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Switzerland and Germany: Regulation of the digital economy – Blessing or curse?

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ABSTRACT

Globally, the demand for digital services is concentrated among a small number of extremely powerful companies. The ongoing international debate on competition policy explores whether *ex post* abuse control under competition law should be complemented by *ex ante* regulation. Drawing insights from Lukas Valis' PhD thesis, supervised by Blaise Carron, which discussed these issues by investigating the existing regulation of the [Tele]Communications sector in Germany and Switzerland, the authors examine recent developments in Germany and propose a balanced solution to mitigate potential negative effects of an *ex ante* regulation of the digital economy.

À l'échelle mondiale, un petit nombre d'acteurs très puissants dominent le marché des services digitaux. Un débat international est en cours sur le rôle de la politique de la concurrence, pour déterminer si le contrôle des abus ex post *doit être complété par une régulation* ex ante. *Se fondant sur les résultats de la thèse du Dr Lukas Valis, dirigée par le Professeur Blaise Carron, qui a tiré les leçons de la régulation existante dans le secteur des (télé) communications en Allemagne et en Suisse, les auteurs examinent les développements récents et présentent une solution équilibrée réduisant les effets négatifs potentiels d'une régulation* ex ante *de l'économie numérique.*

I. Introduction

1. The German Federal Cartel Office (Bundeskartellamt, "BKartA") recently found that Apple Inc., based in Cupertino (USA), is an undertaking of "*paramount significance for competition across markets.*"[1] Apple allegedly holds "*a key position for competition as well as for gaining access to the ecosystem and to Apple customers.*" Not only is it occupying the entire vertical value chain of mobile digital devices, including proprietary development of key components like processors, but it is also developing the software for those devices itself (IOS). The same is allegedly true of the App Store, another one of Apple's proprietary products. The decision is one in a series of other BKartA decisions that have consistently established the paramount significance across markets of the tech giants known as GAMAM (Google/Amazon/Meta/Apple/Microsoft) as the basis for regulating their conduct.[2]

2. The BKartA obtained the authority to do so thanks to its newly created *ex ante* instrument under § 19a of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, hereinafter "GWB"), which is intended to put a stop to the monopolization of digital markets outside of pre-existing ecosystems, as in the case of GAMAM.[3] Unlike the previously applicable *ex post* concept of abuse control under GWB § 19, GWB § 19a allows the competition authority to intervene earlier, based on a finding of a company's paramount significance across markets, rather than having to wait for a finding of concrete abuse of market power. On the European level, a similar construct has been created based on the rules of Articles 5 and 6 of the Digital Markets Act.[4] Switzerland seems to be the only place on the European continent that has not yet adopted the trend towards *ex ante* regulation of digital gatekeepers such as GAMAM. The Swiss Federal Act on Cartels and Other Restraints of Competition (Kartellgesetz, hereinafter "KG") continues

1 In German: "*überragende marktübergreifende Bedeutung*"; *see* BKartA, Fallbericht of 5 April 2023, ref. B9-67/21 – Apple Inc., https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2023/B9-67-21.pdf?__blob=publicationFile&v=5.

2 BKartA, Laufende Verfahren gegen Digitalkonzerne, https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Downloads/Liste_Verfahren_Digitalkonzerne.html?nn=10160192 (last visited May 2023).

3 German Fed. Govt, Bundestag Publication 19/23492, p. 73, https://dserver.bundestag.de/btd/19/234/1923492.pdf.

4 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1; cf. P. Bongartz, *§ 19a GWB - a keeper?, WuW* 2022, Vol. 72, No. 2, pp. 72-82, at 74; B. Hebers, *Der Digital Markets Act (DMA) kommt – neue Do's and Don'ts für Gatekeeper in der Digitalwirtschaft, RDi* 2022, pp. 252-259, at 253.

to be based on the *ex post* concept; i.e. the Competition Commission (Schweizerische Wettbewerbskommission, hereinafter "WEKO") does not intervene until at least a suspicion of abusive behaviour has emerged.

