

Newsletter, July 2019

## German Competition Law 4.0 in the international framework

The enforcement of German competition law in 2018 and its adaptation to the transforming economic environment

**Competition law and policy have been set in motion in 2018. Lawyers, economists and politicians all over the world are discussing whether the progressing digitalisation of trade and competition as well as the rise of dominant information technology companies and platforms require adjustments or completely new approaches to competition law and policy. This Newsletter gives an overview of the competition law enforcement in Germany in 2018 and of the steps that have been taken so far to adapt German competition law to the changing environment. It also takes a quick glance at the reforms which are being called for at German and EU level.**

*“The broad antitrust consensus that has existed within the antitrust community in relatively stable form for the last twenty-five years, is being challenged.”*<sup>1</sup> This is how Chairman Simons of the US Federal Trade Commission opened a hearing in September 2018 on Competition and Consumer Protection in the 21<sup>st</sup> Century. The changes in the economy also call for a reform of the European competition law regimes. In June 2019, the G7 competition authorities published a Common Understanding on “Competition and the Digital Economy”.<sup>2</sup> The G7 agree that in spite of the challenges the digital transformation of the economy brings, there is no need to change the guiding principles and goals of competition law. However, they require competition authorities “to ensure that their specific tools, resources and skills for competition law enforcement are up-to-date”. In order to ensure that the German competition law is up-to-date, the German Federal Ministry of Economic Affairs is currently drafting the 10<sup>th</sup> legislative amendment of the German Act Against Restraints of Competition (“ARC”) (details see below).

Furthermore, from an industrial policy perspective, there are repeated calls for a reform of the

(European) merger control rules to allow for European companies to be competitive on the global stage and to become “European champions”.<sup>3</sup> On 19 December 2018, 19 European governments, inter alia Germany, published a Joint Statement calling for an evolution of the rules “to better take into account international markets and competition in merger analysis.”<sup>4</sup> In this context, the German and the French Ministers of Economic Affairs adopted a joint Franco-German Manifesto on Industrial Policy in February 2019 making specific proposals to the new European Commission which will start working as of November this year under German President Ursula von der Leyen.<sup>5</sup> Although this Newsletter focuses on German competition law, it also briefly outlines the work of the German Commission “Competition Law 4.0” which is developing proposals for a reform of EU competition law in preparation of the German EU Council Presidency in 2020.

### Year 2018 in review

In June 2019, the FCO presented its “Activity Report 2017/2018” and the “Annual Report 2018”.<sup>6</sup>

- **Cartels:** The FCO imposed fines in cartel proceedings of around € 376 million on 22 companies concerning steel manufacturers, newspaper publishers, producers of potatoes and rolled asphalt. The FCO, as do other competition authorities, observes an ongoing decline of leniency applications. The authority received 25 application, i.e. less than a third in comparison to 2015 – the downside of the increasing number of civil actions for damages.

<sup>3</sup> See e.g. Federal German Ministry for Economic Affairs, [National Industry Strategy 2030](#).

<sup>4</sup> Friends of Industry, 6th Ministerial Conference, [Joint Statement](#), 18.12.2018.

<sup>5</sup> [Franco-German Manifesto on Industrial Policy](#), 19.02.2019. The Manifesto was published in the wake of the EU Commission’s prohibition of the merger between French Alstom and German Siemens.

<sup>6</sup> [Activity Report 2017/2018](#) and [Annual Report 2018](#) are published in German only; but see FCO [Press Release](#) of 27.06.2019 (in English).

<sup>1</sup> FTC Chairman Simons, [Hearings on Competition and Consumer Protection in the 21st Century](#), 13.09.2018.

<sup>2</sup> G7 Competition Authorities, Common Understanding “[Competition and the Digital Economy](#)”, 05.06.2019.

- **Merger control:** With more than 1,300 examined merger notifications the FCO holds (by its own account) a world record in 2018. 13 cases, i.e. only 1% of all cases, were closely examined in second-phase-proceedings. Five merger notifications were caught by the transaction value threshold (which has been introduced by the 9<sup>th</sup> amendment of the ARC in 2017) and cleared in phase one.<sup>7</sup> Even though the FCO was carrying out the proceedings “*as efficiently and unbureaucratically as possible*”<sup>8</sup>, the total number of notifications was far too high, particularly considering the fact that the FCO was legally not able to examine certain transactions which raised (public) concerns on market concentration.<sup>9</sup>
- **Digitalisation and the control of abusive behaviour:** The digital economy was a key area of the FCO’s activities in 2018. The FCO concluded its widely noticed proceedings against Facebook in early 2019, prohibiting the company’s continued collection and combination of data from different sources.<sup>10</sup> Facebook has appealed the decision; an initial decision by the Düsseldorf Higher Regional Court is expected later this year. In mid-June, the FCO also concluded proceedings against Amazon. Following a large number of complaints from sellers, the FCO initiated abuse of dominance proceedings against the online retailer in November 2018. In response to the competition concerns Amazon has now agreed to amend its terms of business for sellers on its online marketplaces, not only for the German marketplace amazon.de, but for all marketplaces worldwide.<sup>11</sup> Together with the French Autorité de la concurrence, the FCO launched a joint project in 2018 on “Competition and algorithms” to gain a better understanding of digital markets.<sup>12</sup> The FCO is furthermore still conducting a sector inquiry on “online advertising”.<sup>13</sup>

### 10<sup>th</sup> amendment of the ARC

The German Federal Ministry of Economic Affairs is currently drafting the 10<sup>th</sup> amendment of the ARC, concentrating on three challenges competition law is currently facing: (i) the tendencies towards monopolisation on the plat-

form markets, (ii) data as value creation factor and (iii) the dynamic of the markets. In response to these challenges the (i) control of abusive practices will be extended, (ii) rules on the use of and access to data will be introduced and (iii) procedures will be accelerated and aligned to the relevance of the case (“big on big, small on small”).

