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Relative Market Power – What you need to know

The latest German competition law amendment reforms the prohibition rules for undertakings with relative or superior market power. While the changes aim to meet new challenges in the digital economy, they have significant consequences across industries

In January 2021, the 10th amendment to the German Act against Restraints of Competition ('ARC') entered into force.¹ While the public debate focused on the newly introduced Sec. 19a ARC with its new intervention measures against undertakings with paramount significance for competition across markets, the highly relevant changes in Sec. 20 ARC stipulating special rules for undertakings with *relative market power* deserve equal attention. In particular, the new rules on data dependency and a corresponding data access claim raise many practical questions beyond the digital economy.

Background

Sec. 20 ARC prohibits exclusionary and discriminatory conduct of undertakings with so-called *relative market power* to the extent that other undertakings – suppliers or purchasers – are dependent on them in such a way that sufficient and reasonable possibilities for switching to third parties do not exist. In addition, a significant imbalance of market or negotiation power between the companies concerned is required. Under past case law, various dependency categories evolved, such as dependency on other companies' 'must have' products or services, company-specific dependency based on specialized and individualized supply relationships, or scarcity-based dependency (which gained new relevance during the Corona pandemic).

The 10th amendment came along with several changes to Sec. 20 ARC concerning the scope of protection, additional dependency categories and corresponding data access claims as well as a new prohibition to prevent measures that could lead to markets tipping into monopoly.

Extension of scope – Giving up the SME criterion

Whereas the previous Sec. 20 ARC only protected small and medium-sized enterprises (so-called SME criterion), its scope has now been extended to all companies, regardless of their size. According to the legislator's reasoning, this extension applies to undertakings from all economic sectors. However, the greatest benefit is expected in the digital economy, in particular as it may prevent digital platforms with a gatekeeper position from impeding their depended small, medium or large-sized users. In order to avoid the provision from getting out of hand, Sec. 20 (1) ARC still requires that there is a clear imbalance to the countervailing power of the dependent undertaking. This requirement is intended to prevent Sec. 20 ARC from being applied to a large number of bilateral agreements between equal-ranking parties.

New dependency category: Intermediary services

Sec. 20 (1) 2 ARC has been extended to catch providers of intermediary services that have become central players in the digital economy. According to this provision, a dependency may also arise from intermediaries that provide access to relevant sales markets to the extent that sufficient and reasonable alternatives to enter these markets do not exist.

Reliance on data access – data access claims

Most noticeable, however, is the introduction of Sec. 20 (1a) ARC which not only provides for another new dependency category, the so-called data dependency, but also for a corresponding data access claim. Pursuant to this new provision, a dependency may also arise from the fact that an undertaking is dependent on accessing data controlled by another undertaking in order to carry out its own

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

activities. Refusing to grant access to such data in return for adequate compensation may constitute an unfair impediment of competition. This shall also apply even if such data have not yet been commercially traded.

The legislator intended the provision to cover specifically two constellations. Firstly, an economically legitimate and important interest in access to machine-generated data often arises in vertical relationships in the *IoT* context where multiple stakeholders jointly generated the data. Secondly, data access claims may be invoked by third parties without an existing business relationship to the data owner in order to offer their services on an upstream or downstream market. In the latter case, more restraint and a stronger focus on the balancing of interests shall be required. Note, however, that the wording of this new provision is not limited to these constellations, and thus goes beyond the above described situations.

Sec. 20 (3a) ARC: Prevention of tipping

Sec. 20 (3a) ARC introduces a new prohibition to prevent measures that could lead to markets tipping into monopoly. This new provision prohibiting exclusionary abuse only deals with certain multi-sided markets and networks, and applies to companies with superior market power, i.e. it likewise does not require market dominance. The provision aims to facilitate swift intervention, namely an intervention before a market turns into monopoly, as the creation of a serious risk of significantly restricting competition on the merits is deemed sufficient and a restriction of competition does not yet need to have occurred.

This new tipping clause has already become relevant in court. In an interim measures proceeding, the Regional Court of Berlin² held that certain so-called *list first rebates* offered by the real estate platform provider and market leader ImmoScout would lead to a de facto exclusivity and result in market foreclosure by impeding the independent attainment of network effects by competitors such as the claimant Immowelt. *List first rebates* refer to discounts that a broker receives when it offers its properties exclusively on the ImmoScout platform within a specified period of time, 7 days in the case at hand. Claimant Immowelt argued that that over 50% of all contacts take place within this time period – and 30% of the advertisements are already taken out of the

platform before the end of the first week. Based on Sec. 20 (3a) ARC, the court issued an injunction against ImmoScout to no longer offer the respective rebate system.

Comment

The changes introduced by the 10th ARC amendment are certainly of great practical relevance, far beyond companies operating in the digital economy. Especially with regard to the newly created data access claim, there are numerous open questions equally affecting small and medium-sized enterprises in traditional industries. It remains to be seen whether case law and enforcement practices will result in clearer criteria in the context of the required balancing of interests, or whether there will be a right of 'free riding' when it comes to data access in the future.

Whereas the concept of relative market power has previously been considered a specific national topic in Germany, France and Austria, recent legislative developments in Europe and beyond, such as the Swiss *Fair-Price-Initiative*³ and the latest amendment of the Belgian competition law⁴, have shown that legislators see a growing need to intervene in business practices below the level of market dominance. Correctly assessing the consequences of relative market power will hence be an even more important issue when providing antitrust advice.



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² Regional Court of Berlin, judgment of 8/4/2021, 16 O 73/21 Kart - *Immowelt ./Immoscout* ([German version](#)).

³ See <https://www.fair-preis-initiative.ch/deutsch/aktuell>.

⁴ Law of 4/4/2019, entered into force on 22/8/2020, introducing Article IV.2/1 in the Belgian Code of Economic Law.