3. The question therefore arises whether Switzerland should be more proactive in the "regulation of digital gatekeepers" or whether its culturally embedded prudence in matters of "regulation" is actually justified in this case. This question is even more justified when considering that, while European and national regulatory initiatives relied on internationally well-acknowledged studies that examined both the necessity and consequences of potential regulatory measures in the digital economy, insightful findings about the actual (rather than merely predicted) effects of *ex ante* regulations in other, comparably dynamic sectors that have been already regulated for decades, such as the telecommunications sector, have remained largely ignored.[5]

Dr Lukas Valis discussed these issues in his dissertation supervised by Professor Dr Blaise Carron.[6] The dissertation was successfully defended in December 2022 at the University of Neuchâtel and then published as an open-access book. This essay gives a cursory overview of the contents of the dissertation, after which the two authors shed light on the current situation in Germany and in Switzerland.

4. The article covers the competitive economic challenges in the telecommunications sector and digital economy (II.), the insufficiencies of antitrust abuse control (III.), the regulation of the telecommunications sector in Germany and Switzerland (IV.) as well as their effects in both countries (V.). The article closes with a conclusion (VI.).

II. Competition economics: Challenges in the telecommunications sector and in the digital economy

5. When the competition economic specificities of the digital economy are examined alongside those of the telecommunications sector,[7] it is readily apparent that both sectors share basic similarities—including the pronounced innovation dynamic, the need for technical infrastructure in order to enter the market, as well as strong network effects, economies of scale and scope—indicating the suitability for a comparison in terms of competition economics.[8] The main common characteristic of the two sectors is that both show a power imbalance between incumbents and new entrants.

6. In the telecommunications sector, this is due to the physical telecommunications network, which—partly for historical reasons—is available to incumbents only. The high irreversible upfront investments[9] and high fixed operating costs required for a start-up in a local loop prevent new entrants from duplicating existing physical telecommunications networks and stimulating competition in infrastructure.[10] Even if newcomers strive for independent network expansion, they are incapable of achieving competitive pricing because the incumbent has long benefited from network effects, as well as from economies of scale and scope.[11]

5 For example, H. Schweitzer, J. Haucap, W. Kerber and R. Welker, *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen*, Nomos, Baden-Baden, 2018; BMWi, Wettbewerbsrahmen Digitalwirtschaft, 2019; J. Furman, D. Coyle, A. Fletcher, P. Marsden and D. McAuley, Unlocking digital competition, Report of the Digital Competition Expert Panel, 2019 (hereinafter "Furman Report"); J. Crémer, Y. de Montjoye and H. Schweitzer, *Competition Policy for the Digital Era*, Publications Office of the European Union, Luxembourg, 2019; ACCC, Digital Platforms Inquiry, 2019; F. Scott Morton, P. Bouvier, A. Ezrachi, B. Jullien, R. Katz, G. Kimmelman, A. Melamed, J. Morgenstern, Stigler Committee on Digital Platforms: Final Report, 2019 (hereinafter "Stigler Report").

6 L. Valis, Digitale Ökonomie: Erforderlichkeit sektorspezifischer Ex-ante-Regulierung? Erkenntnisse aus der deutschen und schweizerischen Regulierung des Telekommunikationssektors (2004-2020), sui generis, Zürich, 2023 https://suigeneris-verlag.ch/img/uploads/pdf/oa_pdf-041-1689945250.pdf.

7 Ibid., para. 491 *et seqq*.

8 Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code, OJ L 439, 29.12.2020, p. 23, recital 9; H. Gersdorf, in *Recht der elektronischen Medien*, G. Spindler and F. Schuster (eds.), 4th ed., C. H. Beck, Munich, 2019, TKG [Telecommunications Act], § 10, para. 40; BKartA, Arbeitspapier, ref. B6-113/15, p. 92 *et seqq*. with further notes; for a different opinion: S. Louven, Datenmacht und Zugang zu Daten, *NZKart* 2018, Vol. 5, pp. 217-222, at 220; BKartA, Big Data und Wettbewerb, 2017, p. 7.

