dominant market position in Germany and the lack of comparable alternative comparable social media networks – were not able to refuse this wide-reaching data

collection exercise if they wanted to access Facebook's network (under Facebook's terms of service, users could only join the social network if they also agreed to Facebook collecting and matching user data obtained from sources other than Facebook's core platform, including not only other Facebook-owned platforms, but also third-party websites). In this situation, the user's consent could not be viewed as freely-given, a requirement for its validity under the GDPR. The FCO, therefore, imposed limitations on Facebook's current practice of collecting and processing user data and prohibited using the related terms of service.

23 | Abuse of administrative or government process

Misuse of administrative or government processes may constitute illegal abusive behaviour. For instance, the FCJ found in 2009 that not only the refusal to grant a patent licence, but also the dominant patent holder's exercise of its right to obtain an injunction before a court may constitute an abuse of market power. However, the court held that the latter conduct would only amount to an abuse of dominance if the patent user previously made an unconditional offer to the patent holder to conclude a licence contract to which the patent user abided already in using the intellectual property, and which the patent holder was not allowed to reject (FCJ in *Orange Book Standard*, 6 May 2009).

Since then, several German courts have had to decide whether participants in a standardisation procedure who committed to grant licences on fair, reasonable and non-discriminatory (FRAND) terms are prohibited under the antitrust laws from seeking injunctions against users of their standard essential patents. While most German courts initially made the use of the FRAND compulsory licencing defence for the patent users subject to very strict requirements, the Düsseldorf District Court (decision in *Huawei/ZTE*, 21 March 2013) ultimately referred one case to the ECJ. In its judgment of 16 July 2015, the ECJ specified the conditions under which the seeking of an injunction is not abusive (*Huawei/ZTE*, 16 July 2015) and German courts have subsequently applied these criteria in a number of cases (decisions of the Düsseldorf District Court, 3 November 2015; and of the Düsseldorf Court of Appeals, 13 January 2016).

24 | Mergers and acquisitions as exclusionary practices

Since concentrations that would result in the creation or strengthening of a dominant position may not be cleared by the FCO according to section 36(1) of the ARC in the first place, exclusionary conduct relating to mergers and acquisitions has, so far, not been addressed in the context of dominance cases in Germany.

25 | Other abuses

The general provision in section 19(1) of the ARC does not focus on specific types of behaviour but prohibits abuse of dominance in any form. In the same vein, the examples of abusive behaviour provided in sections 19 and 20 of the ARC do not constitute an exhaustive list of all possible violations. Therefore, additional forms of abuses beyond these examples are possible. For instance, the FCJ (judgment in *VBL Gegenwert II*, 24 January 2017) considered a public pension fund's terms of service – which violated provisions on general terms and conditions under the German Civil Code – to constitute an abuse of a dominant position. This decision may have far-reaching implications, given that now infringements of non-competition rules by dominant companies may apparently also constitute abuses under competition law. For instance, in its decision against Facebook, the FCO based its analysis particularly on the finding that some of Facebook's terms and conditions infringed EU and German data protection law and, therefore, found that they constituted an exploitative abusive (see question 22).

