## F. Summary and recommendations

### I. Sec. 19 para. 2 No. 4 Draft of the Act Against Restriction on Competition (GWB-E) — Data sets as an essential facility

1. The intention of clarifying the wording of sec. 19 para. 2 No. 4 GWB and adapting it to EU practice is to be welcomed. However, for the sake of clarity, the following wording of the law appears to be more precise:

> "4. refuses to supply another undertaking with these products or commercial service against adequate consideration, and in particular, refuses to grant them access to networks or other infrastructure facilities, intellectual property rights or data relevant to competition, and the delivery or granting of access is indispensable in order to operate as a competitor of the dominant undertaking in an upstream or downstream market, and the refusal is likely to lead to the elimination of competition in this market unless the refusal is objectively justified."

2. The official explanatory memorandum of the RefE (draft bill) with regard to sec. 19 para. 2 No. 4 GWB-E must be urgently reviewed and corrected since, in its current version, it is more likely to generate misunderstandings about the scope of sec. 19 para. 2 no. 4 GWB-E than to clarify it. The examples described in the memorandum are not in line with the wording of the law because sec. 19 para. 2 no. 4 GWB-E does not deal with general participation rights to *individual data*, but only aims at opening neighboring markets and at keeping these markets open for effective competition with the owner of the essential facility. The memorandum's remark that access without a consideration could be envisaged "in particular for data" also creates confusion since no scenarios are apparent in which unpaid access to data has been assigned or could be legally assigned on the basis of the Essential Facilities Doctrine (EFD).

### II. Sec. 20 para. 1a GWB-E — Data access in the case of relative market power

1. In practice, the most significant data-related obstacle to market access is the lack of legal certainty on the part of undertakings. A clear and legally secure regulatory framework for data flow and data exchange is therefore urgently required. Contrary to this aim, the creation of additional, broad and therefore vague data access rights increases the existing legal uncertainty and therefore appears to be counterproductive. This is all the more true since no gaps in protection have been identified that could not be addressed by sections 19 and 20 GWB, which already go well beyond EU law. Should further need for regulation arise, then — following the advice of Competition Commission 4.0 — a regulation at EU level would be the better approach.

2. The best solution would be to delete sec. 20 para. 1a GWB-E and only to clarify in the memorandum that a dependency within the meaning of sec. 20 para. 1 GWB may also exist in relation to data.

3. Such clarification can also be achieved by the following wording of Sec. 20 para. 1a GWB-E. In this case, particular attention must be paid to ensure that the clause for the protection of smaller prohibition addressees that will be added to Sec. 20 para. 1 after the removal of the SME criterion, also applies within the scope of Sec. 20 para. 1a:

> "(1a) A dependency within the meaning of paragraph 1 can also result from the fact that an undertaking for its own activities relies on access to data relevant for competition, which is controlled by another undertaking and, due to a clear imbalance, the dependency is not counterbalanced by a corresponding countervailing power of the suppliers or customers of the undertaking with market power."

4. If the legislator, in addition to sec. 20 para. 1 GWB, maintains the goal of creating an independent data access standard that is below the strict requirements of the EFD, the following wording of sec. 20 para. 1a sentence 2 GWB-E could be added in order to avoid an unlimited application of the rule (especially to any third-party constellation) and to guarantee a minimum level of legal certainty:

> "In this case, the refusal of access to such data can also constitute an unfair impediment if no commerce for such data has been opened yet and if the dependent undertaking relies on this data for substantial value creation in a value creation network in order to act as a competitor of the undertaking with market power in an upstream or downstream market."

5. In any case, the explanatory memorandum to the draft bill requires clarification with regard to sec. 20 para. 1a GWB-E. In particular, it must be clarified that an existing contractual relationship between the data owner and the access applicant as well as the requirement of a substantial added value cannot be dispensed with, because otherwise an entitlement to access would be created that extends beyond the EFD not only in terms of the prohibition addressees but also in terms of the scope of the access provision. This would contradict the advice of the preparatory studies and would also constitute an error in terms of the matter. Instead, a narrow and precise area of application should be defined that corresponds to the wording proposed above. In addition, sec. 20 para. 1 GWB is available as a "catch-all" provision.