9 I. Schmidt and J. Haucap, *Wettbewerbspolitik und Kartellrecht*, 10th ed., Oldenbourg Verlag, Oldenburg, 2013, p. 48.

10 J. Kühling, T. Schall and M. Biendl, *Telekommunikationsrecht*, 2nd ed., C. F. Müller, Regensburg, 2013, p. 53, para. 91; T. Mayen, in *Kommentar zum Telekommunikationsgesetz*, K. Scheurle and T. Mayen (eds.), TKG [Telecommunications Act], 3rd ed., C. H. Beck, Munich, 2018, Preliminary remarks on § 9, para. 10; C. von Zedtwitz, Art. 11 FMG als regulatorische Marktzutrittsschranke?, *sic!* 2002, Vol. 5, pp. 365-370 with further notes.

11 Cf. Mayen, *supra* note 10, Preliminary remarks on § 9, para. 10; Gersdorf, *supra* note 8, § 10, para. 40; C. Bongard, in *Kommentar zum Telekommunikationsgesetz*, M. Geppert and R. Schütz (eds.), TKG [Telecommunications Act], Preliminary remarks on §§ 9 – 15a, C. H. Beck, Munich, 2013, para. 73; G. Knieps, *Netzökonomie*, Betriebswirtschaftlicher Verlag Dr. Th. Gabler, Wiesbaden, 2007, p. 5.

7. In the digital economy, the power imbalance results not so much from the need for irreversible upfront investments in technical infrastructure[12] as from the extremely self-reinforcing network effects and economies of scale as well as data-based economies of scope[13] that lead to a competitive advantage.[14] It is practically impossible to catch up with that advantage, especially in markets that have already tipped into a monopoly to the benefit of an incumbent.[15] Unlike in the telecommunications sector, the resulting anticompetitive barrier for new entrants does not necessarily result from pricing[16] but rather from quality. Qualitative competition dominates.[17] The crucial competitive parameter in the digital economy is data.[18] In lieu of paying a monetary price for the service offered, users watch the ads displayed or make their personal data available.[19] The longer digital platforms or companies exist in the market, the greater their lead in collecting and evaluating data and in customizing their own services to the preferences of their end users.[20] Self-reinforcing direct and indirect network effects underlying the business models of one-sided or multi-sided digital platforms[21] constantly attract users and lock them into the platform[22] (so-called lock-in effect). A shortage of users prevents new entrants from initiating such effects and achieving qualitative improvements.

8. Although the causes of the power imbalance differ in each of the two sectors, the situation leads to consumers being tied to incumbents and kept away from new entrants, thereby preventing effective competition.[23] New entrants are consistently dependent on using the incumbents' existing physical (telecommunications networks[24]) and non-physical (platforms[25] and data[26]) infrastructure and facilities, since they are the only ways of accessing consumers.[27] Operators of telecommunications networks, platforms or databases become gatekeepers. To maintain their own competitive advantage in the consumer market, such operators strategically deny their competitors access to the consumer market or hinder it, inter alia, by demanding discriminatory and exploitative conditions.[28] In the telecommunications sector, this applies in the examined wholesale market for locally provided access to the local loop at fixed locations.[29] In the digital economy, equivalent dependencies can be found above all in the tipped markets of GAMAM.[30]

9. Based on the above factors, the question whether the digital economy and telecommunications sectors are comparable in terms of competition economics can generally be answered in the affirmative. Thus, to answer the question whether *ex ante* regulation is necessary in the digital economy, it is not only possible but also quite revealing to draw on the findings about the effectiveness of regulation in the telecommunications sector. It is imperative, however, to consider the differences between the two sectors. It is important to note, for example, the particular cost structure and tremendous dynamic of digital markets, as well as the facilitated possibility of multi-homing, which in some digital markets— outside the markets of GAMAM—can conceivably lead to platform or infrastructure competition.[31]

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12 Cf. Schmidt and Haucap, *supra* note 9, p. 48; D. Rubinfeld and M. Gal, Access Barriers to Big Data, *Ariz. L. Rev.*, Vol. 59, 2017, pp. 339–381, at 363 *et seqq*.

