Position Paper (Translation)

Shaping competition policy in the era of digitisation

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1. Introduction

On 17 January 2019 the European Commission is organising a conference on the theme of "Shaping competition policy in the era of digitisation" and has asked for positions in advance of this event. The Federation of German Industries (BDI) sets out its contribution to the discussion below. It should be pointed out first of all that this analysis merely constitutes a snapshot of companies' needs, since the possibilities and potential presented by connected production of individualised industrial products are still far from exhausted and/or companies may not, yet, all be aware of them. According to a recently published study by Deloitte "The Industry 4.0 paradox", companies are increasingly investing on a considerable scale in the digital transformation of their business models. Nevertheless, this is sometimes taking place on the basis of an approach focused primarily on maintaining the status quo of the business model (e.g. with investments in the existing IT infrastructure). Companies will only gradually succeed in realising new potential outside the business mainstream with targeted investments and hence in breaking into business fields which offer opportunities for additional growth and promise higher margins. In some cases, new business models may generate a new need for legislative adjustments which is not currently obvious. Since the discussion on digital issues is continuously moving forward both within industry and beyond at policy-making level, BDI retains the option of elaborating and commenting on the questions which arise at a later date, not least with a view to revision of the European Block Exemption Regulations.

Better regulation and a dismantling of administrative burdens are of decisive importance to strengthen companies' competitiveness. In the competition between national economies and thus between business locations, the ultimate aim must be to put in place optimal conditions for functioning digital ecosystems. This creates incentives for innovations and attracts skilled employees.

Conversely, it is important to refrain from introducing legislative provisions per se. A great deal would already be gained if company creation and business growth were not hindered by stricter rules. It could be counterproductive for the heralded emergence of strong European players in the platform economy if policy-makers at the same time want to tighten abuse control and create new regulation, e.g. in merger control. However, it would be an advantage from the standpoint of both companies and administration if abuse control procedures could be accelerated. This would not only provide more rapid legal certainty but also create a better picture of the dynamics prevailing in platform markets and market realities.

The development of concentrations and monopolistic structures by individual platforms should not be over-hastily regarded as a threat, since this is also a reflection of entrepreneurial success. It is often overlooked that several highly promising industrial platforms, especially in the business-to-business sphere, are currently developing very well. Any regulation which has not been fully thought through therefore runs the risk of stifling these highly promising platforms or placing a brake on their growth.

It is often suggested in the discussion that "the" digital domain actually exists as a "sector" alongside other branches of business which are already known. Yet every business sector and very particularly SMEs face the challenge of applying connected, digital technologies, be it in production, in distribution or in development. It should therefore be the goal of a smart competition and industrial policy to encourage all sectors and SMEs to exploit the opportunities of digitisation. This applies in particular for the opportunities of Industry 4.0. The goal here must be smart connectivity. Digitisation offers the opportunity for SMEs also to be able to participate more easily in national and global markets alike. In this regard, standards – e.g. for "one" barrier-free machine language for all players in a sector – are essential for successful, sector-wide digitisation.

Nevertheless, a weakness of current competition law is the absence of clarity at numerous points (e.g. in relation to exchange of information or horizontal cooperation arrangements) which leads to a corresponding degree of legal uncertainty. In our view, this calls for adjustments. By contrast, there is no need for substantive legislative amendments in the area of abuse control, which would be likely to hamper the international competitiveness of European digital companies.

2. Take greater account of companies' cooperation needs in European competition law

In the age of Industry 4.0, European antitrust law must open the way for cooperation agreements between competitors more strongly than in the past. Because such cooperation arrangements between companies, both in the same sector and across sectors, can in turn be an element in enabling the development of a counterweight in the digital sphere to the non-European digital champions. The current architecture of competition law whereby companies themselves evaluate, in a self-assessment, the compatibility of a cooperation arrangement or similar horizontal contacts with competitors with antitrust law suffers from the deficit of adequate legal certainty. This has the following causes:

1. the broad reach of the ban under article 101.1 TFEU – as currently interpreted by antitrust authorities (key word: exchange of information),
2. imprecision in the criteria for the derogation provision under article 101.3 TFEU,
3. the narrow scope of existing block exemption regulations for certain horizontal cooperation arrangements which tends to be based on low market share thresholds.

