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Practical cross-border insights into vertical agreements and dominant firms

Vertical Agreements and Dominant Firms 2023

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The German Federal Cartel Office (*Bundeskartellamt* – FCO), which is located in Bonn, enforces German and European competition law in Germany. It is therefore responsible, among other things, for investigating and enforcing the laws relating to vertical agreements and dominant firm conduct. The FCO's decisions are generally taken by one of the 13 decision divisions – decision divisions 10, 11 and 12 are responsible for the prosecution of "hardcore cartels" and have no sector-specific competence.

In addition, there are 16 state competition authorities (*Landeskartellamt*). The state competition authorities generally perform their duties and exercise their powers under the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – ARC) if the effect of market influence or anticompetitive or discriminatory conduct does not extend beyond the territory of one federal state. Because this happens very rarely, their scope of action is limited. In that case, the state competition authorities generally have the same competences as the FCO and the following references to the FCO apply *mutatis mutandis* to the state competition authorities.

1.2 What investigative powers do the responsible competition authorities have?

Evidence may be obtained by inspection and/or testimony of witnesses and experts; imprisonment may not be imposed (Sec. 57 ARC).

The FCO may seize objects which may be of importance as evidence in the investigation without a prior court decision (Sec. 58 ARC).

To the extent necessary, the FCO may demand that companies and associations of companies provide information and hand over documents until its decision becomes final and binding (Sec. 59 ARC). Accused undertakings and associations of undertakings are now obliged to provide, upon the request of the FCO, all available documents and information. While they may still not be forced into self-incrimination regarding their involvement in a cartel infringement, they may have to disclose information which can be used as indications or evidence against them.

The FCO may, until its decision becomes final, inspect and examine business documents of undertakings and associations of undertakings at their premises during normal business hours (Sec. 59a ARC).

The FCO may search business (private) premises, homes, land and objects if it can be assumed that documents are located there that may be inspected and examined, and the surrender of which may be requested by the FCO pursuant to Secs 59 and 59a ARC (Sec. 59b ARC). Searches may be conducted only by order of the judge of the competent local court. If there is imminent danger, the persons entrusted with the search by the FCO may conduct the necessary searches during business hours without a judicial order.

If the rigidity of prices or other circumstances suggest that domestic competition may be restricted or distorted, the FCO may conduct an investigation into a specific sector of the economy (sector inquiry) or – across sectors – into a particular type of agreement (Sec. 32e ARC). The 11th ARC amendment, which may come into force in 2023, shall provide for a strengthening of sector inquiries. According to the current draft, the FCO shall be enabled to draw the consequences from the identified abuses and to intervene in a regulatory manner – without having to prove specific violations of competition law.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

Proceedings may be initiated on the basis of, *inter alia*, information provided by current cartel members, customers/suppliers, competitors or former cartel members. The FCO then investigates by searching companies, evaluating evidence and interviewing witnesses (see also question 1.2 above). Since the number of leniency applications has been decreasing recently, the FCO now also helps itself by screening markets.

The FCO can initiate administrative proceedings (*Verwaltungsverfahren*) under the ARC. In the context of administrative proceedings, for example, an order is issued to put an end to objectionable, abusive behaviour. It is also used when new legal questions arise in connection with new business models or to put an end to objectionable conduct.

Alternatively, the FCO can also initiate administrative offence proceedings (*Ordnungswidrigkeitenverfahren*) to investigate serious antitrust infringements; for example, hardcore cartels. The administrative procedure requires a lower standard of proof in comparison to the administrative offence proceedings.

If the FCO suspects an infringement, the suspected companies and persons are informed of the FCO's accusation in a statement of objections. They are given the opportunity to refute the legal findings, are given access to the procedural files, and can present counterevidence. The administrative proceedings end either by a reasoned and served order or by termination of the proceedings. The administrative offence proceedings end with a fine notice or the discontinuation of proceedings.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The FCO may oblige undertakings or associations of undertakings to terminate an infringement of a provision of the ARC or of Arts 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) (Sec. 32 (1) ARC). For this purpose, the FCO may require undertakings or associations of undertakings to take all necessary behavioural or structural remedies that are proportionate to the infringement identified and necessary to bring the infringement effectively to an end. Structural remedies may only be imposed if there is no behavioural remedy which would be equally effective, or if the behavioural remedy would entail a greater burden for the undertakings concerned than the structural remedies (Sec. 32 (2) ARC).

In its order to terminate the infringement, the competition authority may order reimbursement of the benefits generated through the infringement (Sec. 32 (2a) ARC).

Even following termination of the infringement, the competition authority may, to the extent that a legitimate interest exists, declare that an infringement was committed (Sec. 32 (3) ARC).

In addition, in urgent cases where there is a risk of serious and irreparable harm to competition, the FCO may order interim measures *ex officio*. Such measures shall be limited in time and should not exceed one year in total (Sec. 32a ARC).

If agreements, decisions by associations of undertakings, or concerted practices falling under a block exemption regulation have effects in a particular case which are incompatible with Sec. 2 (1) ARC or with Art. 101 (3) TFEU and which arise in a domestic territory bearing all the characteristics of a distinct geographic market, the FCO may withdraw the legal benefit of the block exemption for that territory (Sec. 32d ARC).

The FCO may also generally order the disgorgement of the economic benefit by undertakings infringing the ARC and/or Arts 101 or 102 TFEU and require the undertakings to pay a corresponding sum (Sec. 34 ARC).

The most drastic remedy is the imposition of a fine (Sec. 81 ARC). The FCO may impose fines on undertakings, associations of undertakings and their representatives. The condition for imposing a fine is that the representatives of an undertaking, e.g. authorised representatives and general representatives, executives and management, were actively involved in the violation. However, authorised representatives of an undertaking and its owners are also liable even if they have no personal knowledge of their participation in the infringement, provided the sanction can be based on their failure to have taken all necessary measures to prevent a cartel infringement. Such failure is then attributed to the respective undertaking.