13 Monopolkommission, Sondergutachten 68, 2015 p. 33; cf. J.-P. Dubé, G. Hitsch an P. Chintagunta, Tipping and Concentration in Markets with Indirect Network Effects, *Chicago GSB Research Paper* No. 08-08, p. 3; M. Bourreau, A. de Streel and I. Graef, Big data and competition policy: Market power, personalised pricing and advertising , CERRE Report, 2017, p. 35 *et seq*.; Furman Report, *supra* note 5, p. 32 *et seq*.; G. Parker, G. Petropoulos and M. Van Alstyne, Platform mergers and antitrust, *Working Paper* 01/2021, Bruegel, 2021, p. 6; N. Guggenberger, Essential Platforms, *Stan. Tech. L. Rev*., Vol. 24, 2021, pp. 237–343, at 285; M. Stucke and A. Grunes, *Big Data and Competition Policy*, Oxford University Press, 2016, p. 186; BKartA, Hintergrundpapier zur Tagung des Arbeitskreises Kartellrecht of 1 January 2015, p. 19 et *seq*.

14 M. Tamke, Marktmacht in digitalen Märkten nach der 9. GWB-Novelle, Vol. 11, *NZKart*. 2018, p. 506; J. Drexl, Designing Competitive Markets for Industrial Data: Between Propertisation and Access, *JIPITEC*, Vol. 8, Issue 4, 2017, pp. 257–292, at 262; J. Drexl, Data access as a means to promote consumer interests and public welfare – An introduction, in *Data Access, Consumer Interests and Public Welfare*, BMJV/Max-Planck-Institut, Nomos, Baden-Baden, 2020, pp. 11–32 at 17; G. Colangelo and M. Maggiolino, Big Data as misleading facilities, *ECJ* 2017, Vol. 13, pp. 249-281, at 252 *et seqq*.; T. Körber, Konzeptionelle Erfassung digitaler Plattformen und Regulierungsstrategien, *ZUM* 2017, Vol. 2, pp. 93-101, at 95 *et seq*.; BKartA, Arbeitspapier, ref. B6-113/15, p. 92 *et seq*. with further notes; for a different opinion: Louven, *supra* note 8, p. 220.

15 Guggenberger, *supra* note 13, p. 285; BKartA, Arbeitspapier, ref. B6-113/15, p. 113 *et seq*.; Eur. Comm., Commission Staff Working Document, Impact Assessment Report accompanying the document Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363 final, Part 1/2, 15 December 2020, p. 21.

16 Cf. Bongard, *supra* note 11, para. 73; Knieps, *supra* note 11, p. 163.

17 Cf. Furman Report, *supra* note 5, p. 42 *et seqq*.

18 Tamke, *supra* note 14, p. 506; Drexl, Designing Competitive Markets for Industrial Data, *supra* note 14, p. 262; Drexl, Data access as a means to promote consumer interests and public welfare, *supra* note 14, p. 17; Colangelo and Maggiolino, *supra* note 14, p. 252 *et seqq*.; Körber, *supra* note 14, p. 95 *et seq*.

19 ACCC, *supra* note 5, p. 61; Eur. Comm., decision C(2017) 4444 final of 27 June 2017, *Google Search (Shopping)*, case AT.39740, para. 8 et *seqq*., fn. 157 *et seqq*.

20 BKartA, Arbeitspapier, ref. B6-113/15, p. 92 *et seq*. with further notes; for a different opinion: Louven, *supra* note 8, p. 220; Bourreau et al., *supra* note 13, p. 35; A. Ezrachi and M. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, Cambridge, 2016, p. 18.

21 R. Podszun, P. Bongartz and S. Langenstein The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers, *EuCML* 2021, Vol. 2, pp. 60-67, at 60; P. Belleflamme and M. Peitz, Inside the Engine Room of Digital Platforms: Reviews, Ratings and Recommendations, *AMSE WP* No. 06, 2018, pp. 1-33; M. Katz and J. Sallet, Multisided Platforms and Antitrust Enforcement, *Yale L.J.*, Vol. 127, Issue 7, 2018, pp. 1742–2203, at 2143; Stigler Report, *supra* note 5, p. 6.

22 BKartA, Resolution of 6 February 2019, ref. B6-22/16, para. 460 *et seqq*.

23 Cf. Bongard, *supra* note 11, para. 73; Knieps, *supra* note 11, p. 163; Von Zedtwitz, *supra* note 10, p. 366 with further notes.

24 Cf. § 3 Nr. 27 of the German Telecommunications Act (Telekommunikationsgesetz, "TKG") (the Swiss Telecommunications Act [Fernmeldegesetz, "FMG"] does not define the term "network").