The Commission should first look into the question of whether the present foundation of competition theory is still up-to-date for creating legislative framework conditions under which industry can carry out the digital transformation. If Industry 4.0 is understood to be the aggregation of industrial networks or platforms for the production of individualised products in real time

through the deployment of digital information and communication technology in "smart factories", integrated value chains across market stages are needed so that any product of an original equipment manufacturer (OEM) belonging to the production platform can be produced in line with customers' wishes. But a precondition for connected production is a high degree of transparency as well as an exchange of data and information between the companies belonging to the platform. As an ultimate consequence, this concept of Industry 4.0 could lead to the elimination of existing boundaries between companies insofar as they result in inefficiencies in the value chain. Yet this would largely rule out competition between participants in a platform, whereas a focus would be on competition between rival platforms. Such a competition model would have to give much greater precedence than hitherto to cooperation between companies and in particular between companies in the same stage of the value chain.

Weaknesses of the current system

In light of companies' cooperation needs, current European competition law has the following weaknesses:

- First, a self-assessment on the question of whether a particular form of cooperation between competitors is admissible is associated with a high degree of legal uncertainty. This is already the case for cooperation arrangements outside Industry 4.0 but applies with full force for new digital situations (e.g. with a view to cooperation arrangements for the generation and shared use of data) for which there is as yet none or only little case law.
- Second, a mistaken finding in the self-assessment (cooperation is deemed to be admissible, while competition authorities and/or courts rule the reverse) runs very high risks which are today clearly higher than when the principle of legal exception was introduced in 2004 (fines measured in millions or even billions, demands for damages which can also run into the billions, serious reputational damage).

All in all, this means that the leeway which antitrust law should provide for a cooperation arrangement in theory cannot be used in practice for reasons of business and legal due diligence. As a result, the current legal uncertainty about the admissible framework for cooperation between competitors constitutes a central obstacle to the digital transformation in the framework of Industry 4.0 application scenarios.

Below is an example of a configuration where a self-assessment is difficult:

Two competing companies in the field of mechanical and plant engineering (company A and company B) would like to cooperate in the area of collection and analysis of remote maintenance data in order to improve service in this area. As part of their cooperation, both competitors would have mutual access to the many technical data generated via the relevant installations in

the framework of remote maintenance work. The competitors can also identify the competitor's customers with which the installations have been placed. Commercial data (prices, conditions, etc.) are not shared. Is such a cooperation arrangement exempt from the antitrust ban? This question cannot be answered with legal certainty with a lawyer's classical evaluation instruments. Thus, the cooperation would be exempt in accordance with article 101.3 TFEU if it

1. contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit,
2. without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or
3. affording the possibility of eliminating competition in respect of a substantial part of the products in question.

Even a lawyer conversant with antitrust law cannot say with certainty whether or not the conditions for the configuration set out above are met. Much speaks in its favour but residual doubts remain, for instance with regard to the fact that each of the cooperating partners can identify the location of the other cooperating partner's installations. Authorities can deal well with such unclear situations, because courts examining the authority's decision assess only whether authorities have acted within the leeway granted to them or exceeded it. In other words, courts grant authorities discretion and leeway. However, companies are not currently granted such discretion and leeway in the framework of the self-assessment. Companies face the risk that their assessment may diverge from the competition authority's assessment.