Finally, the 11th ARC amendment, which may come into force in 2023, is intended to strengthen the rights of the FCO regarding sector enquiries: According to the current draft as provided by the German Federal government, the FCO, based on a previous sector enquiry, shall be able to impose remedies in order to enforce effective competition. These remedies may include behavioural or quasi-structural obligations. This means, for example, obligations to establish open standards, to grant access to interfaces, to establish an effective complaint management, to change supply relationships, to organisationally separate company divisions and – as *ultima ratio* – to order ownership unbundling shall be possible. As a further remedy following a sector enquiry, the FCO may be in the position to even oblige companies to notify almost all relevant mergers in certain markets for merger control, subject only to very low turnover thresholds.

1.5 How are those remedies determined and/or calculated?

While the FCO followed its guidelines for the setting of fines in cartel administrative offence proceedings and provided an initial "cap" on the fine on the basis of the turnover relevant to the offence, the appeal court (the Higher Regional Court Düsseldorf) primarily qualified the 10% threshold provided in the ARC as the maximum penalty, which, in some cases, led to a significant increase of fines in the appeal proceedings. This has been possible because the guidelines for the setting of fines in cartel administrative offence are not binding on the courts.

Sec. 81d ARC, which was inserted in 2021, is intended to supplement the criteria for the assessment of fines in the fine proceedings. The criteria are:

1. the nature and the magnitude of the infringement, in particular the amount of the turnover directly or indirectly linked to the infringement;
2. the relevance of the products and services affected by the infringement;
3. the manner in which the infringement was committed;
4. previous infringements committed by the undertaking as well as any adequate and effective precautions taken prior to the infringement to prevent and uncover infringements; and
5. the undertaking's efforts to uncover the infringement and remedy the harm, as well as the precautions taken after the infringement to prevent and uncover infringements. Apart from punishing the infringement, the FCO reserves the right to skim off the economic benefit either in the fine proceedings or in separate proceedings.

These statutory criteria are intended to bring about a largely harmonised system for the assessment. The FCO and the courts must now use these assessment criteria to develop a harmonised assessment system.

The FCO and the courts recognise adequate and effective compliance measures to avoid and detect infringements or the establishment of a compliance programme to close existing compliance gaps as a mitigating factor when setting fines (Sec. 81d ARC). A positive post-offence conduct in the form of a leniency application is considered in a separate stage. Finally, reductions may be granted if a settlement agreement was reached.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Where, in the course of administrative proceedings, undertakings offer to enter into commitments that are capable of dispelling the concerns communicated to them by the FCO upon preliminary assessment, the FCO may by way of a decision declare those commitments to be binding on the undertakings (Sec. 32b ARC).

Administrative offence proceedings can be concluded in the form of a negotiated agreement (settlement) between the FCO and the parties concerned to terminate the proceedings. A settlement agreement requires a statement of confession by the person or company concerned containing not only a description of the offence but also information on the circumstances that are relevant for setting the fine. The formal requirement for a confession is that it includes a so-called "settlement declaration" in which the person or company declares that he/it acknowledges the facts of the infringement of which he/it is charged and accepts the fine up to the amount announced. A settlement declaration is considered a mitigating circumstance which

results in a reduction of the fine (so-called "settlement reduction"). In the case of horizontal cartels, a fine can be reduced by a maximum of 10%.

1.7 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

The FCO does not publish figures on how many cases have been settled by voluntary resolution compared to adversarial litigation.

1.8 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No, the FCO is entitled to make all of its decisions without having to defend them in front of a legal tribunal or in other judicial proceedings (apart from the appeals process, see question 1.9 below).

When imposing an administrative fine, the FCO must comply with the legal standard applicable in criminal proceedings. Therefore, the FCO must prove the infringement as well as the culpability of the participating undertakings and individuals. Pursuant to Sec. 261 of the German Code of Criminal Procedure (*Strafprozessordnung*), which applies mutatis mutandis, the standard of proof is the free judicial conviction beyond reasonable doubt. In contrast, the individual culpability does not have to be established by the FCO in administrative proceedings and the legal standard is lower.

1.9 What is the appeals process?

The appellate court for decisions of the FCO is the Higher Regional Court of Düsseldorf. The Higher Regional Court can review the decision for points of fact and law.

Further appeal to the Federal Court of Justice is possible (limited to points of law) unless the Higher Regional Court has denied leave to appeal. In the latter case, the parties may appeal against the denial of leave to appeal.

1.10 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Yes, private rights of action are available in Germany.

Under German civil law, any agreement infringing the ban on cartels or the prohibition of an abuse of dominance is null and void (Sec. 134 German Civil Code).

The ACR has implemented Directive 2014/104/EU on antitrust damages actions. Whoever intentionally or negligently commits an infringement of Arts 101 or 102 TFEU, or of the corresponding provisions of the ARC, shall be liable for any damages arising from the infringement (Sec. 33a (1) ARC). It is rebuttably presumed that a cartel results in harm (Sec. 33a (2) ARC).

Furthermore, whoever violates Arts 101 or 102 TFEU, or the corresponding provisions of the ARC or a decision taken by the competition authority, shall be obliged to the person affected to rectify the harm caused by the infringement and, where there is a risk of recurrence, to desist from further infringements (Sec. 33 (1) ARC).

Germany is one of the principal forums for private cartel damages actions. There has been a lot of case law on antitrust damages recently. The vast majority of claims are so-called "follow-on claims", i.e. actions for damages after a cartel violation by the defendant has been established by final judgment.

The private rights of action differ significantly from the enforcement actions by the FCO; while the FCO may adopt all decisions without the need to obtain approval by a legal tribunal or other judicial proceedings, private rights of action must be asserted before the state civil courts pursuant to the rules of the German Civil Procedure Act (*Zivilprozessordnung*).