25 Belleflamme and Peitz, *supra* note 21, p. 1; Katz and Sallet, *supra* note 21, p. 2143; Podszun et al., *supra* note 21, p. 60.

26 ISO/IEC 2382:2015, https://www.iso.org/obp/ui/#iso:std:iso-iec:2382:ed-1:v1:en (last visited 13 January 2023); cf. M. Eckert, Digitale Daten als Wirtschaftsgut, *SJZ* 2016, Vol. 10, pp. 245-249, at 247.

27 Cf. T. Körber, in *Wettbewerbsrecht*, U. Immenga and E. Mestmäcker (eds.), Vol. 3, 5th ed., Section VIII, Telecommunication, C. H. Beck, Munich, 2016, para. 4; BKartA, Arbeitspapier, ref. B6-113/15, p. 113 *et seq*.; F. Ducci, *Natural Monopolies in Digital Platform Markets*, Cambridge University Press, 2022, p. 4 *et seq*.; OECD, Competition Economics of Digital Ecosystems – Note by Georgios Petropoulos, DAF/COMP/WD(2020)91, 3 November 2020, p. 5.

28 Cf. Körber, *supra* note 17, para. 4; Von Zedtwitz, *supra* note 10, p. 366; *see* for example BKartA, Resolution of 6 February 2019, ref. B6-22/16, para. 460 *et seqq*.; Commission Staff Working Document, *supra* note 15, p. 10; cf. J. Haucap, Plattformökonomie: Neue Wettbewerbsregeln – Renaissance der Missbrauchsaufsicht, *Wirtschaftdienst* 13/2020, pp. 20-29, at 23 and 25.

29 On the market under scrutiny: BNetzA, Festlegung Markt No. 3a 2014, p. 156 *et seqq*.

30 Monopolkommission, *supra* note 13, p. 35; Schweitzer et al., *supra* note 5, p. 12 *et seq*.

31 Schweitzer et al., *supra* note 5, p. 12 *et seq*.

III. Insufficiencies of the classical *ex post* abuse control under competition law in the digital economy

10. Separate *ex ante* regulation does not become necessary unless the above-mentioned competitive economic specificities of the digital economy cannot be dealt with through classical *ex post* abuse control under competition law, such as the prohibition of abuse of a dominant position (TFEU 102, GWB 19 or KG 7). Competition must be protected in general in digital markets and revived, in particular, in the tipped markets where GAMAM are active. Although the insufficiencies of abuse control under current competition law may be related to the methods for defining the relevant market and for establishing market power, to the *ex post* concept, as well as to the existing insufficient enforcement tools, the following discussion will be limited to analysing the insufficiencies of the latter two categories (*ex post* concept and existing enforcement tools).

11. First of all, it should be noted that the German and Swiss legislators disagree on the subject of the insufficiency of the *ex post* concept of abuse control under competition law:

On the one hand, in the opinion of the German legislator, the *ex post* abuse control under competition law is unsuitable to mitigate the above-mentioned barriers to market entry only in certain cases. They argue that the existing abuse control has generally proved to be "*efficient, powerful and flexible*" in covering (normal) situations in digital markets, especially for digital platforms,[32] but that *ex post* abuse control is insufficient to cover gatekeeper digital platforms (such as Google or Meta).[33] Accordingly, by enacting GWB § 19a, the German legislator recognized that competition can be insufficiently protected in the case of digital platforms with "*paramount competitive significance across markets*" (so far Google and Facebook [Meta] and since early 2023 Apple, too).