ENFORCEMENT PROCEEDINGS

Enforcement authorities

26 | Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The FCO is responsible for the enforcement of the dominance rules. It carries out investigations and decides whether a specific practice must be prohibited and whether a fine is appropriate. Prohibition and fining decision may be taken simultaneously or successively. Before adopting a formal decision, the FCO will normally issue a statement to which the enterprise concerned may respond. The FCO commences investigations either on its own initiative or, in the majority of cases, in reaction to complaints of third parties (ie, in particular competitors, customers or suppliers). As part of its proceedings, the FCO may carry out informal discussions or send informal questionnaires. Alternatively, the FCO may also take formal measures such as information requests or, subject to a prior court order, surprise inspections (dawn raids). Although there is no regulatory framework for settlements, according to the FCO, its power to conclude settlements derives from its discretion to pursue cases. The FCO's competences have recently been expanded to cover some consumer protection aspects. Under section 32e(5) of the ARC, the FCO may now in particular conduct sector inquiries if there is evidence of sustained, significant and repeated violations against consumer protection law in an industry. In December 2017, the FCO launched a first sector inquiry on this basis focusing on the conduct of price comparison websites in the area of travel, insurance, financial services, telecommunications and energy, and published its preliminary findings in a consultation paper in December 2018 (available on the FCO's website), concluding that the investigation confirmed suspected infringements of consumer rights. The FCO has invited the companies concerned and other interested parties to submit comments on its report by 4 February 2019, and expects to publish its final report in 2019. In addition, the FCO can now act as amicus curiae in court proceedings that concern such violations (section 90(6) of the ARC).

Sanctions and remedies

27 | What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Fines

The FCO may impose fines on persons or entities that participated in an infringement of antitrust law or violated an FCO decision. In contrast to EU law, the FCO needs to identify one or more individuals who have committed the infringement and then attribute their behaviour to the legal entity they represented to impose a fine on that entity. Because the FCO may not refer to the concept of a 'single economic entity', it is therefore difficult for the FCO to fine a parent company for infringements committed by employees of its subsidiaries.

The FCO may impose a maximum fine of up to €1 million on an individual and 10 per cent of the consolidated group turnover on a legal entity (section 81(4) of the ARC). According to the FCO's 2013 fining guidelines – which differ significantly from the European Commission's fining guidelines – the 10 per cent maximum does not constitute a cap limiting a fine calculated independently, but rather provides for an upper limit of the fining scale, which should be applied only in cases of the most extreme hard-core infringements. In order to calculate a fine according to these guidelines, the FCO first determines a basic amount, which equals 10 per cent of the turnover that the entity generated with the products or services related to the infringement throughout its duration. In a second step, this amount is multiplied by a factor between two and six depending on the size of the entity (or even higher in cases

where the entity's turnover exceeds €100 billion). In a third step, the resulting basic amount may then be adjusted according to mitigating or aggravating circumstances. In addition, German administrative offence law allows the FCO to skim off any profits that the entity derived through its infringement (in which case the total fine may exceed the 10 per cent maximum).

Remedies

According to sections 32 to 34 of the ARC, the FCO may impose all remedies that are necessary to bring an infringement effectively to an end and that are proportionate to the infringement. This includes in particular the right to impose behavioural remedies (ie, measures that require action by the infringer). According to section 32a of the ARC, the FCO may also impose interim measures in cases of urgency if there is a risk of serious and irreparable damage to competition (the duration of interim measures should, however, not exceed one year). In addition, section 32(2) of the ARC provides for the – as of now theoretical – possibility of structural remedies. These include in particular the ability to order the divestiture (unbundling) of companies. Such structural remedies would, however, be subject to a strict proportionality test and can only be applied where behavioural remedies would be insufficient to remedy an infringement. To date, the FCO has not imposed any structural remedies in abuse cases.

Enforcement process

28 | Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The FCO can impose sanctions directly without prior petitioning of a court or other authority.

Enforcement record

29 | What is the recent enforcement record in your jurisdiction?

Throughout the past decade, the FCO has investigated potential abusive practices by dominant enterprises on several occasions. However, only in a few cases has the FCO actually adopted a formal decision based on either sections 18 et seq of the ARC or article 102 of the TFEU, with fines imposed in even fewer cases (a list of the FCO's past dominance cases is available on the FCO's website in German only at: www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Entscheidungssuche_Formular.html;jsessionid=A980E7DC344F4F92321FAE58654279FD.2_cid371?nn=3589936&cl2Categories_Format=Entscheidungen&cl2Categories_Arbeitsbereich=Missbrauchsaufsicht&docId=3590026). Instead, the FCO has often dropped its investigations after the companies concerned have agreed to discontinue their allegedly abusive behaviour on a voluntary basis. In the same vein, the FCO has often ended proceedings by adopting commitment decisions (ie, by declaring offered commitments as binding).