1.11 Describe any immunities, exemptions, or safe harbours that apply.

According to Sec. 2 (1) ARC, in line with Art. 101 (3) TFEU, agreements between undertakings, decisions by associations of undertakings, or concerted practices shall be exempted from the ban on cartels according to Sec. 1 ARC which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while permitting consumers a fair share of the resulting benefit, and which do not (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or (ii) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Sec. 2 (2) ARC makes direct reference to the block exemption regulations. Therefore, the new Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Art. 101 (3) TFEU to categories of vertical agreements and concerted practices (VBER) is also directly applicable. If the VBER applies, the vertical agreement is deemed to be exempted from the prohibition in Art. 101 (1) TFEU and Sec. 1 ARC, respectively. The VBER requires that the market share of the supplier in the vertical relationship must not exceed 30%, and the purchaser's share of demand in the market for the respective goods and services must not exceed 30%. Furthermore, the vertical agreement must not contain a so-called "hardcore restriction" according to Art. 4 VBER (*inter alia*, price maintenance, certain restrictions of territory or customers, restrictions of sales to end users by members of a selective distribution system operating at the retail level of trade and restriction of cross-supplies between distributors within a selective distribution system or prevention of the effective use of the internet).

Another general exception to the prohibition of restrictive agreements and concerted practices stems from the requirement that restraints of competition must have an appreciable effect. The FCO published its *De Minimis Notice* in March 2007, stipulating that the FCO will generally refrain from initiating proceedings where (a) the combined market share of the undertakings involved in a horizontal agreement does not exceed 10% in any one of the markets affected, or (b) the market share of each of the undertakings involved in a non-horizontal agreement does not exceed 15% in any one of the markets affected, unless a hardcore restriction is concerned.

The ARC does not apply to *Deutsche Bundesbank* and *Kreditanstalt für Wiederaufbau* (Sec. 185 (1) (3) ARC). Moreover, the prohibition of an abuse of a dominant position does not apply to charges and dues under public law (Sec. 185 (1) (2) ARC). The operation of electricity and gas networks, the establishment of such network connections and the grant of access to such networks is not governed by the ARC, but by the special rules of Art. 111 *et seq.* of the German Energy Sector Act (*Energiewirtschaftsgesetz*) enforced by the Federal Network Agency (*Bundesnetzagentur*) (Sec. 185 (3) ARC).

Finally, there are selected areas that are exempted to a limited extent under Sec. 28 (restrictive agreements and concerted

practices in the agricultural sector), Sec. 30 (fixed prices for newspapers and magazines) and Sec. 31 ARC (restrictive agreements and concerted practices, as well as abuse of a dominant position in relation to the public supply of water). The Book Price Fixing Act (*Buchpreisbindungsgesetz*) permits the fixing of resale prices for books.

1.12 Does enforcement vary between industries or businesses?

No; excluding the exemptions outlined in question 1.11 above, the enforcement by the FCO does not vary between industries or businesses.

1.13 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

Generally, the FCO and the courts also apply the ARC to regulated industries, unless there is an explicit exemption in the ARC (see question 1.11 above). However, the FCO does take into account any industry-specific regulation when analysing a case, since regulation naturally affects the conditions of the relevant market.

1.14 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The FCO is an independent higher federal authority which is assigned to the Federal Ministry of Economics and Energy (the Ministry). The Ministry only has supervisory functions; it cannot issue any orders to the FCO.

Decisions are taken by the decision divisions. In the decision divisions, each case is decided upon by majority decision of a collegiate body consisting of the respective division's chairman and two associate members. The decision divisions are autonomous and not subject to instructions in their decision-taking.

1.15 What are the current enforcement trends and priorities in your jurisdiction?

The German legislator as well as the FCO has recently focused on the digital economy. The FCO has formed a working group on the future of the VBER in the digital economy. Moreover, the FCO intensified its investigations dealing with online sales restrictions, resale price maintenance and most favoured nation clauses.

In the first half of 2021, the FCO opened proceedings against Meta/Facebook, Amazon, Alphabet/Google and Apple based on the new rules for large digital companies (Sec. 19a (1) ARC), in order to determine whether these companies are of paramount significance for competition across markets. In the meantime, the FCO has already determined outstanding cross-market significance in the cases of Alphabet/Google, Amazon, Apple and Meta/Facebook. In March 2023, the FCO's investigation of the extent to which large digital companies are of paramount significance for competition across markets was also extended to Microsoft (see question 1.16 below).

As part of the 11th ARC amendment, which may come into force in 2023, German competition law shall be supplemented by a fourth pillar in the form of a market structure control independent of infringement and abuse, which shall apply in addition to the prohibition of cartels, abuse control and (preventive) merger control. The proposed changes follow the current discussion on German competition policy. The FCO's powers of intervention are perceived as insufficient if, without a provable infringement, a disruption of competition occurs, which could have market structure-related causes. The FCO should then not only be able to prevent negative structural changes (merger control), but also to shape structures considered as preferable.

1.16 Describe any notable recent legal developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

The 10th ARC amendment came into force on 19 January 2021. This was prompted not only by the implementation of the ECN+ Directive, but also by the adaptation of the ARC to the challenges of the digital economy. In particular, the provisions on the abuse of market power were reformed.

The new Sec. 19a ARC represents a paradigm shift. It is aimed in particular at platforms like Google, Facebook and Amazon, permitting the FCO to carry out *ex ante* control of companies with "paramount significance for competition across markets". After issuing a declaratory order, the FCO can prohibit certain conduct set out in Sec. 19a (2) ARC, even when below the market dominance threshold. This is intended to prevent the market from tipping, as a subsequent abuse control is often not able to compensate the damage to competition.

The requirements for relative market power were modified with the 10th ARC amendment in Spring 2021 in such a way that, in future, a clear imbalance to the countervailing power of the other companies must arise; the previously existing limitation of relative market power to the protection of small and medium-sized companies was abandoned in return.

