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Gleiss Lutz

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COMPETITION / ANTITRUST

THE GOVERNMENT DRAFT BILL FOR THE TENTH AMENDMENT TO THE ACT AGAINST RESTRAINTS OF COMPETITION – DIGITAL COMPETITION ACT

The government draft bill for a Tenth Act Amending the Act against Restraints of Competition for Competition Law 4.0 ("*ARC-Digital Competition Act*") was approved by the Federal Cabinet on 9 September 2020. The German government's intention is to create a "regulatory framework for digital competition". The Act will also implement Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers (the "ECN+ Directive"). Key changes are:

- **The control of abuse is being modernised, first and foremost in the form of new and far-reaching anti-abuse rules, targeted at "companies with overwhelming importance for competition across multiple markets", but also in the form of a number of key amendments for dominant companies and companies with relative market power, in particular by facilitating access to data,**
- **Proceedings are being accelerated, among other things by scaling down the prerequisites for interim measures,**
- **The two domestic turnover thresholds are being raised from EUR 25 million to EUR 30 million and from EUR 5 million to EUR 10 million,**
- **The possibility of imposing an obligation to notify smaller concentrations following sector inquiries in certain industries is being introduced,**
- **The time-period for the main examination in merger control proceedings is being extended from four to five months from the date of the merger filing,**
- **The rules for access to the files in cartel administrative proceedings are being revised,**
- **The right to refuse to provide information in cartel investigations is being restricted,**
- **The leniency programme is being codified,**
- **The criteria for calculating fines are being framed more precisely,**
- **A refutable presumption that legal transactions with cartel members are affected by the cartel is being introduced in the context of private antitrust lawsuits.**

The provisions on abuse of market power are at the heart of the Tenth Amendment to the Act against Restraints of Competition. Compared to the ministerial draft bill of October 2019, the new anti-abuse rules in section 19a ARC have only changed in a few places. In contrast, there have been more extensive changes to merger control as compared to the ministerial draft bill.

Overview

The government draft bill for a Tenth Act Amending the Act against Restraints of Competition was presented by the Federal Cabinet. It follows the ministerial draft bill of the Federal Ministry for Economic Affairs and Energy published (unofficially) in October 2019 and amends and supplements it in a number of important areas. The draft bill is to embed in the Act against Restraints of Competition the means to face the challenges of digital competition; it is being referred to as the "ARC-Digital Competition Act". One main aim here is to restrict the market power of digital giants like Google, Facebook and Amazon. However, the Amendment also makes it significantly easier to assert data access rights vis-à-vis other dominant companies or companies on which others are dependent. The government draft bill also transposes the ECN+ Directive into German law. The intention with the

Directive is to approximate the standards applied by the various Member States when enforcing European competition law and to facilitate cooperation between the competition authorities at international level.

Greater powers to intervene in the case of companies with market power

One central plank of the government draft bill is the amended anti-abuse rules. The new section 19a ARC, in particular, provides for new, far-reaching powers of intervention on the part of the Federal Cartel Office vis-à-vis "companies with overwhelming importance for competition across multiple markets" (the "super-dominant companies"), the intended targets being digital giants like Google, Facebook and Amazon. Specifically, the expectation in the government draft bill is that in the first five years these three companies will be found to be companies with overwhelming importance for competition across multiple markets.

Companies that are not only dominant on single markets, but that – especially thanks to network effects, data access, resources and strategic positioning – can also impact the business of companies in other markets (for example as "gatekeepers") are to be subject in future to much stricter standards than "normal" dominant or powerful companies in order to be able to, among other things, mitigate self-reinforcement tendencies sufficiently early.

This reflects the various proposals the legislator received from panels of experts in Germany and abroad (cf., e.g., the Commission's report on Competition Law 4.0 of September 2019, the report by the special advisors Crémer/Montjoye/Schweitzer for the European Commission of April 2019, the Furman report of March 2019, the background paper of the Federal Cartel Office on the control of abuse of October 2018, the market power study by Schweitzer/Haucap/Kerber/Welker of August 2018, etc.). At the same time, the government draft bill partially anticipates the plans that are currently being discussed in Brussels within the framework of the Digital Services Act (cf. here) and possible new powers of intervention in antitrust legislation ("New Competition Tool", cf. here). These planned significant extensions of the European Commission's powers are also aimed at limiting the market power of the major digital giants and ensuring a balanced competitive environment. Although the intention is to implement both plans at European level as soon as possible, realistically, however, the Tenth Amendment to the ARC will be implemented and applied (much) earlier.

Section 19a ARC: Companies with overwhelming importance for competition across multiple markets

Based on the new provisions in section 19a ARC, in cases where the Federal Cartel Office has officially found that a company has overwhelming importance for competition across multiple markets, it will have far-reaching powers to make interventions that affect that company's business. This finding may also be challenged in isolation by means of an appeal pursuant to section 63(1) ARC, as the explanatory memorandum now expressly emphasises. The government draft bill also assumes that such findings will as a rule be limited in time, for example to five to ten years.