The FCO's past enforcement activity has focused in particular on the energy, retail, postal service, water, harbour service and air transport sectors. It also carried out several sectoral investigations in industries with arguably oligopolistic structures in which it suspected structural problems, including the energy, fuel and food retail sectors. Since May 2011, the FCO has published nine reports on investigations into different sectors of which seven specifically deal with (possible) abuses of market power (district heating, milk, fuel retail, wholesale fuel, food retail, ready-mixed concrete and meter-reading services). In addition, the FCO is currently conducting further investigations, for example, regarding the household waste disposal and hospital sector.

Since 2015, the FCO has in particular focused more on the digital economy and online platforms – notably in light of the recent rise in 'online cases', including a decision concerning an alleged abuse of dominance by Google (see the FCO's decision in *Google/VG Media*, 8 September 2015), the FCO's sector inquiry on price comparison websites, which the authority plans to conclude in 2019 (see question 26 and the FCO's press release, 12 December 2018), the FCO's decision against Facebook, and its ongoing proceedings against Amazon. In Facebook (see questions 2 and 22), the FCO found that Facebook enjoyed a dominant position in the German market for social media networks) which enabled it to collect and process user data beyond what is legally acceptable under EU and German data protection rules. In particular, the FCO held that requesting a user's consent for far-reaching data collection and processing in exchange for access to Facebook's social network was abusive and harmed users, who lost control over what personal data was collected from which sources and for which purpose. The FCO refrained from imposing a fine given the complexity of the investigation. Facebook has already appealed against the FCO's decision. In November 2018, the FCO also initiated proceedings regarding Amazon's terms and conditions and its behaviour in relation to the retailers using its German marketplace platform amazon.de (see question 2). Inter alia, the FCO's activities in this respect inspired the German legislator to introduce new provisions on dominance in digital markets (see question 2).

In 2015, the FCO also found that Deutsche Post AG abused a dominant position in the provision of postal services by agreeing on letter prices and loyalty discounts with some of its largest customers that were impossible for other postal service suppliers to compete against (FCO decision in *Deutsche Post AG*, 2 July 2015, confirmed by the Düsseldorf Court of Appeal, judgment of 6 April 2016). The FCO found that Deutsche Post AG's behaviour was abusive in two ways: it fulfilled the requirements of a margin squeeze (see question 18) and also constituted an illegal use of loyalty rebates (see question 14).

In 2016 and 2017, the FCO issued only a single formal prohibition decision regarding CTS Eventim's use of exclusivity clauses. CTS Eventim – the operator of Germany's largest ticketing system – had required organisers of live events to sell the tickets for their events exclusively via CTS Eventim's ticketing system, while at the same time requiring ticket offices to source tickets only from the same system. In its decision, the FCO took account of CTS Eventim's significant market share, but also applied the newly introduced criteria for the assessment of a company's dominance on multisided platform markets under section 18(3a) of the ARC (for more details regarding the new provision, see question 2).

In addition, the FCO adopted a number of commitment decisions, inter alia concerning several district heating suppliers for charging excessive prices (the suppliers committed to reimburse their customers and to decrease their current prices, see decisions regarding *Danpower* and *Innogy*, both of 13 February 2017).

The FCO also investigated the German Football Association (DFB) for an abuse of its dominant position regarding the allocation of the German ticket quota for the 2018 soccer world cup, because the DFB intended to sell tickets only to its own members who had to pay an annual membership fee of €40. While the FCO considered that this behaviour could be justified, at least in part, by security considerations (effectively preventing ticket sales to known hooligans), the DFB, nonetheless, committed to introduce a short-time membership at a reduced fee. Against this background, the FCO dropped its investigation.