Shortly after the 10th ARC amendment had come into force, the FCO initiated Sec. 19a ARC proceedings against Meta/Facebook, Amazon, Alphabet/Google and Apple to examine whether these companies are of paramount significance for competition across markets. In the meantime, the FCO determined paramount cross-market significance in the cases of Alphabet/Google, Amazon, Apple and Meta/Facebook. As part of the proceedings to determine Amazon's paramount significance for competition across markets, the FCO conducted a survey of 400 retailers, which shows that the actual conduct of the proceedings is very time-consuming.

In January 2021, the Federal Court of Justice confirmed the decision of the FCO to block the vertical concentration between CTS and Four Artists, the latter being active in the area of live entertainment. The FCO had held that the planned acquisition of a major customer of CTS would strengthen CTS's dominant position on the multi-sided market for ticketing system services and thus significantly impede effective competition on this market. The Federal Court of Justice stated that it is irrelevant that the contemplated vertical concentration does not lead to horizontal overlaps and that the expected increase in market shares of CTS results from the foreclosure of alternative providers of ticketing services from Four Artist.

In May 2021, the Federal Court of Justice reversed a decision of the Higher Regional Court Düsseldorf and decided that booking portal Booking.com may not prohibit hotels from offering rooms at lower prices on their own websites. The Federal Supreme Court does not recognise such narrow best price clauses as ancillary restraints to the contract between the hotel and booking; therefore, the clause is regarded as restricting competition. The Federal Court of Justice held that, in the case of Booking.com, the market share thresholds of Art. 3 VBER were exceeded, and denied an individual exemption under Art.

101 (3) TFEU. The decision was the result of a dispute over the admissibility of "narrow" and "wide" best price clauses that lasted for years and is likely to have a signal effect for other countries in Europe as well as other internet platforms (please refer to question 2.23 below for further detail).

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The FCO generally has fewer concerns regarding vertical agreements compared to horizontal agreements. In the recent past, the FCO's case practice in the area of vertical agreements focused on cases of vertical price maintenance, with three published decisions in 2021 and 2022, fining – amongst others – manufacturers of audio products and musical instruments. However, the FCO has repeatedly expressed its concerns about the practicability of the VBER regarding the digital industry and, in particular, has taken action against vertical price fixing practices within this emerging sector. For example, its decision to ban a prominent hotel booking platform's narrow best price clause was upheld by the Federal Court of Justice in 2021 (please refer to questions 1.16 and 2.23). Moreover, in 2022 the FCO – for the first time in many years – extensively investigated distribution agreements and deemed a non-compete obligation enforced by a market-leading manufacturer as not eligible for exemption and thus unlawful (please refer to question 2.17).

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The ARC does not include definitions of the terms "agreement" or "vertical agreement". However, the interpretation of these terms under the ARC is the same as under Art. 101 TFEU. An agreement, thus, is any bilateral or multilateral agreement between independent undertakings. The agreement is of vertical nature if the concerned undertakings operate on a different level of the production or distribution chain. In addition, the agreement must relate to the provision of goods or services.

2.3 What are the laws governing vertical agreements?

Sec. 1 ARC contains a prohibition of agreements, decisions and concerted practices that have as their objective or effect the prevention, restriction or distortion of competition. In line with Art. 101 (3) TFEU, Sec. 2 (1) ARC covers exemptions to the aforementioned prohibition. In addition, the German legislator decided to adopt the legal framework of the VBER as well as of other block exemption regulations of the European Union by reference in Sec. 2 (2) ARC. Excluding this, there are no special rules for vertical agreements.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected? Are there any types of vertical agreements or restraints that are *per se* unlawful?

There are no types of vertical agreements that are *per se* protected.

However, if a commercial agent bears no or only insignificant risks in relation to the contracts concluded and/or negotiated on behalf of the principal and in relation to market-specific investments, obligations on the agent's part relating to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods or services will be considered to form an inherent part of an agency agreement and therefore fall outside Art. 101 (1) TFEU and Sec. 1 ARC. This includes limitations on the territory in which the agent may sell these goods or services, limitations on the customers to whom the agent may sell these goods or services, and limitations on the prices and conditions at which the agent must sell or purchase these goods or services.

Art. 101 (1) TFEU and Sec. 1 ARC also do not apply to certain clauses in subcontracting agreements under the conditions outlined in the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements.

The restrictions of competition listed in Art. 4 VBER are regarded as anticompetitive by their very nature (hardcore restrictions) and thus *per se* not exempted by the VBER, regardless of the market shares of the undertakings.

Theoretically, it is possible to obtain an individual exemption pursuant to Art. 101 (3) TFEU, even for hardcore restrictions. However, the requirements are very high. According to the Guidelines on Vertical Restraints by the European Commission (Vertical Guidelines), it is presumed that an agreement containing one of the hardcore restrictions listed in Art. 4 VBER falls under Art. 101 (1) TFEU and most likely does not meet the requirements of Art. 101 (3) TFEU.

2.5 What is the analytical framework for assessing vertical agreements?

As with any other agreements, vertical agreements initially must be examined for their compatibility with Art. 101 (1) TFEU/Sec. 1 ARC. The second step is to assess whether the vertical agreement qualifies for a vertical block exemption (pursuant to the VBER) or an individual exemption (pursuant to Art. 101 (3) TFEU/Sec. 2 (1) ARC). Vertical agreements without hardcore restrictions that do not reach the thresholds of the FCO's *De Minimis Notice* are likely to be permitted.

On 10 May 2022, the European Commission published a final version for a new VBER as well as for updated Vertical Guidelines with effect from 1 June 2022 until 31 May 2034 (please also refer to question 1.11).

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The FCO defines the product market according to the so-called "concept of demand-side substitutability". This concept examines the interchangeability of products from the perspective of the market counterparts (usually the consumer). Thus, goods or services form a single product market if they are so close to each other in terms of their characteristics, economic purpose and price level that a reasonable consumer would regard them as substitutable.