6. If the legislature adheres to the current wording of sec. 20 para. 1a sentence 2 GWB-E, the explanatory memorandum should make it clearer that (as suggested by the Federal Minister of Economics and Technology (BMWi) study) the criterion of an existing commerce for such data is only waived for cases of company-related dependency, without extending the scope of sec. 20 para. 1a GWB-E compared to sec. 20 para.1 GWB in other aspects. This is particularly important with regard to data in order to properly limit the scope of application because data (unlike other resources) can be useful for a potentially unlimited number of usage scenarios and markets, while sec. 20 GWB (similarly to sec. 19 GWB) is not intended to grant general participation rights to data on the basis of mere usefulness, but aims to enable or maintain effective competition in neighboring markets. It should therefore be clarified that Section 20 para. 1a GWB-E does not guarantee any data access rights in cases in which the access applicant has no contractual relationship with the data owner and neither wishes to compete with the data owner nor wishes to offer complementary services within the meaning of the Aftermarket Doctrine.

**III. Sec. 20 para. 3a GWB-E — Impediment by promoting tipping**

1. The draft bill's aim to counter the risk of market tipping into an non-contestable monopoly through a new regulation in sec. 20 para. 3a GWB-E appears legitimate. However, sec. 20 para. 3a GWB-E goes beyond this concern and — particularly in the light of the explanatory memorandum to the draft bill — is vague to an extent that is detrimental to legal certainty and innovation.

2. The aim pursued by the regulation can be achieved more easily and more clearly by adding further presumptive examples to sec. 20 para. 3 sentence 1 GWB (namely: anti-competitive restrictions to multi-homing and platform switching). This moderate approach would correspond to the recommendation of the BMWi study to counter practices that are recognized as particularly dangerous by competition authorities and courts and to increase legal certainty instead of reducing it, as is the case with the currently proposed regulation. Such a moderate solution would not leave significant gaps in protection. Sec. 20 para. 3a GWB-E could be simpler and clearer:

> "(3a) An unfair impediment within the meaning of section 20 paragraph 3 sentence 1 also shell be deemed to exist if the parallel use of multiple services is impeded in an anti-competitive manner or if t switching to another service is made more difficult in an anti-competitive manner".

3. If the legislator maintains a more comprehensive general clause-type solution, clarification of the legal wording would be advisable for reasons of legal certainty. Sec. 20 para. 3a GWB-E could be formulated more clearly as follows without loss of scope:

> "(3a) An unfair impediment within the meaning of paragraph 3 sentence 1 also exists if an undertaking with superior market power in a market characterized by strong positive network effects hinders the independent achievement of positive network effects by competitors, in particular by impeding the parallel use of multiple services or the switching to another service, thereby creating the serious risk that competition on the merits will be significantly reduced."

4. Furthermore, the explanatory memorandum should contain clarifications, in particular with regard to the point of reference of "superiority" of market power (which must correctly exist with respect to all others and not just to one single market participant) and to specify a sufficient "tipping risk". Thus, the note from the explanatory memorandum to the effect that sec. 20 para. 3a GWB-E only protects the *independent* achievement of positive network effects and that, for example, no claim to establishing interoperability can be derived from the regulation, can be supplemented by additional clarifying negative examples. In this respect, it is obvious that the offer of free services or flat rates does not in principle constitute an impediment prohibited by sec. 20 para. 3a GWB-E. In addition to a general increase in legal certainty, this could also help to avoid misguided or even abusive private lawsuits, which are often directed against innovation and competition, and are aimed at protecting outdated services and business models from innovation competition, as the UWG (fair trading) case law on "market disruption" and comparable antitrust cases teach.

## IV. Sec. 19a GWB-E – Regulation of paramount cross-market significance companies

1. Sec. 19a GWB-E states a regulatory law rule that has been inserted in the draft bill against the advice of the preparatory German studies. It represents a foreign body in the GWB. According to its wording, the rule aims at a potential *ex ante* regulation of companies with paramount cross-market significance for competition (PCS companies). According to the explanatory memorandum, Sec. 19a GWB-E should only apply in a sector-specific manner to a few large digital platform companies, without the limitation to the digital sector being clear from the rule's text itself.

2. Sec. 19a GWB-E is characterized by great vagueness and therefore creates considerable legal uncertainty. Even the concept of the PCS company remains extremely vague. In particular, it is unclear whether a PCS company must have a dominant position in at least one market. For reasons of legal certainty, this should be clarified in the affirmative. Greater clarity should also be created, among other things, regarding the question of the temporal limitation of decisions pursuant to sec. 19a GWB-E and regarding their judicial reviewability.

