Overhaul of the German Competition Act Brings Groundbreaking Changes, Namely for Digital Actors

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On 19 January 2021, the Tenth Amendment to the German Act against Restraints of Competition (the "ARC") entered into force. The Amendment, also known as the Digitalization Act, brings about a major revamp of the German competition rules. It addresses the challenges posed by the highly dynamic digital economy and the need for *ex-ante* competition oversight in order to curb the market power of large digital platforms to ensure effective competition.

The German Digitalization Act is the global pioneer in translating the identified need for action into law, following an international call to tame large digital companies. Over the last few years, a number of international reports[1] addressed the impact of market power of large companies active in the digital economy, particularly digital platforms and networks. While these reports are different in approach and findings, they all identify a strong need for action to limit the market power of certain digital players.

The Amendment has far-reaching implications for powerful digital platforms and gatekeepers. The German Federal Cartel Office (the "FCO") will be vested with new powers to tackle abusive behavior of companies with "paramount significance across markets." In the words of the German Minister of Economics: "With the Digitalization Act, we are creating digital competition law that sets clear rules for digital markets. For the first time in the world, we are setting clear requirements in competition law for major digital companies."[2]

The Amendment also introduces major changes, *e.g.*, to the merger control regime by raising thresholds and to antitrust enforcement by accepting existing and effective compliance programs as a mitigating factor when fining companies for antitrust violations.

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1 *E.g.*, the report of the Stigler Committee on Digital Platforms from the United States (September 2019), the report of the Digital Competition Expert Panel from the United Kingdom (March 2019), the Digital Platforms Inquiry of the Australian Competition and Consumer Commission (July 2019), the report Competition Policy for the Digital Era of the EU Commission (2019) and the German report of the Commission Competition Law 4.0 (September 2019, in German language only).

2 Press release of the German Federal Ministry of Economics and Energy of 18 January 2021.

In this client update, we will discuss the most important changes relating to:

MARKET POWER IN DIGITAL SECTORS

Access to Data

The Digitalization Act introduces a new criterion to assess the market power of a company: the access to competitive relevant data. Given the importance of data in all economic areas, the access to competitive relevant data will be assessed for the entire "digitalized" economy regardless of industry and not only on multisided markets and networks as has been the case until now.

In addition, the *essential facilities doctrine*, which largely applied to physical infrastructure only, has been extended to data and networks. Therefore, an abuse of a market-dominant position can now also be established where, for example, access to data or networks is denied (even against reasonable compensation). This affects not only digital platforms but also application programming interfaces, application software and IP rights licensing.

Intermediation Power

In addition, companies active as "intermediaries on multisided markets", typically multisided digital platforms, may be subject to enhanced scrutiny by the German competition authority, particularly as regards their importance for access to procurement and sales markets ("intermediation power"). This test has been introduced in response to the findings of the German report "Commission Competition Law 4.0"[3] that digital intermediaries play an increased role in the supply of products and services and that intermediation can therefore result in its own kind of dependence. Moreover, given their business model of collecting and processing data in order to bring together various user groups and the use of, *e.g.*, favorable listings and rankings, platforms can play a decisive role in the success or failure of users of intermediation services (the power of which has not been effectively limited to date).

[3] Commission Competition Law 4.0 (September 2019, in German language only).

Markets Tipping into Monopolies

The FCO will now be able to intervene if it determines a serious risk that a particular market will "tip" into monopoly-like structures. This is the case where a company with "superior" but not dominant market power on a platform or network market is becoming able to impede competition from accumulating "network effects" on their own. Network effects describe the attractiveness of a product or service that increases with a growing number of users or customers attained.