The relevant geographic market comprises the area (1) in which the products concerned are regularly offered and demanded, (2) in which the conditions of competition are sufficiently homogeneous, and (3) which can be distinguished from neighbouring areas by different conditions of competition.

The assessment of the relevant markets in vertical agreement cases must comprise the market counterparts of both undertakings, as the vertical block exemption under the VBER demands the assessment of the market share of both buyer and supplier.

On 8 November 2022, following a thorough review process launched in 2020, the European Commission published a draft

revised Market Definition Notice that should replace the 1997 notice. The 1997 notice serves to offer more guidance, transparency and legal certainty for undertakings to facilitate compliance with competition law. The new draft provides updates on the guidelines considering the significant developments in the last decades concerning digitalisation and new innovative ways of offering goods and services, while leaving the basic principles untouched (i.e. the principles of demand-side and supply-side substitution and potential competition). The proposed changes include, in particular, (i) a greater emphasis on non-price elements such as innovation and quality, especially in case of multi-sided platforms (where products are often supplied at a zero monetary price on one side of the platform), (ii) guidance on system markets and products built around a primary core product (so-called "digital eco-systems"), (iii) guidance on the market definition in the presence of significant investments in research and development projects (i.e. with regard to so-called "pipeline products", meaning products not yet available to customers but sufficiently visible during the research and development process to establish an already existing market), as well as (iv) guidance on the calculation of market shares (i.e. not only considering product sales, but also other metrics such as capacity, user numbers, numbers of downloads or reserves held). It is expected that the European Commission will publish the final version of the new Market Definition Notice in the third quarter of 2023.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

In principle, such agreements are treated as vertical *and* horizontal agreements, and therefore are subject to a "double-sided check". As regulations regarding horizontal agreements are also applicable, the exchange of sensitive information is restricted in particular.

However, Art. 2 (4) VBER expressly provides for an exemption in case of "dual distribution". Either (1) the buyer must solely act at the downstream level and not compete at the upstream level where it buys the contract goods, or (2) in case the supplier is a provider of services at several levels of trade, the buyer must only provide its goods or services at the retail level and not compete at the level of trade where it purchases the contract services. Additionally, the agreement must be of a non-reciprocal nature. However, the exceptions set out in Art. 2 (4) VBER shall not apply to the exchange of information between the supplier and the buyer that is not directly related to the implementation of the vertical agreement or not necessary to improve the production or distribution of the contract goods or services (Art. 2 (5) VBER). The exceptions set out in Art. 2 (4) VBER shall also not apply to agreements with providers of online intermediation services that are competing on the relevant market for the sale of the intermediated goods or services (Art. 2 (6) VBER).

In theory, an exemption pursuant to Art. 101 (3) TFEU/Sec. 2 (1) ARC is also possible.

2.8 What is the role of market share in reviewing a vertical agreement?

Market shares play a decisive role under the VBER. Pursuant to Art. 3 (1) VBER, an exemption can only be considered if the market share held by the supplier in the vertical agreement does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

2.9 What is the role of economic analysis in assessing vertical agreements?

The FCO uses economic analysis to judge whether vertical agreements are competitively significant and exemptible. Thus, it uses economic analysis to determine the market position of the undertakings, possible efficiencies, as well as the impact of the vertical agreement on competition and the scope of the restraints.

In addition, the FCO has the Policy Department G3-Basic Economic Issues, which advises the decision divisions on specific economic issues.

2.10 What is the role of efficiencies in analysing vertical agreements?

Efficiencies of vertical agreements can lead to an individual exemption pursuant to Art. 101 (3) TFEU and Sec. 2 (1) ARC. Art. 101 (3) TFEU and Sec. 2 (1) ARC contain four conditions for exemption, which must be met cumulatively: (1) the agreement must contribute to improving the production or distribution of goods or promoting technical or economic progress (efficiencies); (2) the consumer must receive a fair share of the resulting benefit; (3) the restriction of competition is indispensable; and (4) the competition is not eliminated in respect of a substantial part of the products concerned.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Art. 2 (3) VBER serves the necessary delimitation under which conditions the VBER applies to restrictive agreements relating to intellectual property rights providing that vertical agreements on intellectual property rights only fall within the scope of Art. 2 (1) VBER if the transfer or use of these rights do not form the main subject matter of the agreement. Consequently, they must be part of an underlying agreement on a purchase or supply relationship. Thus, only contractual arrangements that are an annex to distribution or sourcing agreements are exempt under the VBER. If, on the other hand, the parties have concluded an independent agreement on intellectual property rights, the block exemption regulation for technology transfer (Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Art. 101 (3) TFEU to categories of technology transfer agreements) may provide for an exemption. Otherwise, an individual exemption pursuant to Art. 101 (3) TFEU and Sec. 1 (1) ARC can still be considered.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

In general, the FCO is obliged to demonstrate anticompetitive effects. In the case of vertical agreements that have the object of harming competition, especially hardcore restrictions, it is well established in case law that these agreements already have anticompetitive effects by their nature.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

If the VBER is not applicable, the harm can be weighed against the possible efficiencies of the agreement in the context of Art. 101 (3) TFEU/Sec. 2 (1) ARC.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Vertical agreements are only anticompetitive if they have as their object or effect a restraint of competition according to Art. 101 (1) TFEU/Sec. 1 ARC. The specific effect of a restraint or competition must be "appreciable" (see question 1.11). In contrast, by object restraint of competition is always appreciable.

As a further defence, it may be argued under Art. 101 (3) TFEU/Sec. 2 (1) ARC that objective economic benefits flow from the vertical agreement, the restriction of competition is indispensable to the attainment of efficiencies, consumers receive a fair share of the efficiencies, and the agreement does not permit the parties to eliminate competition in respect of a substantial part of the products in question.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

As Sec. 2 (2) ARC explicitly refers to the European block exemption regulations, the FCO must apply the Vertical Guidelines as well as the VBER when assessing vertical agreements.