On 27 February 2019, the FCO closed its proceedings against the German Olympic Sports Confederation (Deutscher Olympischer Sportbund, DOSB) and the International Olympic Committee (IOC) regarding the advertising restrictions that they impose on athletes with a commitment decision. The FCO had initiated proceedings in 2017 because IOC and DOSB had prohibited athletes participating in the Olympic Games to use their person, name, picture or sports performances during the Olympic Games – and several days before and after the games – for advertising purposes. According to the FCO's

preliminary view, these restrictions constituted an abuse of the DOSB's and IOC's alleged dominant position (as the athletes – who are the performers of the games – do not profit directly from the very high advertising revenues generated by the official Olympic sponsors). Faced with this preliminary assessment, DOSB and IOC offered to loosen some of their restriction, thereby enhancing advertising opportunities for German athletes and their sponsors. The FCO accepted these proposals after market testing the proposed commitments with athletes and sponsors (see FCO's press release of 27 February 2019).

The FCO recently investigated Lufthansa's price increases on some routes. After the insolvency of Germany's second biggest airline Air Berlin, Lufthansa enjoyed a monopoly position for a few months on some German domestic flight routes. The FCO's investigation showed that Lufthansa's tickets prices on these routes had increased by an average of 25 to 30 per cent after Air Berlin's exit from the market. However, as these increases were only of a temporary nature and prices returned to the previous level only a few months later after easyJet's entry into the market, the FCO did not open formal proceedings (see FCO's press release of 29 May 2018).

Contractual consequences

30 Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

According to section 134 of the German Civil Code, legal transactions violating statutory prohibitions, such as sections 19 and 20 of the ARC, are void. However, it must be determined on a case-by-case basis, in line with (German) civil law, whether the fact that certain legal clauses within a comprehensive agreement violate sections 18 or 19 of the ARC results in the nullity of the entire agreement, or whether the nullity is restricted to the problematic contractual clauses. In many cases, it is regarded reasonable to limit the nullity to single contractual clauses in order to protect the disadvantaged party, for example, if a contract, while providing for an overcharged price, is important for the other contractual party.

Private enforcement

31 To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The legal basis for private enforcement is section 33(1) of the ARC, which provides the affected party with claims for compensation and rectification of the infringement as well as, where there is a risk of recurrence, for an injunction. The legal consequences of these claims strongly depend on the individual case at hand. In certain cases it may even be at the discretion of the dominant company how to rectify the infringement, eg, whether to offer the same rebate to the discriminated company or to subsequently deny preferential treatment to the favoured company. In general, granting access to infrastructure, supplying goods or services or concluding a contract are all possible legal consequences of private enforcement under section 33 of the ARC. Accordingly, in one instance the owner of an airport was ordered to grant a company providing shuttle services access to the roadway leading to the terminal (judgment of the Koblenz Court of Appeals, 17 December 2009).

Following a significant increase in cartel-related follow-on damage litigation over recent years, damage actions or other types of litigation (eg, requesting the termination of discriminatory conduct, access to a network or infrastructure) based on alleged restrictive unilateral conduct have also become fairly commonplace. Unlike cartel damage cases, these actions often do not follow an investigation and decision by the FCO (or other competition authorities) but are brought on a stand-alone basis.

Damages

32 Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Section 33a of the ARC provides an express legal basis for damage claims based on deliberate or negligent infringements of antitrust law, which are adjudicated by the ordinary courts of law (civil courts). In the context of follow-on suits, German courts are legally bound by the final decisions of the FCO, Commission, or any other EU member state's antitrust authority with respect to the determination of the antitrust infringement (ie, other factors, such as causality and amount of damages, are not covered by the binding effect). The amount of damages that may be granted is strictly limited to the material losses of the company harmed by the abusive practices. There is no legal basis for punitive damages.

German law currently does not provide for class actions seeking damages. Instead, victims of illegal unilateral conduct that want to consolidate their individual damage claims may assign their claims to one party or institution, which then brings the law suit.