Risks for companies

If the risk of such an incorrect assessment were limited, companies could under some circumstances live with the current degree of legal uncertainty with regard to a cooperation arrangement/exchange of information. Yet the risks of an incorrect assessment are not limited but massive. There is a threat of large fines, claims for damages, exclusion from public procurement tenders and reputational losses as well as a major internal effort by companies to conduct the related court proceedings. The deterrent effect, that large fines are intended to have, results in companies backing away from planned cooperation or allowing them to go ahead only with a process that has little to do with self-assessment (coordination with all relevant antitrust authorities at European and national level with the involvement of external advisers) and for which it is difficult to predict the timescale. According to our surveys of industry, backing away from wanted and planned cooperation arrangements without involvement of antitrust authorities seems to us to be one of the most serious problems in the business landscape. These cases of "self-censorship" are also difficult to illustrate, since companies (and sectors) do not want to be identified. Another situation concerns accomplished cooperation cases which fall short of their (legally admissible) innovation potential – due to caution with regard to antitrust law. These include cases involving cautious internal

advice (self-censorship) as well as cases which have been examined jointly with antitrust authorities in advance.

The problem that article 101.3 TFEU cannot be assessed with legal certainty and that case law for new digital questions is also available only to a very limited extent has become increasingly relevant over the last fifteen years since introduction of the principle of legal exception. Because antitrust authorities today regard many more situations as being covered by the stipulations of article 101.1 TFEU than was the case prior to introduction of the principle of legal exception. If any exchange of information between competitors, e.g. also on purely technical information, has the potential to fall within the scope of article 101.1 TFEU, it is all the more important to be able to prove the derogation provision of article 101.3 TFEU with legal certainty. However, as highlighted above, this poses considerable problems in the framework of a self-assessment. This widening of the substantive reach of article 101.1 TFEU also explains why the discussion on the deficits of the current system is being conducted with this intensity today and was not triggered immediately when regulation 1/2003 was introduced.

Standardisation efforts

Alongside cooperation arrangements, these considerations also apply for standardisation efforts between companies. Inasmuch, it should nevertheless be clarified first of all that there is little legal uncertainty surrounding a standardisation exercise initiated and organised by national and international standardisation bodies such as DIN, ISO or CEN, or large business associations. The European Commission's horizontal guidelines offer good orientation here. However, legal uncertainty persists with regard to standardisation efforts or related issues outside the procedures of standardisation bodies.

To take a recent example, BDI refers here to the European Commission's press release of 18 September 2018 (IP/18/5822) on an investigation into possible collusion in the automotive sector on clean emission technology. *Inter alia*, this press release states:

The Commission's formal investigation concerns solely the emissions control systems identified above. These were only some of the issues discussed by the "circle of five". Numerous other technical topics were discussed, including common quality requirements for car parts, common quality testing procedures or exchanges concerning their own car models that were already on the market. The "circle of five" also had discussions on the maximum speed at which the roofs of convertible cars can open or close, and at which the cruise control will work. Cooperation also extended to the area of crash tests and crash test dummies where the car companies pooled technical expertise and development efforts to improve testing procedures for car safety.

At this stage the Commission does not have sufficient indications that these discussions between the "circle of five" constituted anti-competitive conduct

that would merit further investigation. EU antitrust rules leave room for technical cooperation aimed at improving product quality. The Commission's in-depth investigation in this case concerns specific cooperation that is suspected to have aimed at limiting the technical development or preventing the roll-out of technical devices.

Even following this press release, it remains unclear under what specific circumstances technical cooperation and/or a simple exchange of information on technical/quality objectives is admissible. The press release examines numerous forms of exchange of information without at the same time saying that such an exchange of information is non-critical per se. Instead, the formulation on this point is fairly vague: *"At this stage the Commission* ***does not have sufficient indications*** *that these discussions between the "circle of five" constituted anti-competitive conduct."* Clear criteria for distinguishing an admissible from an illegal exchange of information are still missing. Thus, if companies agree on common quality requirements for components, they could at the same time face the objection that quality competition is restricted above the agreed requirement threshold. On this basis, an antitrust accusation could be made, if companies - in the framework of a legislative procedure on stricter emission standards - reach agreement (possibly also in the context of trade association meetings) to speak out jointly against such a law on the introduction of new standards which would require new emission reduction systems. The statements in the European Commission press release quoted above provide no clear answers on this point, rather they tend towards even greater legal uncertainty.