In addition, in 2017 the FCO published a guidance paper on price-fixing prohibitions in the stationary food retail sector. The guidance paper also covers the legality of vertical agreements between suppliers and distributors in the grocery retail sector. The explanations relate to non-binding price recommendations, volume management/action planning, agreement of fixed and minimum prices, margin guarantees/re-negotiations, non-establishment and termination of business relationships and data exchange between retailers and manufacturers.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance is not permitted according to Art. 101 TFEU/Sec. 1 ARC and cannot qualify for a vertical block exemption, as it is a hardcore restriction pursuant to Art. 4 (a) VBER. According to the Vertical Guidelines, undertakings have the possibility to demonstrate pro-competitive effects under Art. 101 (3) TFEU in individual cases. The new Vertical Guidelines explicitly regard fixed resale prices within a coordinated short-term low-price campaign to be potentially permissible. Moreover, they state that a price monitoring system does not constitute resale price maintenance as such.

However, due to the presumed harmful nature of resale price maintenance, an efficiency defence under Art. 101 (3) TFEU can only be considered in exceptional cases.

2.17 How do enforcers and courts examine exclusive dealing claims?

Not every exclusive dealing in the form of an exclusive supply or purchase obligation constitutes an appreciable restraint of competition, as both supplier and purchaser benefit from such an exclusivity. An exclusive dealing is only anticompetitive if it, in combination with other similar agreements, leads to a significant market foreclosing effect.

In any case, exclusive distribution and purchasing agreements are exempted under the VBER, provided the market shares of both supplier and purchaser do not exceed 30% of the relevant market (please refer to question 2.7 for exceptions regarding information exchange within dual distribution and online intermediation services). However, if the exclusive dealing constitutes a "non-compete obligation" pursuant to Art. 1 (1) (f) VBER, it must not exceed a duration of five years. A "non-compete obligation" refers to any obligation causing the buyer not to manufacture, purchase, sell or resell goods or services from the supplier if the volume of the obligation constitutes more than 80% of the buyer's total purchases of the contract goods or services.

According to the new VBER and Vertical Guidelines, an agreement containing a "non-compete obligation" that is tacitly renewable beyond the agreed period of five years shall – in contrast to the "old" VBER in its version with effect until May 2022 – not be deemed to have been concluded for an indefinite duration, provided that the buyer can effectively switch its supplier after five years (e.g. through the option of renegotiation or termination).

Even without a vertical block exemption under the VBER, an individual exemption pursuant to Art. 101 (3) TFEU/Sec. 2 (1) ARC is still possible.

In a notable decision of 2022 (not yet legally binding), the FCO deemed the non-compete obligation between market-leading manufacturer of power tools Stihl and its independent distributors as unlawful. An exemption under the VBER was not possible due to market shares of the manufacturer exceeding 30% in the relevant markets. An individual exemption was declined for the lack of indispensability of such obligation. Even though the non-compete obligation was abandoned by the manufacturer shortly after the start of the investigation, the FCO expressly felt compelled to establish the unlawfulness – thereby sending a signal to other market-strong manufacturers. In the context of this decision, the FCO also announced that it would continue to closely monitor vertical distribution agreements in comparable markets.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying involves transactions in which the customer is required to accept other goods in addition to the coveted goods. In principle, tying obligations are regarded as an abuse of a dominant position according to Art. 102 (2) (d) TFEU/Secs 19 and 20 ARC. However, if the competitive opportunities of competitors on the non-dominated market are not significantly impaired by the tying practices, or there is an objectively justifiable reason for the tying (e.g. for product safety or technical reasons), there is no abuse or unfair hindrance under Art. 102 (2) (d) TFEU/Secs 19 and 20 ARC. Furthermore, the VBER applies to tying agreements if the provider's market share does not exceed 30% for either the tied product or the tying product, and the provider's market share on the relevant upstream market does not exceed 30% either. If the VBER is not applicable, an exception under Art. 101 (3) TFEU may apply if the conditions are fulfilled.

2.19 How do enforcers and courts examine price discrimination claims?

An agreement with a supplier that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline was

up to now regarded as a violation of Art. 101 (1) TFEU and Sec. 1 ARC. The new Vertical Guidelines take a different position in this respect and do not generally exclude such price differentiation from the scope of the VBER.

A dominant company violates Art. 102 TFEU/Secs 19 and 20 ARC by pursuing a discriminatory pricing policy towards its customers which, without any objectively justified reason, only benefits individual customers. The FCO considers price differentiation abusive if these advantages are arbitrarily withheld or linked to extraneous conditions. Price discrimination on platform markets by dominant companies has increasingly been under the scrutiny of antitrust authorities and courts.

2.20 How do enforcers and courts examine loyalty discount claims?

Product and order-related quantity and turnover discounts that are exclusively linked to the quantities or values purchased are unobjectionable. However, a loyalty discount system of a dominant undertaking violates Art. 102 TFEU/Secs 19 and 20 ARC if its purpose is (1) to make it difficult for the customer to choose between several sources of supply, or (2) to deny competitors access to the market by granting them an advantage that is not based on an economic performance that justifies it.

However, loyalty discount claims can have the same effect as an exclusive dealing discount. In such case, the same principles apply as for exclusive dealing discounts (see question 2.17).

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or bundled rebate claims may be prohibited under Art. 102 TFEU/Secs 19 and 20 ARC if the undertaking granting the discount is in a dominant position. Under German law, bundled discount claims and tying practices are treated equally (see question 2.18).

2.22 What other types of vertical restraints are prohibited by the applicable laws?

There is no exhaustive list of vertical restraints that are prohibited. Often, it is a case-by-case decision as to whether an exemption under the VBER/Sec. 2 ARC applies.