Paramount Significance Across Markets: The New Section 19a ARC

The Amendment introduces a new type of market power: the paramount significance for competition across markets (Section 19a ARC), which constitutes the most important change in German competition law. It will enable the FCO to intervene at an early stage if it finds that competition is threatened by certain large digital companies, including in markets that are not the primary target market of the relevant company. This approach is in line with the findings of the U.S. House of Representatives' House Judiciary Committee report "Investigation Of Competition In Digital Markets 2020" that the "digital economy has become highly concentrated and prone to monopolization" and that "several markets investigated […] are dominated by just one or two firms."[4]

The new concept applies in particular to companies that carry out significant activities in multisided markets or platforms but do not have a dominant position in a specific market. The FCO may determine by order that a company has a "paramount significance across markets" on the basis of a number of parameters, including (i) a dominant position in *other* markets, (ii) a strategic position and resources, (ii) vertical integration, (iv) access to competitively relevant data and (v) influence on third-party businesses by virtue of facilitating access to procurement or sales markets.

After having determined the "paramount significance across markets" of a company, the FCO may then prohibit, by a separate, second order, certain conduct, for example:

- Self-preferencing its own services;
- Pre-installing or pre-setting its own products in browsers or mobile devices;
- Denying access to certain data;
- Hindering advertising or otherwise reaching customers via access points other than those facilitated/preferred by the company;

[4] House Judiciary Committee report "Investigation Of Competition In Digital Markets 2020", at page 11.

- Linking the use of an offer with the use of another offer;
- Processing competitively sensitive data collected without legally required consent;
- Processing competitively sensitive data received from third parties for purposes other than those necessary for the provision of its own services;
- Denying or impeding interoperability or data portability; or
- Demanding data or rights that are not justifiably necessary.

By explicitly mentioning the above (non-exhaustive) examples, the German legislator codified some of the ongoing practices of large digital companies that the FCO and the EU Commission have already identified as anti-competitive.

The German legislator expects that effectively only a few companies will fall within the purview of the new Section 19a ARC, likely those that already possess a dominant market position on a platform or network *and* have the resources and strategic market position that enable them to significantly influence the business activities of other entities or expand their own activities into new markets to the detriment of effective competition.

Legal Review Shortened to One Instance Only

In an unprecedented move, the German legislator has shortened the legal review in connection with Section 19a ARC claims (see above) to one instance only, *i.e.*, with the German Federal Court of Justice (the "FCJ"). This is being criticized by some as unconstitutional. However, the recent Facebook case (where the FCO prohibited Facebook from collecting and processing certain user data) and protracted summary proceedings (let alone proceedings on the merits) in the German courts have shown the limits of the competition law enforcement in addressing anti-competitive practices in digital markets in a timely and effective fashion. Against this backdrop and in line with various international reports on digital markets, the explanatory notes to the Amendment emphasize the need for speedy intervention to ensure that competition is effectively safeguarded.

Interim Measures Possible with Lowered Standard of Proof

Implementing the EU ECN+ Directive 2009/1 into German national law, the Amendment lowers the threshold for imposing interim measures to prevent competitive harm by changing the previous "serious and irreparable damage to competition" criterion to the new threshold that calls for an infringement being merely "predominantly probable" or there being "an imminent threat of serious harm to

another undertaking." Such lower degree of proof gives the FCO the power to more aggressively curtail competitive harm caused by dominant companies in digital markets.

Correlation with the Draft EU Digital Markets Act

On the EU level, the Commission recently published its draft Digital Markets Act (the "DMA"), which similarly targets "gatekeeper" platforms. Similar to the German Digitalization Act, Articles 5 and 6 DMA provide a large a set of compliance obligations for (digital) gatekeepers, namely to refrain from actions similar to the ones set out above under Section 19a ARC. While the legislative procedure at the European level is likely to take about two more years, it is likely that the DMA, once in force, will conflict with national legislation, particularly in respect of digital platforms. While aiming to enforce competition law against the same gatekeepers, Germany has already announced that it will ensure its national rules are not going to be overridden by the DMA.