Appeals

33 To what court may authority decisions finding an abuse be appealed?

FCO decisions are subject to judicial review of the facts and the law by the Düsseldorf Court of Appeal. The court's decisions can be further appealed – on points of law only – to the Federal Court of Justice. In practice, the courts indeed carry out an independent review of the cases brought before them. While they often side with the FCO, it is by no means rare that FCO decisions are overturned.

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

34 Are there any rules applying to the unilateral conduct of non-dominant firms?

Section 20 ARC

As noted above, going beyond the scope of article 102 of the TFEU, the ARC prohibits exclusionary (and discriminatory) conduct not only by undertakings that are dominant in 'absolute' terms, but also by undertakings on which 'small or medium-sized companies depend' as suppliers or purchasers of certain goods or commercial services (section 20(1) of the ARC), and by companies enjoying 'stronger market power in comparison with their small and medium-sized competitors' (section 20(3) of the ARC). The prohibitions laid down in section 20 of the ARC aim at protecting small and medium-sized companies against anticompetitive conduct by their larger trading partners or competitors (the German FCJ recently passed an interesting judgment regarding the characterisation of retailers as small or medium-sized companies vis-à-vis suitcase manufacturer Rimowa, see FCJ judgment *Rimowa*, 12 December 2017).

The prohibition of discrimination or unreasonable obstruction for 'relatively' dominant enterprises towards dependent companies was introduced primarily to address buyer power in the (food) retail sector. Thus, section 20(1), sentence 2 of the ARC sets forth a legal presumption of dependency if a supplier of goods frequently grants additional rebates or similar bonuses to a customer that are not also granted to other customers. The protection of small and medium-sized competitors

against exclusionary conduct of competitors with 'stronger market power' is also principally targeted at retail markets (food, gas, etc). An example of prohibited exclusionary conduct is frequent below-cost pricing, section 20(3) of the ARC (which now includes a legal definition of which sales should be considered below-cost). In the food sector, pricing below cost (by food retailers) even in a single instance is prohibited, unless it is necessary to prevent goods from spoiling or becoming unfit for sale. Note that the ARC does not precisely define the concept of small and medium-sized companies that enjoy protection under these rules. The concept is generally understood to be turnover-related, but there are no specific turnover 'thresholds', and the amounts can differ from industry to industry.

Section 21 ARC

In addition to the rules laid out in sections 18 through 20, which apply only to enterprises with dominant market positions or enterprises that are dominant at least in relative terms by enjoying relative market power with respect to small or medium-sized undertakings, section 21 of the ARC stipulates a number of prohibited forms of unilateral behaviour by individual enterprises or groups of enterprises that do not require any from dominance.

Under section 21(1) of the ARC, an enterprise (or association of enterprises) may not request that other enterprises boycott a third enterprise (ie, to refuse either to supply this enterprise or to purchase from it). However, this prohibition only applies if the enterprise requesting the boycott acts with the intention to unfairly impede the third enterprise.

Under section 21(2) of the ARC, an enterprise (or association of enterprises) may not induce other enterprises, by either coercion or incentives, to engage in conduct that is prohibited under German or EU antitrust law. This (secondary) prohibition is intended to prevent enterprises from forcing other enterprises to engage into horizontal cartels, or illegal vertical agreements (for instance, it might apply to a supplier that tries to coerce retailers to apply a specific resale pricing policy; where the retailer agrees, this infringes section 1 of the ARC; where the retailer does not agree, the supplier's conduct infringes section 21 of the ARC).

Section 21(3) of the ARC prohibits the use of coercive measures in order to induce another enterprise to engage in activities that might influence competition, but do not, in principle, infringe antitrust law (eg, to force an enterprise to merge with another enterprise).

Section 21(4) of the ARC prohibits enterprises from causing economic harm to a third person in retaliation for this person requesting the FCO to take action.