On the other hand, although the Swiss legislator recognizes the challenges of digital markets, they have denied the need for legislative amendments in abuse control under competition law to date; one reason for this may be that they are confident that European competition policy will have a "spillover effect" on Switzerland.[34, 35]

12. The enforcement instruments of the existing competition law, which is characterized by the *ex post* concept, can generally be assumed to be suitable in the digital economy. The main arguments in favour of introducing an *ex ante* instrument and against the *ex post* concept alone being sufficient to meet the challenges of the digital economy are the fact that the *ex post* instruments lead to delays and the lack of detailed, universally applicable behavioural obligations that could have a prospective effect.[36]

As argued by the German legislator, the susceptibility to delays of the classical *ex post* abuse control is incompatible with the dynamic of digital markets and the strong, fast-acting tendencies towards concentration.[37] An intervention that is delayed until an abusive conduct under competition law is established may be too late to stop the self-reinforcing network effects and economies of scale, which are already set into motion even before the thresholds of the intervention of the competition authority are reached.[38] In the worst-case scenario, by the time of completion of the proceedings filed, a market may already have irreversibly tipped in favour of a certain platform to the detriment of competition[39] or a pre-existing market power may have been extended to further markets or sectors not yet under its control at the beginning of the proceedings, or the anticompetitive influence on third-party business activities may have been intensified.[40]

Behavioural remedies that are generally applicable and have a prospective effect may make it possible to prevent anticompetitive hindrance of multi-homing, for example, or an anticompetitive restriction on interoperability, thereby ensuring that markets can be kept open from the outset.[41]

13. The impact of competition law in the dynamic digital economy stands and falls with the applicability and effectivity of procedural enforcement tools to accelerate proceedings. These are effectively challenged by the strong and fast-acting concentration tendencies as well as the leverage of market power from one dominated market into further, not yet dominated (digital) markets. In this context, overly long proceedings, as in the European case *Google Search (Shopping)*, or a reluctant use of existing procedural tools (such as interim remedies and the immediate enforcement of orders) do not seem appropriate in

32 German Fed. Govt, Draft of the 10th GWB Amendment of 19 October 2020, Bundestag Publication 19/23492, p. 73.

33 Ibid.

34 Heinemann and Meier, Der Digital Markets Act (DMA): Neues „Plattformrecht" für mehr Wettbewerb in der digitalen Wirtschaft, *EuZ* 3/2021, pp. 86-101, at 101; for example, Google declared its willingness to correct the practices sanctioned by the European Commission in the *Google Search (Shopping)* case in Switzerland as well, and to extend the commitments made to the French Competition Authority in the *Google Ad Servers* case to Switzerland, too.

35 Swiss Federal Council, Bericht Digitale Wirtschaft, 2017, p. 175.

36 Cf. German Fed. Govt, Draft of the 10th GWB Amendment of 19 October 2020, Bundestag Publication 19/23492, p. 73 *et seq.*, 75 *et seqq.*, 83 *et seq.*

37 Cf. ibid., p. 73 *et seq.*

38 Cf. Schweitzer et al., *supra* note 5, at 61 *et seq.*

39 Cf. German Fed. Govt, Draft of the 10th GWB Amendment of 19 October 2020, Bundestag Publication 19/23492, p. 73 *et seq.*; Eur. Comm., Commission Staff Working Document, Impact Assessment Report, Annexes accompanying the document Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363 final, Part 2/2, 15 December 2020, p. 36. For example, it took seven years to complete the case AT.39740 – *Google Search (Shopping)* before the European Commission.

40 Cf. German Fed. Govt, Draft of the 10th GWB Amendment of 19 October 2020, Bundestag Publication 19/23492, p. 73 *et seq.*

41 Cf. J. Haucap, *supra* note 28.

any case.[42] Germany has already reacted to these problems by reducing the requirements for ordering interim remedies and by shortening the stages of appeal in the case of GWB § 19a in the framework of the 10th GWB Amendment. It remains to be seen whether Switzerland's reluctance to act in this area is the right course of action for the future.

IV. Regulation of the telecommunications sector

14. The regulation of the telecommunications sector in Germany by the German Telecommunications Act (Telekommunikationsgesetz, hereinafter "TKG")[43] and in Switzerland by the Swiss Telecommunications Act (Fernmeldegesetz, hereinafter "FMG")[44] and its ordinances has similarities and differences in its basic concept.

