A.030 GWB Restraints of Competition

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Section 20
Prohibited Conduct of Undertakings with Relative or Superior Market Power

(1) Section 19(1) in conjunction with subsection (2) no 1 shall also apply to undertakings and associations of undertakings to the extent that other undertakings as suppliers or purchasers of a certain type of goods or commercial services are dependent on them in such a way that sufficient and reasonable possibilities for switching to third parties do not exist and there is a significant imbalance between the power of such undertakings or associations of undertakings and the countervailing power of other undertakings (relative market power). Section 19(1) in conjunction with subsection (2) no 1 shall also apply to undertakings acting as intermediaries on multi-sided markets to the extent that other undertakings are dependent on their intermediary services for accessing supply and sales markets in such a way that sufficient and reasonable alternatives do not exist. A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other compensation, special benefits which are not granted to similar purchasers.

> ***(1a) Dependence within the meaning of subsection (1) may also arise from the fact that an undertaking is dependent on accessing data controlled by another undertaking in order to carry out its own activities. Refusing to grant access to such data in return for adequate compensation may constitute an unfair impediment pursuant to subsection (1) in conjunction with Section 19(2) no 1. This shall also apply even if such data have not yet been commercially traded.***

(2) Section 19(1) in conjunction with subsection (2) no 5 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them.

(3) Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market power to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of sentence 1 exists in particular if an undertaking

1. offers food within the meaning of Section 2(2) of the German Food and Feed Code [*Lebensmittel- und Futtermittelgesetzbuch*] below cost price, or

2. offers other goods or commercial services not just occasionally below cost price, or

3. demands from small or medium-sized undertakings with which it competes on the downstream market

in the distribution of goods or commercial services a price for the delivery of such goods or services which is higher than the price it itself offers on such market,

unless there is, in each case, an objective justification. Cost price within the meaning of sentence 2 shall be the price agreed between the undertaking with superior market power and its supplier for the provision of the good or service and from which general discounts that can be expected with reasonable certainty at the time the offer is made are proportionally deducted unless otherwise expressly agreed with regard to the specific goods or services. Offering food below cost price is objectively justified if this is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises through a timely sale, or in equally severe cases. Donating food to charity organisations for use within the scope of their responsibilities shall not constitute an unfair impediment.

(3a) An unfair impediment within the meaning of subsection (3) sentence 1 shall also be deemed to exist where an undertaking with superior market power on a market within the meaning of Section 18(3a) impedes the independent attainment of network effects by competitors and in this way creates a serious risk of significantly restricting competition on the merits.

(4) If, on the basis of specific facts and in the light of general experience, it appears that an undertaking has abused its market power within the meaning of subsection (3), the undertaking shall be obliged to disprove this appearance and to clarify such circumstances in its field of business which give rise to claims and which cannot be clarified by the competitor concerned or by an association within the meaning of Section 33(4), but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which claims are made.

(5) Business and trade associations or professional organisations as well as quality mark associations may not refuse to admit an undertaking if such refusal would constitute an objectively unjustified unequal treatment and place the undertaking at an unfair competitive disadvantage.