2.23 How are MFNs treated under the law?

Recently, MFNs ("most favoured nation clauses" or "best price clauses") came under close scrutiny by the FCO and courts. The Federal Court of Justice ruled in May 2021 that "narrow" best price clauses by hotel booking platforms violate Art. 101 (1) TFEU/Sec. 1 ARC. The booking platform permitted cooperating hotels to offer better prices for their rooms on other platforms under certain conditions, but not on their own website. The court decided that narrow best price clauses cannot be considered ancillary restraints to the service agreement between the hotel and the platform. This already follows from the fact that the hotel booking platform was able to further strengthen its market position even after abandoning the use of narrow best price clauses during the court proceedings. The requirements for a vertical block exemption under the VBER were not met due to the market share of the platform exceeding 30%. An individual exemption according to Art. 101 (3) TFEU/Sec. 2 (1) ARC is also not possible, as there is no evidence that the best price clause is necessary in order to achieve the claimed efficiencies (in particular, to prevent "free riders").

Thus, best price clauses are inadmissible vertical restraints if the using undertaking has a market share exceeding 30% on the relevant market. The VBER is even stricter regarding "wide" best price clauses – according to Art. 5 (1) lit. d) VBER, such clauses that prohibit the offering of better prices on any other platform will not qualify for a vertical block exemption at all, regardless of any market shares.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Based on the authorisation in Art. 3 (2) 2 of Regulation (EC) No 1/2003 of 16 December 2002, the German legislator has adopted rules in the area of unilateral conduct which are stricter than those in Art. 102 TFEU in two respects:

- On the one hand, the scope of application of the prohibition of abuse of market power is extended, under certain conditions, to companies that do not have a dominant market position, but only so-called "relative market power". This affects market participants on whom other companies are dependent as suppliers or customers in such a way that there are no sufficient and reasonable possibilities to switch to third companies.
- On the other hand, since the beginning of 2021, it is possible, pursuant to Sec. 19a ARC, to prohibit abusive conduct by undertakings with outstanding significance for competition across markets.

The FCO is very active in investigating cases of abuse of dominant or strong market positions. With the amendment of Sec. 19a ARC in 2021, the FCO has focused on investigating practices in digital markets. Since 2019, the activities of the most influential internet groups have already been consistently investigated; several proceedings (against Alphabet/Google, Amazon, Apple, Meta/Facebook and Microsoft) have been initiated.

3.2 What are the laws governing dominant firms?

Secs 18 to 21 ARC regulate the control of abusive behaviour by dominant or strong companies. As soon as the abusive conduct is capable of affecting interstate trade, Art. 102 TFEU must also be applied in addition to Secs 18 to 21 ARC (interstate competition).

Sec. 19a ARC was introduced in 2021. Abusive conduct by companies with outstanding cross-market significance for competition can thus be prohibited.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The analytical framework for defining a market in dominant firm cases does not differ from cases of vertical agreements (see question 2.6 above).

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

A dominant position of an individual company is presumed from a market share of at least 40% (Sec. 18 (4) ARC).

There are no market share thresholds for the determination of relative market power within the meaning of Sec. 20 ARC. The relevant assessment is made on a case-by-case basis according to certain criteria defined by case law and case groups (see question 3.7 below).

There are also no rigid market share thresholds for the determination of an outstanding cross-market significance for competition within the meaning of Sec. 19a ARC; the classification is made on the basis of different criteria laid down in the law.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

A dominant or strong market position is not illegal *per se*. The abuse of this superior position is prohibited.

On the contrary, case law has expressly stated that even a dominant or strong company can, in principle, organise its sales or purchases at its own discretion; this corporate freedom must be weighed against the interests of the market opponent when determining an abuse.

As soon as the FCO has determined that a company has an outstanding cross-market significance on the market within the meaning of Sec. 19a ARC, the company's business activities can be significantly restricted by the FCO.

3.6 What is the role of economic analysis in assessing market dominance?

A company is dominant if it is not exposed to any significant competition on its market and can act independently to a significant extent *vis-à-vis* competitors and customers. Economic aspects play a significant role in determining this dominant position.

An abuse of a dominant or strong market position can take place both in the form of an unfair hindrance and in the form of unjustified discrimination. Economic evaluations should be made when assessing both types of practices.

3.7 What is the role of market share in assessing market dominance?

Market shares play a decisive role in the assessment of market dominance due to the related presumption rules. The market share threshold must undoubtedly be exceeded; if there are uncertainties, the presumption does not apply. However, the presumption of a dominant position established in Sec. 18 (4) ARC (having a market share of above 40%) is rebuttable.

The assessment of relative market power within the meaning of Sec. 20 ARC is not dependent on market shares. The assessment is made in accordance with case groups developed by case law. In practice, product-related or company-related dependence play a special role in particular.

The specific market share is only one of the criteria to be assessed in order to determine whether a company has an outstanding cross-market significance on the market within the meaning of Sec. 19a ARC. In addition, according to Sec. 19a (1) no. 2 ARC, the following criteria are taken into account: financial strength and access to other resources; vertical and conglomerate integration or activity; access to competition-relevant data; and the importance for and influence on the business activities of third parties, in particular their market access to sourcing and sales markets.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Factual justifications of alleged abusive behaviour can exclude a violation of Sec. 19 (1) ARC. In order to assess the factual justification, the interests of the parties involved must be weighed up, taking into account the objective of the law, which is directed towards the freedom of competition.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

In contrast to Art. 101 (3) TFEU, efficiencies generally do not play a role in the analysis of the conduct of dominant undertakings. However, they can play a major role in determining whether conduct is unfair. Efficiencies can be taken into account in the justification of behaviour as part of the balancing of interests.

3.10 Do the governing laws apply to "collective" dominance?

Yes, collective dominance is covered by German law.

According to Sec. 18 (5) ARC, two or more undertakings are dominant if there is no substantial competition between them and they collectively fulfil the requirements of Sec. 18 (1) ARC (collective dominance or oligopoly dominance).