15. Similarities are shown with respect to the addressees of market regulation and the implemented regulatory instruments. Both regulatory regimes generally only address companies whose dominant position on a predefined relevant market has previously been assessed.[45] With the expected decline in market concentrations, the long-term goal was theoretically a transition back to general competition law (so-called phasing-out). Both regulatory regimes also provide for access and price regulation as well as a separate regulatory authority, which is responsible for enforcing sector regulation in varying forms of cooperation with the relevant competition authority.[46]

16. Differences appear regarding the scope of application and time of intervention. Under the TKG, the scope of application of market regulation is designed to be technology-neutral with respect to the local loop—neither prescribing certain technologies nor favouring their use. Under the scope of the FMG, however, only unbundling of the copper-wire pair (i.e. only one technology) is covered. The FMG's scope does not cover any other transmission technologies, such as optical fibre.[47] The related anticompetitive behaviours fall exclusively under the Swiss KG.[48] Regarding the time of intervention, the German regulatory agency (Bundesnetzagentur or "BNetzA") can largely decide *ex officio* on relevant competitive parameters for market regulation (e.g. quality and price) even before abusive competition restraints (*ex ante* regulation) have been found after a detailed market definition and analysis. In contrast, the Swiss regulator—especially the Swiss Federal Communications Committee (Eidgenössische Kommunikationskommission or "ComCom")—only initiates proceedings upon request, after negotiations for access to the network have failed. Accordingly, market regulation under the FMG takes place *ex post*. Complex preliminary investigations of the need for regulation are foreign to the FMG. If the Swiss WEKO finds that the applicant's opponent holds a dominant position in the relevant market, then ComCom almost automatically orders appropriate conditions of access.

V. Effects of regulation of the telecommunications sector

17. Based on the identical regulatory goals of the TKG and FMG, the respective degrees of success of regulation can be examined in a prototypical telecommunications market.[49] All things considered, Valis concludes that the technology-neutral *ex ante* regulation under the TKG is less successful at achieving the regulatory goals of ensuring fair competition across market levels[50] and at promoting infrastructure investments and supporting innovation[51] than the technology-specific *ex post* regulation under the FMG.[52] In contrast, both regulatory regimes can be assumed to have a comparably high degree of success in achieving the public service-related regulatory goals of nationwide network expansion[53] and the affordability of prices as compared to the quality provided.[54]

18. Valis' study reached three main conclusions:[55]

– Firstly, the static market shares of the incumbents in the wholesale market investigated in Germany and Switzerland suggest that regulation, regardless of its design and of whether it is *ex ante* or *ex post*, protects the incumbent's position of power in the wholesale market. Regarding access regulation in particular, it

42 Cf. J. Bernhard, Einstweilige Maßnahmen, GWB § 32a, in *Die 10. GWB-Novelle*, F. Bien, T. Käseberg, G. Klumpe, T. Körber and K. Ost (eds.), C. H. Beck, Munich, 2021, p. 158 *et seqq.*; German Fed. Govt, Draft of the 10th GWB Amendment of 19 October 2020, Bundestag Publication 19/23492, p. 84.

43 Telekommunikationsgesetz of 23 June 2021 (*Fed. Gaz.* I, p. 1858).

44 Fernmeldegesetz (FMG) of 30 April 1997 (SR 784.10).

45 Cf. § 13 TKG and FMG Art. 11.

46 Cf. TKG §§ 21–23, 26, 37–48, 190, 196; FMG Art. 11, 11a, 58, 60.

47 Cf. FMG Art. 11(1)(a).

48 Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG) of 6 October 1995 (SR 251).

49 One such analysis was carried out in Valis, *supra* note 6, para. 273 *et seqq.* on the wholesale market from 2004 to 2020 for locally provided access to the local loop at fixed locations—i.e. to the market for local access to the last mile or to the local loop—drawing on market data published by government agencies.

50 Ibid., para. 327 *et seqq.* and para. 340 with further notes.

51 Ibid., paras. 330 and 340.

52 Ibid., para. 388 *et seqq.*

53 Ibid., para. 331 *et seqq.* and para. 341.

54 Ibid.

55 Ibid., para. 416 *et seqq.* including notes.

seems obvious that it does not provide incentives for investment in alternative infrastructure as originally intended by the legislator[56] but rather encourages the exclusive use of wholesale products without investment risk and thus tends to eliminate competitive pressure in the wholesale market.[57]

– Secondly, the fact that optical fibre is clearly less developed in Germany than it is in Switzerland suggests that technology-neutral *ex ante* regulation tends to inhibit innovation (dynamic efficiency) in (wholesale) markets that are already regulated or that are still open to regulation. The reason for this could be that following technology-neutral *ex ante* regulation, it is always possible for the regulatory authority to impose regulations on new technologies such as optical fibre, which constantly raises doubts about the profitability of potential or existing investments.