For the reasons set out above, horizontal and vertical cooperation arrangements and standardisation efforts should be promoted and even prioritised. It appears particularly important to prioritise cooperation arrangements between companies of the "analogue world" which want to conquer digital terrain together in order to qualify for scenarios based on Industry 4.0. Conversely, a focus only on "digital businesses" would create barriers for SMEs rather than open up opportunities for them.

Proposed solutions

Regarding possible measures which could be deployed to counter these structural weaknesses, we would like to share the following considerations:

- The current conditions for exemptions under the block exemption regulations (BER) are very strongly oriented on the combined market share of the companies seeking to cooperate. The block exemption conditions are no longer applicable as soon as the combined market shares of the companies seeking to cooperate exceed the threshold value of 20% (Specialisation BER) or 25% (R&D BER). The existing BER apply only if the joint market share of the participating companies is low.

To this is added that the market share relates not to the business in question, i.e. the market share covered by the cooperation itself, but to the joint market share of the cooperating partners. Similarly restrictive are market shares with respect to a possible derogation for vertical cooperation arrangements (Vertical BER: 30%) or for technology transfer (Technology Transfer BER: 30%).

Moreover, the admissibility of a cooperation arrangement always requires a series of further strict conditions which a company with a dominant market position does not have to meet, even with market shares of more than 70%. This is because the competition behaviour of a dominant company is not automatically deemed to restrict competition, unlike cooperation between companies.

The market share criterion has certainly not become obsolete, even in the area of Industry 4.0. But neither can it continue to be the decisive criterion for a block exemption. Cooperation arrangements (e.g. in the field of data) between large companies and SMEs would then be debarred from enjoying the advantages of the block exemption from the outset, even though there is a specific need for this. The few existing block exemption regulations are therefore not suitable for forms of cooperation which could challenge dominant technology companies.

A clear development can be seen in merger control, following the introduction of the SIEC test, which no longer focuses on market shares alone. For instance, the Bundeskartellamt allowed the merger between the real estate portals Immowelt and Immonet despite high combined market shares of more than 70%. Neither are the criteria for initiating an investigation in merger control oriented on market shares. Accordingly, the current architecture of the block exemption regulations, dating back to the time before the introduction of the SIEC test, should be adapted to the architecture of modern antitrust law. Instead of market shares, new or at least supplementary criteria should be found which are simultaneously as clear and unambiguous as market shares. Here, thought could be given to drawing inspiration from criteria such as those used by the European Commission to distinguish SMEs from larger companies (cf. Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC). Instead of company-related criteria such as market shares, one could also think about “black clauses” and “grey clauses” or other criteria related to the form of cooperation (e.g. volumes of services covered by the cooperation arrangement).

- Furthermore, there will be configurations which do not fall within the scope of a block exemption regulation. Further instruments which offer companies greater legal certainty than hitherto are needed for these configurations.

  The European Commission’s guidelines on horizontal cooperation agreements (and similar guidelines issued by national authorities) should be

reviewed and extended. Nevertheless, this alone will not be sufficient to secure legal certainty. Such guidelines may lead to provisions which bind competition authorities, and hence may in the past have provided adequate legal certainty when antitrust law was enforced primarily by competition authorities. However, this legal certainty of earlier times is no longer a given since the development of private enforcement initiated and strongly promoted by the European Commission. Because courts are not bound by the Commission's or other competition authorities' guidelines. Accordingly, guidelines are of only limited assistance in a court action for damages. The development of private enforcement which has characterised antitrust law in recent years calls for a parallel development of new safe harbour provisions which have a binding effect in court cases. There is currently a gap in the system and hence a need to close it.