No Time Wasted: Section 19a ARC in Use—The Oculus/Facebook Investigation

Before the Amendment was enacted, the FCO had already announced on 10 December 2020 that it had initiated abuse proceedings against Facebook for requiring users to have a Facebook account to be able to use Facebook's own new Oculus glasses (despite such virtual reality glasses not yet being distributed in Germany). On 28 January 2021, the FCO went a step further and announced that it had extended the scope of its investigation under the newly enacted Digitalization Act by investigating now also Facebook's market position in order to determine whether (or rather: that) Facebook is a company with "paramount significance across markets."

MERGER CONTROL

The Amendment significantly increases the merger control thresholds to ease the burden on the FCO and alleviate concerns long raised by the German *Mittelstand* representative organizations. As a result, it is expected that around 40% fewer merger cases will be filed with the FCO.

Going forward, merger notification will only be required if (i) one company generates revenues in Germany of EUR 50 million (from previously EUR 25 million) and (ii) another company generates revenues in Germany of EUR 17.5 million (from previously EUR 5 million). It is still a requirement that the companies together generate worldwide revenues of EUR 500 million and that merger control obligations be assessed carefully if not all revenue thresholds are met, but the value of transaction is EUR 400 million (on the value of transaction see here).

The Amendment also introduces an entirely new obligation to file a merger notification if the FCO "calls in" a transaction. The conditions that need to be satisfied are narrow and include (i) certain turnover thresholds, (ii) that the acquiring party has a share of supply of more than 15% in respect of the goods or services it offers in Germany and (iii) that the FCO has completed a sector inquiry into the sector in which the acquiring party is active.

It is expected that only a few cases will be "called in." The new obligation aims at situations where a company acquires businesses active within the same market from various sellers by way of separate deals that are not reportable on their own. Such successive acquisitions can lead to an uncontrolled accumulation of market power, as has been observed, for example, in the German waste management market.

COMPLIANCE PROGRAMS

In a revolutionary move and as a last-minute change in the legislative procedure, the Amendment specifies that "appropriate and effective" compliance measures can constitute a mitigating factor in sentencing antitrust infringements.

So far, the FCO had been reluctant to reduce fines in view of existing compliance management programs in place at the perpetrating company. Unlike the U.S. DOJ, which explicitly stated in 2019 that it will consider the adequacy of compliance programs (see here), the FCO so far has not considered such programs as a mitigating factor when charging companies for antitrust infringements (arguing that the programs did not prevent companies from breaching antitrust rules). As far as Germany's general misdemeanor law enforcement is concerned, however, the FCJ in criminal matters has already ruled in 2017 that existing compliance programs may be taken into account to reduce fines, thereby confirming a practice that several German prosecutor offices had adopted over many years in public misdemeanor enforcement.

In what appears to be a last-minute consideration, the German legislator realized that an antitrust infringement does not in itself speak against serious efforts to avoid antitrust infringements. Indeed, compliance programs can lead to the discovery and reporting of antitrust infringements, while it is widely accepted that they provide no guarantee that compliance violations won't occur. The ultimate test in such cases is whether the program as such was well designed, seriously enforced by the management and operating effectively, which in practice requires the company to show that the program was able to reasonably avoid and detect wrongdoings of the kind that is at issue. Conversely, defective, unenforced or inappropriate compliance programs, "fig leaves" in particular, will rather turn against the top management as a possible lack of proper

business organization and oversight. Whether and to what extent the FCO will follow these established principles of general misdemeanor enforcement remains to be seen.

OTHER NOTABLE CHANGES

The Amendment introduces a number of other important changes implementing the ECN+ Directive 2009/1, including increasing the investigative powers of the FCO to question employees and company representatives. The Amendment also introduces higher fines for associations participating in cartels and for breaches against procedural rules. The leniency program, which was previously set out in a notice issued by the FCO, is now codified.

FINAL REMARKS

In line with international developments and increased action against digital companies, the competition landscape in Germany has undergone significant changes on various fronts. Therefore, we recommend that companies holding or acquiring business interests in Germany conduct a careful assessment of the new applicable rules.

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Please do not hesitate to contact us with any questions.

FRANKFURT

Thomas Schürrle
tschuerrle@debevoise.com

Andrea Pomana
apomana@debevoise.com