– Thirdly, the analysis clearly reveals the constant conflict of objectives between competition and the provision of public services.[58] The observed degree of success in achieving the competition-related regulatory goals appears less than the success in achieving the public-service-related regulatory goals. Despite the near absence of competition in the wholesale market in both countries, rising consumer welfare is observable, such as falling prices for higher transmission speeds and a higher degree of coverage. Thus, the regulation of the markets studied does not appear to lead to self-driven competition in the wholesale market, as intended, which would make further regulation unnecessary, but rather to replace such competition. That could only change through disruptive technological progress, which could stimulate infrastructure competition in the market under study.[59]

VI. Conclusion: *Ex ante* regulation of the digital economy in Switzerland?

19. *Ex ante* behavioural obligations for gatekeepers and/or companies with significant impact on the internal market, as they are stipulated today on the European level in Articles 5 and 6 of the Digital Markets Act and on the German national level in GWB § 19a or are being discussed in Switzerland (e.g. access rights to data, prohibitions of discrimination or of self-preferment in designing contractual conditions for access to upstream or downstream markets, prohibitions of tying and bundling to prevent leveraging of market power, transparency obligations to prevent information asymmetries and obligations to guarantee interoperability), are quite similar to the *ex ante* behavioural obligations of telecommunications network owners under the TKG. Thus, given the observed fundamental comparability of the two sectors, comparable regulatory consequences in the digital economy may be expected.

20. *Ex ante* access regulation in the digital economy could therefore lead to the continued invulnerability of already existing concentrations of power of one-sided or multi-sided digital platforms such as GAMAM, whose infrastructure is decisive for access to the other platform side. Gatekeeper platforms would face an additional investment risk and new entrants could enter the market without making any investments in innovations. This means that the desired infrastructural competition between platforms would not be promoted, but only competition among the services provided by the gatekeeper platforms.

21. No sector-specific *ex ante* regulation shall be favoured if the regulator's primary objective is to promote competition in the infrastructure markets of the digital gatekeepers or GAMAM and to ensure the continued existence of incentives for investment and innovation. Evidence from the regulation of the telecommunications sector shows that such incentives would be inhibited by *ex ante* regulation. If, in contrast, the primary goal of the regulator is to promote competition based solely on the infrastructure of digital gatekeepers and to ensure a static level of consumer welfare, sector-specific *ex ante* regulation may be desirable.

22. Regarding the consequences of regulation in the telecommunications sector, it would be generally advisable to supplement the classical *ex post* abuse control under competition law with the instruments of *ex ante* regulation, to the extent that it is actually established that *ex post* abuse control reacts too slowly to the challenges posed by the digital economy on a case-by-case basis. It is important to keep markets from "tipping" as a result of the extreme interaction of external effects and thereby prevent the formation of further anticompetitive concentrations of power, as in the case of GAMAM. ■

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56 On the so-called springboard argument, *see* A. Gabelmann and W. Gross, Telekommunikation: Wettbewerb in einem dynamischen Markt, in *Zwischen Regulierung und Wettbewerb*, G. Knieps and G. Brunekreeft (eds.), Springer-Verlag Berlin Heidelberg GmbH, Freiburg, 2003, p. 101 *et seq.*

57 Similarly T. Fetzer, *Staat und Wettbewerb in dynamischen Märkten*, Mohr Siebeck, Tübingen, 2013, p. 321 *et seq.*, 346 *et seqq.*

58 Cf. J. Haucap and M. Coenen, Regulierung und Deregulierung in Telekommunikationsmärkten: Theorie und Praxis, *DICE Ordnungspolitische Perspektiven*, No. 01, 2010, p. 13; *see also* Fetzer, *supra* note 57, p. 343.

59 The conclusions presented are based on a quantitative analysis; for the underlying data, *see* the annexe to the dissertation, https://suigeneris-verlag.ch/img/uploads/pdf/oa_pdf-041-1689945250.pdf.

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