The possible objection that an action for damages was in the past usually preceded by an authority-led procedure may hold true for cases of secret price, customer or quota agreements. However, it does not apply for the antitrust risks to which cooperating companies are exposed. Cooperation arrangements between companies can be distinguished precisely because they are communicated transparently and are not kept secret. Here, unlike with a secret price cartel, there is no need for investigative work by an authority in order to ascertain the situation. Thus, even without a decision by an authority, cooperation arrangements between companies run the risk that they will be declared contrary to antitrust law by potential damages claimants and become the object of a damages action. The cooperation partners then bear the burden of demonstrating in court that their cooperation meets the conditions of article 101.3 TFEU. Conversely, potential damages claimants can invoke article 17 of the antitrust damages directive 2014/104/EU or its national transposition whereby there is a rebuttable presumption that a cartel infringement (i.e. also a cooperation arrangement between competitors which is disallowed under article 101.3) has caused harm. From the angle of civil actions, competitors which cooperate, e.g. in the area of data, are on the defensive.

The possibility which exists in some Member States and which is broadly welcome, whereby a company can request an informal evaluation of an envisaged cooperation arrangement from competition authorities, e.g. from the Bundeskartellamt in Germany, cannot currently close this gap to a sufficient extent. Here, too, courts are not bound by a legal opinion voiced in the framework of such a consultation, even if it has also been published as a case report. The same applies for the European level. Rulings in a court action in accordance with article 16 of regulation 1/2003 are binding on courts, but the European Commission has hitherto hardly used this instrument to create legal certainty. It is likely to be applied only for very few large cooperation arrangements also in the future.

- Therefore, alongside the existing block exemption regulations, new instruments are needed which offer legal certainty to companies which want to cooperate (but do not want to set up a joint undertaking) and protect

them from the risk of fines and, more particularly, damages actions. At the same time, these must be instruments which do not make too heavy a claim on authorities' human resources capacities.

Thought could be given here to the possibility for companies to voluntarily notify agreed forms of cooperation in the area of Industry 4.0 vis-à-vis the competent competition authority, for instance in the framework of "opposition proceedings", with the consequence that fines and antitrust damages actions cannot be enforced as long as the competent authority does not express opposition. A comparable instrument can be found, for instance, in Swiss antitrust law (article 49a.3.a antitrust law). If deemed appropriate, this procedure could be restricted to cooperation cases.

To avoid misunderstandings, it should be underlined at this point that this is in no way intended as a return to the old system prior to introduction of the legal exception and self-assessment. However, the legal exception system should be complemented by a system which creates legal certainty in the area of Industry 4.0 and offers a safe haven providing protection against incalculable fine and damages risks.

- Also worth considering is whether, for certain cooperation arrangements, for example in the pre-competitive sphere and/or in the case of core and key technologies, special privileges could be created, perhaps in the form of a legal experimental space in which companies can first try out new forms of cooperation without at the same time being confronted with an official investigation procedure.

- Additionally, a new provision in Regulation 1/2003/EC would be very welcome, according to which the Commission can also take a decision - outside the context of commitments -, which states that there is "no reason to take action". In the context of commitments, this is already laid down in Regulation 1/2003/EC (recital 13; Article 9.1), but otherwise, it is only foreseen for Member States (Article 5, implemented in Germany in § 32c GWB). Article 10 is too restrictive. The decision not to take action can provide companies with legal certainty for cooperation. If necessary, the competition authorities should also defend such a decision in court if third parties attack the cooperation with a claim for damages.

