

Newsletter, 19 January 2021

Overview of the 10th amendment to the German competition law – Competition policy for the digital age

The 10th amendment, also known as Digitization Act, entered into force on 19 January 2021

The German Act against Restraints of Competition ("ARC") has been revised considerably with the 10th amendment entering into force on 19 January 2021.¹ The amendment intends to adapt competition policy to the digital age. A key goal of the reform is to modernize abuse of dominance rules vis-à-vis digital market players with market power. Additionally, the merger control thresholds have been increased significantly and changes have been made to cartel fine and administrative proceedings.

Background

The 10th amendment to the ARC, also known as Digitization Act, is intended to introduce new competition rules for the digital age which, on the one hand, will enable effective action to be taken against large digital corporations and so-called *gatekeeper platforms* and, on the other hand, will relieve the burden on small and medium-sized companies. The "Competition Law 4.0" aims at creating a regulatory framework that meets the requirements of digitalization and globalization and the related changes in the balance of economic power. Key elements of the reform are therefore abuse of dominance provisions for digital companies with market power and new criteria for assessing market dominance and relative market power.

At the same time, the reform transposes the ECN+ Directive² – which aims at empowering the competition authorities of the EU Member States to be more effective enforcers of competition rules – into German law and leads to numerous new provisions regarding cartel fine and administrative proceedings. Merger

control also undergoes a number of changes that are particularly significant in practice.

Abuse of dominance

New criteria for assessing market dominance

In the future, a company's access to competitively relevant data will also have to be taken into account when assessing its market position.³ A further criterion introduced for determining market dominance is the so-called "intermediation power" of a company in order to better capture the role of platforms as intermediaries in multi-sided markets.⁴

Revision of the essential facilities doctrine

A much discussed novelty is the extension of the *essential facilities doctrine* to the access to data and networks.⁵ Whereas "compulsory access" in the wording of the law has so far been tailored primarily to physical infrastructure, the new law explicitly pursues the goal of being able to better counter abusive behavior by so-called "gatekeepers" in the digital and non-digital areas.

Section 19a ARC – new intervention measures against digital platforms

A key element of the amendment is the new intervention possibility under Section 19a ARC, as amended. According to this provision, the German Federal Cartel Office ("FCO") may issue an order to prohibit certain undertakings with an *paramount significance for competition across markets* from engaging in seven enumerated practices which are specified in more detail by means of rule examples. These practices relate primarily to the granting of access, data processing, self-preferencing of own services, and interoperability restrictions. The aim is to be able to take action against digital companies at an early stage before

¹ Act Amending the Act against Restraints of Competition for a focused, proactive and digital Competition Law 4.0 (ARC Digitization Act), BGBl. Year 2021, Part I, No. 1 of 18 January 2021.

² [Directive \(EU\) 2019/1](#) of the European Parliament and of the Council of 11 December 2018.

³ New Section 18 (3) no. 3 ARC.

⁴ New Section 18 (3) b ARC.

⁵ New Section 19 (2) no. 4 ARC.

things have gone wrong. According to the new Section 19a ARC, affected companies can appeal the order, which is limited to a maximum of five years, directly to the German Federal Court of Justice ("FCJ").⁶

Relative market power

In the context of abuse of dominance, when determining relative market power, the scope of protection has been extended to all companies regardless of their size (previously conferred only to small and medium-sized companies). In addition, reliance on intermediary services or access to data have been introduced as new dependency categories.⁷

Moreover, the new Section 20 (3a) ARC introduces a new prohibition to prevent measures that could lead to markets *tipping* into monopoly. The new provision prohibiting exclusionary abuse only applies to multi-sided markets and networks within the meaning of the old version of Section 18 (3a) ARC, but explicitly applies to companies with superior market power, i.e., it does not require market dominance.

Merger control

Increase of the domestic turnover thresholds and extension of the review deadline in Phase II proceedings

With regard to merger control, the amendment raises the two domestic turnover thresholds: going forward, concentrations will be notifiable in Germany if the undertakings concerned have achieved combined worldwide turnover of more than EUR 500 million, one of the undertakings concerned has achieved domestic turnover of at least EUR 50 million (previously: EUR 25 million) and another undertaking has achieved domestic turnover of at least EUR 17.5 million (previously: EUR 5 million).⁸ In addition, the deadline for the review process in Phase II proceedings has been extended from four to five months.⁹

Introduction of Section 39a ARC – also known as "Remondis clause"

The new Section 39a ARC creates a completely new instrument in the context of merger control. Under this provision, the FCO

can, under certain narrow conditions (including a prior sector inquiry), require companies to notify a proposed concentration irrespective of the above-mentioned thresholds. The clause seeks to enable intervention before a dominant position is created in certain markets through a series of non-notifiable concentrations.