Specifically, the Federal Cartel Office will have the following powers of intervention pursuant to section 19a(2) ARC vis-à-vis a company with overwhelming importance for competition across multiple markets – in addition to the general anti-abuse rules which continue to apply:

- No. 1: In particular, it can prohibit that company from giving preference to its own offerings vis-à-vis those of competitors ("ban on self-preferencing"). This is in response to the EU Commission's Google Search (Shopping)) case (AT.39740).
- No. 2: In future the Federal Cartel Office will have the power to step in early and stop the "opening up" of not yet dominated markets, i.e. by prohibiting companies with overwhelming importance for competition across multiple markets from using means that are alien to fair competition (such as predatory pricing, exclusivity agreements and bundling) in order to open up said markets. The legislator is thinking here of cases where a "super-dominant company" has launched an attack, in the form of predatory prices or free offers, on markets on which it has not previously been active. However, unlike the ministerial draft bill, the government draft bill makes it clear that such conduct is only prohibited if it involves undue obstruction. Accordingly, it will not be possible to prohibit efforts that condition normal competition. It will moreover only be possible to prohibit such conduct on existing markets, not on new markets or markets where there is no effective competition. Compared to the ministerial draft bill, the changes in the government draft bill have created far-reaching possibilities of interpretation in this regard. Moreover, according to the new provisions in the government draft bill, the Federal Cartel Office must prove that there is no objective justification for this conduct – in contrast to the other four prohibited practices in the new section 19a(3) ARC. This is likely to take away much of the intended effectiveness of this prohibition, which is probably the most important provision in the new section 19a ARC alongside the ban on self-preferencing.
- No. 3: The intention is also to make it possible to prohibit these companies from shifting market power from

- a dominated market to non-dominated markets through the use and/or linkage of existing competition-relevant data if this creates or raises barriers to market entry or otherwise impedes other companies. Under certain circumstances, this criterion may amount to a prohibition on the use of data.
- No. 4: Moreover, the Federal Cartel Office can prohibit "super-dominant companies" from impeding interoperability with other services and data portability. Multihoming will be made easier so that smaller competitors are able to enter the market more easily.
- No. 5: Finally, the Federal Cartel Office will in future also be able to prohibit "super-dominant companies" from withholding data – that they obtain in connection with their services – and in this way creating unjustified dependencies. This can involve cases in which, for example, when advertising online, the advertising customer is for no reason prevented from assessing its own services.

The "super-dominant companies" will bear the burden of proof for demonstrating that the respective practices disapproved of are objectively justified – the only exception in this respect (as mentioned above) is the prohibited practice in No. 2, i.e. the "opening up" of further markets. In the case of the other four prohibited practices, the Federal Cartel Office does not have to affirmatively determine and demonstrate that a measure is unfair. In this respect, this provision clearly differs from sections 19, 20 ARC. This reversal of the burden of proof, resulting in a "*non liquet*" to the detriment of those at which the provision is aimed, is therefore likely to make it considerably easier for the Federal Cartel Office to take on certain practices of the relevant digital giants. In this way the introduction of a corresponding provision on the reversal of the burden of proof in connection with anti-abuse rules in section 29 ARC in 2007 has led to a clearly more rigorous control of price abuse vis-à-vis the energy companies in the energy industry.

Other new provisions on abuse control

There are also some very relevant changes in the other provisions on the abuse of market power. The clarification that strict causality does not have to be present between market dominance and abuse is intended to bring German law in line with European law. The FCJ's Facebook decision of 23 June 2020 (cf. KVR 69/19) has in the meantime already provided greater clarity in this respect.

The additional changes are also relevant for the digital economy in particular as they take into account the increased importance of data and network effects. The provisions on data access in section 20(1) ARC in combination with the lowering of the intervention thresholds in the case of relative market power, in particular, could have very far-reaching consequences for industrial companies as well:

- So-called "intermediation power", for instance, i.e. the significance of intermediation services for access to purchasing and sales markets of third parties, is to be added to the criteria for market dominance (cf. section 18(3b) ARC); this will be particularly relevant for hybrid platforms where the platform operator itself competes with its users and constitutes a barrier to market entry for them.
- The essential facilities doctrine is to be expanded and will now explicitly also include any form of gatekeeper. Not only physical infrastructure, but also the importance of access to data is to play a role here in the future (cf. section 19(2), no. 4 ARC).
- Moreover, the legislator has recognised that it is no longer the case that only SMEs can be dependent on other companies and that a dependency can also exist due to the dependence on data (cf. section 20(1) and (1a) ARC). In particular, larger companies which may likewise depend on the digital platforms are also to be protected. At the same time, the thresholds for relative market power in the sense of dependence on other companies are also significantly lowered, however, thus also considerably reducing the hurdles for claims to data access. This could in particular mean that industrial companies would have to hand over their machine data to third parties if the latter depend on these data for their own business activities. This is to apply even if this is what initiates commercial dealings in these data, i.e. access was not granted previously. The combination of these provisions could therefore have very far-reaching consequences for a large number of industrial companies. The question of whether such wide-ranging access rights are justified is often overshadowed by the discussion of section 19a ARC in the public arena. However, the comprehensive new statements in the explanatory memorandum indicate that the legislator also sees a need to justify such wide-ranging new provisions affecting companies that do not have a dominant position.
- Finally, a new criterion for obstruction is intended to ensure that markets cannot be "tipped" by means of targeted exclusionary strategies; this new provision already applies to companies with superior market power, i.e. the market is deemed to be jeopardised even if the company concerned does not have a dominant position in that market.

It can be assumed that in future the Federal Cartel Office will mainly take action vis-à-vis "super-dominant companies" in accordance with the new section 19a ARC. Sections 19, 20 ARC will however continue to be relevant for the "super-dominant companies" as well, since enforcement under civil law can only take place in accordance with these provisions. In contrast, it is less likely that the Federal Cartel Office will launch cartel investigations into dominant companies or "super-dominant companies". The Federal Cartel Office would rather improve market conditions by intervening at an early stage, as it believes that competition is better served by this.

The accompanying expanded powers of intervention granted to the Federal Cartel Office will therefore play an important role. In particular, the power to take interim measures will make it possible for the Federal Cartel Office to take action more quickly. The idea is that in future it should already be possible to take such measures if it (only) seems more likely than not that an infringement has taken place and early intervention is necessary to protect competition or due to another company being affected. In particular, this is intended to ensure in cases of abusive exclusionary conduct that competitors are not driven out of the market during the ongoing investigations. As can be seen from the European Commission's most recent abuse proceedings relating to the digital economy, heavy fines are of no use to the market and competition if the competitors were already driven from the market during the course of the investigations.

It is unclear to what extent the Federal Cartel Office will enforce the new data access claims vis-à-vis companies in the "traditional" sector as well. It is probably more likely that those petitioning for access will also seek legal protection before the courts.

Horizontal cooperations

The digital transformation of many economic sectors makes it necessary for competitors to cooperate, for example, to meet investment needs, to be able to advance at the necessary pace or to establish networking that is beneficial for the economy as a whole. This leads to increased antitrust risks for cooperating competitors which they themselves, in principle, have to assess and bear in the legal exception system. In future it will be possible for companies to have a claim to the Federal Cartel Office issuing a formal decision that there are no grounds for action in a certain case. However, this provision only applies to cooperating competitors and is therefore not intended to make it possible to have the Federal Cartel Office examine distribution systems for legal conformity in advance. In addition the practice of informal chairman letters (*Vorsitzendenschreiben*) will be codified. Finally, the Federal Cartel Office will be able to establish guidelines for exercising 'take-up' discretion. This is a welcome development in the interest of legal certainty.

Merger control

Only a few – albeit key – aspects of the merger control provisions are to be revised:

- One major change is the planned increase of the two domestic turnover thresholds from EUR 25 million to EUR 30 million (introduced in the government draft bill) as well as from EUR 5 million to EUR 10 million. This is intended to reduce the number of merger control notifications by around 24% in cases which are mostly not problematic from a competition point of view in order to enable a more targeted use of the Federal Cartel Office's resources and to reduce the burden on companies. Consequently, the affiliation clause, which previously exempted concentrations from merger control, ceases to apply if the target company and the seller together generated turnover of less than EUR 10 million. Such relief is also available to newspaper publishers in the form of a further reduction of the factor for press sales.
- The government draft contains a new provision to the effect that the Federal Cartel Office can issue a decree ordering companies to notify certain concentrations in specific industries for a period of three years if these industries were previously the subject of a sector inquiry (carried out after the Amendment came into force). The companies concerned must have worldwide turnover of EUR 500 million and a 15% share of domestic supply (or demand on the buyer side) and there must also be indications that competition will be significantly impeded by future concentrations. The notification obligation will also apply to concentrations with companies that have only EUR 2 million in turnover and achieve more than two-thirds of this in Germany.
- With this provision, the legislator wants to bring the merger control regulations to bear on, for example, acquisition strategies where a (large) company gradually takes over small competitors or newcomers that may pose a threat to its own market position. It is seen as a risk that larger companies could, by applying this acquisition strategy, buy themselves a dominant position at the expense of medium-sized companies, especially in regional markets. The criteria for prohibition pursuant to section 36(1) ARC have not been modified. According to the explanatory memorandum, it is expected that the provision will be applied to one to three companies per year.
- The merger control provisions for concentrations in minor markets will be tightened to some extent. Although the turnover limit for the existence of a minor market will be raised from EUR 15 million to EUR 20 million, at