- In our view, many right answers and recommendations are already contained in the Industry 4.0 publication "*Kartellrechtliche Betrachtungen*" (only available in German).[1] Chapter 4 ("*Zulässige Kooperationen von Wettbewerbern im Bereich Industrie 4.0*") comes to the conclusion that a new block exemption regulation for horizontal cooperation should be created in order to offer cooperating companies the corresponding legal certainty and broaden their cooperation spectrum. This proposal at least

[1] BMWi, Plattform Industrie 4.0., „Industrie 4.0 – Kartellrechtliche Betrachtungen": https://www.plattform-i40.de/I40/Redaktion/DE/Downloads/Publikation/hm-2018-kartellrecht-ag4.pdf?__blob=publicationFile&v=3

points in the right direction, since it has the potential to create legal certainty and, where necessary, greater freedom of action for companies. The examination relates to the areas of standardisation, cooperation in production, supply agreements, cooperation in distribution, cooperation arrangements via joint undertakings, cooperation in purchasing, research and development cooperation and vertical cooperation. We see a need for cooperation arrangements of all kinds. Inasmuch, we refer to the recommendations under number 4 C (page 39 of the Industry 4.0 publication).

3. No need to amend antitrust law for access to data

We do not currently see any need to amend antitrust law for access to data. In the first place, the principle of contractual autonomy is fundamental here to ensure access rights, therefore the question of data access should be the outcome of market-based negotiations. In the event of abusive case configurations, application of the general principles of articles 101 and 102 TFEU can be considered. Antitrust law is regarded as an adequate instrument for restoring competition. In our view, data access should not be governed via *ex ante* regulation, since we cannot fundamentally recognise any structural and long-term market foreclosure which could be addressed adequately through mandatory *ex ante* data access obligations. Furthermore, we point out that a certain rigidity is inherent in *ex ante* regulation which could stifle growth and innovation incentives, in particular against the background of the dynamics and improved scaling possibilities of digital platform markets. This applies to a special extent for the IoT area, since this is still characterised by young, developing markets and platforms and hence (at least currently) does not deliver reliable empirical values and market evidence which would allow robust conclusions to be drawn about structural market foreclosure situations.

Insofar as the right to data access should be regulated by law, for which there seems to be no compelling reason, what would be needed is general civil law rules (data ownership rules). What is involved here is fundamentally a civil law issue (similar to access rights/ownership in the framework of property law, IP law, etc.). Nevertheless, for this it would first be necessary to establish the existence of a structural, non-temporary market foreclosure which could not be remedied in a different way.

4. Promotion of innovation and investments in key technologies and “artificial intelligence”

Investments and innovations in key technologies and infrastructures are indispensable for the development of national business locations and the European single market. The following industrial fields play a particular role in this regard: new digital (ICT) cross-cutting technologies with broad deployment possibilities (*inter alia* AI, 4.0 process automation, cloud and quantum computing), life sciences and classical manufacturing industry, in particular

road vehicle, aircraft and rail vehicle construction, mechanical engineering, areas of electrotechnology.

There is currently still no coherent strategy for how industrial key technologies can be promoted with considerable financing from the EU budget, EIB programmes, EFSI or other resources. The implementation of important projects of common European interest (IPCEIs) is still at a very early stage, since a number of interested Member States have not secured their national financing and approval by the European Commission under competition law rules is taking place only slowly.

At the national level, Member States can and must first make digital infrastructure available. For instance, for many sectors a clear improvement of a Gigabit network with maximum coverage is the central precondition for being able to apply new technologies at all. Inasmuch, the current debate surrounding 5G and the requisite fixed lines are a precondition for many other questions. Research, competition and industrial policy must interact here in order to increase companies' willingness to invest in innovative business models.

In addition, priority for financial backing should be given to application-oriented research and the transfer of research results into implementation. For this, application-oriented research cooperation projects between companies but also between companies and state institutions (e.g. universities) should be further improved. Where appropriate, thought could be given to the establishment of legally privileged experimentation spaces.

Given the numerous application fields of AI and the vagueness of this concept, it is difficult to give comprehensive responses to the issue of possible new special liability rules. In any event, such rules must not distort competition or place European companies at a disadvantage in competition with international competitors.