There is a (rebuttable) presumption rule according to which several undertakings together are dominant if a group of three or fewer undertakings jointly holds a market share of 50% or if a group of four or five undertakings reaches a market share of two-thirds (Sec. 18 (6) ARC).

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Sec. 19 (1) ARC does not differentiate between dominant purchasers and dominant sellers; the effects outlined in question 3.5 apply in both cases.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Sec. 19 (2) ARC lists examples of abusive practices. The list is not exhaustive; further abusive conduct can also be prevented by the general clause of Sec. 19 (1) ARC.

In particular, abusive practices may exist in the following situations:

- Unfair obstruction or discrimination (Sec. 19 (2) no. 1 ARC); in the case of relative market power under Sec. 20 (1) ARC.
- Abuse of exploitation (Sec. 19 (2) no. 2 ARC).
- Price and condition-splitting (Sec. 19 (2) no. 3 ARC).
- Denial of access to networks and infrastructure facilities (Sec. 19 (2) no. 4 ARC).
- Passive discrimination (Sec. 19 (2) no. 5 ARC), in the case of relative market power under Sec. 20 (2) ARC.
- Discrimination against small and medium-sized enterprises (Secs 20 (3) and (4) ARC).
- Prohibition of refusal of admission (Sec. 20 (5) ARC).

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Intellectual property can create market power in individual cases. Such cases have played an increasingly important role in practice in recent years. In addition, cases are also increasing in which market power is based on the availability of certain data.

If there is market power over intellectual property rights, a compulsory licence can be claimed under the conditions of the "essential facilities doctrine", i.e. if the refusal of access prevents the development of further supply on a downstream market, the intellectual property rights are in themselves irreplaceable for the downstream market; the refusal of access prevents effective competition and there is no objective justification for the refusal of access.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Enforcers and/or legal tribunals generally assess market power according to the principles outlined in question 3.6. This does not preclude direct effects from being considered in the economic analysis; however, this is not a focus of the analysis.

3.15 How is "platform dominance" assessed in your jurisdiction?

Platform dominance is essentially assessed like any other form of market dominance. Nevertheless, the ARC takes platforms into account in a specific way:

- In the area of multi-sided markets and networks, Sec. 18 (3a) ARC extends the characteristics for the assessment of a company's market position to include, for example, direct and indirect network effects and economies of scale in connection with network effects. In addition, Sec. 18 (2a) ARC clarifies that the fact that a service is provided free of charge does not prevent the assumption of a market.
- The introduction of Sec. 20 (3a) ARC in 2021 serves to establish a new element of intervention to reduce the competition problems caused by so-called "tipping", i.e. the transformation of a market characterised by strong positive network effects with several suppliers into a monopolistic or highly concentrated market. In this respect, the new regulation provides that an unreasonable impediment also exists if a company with superior market power on a multi-sided market or network impedes the independent achievement of network effects by competitors. The legislator had in mind in particular the prohibition or hindrance of so-called "multi-homing" (parallel use of several platforms) and the impediment of platform switching, without limiting the regulation to these cases.
- Finally, Sec. 19a ARC, which was introduced in 2021 as well, provides far-reaching powers of intervention against abusive behaviour after a digital platform has been classified as a company with outstanding cross-market significance.

3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

The extensive changes to the law having come into force in 2021 permit the FCO to intervene even earlier and more effectively against digital corporations. Thus, proceedings under the new Sec. 19a ARC were immediately initiated against Alphabet/Google, Amazon, Apple and Meta/Facebook in order to determine whether the companies have paramount cross-market significance. In the meantime, the FCO already determined outstanding cross-market significance in the cases of Alphabet/Google, Amazon, Apple and Meta/Facebook. In addition, an investigation was opened against Microsoft in March 2023.

Even before that, the FCO has taken a global leading role in the fight against large tech platforms; for example, Amazon changed its T&Cs for traders on the Amazon marketplace worldwide in response to abuse proceedings before the FCO.

3.17 Under what circumstances are refusals to deal considered anticompetitive?

A refusal to supply by a dominant company or a company with a strong market position (within the meaning of Sec. 20 (1) ARC) may constitute discrimination pursuant to Sec. 19 (2) no. 1 ARC. Affected companies may thereby be entitled to a compulsory right to supply.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The special features of German law to be mentioned here relate in particular to the protection of competition against the abuse of market power. In this respect, the legislator has made use of the leeway available under European law.

Under German law, not only is the abuse of dominant positions prohibited, but also the abuse of "relative market power". A sophisticated body of dogma and intensive case practice has been developed in this regard over the past decades. The 10th ARC amendment extended the prohibition of abuse of relative market power to the extent that, unlike before, protection is not only granted to small and medium-sized enterprises. In this respect, however, the wording of the law had already been interpreted broadly. According to the new regulation, protection is granted irrespective of the size of the company if there is a "clear imbalance" between the market power of the tied company and the countervailing power of the other companies.

In the 10th ARC amendment, the German legislator once again made use of its creative leeway by introducing a provision in Sec. 19a ARC that specifically targets abusive behaviour by companies that have outstanding cross-market significance. With the initiation of proceedings against the most influential internet groups, the FCO made it clear shortly after the law had come into force that it will devote special attention to this issue.

As part of the 11th ARC amendment, which may come into force in 2023, German competition law is proposed to be supplemented by a fourth pillar in the form of a market structure control which is independent of infringement and abuse and which may apply in addition to the prohibition of cartels, abuse control and (preventive) merger control. The proposed changes follow the current discussion on competition policy in Germany. The FCO's powers of intervention are perceived as insufficient if, without a provable infringement, a disruption of competition occurs, which could have market structure-related causes. Based on the current draft, the FCO in such cases shall not only be able to prevent negative structural changes by means of merger control, but also to shape structures defined as preferable.

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