UPDATE AND TRENDS

Forthcoming changes

35 | Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

In recent years, digital markets have been the primary focus of the FCO and the German legislator. This trend is set to continue as the FCO is continuing inter alia its investigation against Amazon (see questions 2, and 29), while the German government is considering further steps to modernise German and EU competition law – and in particular the legal framework for the abuse of dominance review – against the background of the progressing digitalisation and increasing importance of globally active digital players (such as Google, Amazon, Facebook, and Apple).

As its recent proceedings against Google, Facebook and Amazon (see questions 2, 22, 25, 29) as well as the sector inquiry on the conduct of price comparison websites (see questions 26 and 29) show, the FCO is particularly intrigued by the market power of (online) platforms on multi-sided markets. The FCO's particular interest in the combination of (direct or indirect) network effects, large amounts of personal data, and the gatekeeper function of online platforms for evolving markets, has led to a renaissance of dominance proceedings in Germany throughout the past few years. Undoubtedly, the FCO's interest in this regard will continue throughout the coming years. In light of the increasing importance of algorithms for digital services, the FCO also launched a project in cooperation with the French competition authority (Autorité de la concurrence) on algorithms and their implications for competition, including interdependencies between algorithms and market power (see the FCO's press release of 19 June 2018).

In the same vein, the German government and legislator continue to review whether the ARC still allows effective enforcement against abuse of market power in light of the increasing digitalisation and importance of globally active digital players. In this regard, the German legislator already introduced additional criteria for the assessment of dominance on digital platform markets to the ARC in 2017 (see question 2). In addition, in September 2018, the German Federal Ministry for Economic Affairs and Energy (FME) published a report by legal and economic experts that provides several recommendations on the modernization of the ARC's rules on the abuse of dominance (see expert opinion for the FME, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 29 August 2018; for an English summary see https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3).

The report recommends, among other things, to lower the legal threshold for intervention by the FCO or courts in digital markets with strong positive network effects prone to tipping, allowing them to intervene already before a company achieves a degree of market power under competition law in order to prevent a 'tipping' of the market into monopoly that can hardly be reversed thereafter. Specifically, the experts propose to introduce a new rule that prohibits unilateral conduct by platform providers in close oligopolies, or platform providers with superior market power, that could induce tipping and is not justified on grounds of competition on the merits (eg, by obstructing multi-homing or switching for users). In light of platforms' increasing importance as information intermediaries and central players in the digital economy, mediating access to sales or supply markets, the experts further recommend introducing the concept of intermediation (platform) power as an independent, third form of market power in the