Here too, the creation of additional liability rules needs to be justified and the need for them needs to be demonstrated in each individual case. The current liability rules can broadly be applied also to digitalised products. However, self-learning systems could in future pose new challenges for liability law. Following analysis of the legal situation, any regulatory gaps must be identified. Only then should there be a discussion as to whether and, if so, how self-learning systems could lead to a re-assessment or further development of liability rules. In this regard, a clear distinction must be made between pure software application ("non-embedded") and AI in hardware (e.g. robots, "embedded"). The various categories exhibit completely different potential for dangers. Policy-makers should therefore refrain from a general extension of product liability rules. In its evaluation of the EU product liability directive 85/374/EEC, the European Commission also came to the conclusion that a fundamental adjustment of the existing liability system is not necessary. At most it would make sense to issue supplementary guidance on application of the directive to new digital technologies (COM(2018) 246 final).

5. Competition law in conjunction with use of algorithms

BDI is in favour of taking a closer look at markets with algorithm-based price formation. However, more far-reaching legislative measures should be considered only if concrete indications of collusive market outcomes to a considerable degree are found when market development is examined and if the enforcement of competition law were to prove insufficient as a result. However, this has so far not been the case. BDI warns against over-hasty intervention in market development, since this could have a negative effect on innovation potential regarding the further development of digital price-finding tools.

Antitrust authorities' fear that two or more competitors would use the same or comparable price algorithms and completely substitute human control and price setting with computer programs belong to a distant future. Even if these categories of cases were to arise in practice, the activities of computer programs could be attributed under recognised principles for liability in antitrust law to companies which use such programs without the need for further action. As things currently stand, antitrust authorities' concerns should not be the trigger for restricting future-oriented technology which is still in development through over-hasty regulatory intervention.

Policy-makers should also refrain from a general and universal disclosure obligation for algorithms or AI models, since this would mean a deep intrusion into business secrets which could disable entire business models.

It would certainly be helpful if antitrust authorities could first build up specialist knowledge about the functioning of price algorithms, in part by strengthening their expertise and in part on the basis of experience from sector enquiries they have carried out. Their experiences could be set out in the form of case reports and, where appropriate, guidelines for the use of price algorithms in accordance with antitrust law, which would provide companies with practical pointers for their use. That could help to remove unease on the part of business which has arisen from statements by authorities on a "compliance-oriented design of algorithms" and promote legally certain use of algorithms.

6. Accelerate abuse control procedures

BDI does not see any need for fundamental substantive changes to the law governing abuse of a dominant position Where barriers for the digital European single market exist, these are currently remedied via the EU's digital single market strategy. For example, mention can be made of the new provisions of the geo-blocking regulation (regulation 2018/302), the cross-border portability regulation (regulation 2017/1128) or the planned platform-to-business regulation. However, the possibility of accelerating abuse control procedures should be examined.

It is in general an advantage for all concerned if procedures which have been launched are completed as rapidly as possible. However, this should in no way restrict the right of the subjects of an antitrust law procedure to defend themselves and to be heard. The complexity of material competition law combined with the right to an effective defence and hearing means that antitrust law procedures must be tied to a certain procedural timetable. New procedural law instruments are not able to reduce the *de jure* and *de facto* complexity of the situation.

Nevertheless, consideration should be given as to whether acceleration of abuse control procedures can be initiated at EU level in order to take greater account of the dynamics and market realities of platform markets. This could be brought about through a standardisation of the procedural timetable. In the case of a substantial "market penetration" (concept from the patent sphere), thought could also be given to the introduction of a deadline regime as in the area of merger control. The resulting procedural acceleration should go hand in hand with a regular and early exchange between the relevant authority and the company in question.

Most Member States foresee strong requirements for interim measures. If these requirements were to be weakened in favour of procedural acceleration or to avoid disadvantages and damage for competition, this should only take place in line with the constitution. In any event, procedural guarantees would have to ensure that interim measures do not lead to irreversible competition situations and damage that cannot be offset. The deliberations would also have to encompass liability questions as well as affected parties' claims for damages if decisions based on a summary examination prove to be incorrect in the main procedure.

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