

Newsletter, 25 March 2021

Competition Policy Outlook 2021

Digital Markets Act, Sustainability, FDI – These topics have been pushed to the top of the policy agenda by the pandemic

In our Commeo Newsletter of January 2021¹ we have presented the latest amendments to the German Act against Restraints of Competition ("ARC"). Whilst the German competition law community is still getting familiar with the considerable revisions which have entered into force on 19 January 2021, further competition law reforms appear on the horizon. The two predominant topics, which are currently being discussed by competition authorities, academics and competition lawyers worldwide, are the regulation of digital "gatekeepers" and the consideration of sustainability in competition policy. A further hot topic, related to competition law, is foreign direct investment ("FDI") screening which has received a considerable boost due to the pandemic. This Newsletter highlights the most interesting current discussions on and plans for (further) reforms of European and national competition law.

Background

The transformation of the economic environment has been "turbocharged" by the pandemic since it "severely disadvantaged the physical world and moved even more activities into the digital realm"². The winners of this development are digital platforms, many of which are controlled by powerful gatekeepers ruling over entire digital ecosystems and continuously collecting huge amounts of data. In response to this negative effect of the digitalisation, the European Commission ("Commission") had discussed a "new competition tool" and finally proposed the Digital Markets Act ("DMA").³

While struggling with the containment of the virus, mankind is facing an even bigger crisis: climate change. In the course of last year, a discussion has been launched on how competition law can contribute to a more resource-

efficient economy. The Commission, represented by Margrethe Vestager in her capacity as Competition Commissioner as well as Executive Vice-President for "A Europe Fit for the Digital Age", aims at kick-starting the European recovery in line with the twin green and digital transition goals and therefore vigorously expedites these two debates.

Digitalisation

Digital Markets Act (DMA) – Proposal

As part of the European Digital Strategy the Commission has published a proposal for an unprecedented and far-reaching ex-ante regulatory regime for pan-European gatekeeper platforms, the DMA, in December 2020. Gatekeepers are defined as providers of core platform services, such as search engines, social networking and messaging services, operating systems and online intermediation services, that serve as an important gateway for business users to reach their customers and which have (or are about to have) an entrenched and durable market position. Gatekeepers can be designated based on quantitative (i.e. turnover/market value) thresholds or qualitative assessment by means of market investigation. The DMA imposes a list of "Dos & Don'ts" on designated gatekeepers to prevent harmful business models and recurrent behaviour, such as data combination and self-preferencing.⁴ The Commission will be the sole enforcer, equipped with monitoring, investigative and enforcement powers similar to the ones under the competition implementation regulation no. 1/2003 (including severe fines in case of non-compliance), but will only consider national expertise via the envisaged Digital Markets Advisory Committee which the Commission will consult prior to taking enforcement decisions.

While (national) competition law will remain applicable, the proposal has raised many questions on how the DMA and national/European competition law enforcement by the

¹ See [Commeo Newsletter of January 2021](#).

² Director General of DG Competition, WuW 2/2021.

³ Proposal for a regulation on contestable and fair markets in the digital sector, [COM\(2020\)842 final](#).

⁴ See the Commission's [list of the Dos and Don'ts](#).

national competition authorities (“NCAs”) will interplay.

This question especially arises in Germany. The newly introduced Sec. 19a ARC empowers the FCO, as first European competition authority, to issue an order prohibiting certain undertakings with a “*paramount significance for competition across markets*”, covering large digital gatekeepers, from engaging in practices similar to the ones covered by the DMA.⁵ It is therefore no surprise that the FCO does not unreservedly embrace the DMA. Even though it will not supersede the FCO’s newest competence, national enforcement must not be contrary to decisions under the DMA. The FCO’s President Mundt therefore expressed the need for a strong coordination and coherence mechanism to avoid duplication of cases and contradictory remedies.⁶ The German government has announced, together with Belgium, France and the Netherlands (“*the friends of an effective DMA*”⁷), to propose changes to the DMA allowing for a joint enforcement system by the Commission and the NCAs. Even though the obligations under the DMA are inspired and will likely be shaped by (future) competition law enforcement, it has not been determined yet who will enforce it within the Commission. It is thus one central demand of the NCAs that the enforcement of the DMA should be assigned to DG Competition.

As regards timing, the Commission is planning for the DMA to come into effect during the French Council Presidency in summer 2022.

Digital Services Act (DSA) – Proposal

The DMA is accompanied by a second legislative initiative by the Commission, the Digital Services Act. It introduces several new obligations for online platforms, online hosting and intermediary services to better protect consumers online and to establish a transparent and accountable online environment.⁸

On January 2021, the German government also presented a draft bill for an act to strengthen consumer protection and fair competition.⁹ The draft aims at improving the pro-

tection of consumers against unfair business practices, particularly in the context of digital business models, and enabling more effective enforcement of consumer law. The changes concern the German Act Against Unfair Competition (*UWG*), not the ARC (*GWB*), for which the FCO has not been granted any enforcement competencies yet.