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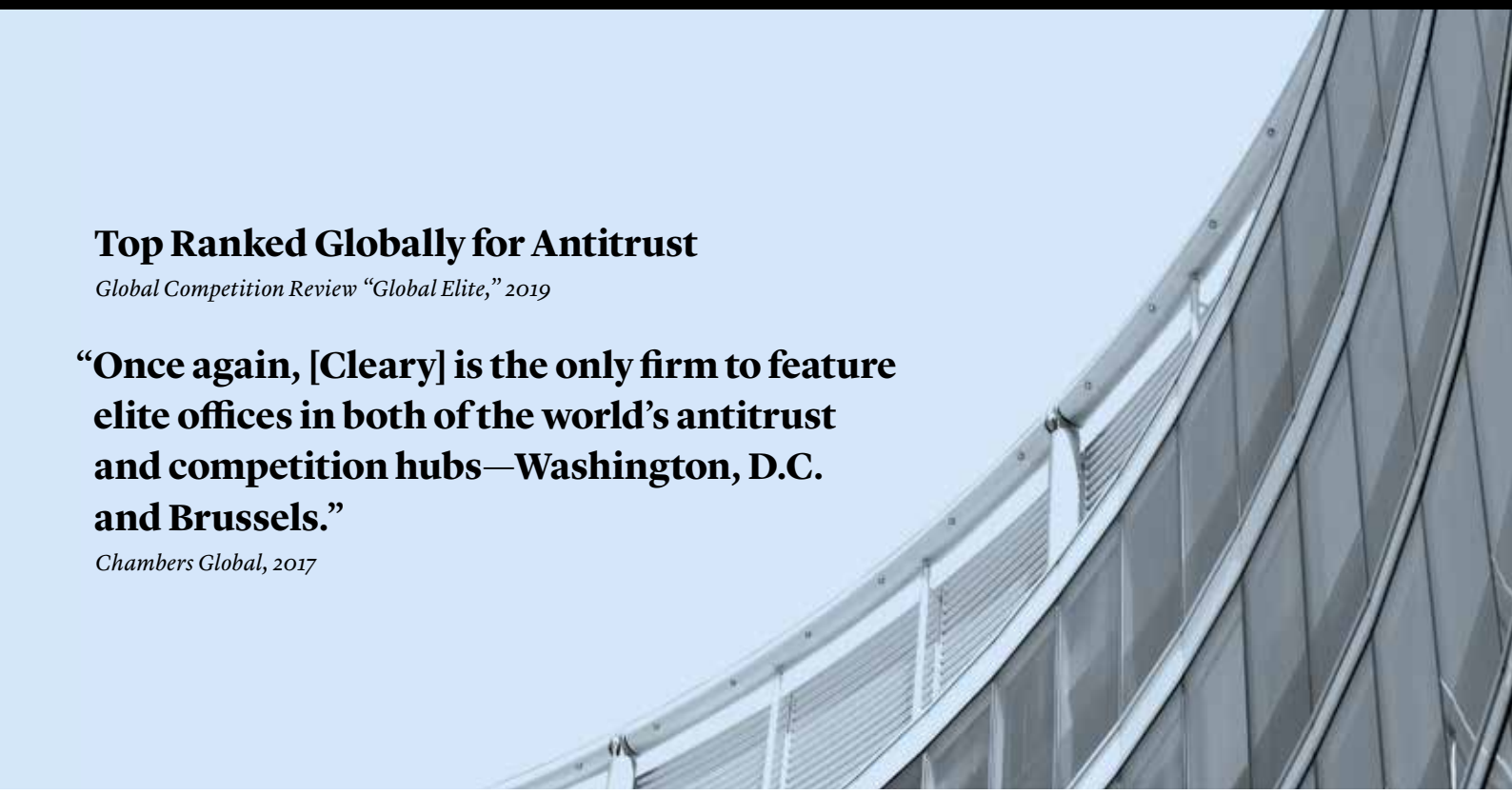
ARC. The experts also recommend a more flexible application of the protection against exclusionary conduct for companies with superior market power vis-à-vis small and medium-sized enterprises (section 20(3) of the ARC, see question 34) beyond only small and medium-sized companies, as in the digital economy relevant dependencies can also arise for large firms. Moreover, the experts considered the significance of control over and access to data for the market position and strategy of companies within an digital economy. The experts pointed out that issues regarding the refusal to grant access to competitively relevant – or even essential – data could already be taken into account under the current legal framework (in particular under sections 18(3a) and 19(2) No. 1 of the ARC). The experts also noted that in particular with respect to data which is generated virtually incidentally and does not require special investment, there can be good arguments in favour of a somewhat lower threshold for finding the refusal to supply data abusive than in cases concerning access to infrastructure or intellectual property rights. However, the expert's considerations did not lead to any concrete recommendations.

The FME is currently assessing the expert report's results and recommendations and has also appointed an expert commission (called the 'Competition Law 4.0 Commission') in September 2018 with the mandate to provide more specific recommendations for the modernisation of German and European competition law (see the FME's press release of 20 September, 2018). While the expert commission is due to provide its results in the fall of 2019, actual legislative changes are not expected before 2020.



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ISBN 978-1-83862-093-6