Fine and administrative proceedings

More legal certainty for cooperations

In the field of cooperation between competitors, greater legal certainty is expected: companies now have right to request an assessment of the planned cooperation from the FCO if there is a considerable legal and economic interest in such assessment. Furthermore, by means of the so-called chairman's letter, an informal "green light" for cooperations will be created.¹⁰

Extended investigative powers of the FCO and rules on the right to inspect files

As part of the implementation of the ECN+ Directive, the investigative powers of the antitrust authorities will be expanded.¹¹ These include, for example, a comprehensive right to request information, the obligation to cooperate during dawn raids (subject to fines), and a limited right of natural persons to remain silent. The considerable restriction of the *nemo-tenetur* principle by the latter provision is mitigated by a prohibition on the use of evidence in cartel fine proceedings and, where applicable, criminal proceedings. Furthermore, for the first time there are now rules on the right to inspect files in administrative cartel proceedings.¹²

Codification of the leniency program, fine setting criteria and liability of associations

As part of the amendment, the provisions of the leniency program¹³ and the criteria for setting fines¹⁴, which were previously set out in the FCO's Leniency Programme and Guidelines on Fines only, have also been codified in law. A welcome substantive change is the inclusion of appropriate and effective compliance measures – taken prior to the cartel infringement – as a criterion for fine reduction.

⁶ New Section 73 (5) ARC.

⁷ New Section 20 ARC.

⁸ In return, the previous "de minimis" clause of the previous Section 35 (2) ARC no longer applies.

⁹ New Section 40 (2) sentence 2 ARC.

¹⁰ New Section 32c ARC.

¹¹ New Section 59 ARC ff.

¹² New Section 56 ARC.

¹³ New Section 81h ARC ff.

¹⁴ New Section 81d ARC.

Another new aspect introduced by the amendment is the increased liability of associations with regard to fines. In the future, the amount of the fine will no longer be based on the turnover of the association itself (generated from membership fees), but on the turnover of those members of the association who were active in the market affected by the cartel.¹⁵ In addition, the members of the association are liable for defaults.¹⁶

Private enforcement

In the area of cartel damages, Section 33a (2) ARC, as amended, introduces a rebuttable presumption that legal transactions with cartel participants that fall within the scope of a cartel in terms of subject matter, duration and location are covered by the cartel. This presumption expressly extends to indirect customers, but not to legal transactions with parties not involved in the cartel (so-called “umbrella pricing”).

Comment

The FCO is taking a pioneering role both nationally and internationally in the fight against large digital corporations such as Google, Apple, Facebook and Amazon by modernizing the abuse of dominance provisions. It will be interesting to see how effective the new powers of intervention and criteria for assessing market power are in practice and how prepared the FCO will really be for the digital age. The relationship between the new rules in the ARC and the Digital Markets Act presented by the EU Commission in December 2020 (which is not expected to come into force until 2022) should also be exciting. The prospect of being able to take action against monopolization and market foreclosure strategies and, in doing so, not jeopardizing the competitiveness of European and German digital companies is in any case welcome. The first instance jurisdiction of the FCJ for appeals against the FCO’s measures under the new Section 19a ARC illustrates the importance the German legislator attaches to swift action against anti-competitive practices of the “GAFA” gang. However, there is no reason for the German “Mittelstand” to worry: in the course of the legislative process, lawmakers emphasized several times that the new Section 19a ARC should not be applicable to any German company.

¹⁵ New Section 81c (4) ARC.

¹⁶ New Section 81b ARC.

The implementation of the ECN+ Directive and, in particular, the extension of the investigative powers of the FCO will in practice pose new challenges for companies involved in antitrust proceedings. First and foremost, companies should revise their internal dawn raid guidelines. At the same time, in view of further fine setting criteria and the new rules in the area of liability of associations, companies must pay even more attention than before to effective compliance measures.

In the context of merger control, the increase of the two domestic turnover thresholds eases future medium-sized transactions. On the other hand, the statutory codification of the leniency program does not appear to contain any substantive changes from the previous leniency programs. The introduction of a rebuttable presumption of involvement in a cartel is also unlikely to be of decisive importance in view of the latest FCJ *Rail Track Cartel* decisions.¹⁷ In the area of cartel damages, however, the legislator has failed to provide the courts with urgently needed assistance in determining the amount of damages.



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¹⁷ See [COMMEO Newsletter](#) of 03/2020.