With regard to the control of abusive behaviour, the legislative amendments aim at countervailing the tendencies towards monopolisation on platform markets and at addressing the dynamics of the digital markets as well as the possibility of rapid changes in market shares and market dominance. These changes are based on a study by *Haucap/Kerber/Schweitzer* which was commissioned by the Federal Ministry of Economic Affairs last year.<sup>14</sup> They include, inter alia, the concept of “intermediary power” as a criterion of market dominance: The more an intermediary, e.g. a digital platform, can bundle the demand for products, the more the suppliers of such products will be dependent on such platform for access to the customers (demand-side). This dependency can exist even below the current thresholds for market dominance.

The amendment foresees improvements in file inspection, the legal hearing process and temporary injunctions to ensure proactive and rapid action by the FCO.

In order to reduce the number of merger notifications, the second domestic turnover threshold will be increased (in all likelihood from € 5 million to €10 million) and the minor market clause will be modified. However, neither a specific prohibition of market foreclosure through the successive purchase of start-ups nor the introduction of an ex-post review which the FCO has asked for are currently considered in the plans for the amendment.

A further purpose of the 10<sup>th</sup> amendment is the implementation of the ECN+ Directive of the EU Commission. To this end, certain leniency programme provisions will be codified and the procedural rights of the FCO in appeal proceedings be strengthened.

The draft bill is going to be published soon. A cabinet resolution is expected to be passed in autumn 2019.

### Commission “Competition Law 4.0”

In preparation of the German EU Council Presidency in 2020 the Federal Ministry of Economic Affairs has set up the Commission “Competition

<sup>7</sup> In July 2018, the FCO and the Austrian competition authority published a [Guidance on the Transaction Value Thresholds for Mandatory Pre-merger Notification](#). See also [Commeo Newsletter](#) of 09.06.2017.

<sup>8</sup> FCO, [Press Release](#) of 20.12.2018.

<sup>9</sup> See e.g. [Statement of the FCO](#) of 03.08.2016 why it did not examine the merger of two long-distance bus operators.

<sup>10</sup> FCO, [Press Release](#) of 07.02.2019.

<sup>11</sup> FCO, [Press Release](#) of 17.07.2019.

<sup>12</sup> FCO, [Press Release](#) of 19.06.2018.

<sup>13</sup> FCO, [Press Release](#) of 01.02.2018.

<sup>14</sup> *Haucap/Kerber/Schweitzer*, [Modernising the law on abuse of market power](#), 29.08.018 (full report in German only).

Law 4.0” to develop specific recommendations to reform and harmonize European competition law in light of the digital change of the economy.<sup>15</sup> The Commission has a broad mandate and debates fundamental issues such as the need for cooperation of European digital companies, the evolution of rules for digital platforms, the relation between data power and market power, the influence of artificial intelligence and algorithms on pricing or access to data. The Commission consists of known representatives from German academia. Initial results are expected this year.

### Outlook

It is the G7’s understanding that competition law is sufficiently flexible to cope with the transforming economic environment. It is also the belief of President Mundt that the FCO – having celebrated its 60<sup>th</sup> anniversary and the introduction of the ARC in 2018 – is already and will be well equipped in the future to effectively enforce competition law in Germany. The changes to the ARC that will be introduced with the 10<sup>th</sup> amendment are accordingly moderate, but pertinent. With regard to the calls for European champions Mundt warns that competition law should not be politicised but decisions should be taken purely from a competition law perspective. This view is shared by many competition law practitioners in Germany.

In order to ensure an effective enforcement of competition law in the digital economy, Mundt is asking for more competencies of the FCO in the area of consumer and data protection and, given the borderless nature of the digital economy, for a greater international cooperation and convergence between competition law enforcers. These requests are also reflected in the G7’s Common Understanding. As regards consumer protection, the German legislator has granted the FCO initial competencies in 2017.<sup>16</sup> However, it has not been granted any competencies regarding the enforcement of the Act Against Unfair Competition so far. It is therefore expected that the FCO will strive to further expand the sphere of its influence as it did in the *Facebook*-case by dealing with consumer and data protection issues in the context of the control of abusive behaviour. As to the collaboration of the competition authorities worldwide, President Mundt is (still) in the driver’s seat: He has just been re-elected as Chair of the International Competition Network, the most important network of competition authorities worldwide.<sup>17</sup>



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<sup>15</sup> Federal Ministry for Economic Affairs, [Kommission „Wettbewerbsrecht 4.0“](#) (in German only).

<sup>16</sup> The FCO has launched sector inquiries into [comparison websites](#) and [smart TVs](#).

<sup>17</sup> FCO, [Press Release](#) of 21.05.2019. Mundt has been Chair since 2013.