3. No convincing legitimacy exists for a reversal of the burden of proof contrary to the principle of official examination of sec. 57 GWB. Even imposing the substantive burden of proof for *non-liquet* situations would only be justified if the behavior described was actually particularly dangerous to competition and if the PCS companies had better opportunities to identify and (dis)prove these effects than the Federal Cartel Office (BKartA). But this is not the case.

a) Sec. 19a para. 2 sentence 1 No. 1 GWB-E (self-preferencing) describes behavior that is generally compliant with the Federal Supreme Court of Justice (BGH) case law. Although the Commission interpreted Article 102 TFEU differently in its *Google Shopping* decision, this decision has so far not become final and binding and could not be generalized even if the European Court of Justice confirmed it.
b) According to its current wording, sec. 19a para. 2 sentence 1 No. 2 GWB-E (roll-up) also describes typically competitive behavior because conquering a market due to outstanding resources would only be anti-competitive if it was achieved by anti-competitive means. However, there is no objective reason to suspect such anti-competitive behavior based solely on the PCS position.
c) According to its current wording, sec. 19a para. 2 sentence 1 No. 3 GWB-E (data usage) describes two variants of typically competitive behavior. Data-related entry barriers should be lowered by facilitating voluntary cooperation and, if necessary, by granting data access. In such a case, sections 19 and 20 GWB already provide sufficient rules for intervention.
d) Sec. 19a para. 2 sentence 1 No. 4 GWB-E (interoperability or data portability complication) describes (also according to the explanatory memorandum findings) competitively ambivalent behavior which, given the complexity of the related aspects, should preferably not be addressed by competition law but — following the advice of the Competition Commission 4.0 — should be addressed at EU level or is already partially addressed in the GDPR.
e) Sec. 19a para. 2 sentence 1 No. 5 GWB-E (withholding information) does not lead to a reversal of the burden of proof, because it only concerns an "insufficient" transmission of information. However, this rule is redundant in relation to other GWB rules as well as EU law and is therefore also superfluous.

4. All in all, sec. 19a GWB-E places undertakings under state supervision because they have achieved a PCS position, i.e. they are "too successful". This contradicts the system of mere anti-abuse supervision under competition law. No real protection gaps ("*gap cases*") are apparent

either; all problem areas covered in sec. 19a GWB-E are already adequately addressed by sections 19 and 20 GWB, by provisions of the General Terms and Conditions law, data protection law, and fair trading law, as well as by Art. 101, 102 TFEU and several EU regulations (in particular GDPR and the P2BR). Both, the development of the digital economy in Germany and Europe as well as the GWB as the "Basic Law of the Social Market Economy", are far too important for national experimental clauses such as sec. 19a GWB-E that trigger legal uncertainty and seem to be "cobbled together". Sec 19a GWB-E should therefore be completely deleted. If any regulatory gaps actually occur in the future, they should be addressed according to the advice of Competition Commission 4.0 through a substantially and geographically comprehensive EU platform regulation or through sector-specific regulation.

5. In the event that the legislator nevertheless adheres to a national special regulation, this should be made much more precise. Sec. 19a GWB-E could be formulated as follows:

> "(1) The Federal Cartel Office can establish by decision that a dominant undertaking that operates to a considerable extent on platform markets characterized by strong positive network effects is of paramount cross-market significance for competition. The criteria listed in section 18 paragraph 3, paragraph 3a and paragraph 3b should be taken into account.
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> (2) In the event of a finding in accordance with paragraph 1, the Federal Cartel Office can prohibit the undertaking from treating
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> 1. competitors' offers differently to its own offers when providing access to supply and sales markets;
> 2. to directly or indirectly unfairly impede competitors in a market in which the undertaking concerned can quickly expand its position, even if it does not dominate the market;
> 3. inadequately informing other undertakings about the scope, quality or success of the service provided or contracted or making it difficult for them to assess the value of this service in an anti-competitive manner.
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> A decision under sentence 1 requires that the prohibited behavior is capable of significantly impeding competition. It is excluded if the respective behavior is objectively justified. The burden of demonstration and proof of this justification lies with the undertaking concerned.
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> (3) In cases of particular urgency, the finding according to paragraph 1 can be combined with a decision according to paragraph 2, for the implementation of which an appropriate transition period must be granted. The decisions under paragraphs 1 and 2 are limited to a maximum of five years and are to be revoked if the underlying circumstances change significantly. With expiry or annulment of the decision according to paragraph 1, decisions against the same undertaking according to paragraph 2 shall cease to apply. Section 32 paragraphs 2 and 3, section 32a and section 32b apply accordingly.
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> (4) Sections 19 und 20 remain unaffected".