Sustainability

With the “European Green Deal” the Commission has set the ambitious goal for Europe to be the first climate neutral continent by 2050. To succeed, Commissioner Vestager claims that “*everyone in Europe will have to play their part - every individual, every public authority. And that includes competition enforcers*”.¹⁰

It is undisputed that competition policy contributes by itself to the effectiveness of green policies by promoting competitive and thus innovative market outcomes. The Commission admits, however, that competition policy is not in the lead when it comes to fighting climate change and that it can merely complement regulation and taxation. The Commission is currently reviewing, after having called for contributions from stakeholders¹¹, how competition policy could do this most effectively and in particular whether there are any barriers to desirable agreements supporting Green Deal objectives.

In its contribution, the German government expresses clear concerns to open up competition policy to public interest objectives¹² and argues against any changes to the current legal framework. The reaction of the FCO to the debate is also very reserved. It has issued a working paper on sustainability and competition, summarizing the current legal and economic discussion as well as its decision-making practice on sustainability initiatives.¹³ The FCO takes the view that it is primarily the task of the legislator to strike a balance where the goals of protecting competition and pursuing public interests come into conflict.

Other NCAs, such as the Dutch ACM, are not that shy. In January 2021, it has published a

⁵ The FCO has initiated abuse proceedings against Facebook/Oculus in December 2020 and is currently examining whether Facebook is subject to the new Sec. 19a ARC, see [Press Release of 28/1/2021](#).

⁶ Mundt, 20th International Competition Conference of the FCO (“ICC”), 4/3/2021.

⁷ Head of the Economic Policy Department of the Federal Ministry of Economy, ICC, 4/3/2021.

⁸ See the [list of the envisaged obligations](#).

⁹ [Entwurf eines Gesetzes zur Stärkung des Verbraucherschutzes im Wettbewerbs- und Gewerberecht](#).

¹⁰ Vestager, [Speech of 22/9/2020](#).

¹¹ The Commission has announced to publish a report on the [contributions](#) in summer 2021.

¹² An issue that is part of the “hipster antitrust” discussion that has taken place especially in the U.S. for a number of years.

¹³ FCO, „[Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice](#)”, 1/10/2020 (in German only; a [Note](#) based on this paper has been submitted by Germany to the OECD in English in 12/2020).

second draft version of Guidelines for sustainability agreements which explicitly allow the consideration of out-of-market efficiencies in the examination of the statutory exemption from the cartel prohibition in Art. 101 (3) TFEU.¹⁴

FDI screenings

Many Member States are eager to screen foreign direct investments (“**FDI**”) from non-EU countries (now also including the UK) on grounds of security or public order (irrespective of their effects on competition). National FDI screening mechanisms are currently in place in 17 Member States. At the beginning of the pandemic in March 2020, the Commission explicitly called on those states to “*make full use*” of their screening powers and on the remaining states to set up a fully-fledged screening mechanism in order to protect critical European assets and technologies in a time of economic vulnerability.¹⁵

While the EU has adopted the FDI Screening Regulation¹⁶ in March 2019, which became fully effective in October 2020 and which sets out binding minimum standards for the Member States with an FDI mechanism, the EU is, so far, only allowed to issue opinions on specific transactions.

Meanwhile, the existing FDI screenings have been tightened in several Member States, including Germany. In reaction to the pandemic, the threshold for the review of critical sectors has been sharply lowered from 25 % to the acquisition of 10 % of the voting rights by a non-European investor. The screening has also been extended to relevant health sectors and will be further extended to sectors such as biotech or robotics in the course of this year.

The German Federal Ministry of Economics can impose orders or prohibit a foreign investor from acquiring a stake in a domestic company.¹⁷ The information to be provided to the Ministry prior to a notifiable FDI is similar to the information needed for the (parallel) merger control notification to the FCO. Parties may be required to file an FDI in multiple jurisdictions.

It will be interesting to see whether the Commission will be satisfied with the low regulatory convergence of the current decentralized FDI

enforcement on national level or whether it will ask for own decision-making powers once the European single market is affected.¹⁸

Comment

The discussions highlighted above show how competition law and policy must constantly adapt to the changing economic circumstances and in case of sustainability even to social and ecological objectives. This makes competition law equally fascinating and challenging. The controversially debated question is whether the European competition law framework and its implementation on national level already provide for enough flexibility and speed of reaction to address the emerging issues or whether the framework needs to be amended by the legislator(s).

President Mundt of the FCO, also President of the International Competition Network, has a very clear stance: competition law in its current form is sufficiently equipped to deal with the challenges at hand. And he counts on competition: on competition between competitors to achieve the most sustainable products and services (instead of legal cooperation) and on “*competition for the best ideas*”¹⁹ between the NCAs to tackle market power in the digital economy (instead of exclusive regulating powers for the Commission). Being whole-hearted competition lawyers we could not agree more.



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¹⁴ See the [ACM's website](#) for further information.

¹⁵ Commission, [Press Release](#) of 25/3/2020.

¹⁶ [Regulation \(EU\) 2019/452 establishing a framework for the screening of FDI into the Union.](#)

¹⁷ The latest prohibition concerned the envisaged acquisition of the small satellite firm IMST by China Aerospace and Industry Group in December 2020.

¹⁸ The Commission has announced to publish further guidance on its FDI Screening Regulation and a first report on FDI review activity in autumn this year.

¹⁹ Mundt, Studienvereinigung Kartellrecht, 11/3/2021.