- the same time, however, it is to be possible for a concentration to be prohibited if the prohibition requirements have been met on several minor markets, the value of each of which is less than EUR 20 million, but more than EUR 20 million when taken together. Such bundling has so far only been possible under strict – although controversial – conditions. The Amendment at least brings more clarity in this respect.
- The duration of the main examination proceedings is to be extended from four to five months from the date of filing (or six months in the case of an offer of conditions or constraints to solve competition-related problems). The ministerial draft bill had also stipulated a maximum duration of the proceedings in the event of mutually agreed extensions, which is not part of the government draft bill. The extension brings the German system of setting deadlines more in line with the situation in other countries and takes account of the increasing complexity of merger control procedures.
- In future, the parties to a notified concentration will no longer be required to file a notice of completion. However, concentrations which have not been notified and which are subject to notification must still be notified on pain of a fine.
- The conditions for granting ministerial authorisation for concentrations prohibited by the Federal Cartel Office for competition-related reasons are to be tightened. This will probably mean that this instrument will in future be used even less than before.
- Finally, certain concentrations in the area of hospitals will be exempted from merger control for a limited period (completion by the end of 2025). A key prerequisite for this is support from the Hospital Structural Fund (*Krankenhausstrukturfonds*).

Implementation of the ECN+ Directive

The Amendment essentially also serves to transpose what is known as the ECN+ Directive into German law. The government draft bill contains rules on the exchange of information with the competition authorities of other Member States and on mutual assistance, e.g. with regard to investigative measures, the notification of documents and the enforcement of decisions by the antitrust authorities of other Member States.

The inspection of files in antitrust administrative proceedings is being regulated for the first time in the ARC and the rights of third parties to inspect files are to be standardised irrespective of the type of proceedings. Third parties must demonstrate that they have a legitimate interest in the inspection. If a third party wishes to inspect a file with the aim of asserting claims for damages, such inspection is limited to the decisions of the authority. The inspection of files is thus regulated in the ARC for all key areas (cartel investigations, administrative proceedings and civil proceedings). The provision is most likely to be understood as being conclusive, so that the parallel application of the Freedom of Information Act is probably to be excluded. However, the explanatory memorandum has nothing to say on this in practice highly relevant issue.

Through the implementation of the ECN+ Directive, the investigative powers of the antitrust authorities are to be extended. Existing guidelines on how searches are to be carried out must be amended accordingly. In particular, in future it will be possible for any natural person to be obliged to provide information or surrender evidence (request for information). As under European law, searches are now subject to a duty to cooperate, with fines being imposed in the case of non-compliance. In certain cases, natural persons also have to incriminate themselves. However, the information may not be used against them in criminal or administrative offence proceedings.

Cartel investigations

The draft brings about radical changes to the German legislation governing cartel investigations and fines, in particular when it comes to the cooperation and disclosure obligations of those involved.

A party involved in a cartel investigation will in future only have a very limited right to silence. The draft, which is rather unfortunately worded on this point – also in regulatory terms –, serves to implement the ECN+ Directive and codifies what is known as the *Orkem* case law of the ECJ (Case 374/87): According to this, a party involved in the investigation may not be compelled to confess to an infringement of Article 101 or 102 TFEU, but general questions on the circumstances of an infringement – from which it can be concluded by means of circumstantial evidence that the infringement was committed – are admissible. This lowers the hitherto higher German level of protection to the lower EU level of protection and considerably restricts the rights of defence. Although, as far as natural persons are concerned, any self-incriminatory statements cannot be used as evidence in criminal or administrative offence proceedings, this is of course of little use to companies involved in a cartel investigation.

The draft fleshes out the criteria for the calculation of fines, thereby creating more specific statutory standards. It codifies a non-exhaustive list of assessment criteria that have already been applied previously. In this way, the legislator is aiming to create greater legal certainty when it comes to applying the broad fine framework in

practice, as well as to harmonise the methods for calculating fines used by antitrust authorities and courts. There has been frequent – and justified – criticism in the past of the different approaches to setting the amount of the fine and the accompanying risk of being faced with an even worse ruling should legal protection against a fine notice be sought before a court. To this extent the draft is therefore to be welcomed, although it does not go far enough.

The Federal Cartel Office's leniency programme will now be laid down as binding by law. This does not involve any major changes to the content, however. The programme still only covers horizontal cartels, i.e. agreements and collusion between competitors. What will also be codified in future is the possibility of submitting corresponding applications in the case of vertical restrictions of competition (e.g. prohibited retail price maintenance), which may be taken into account as a mitigating factor when the amount of the fine is set. The questionable differences in the approaches followed by the antitrust authorities and the public prosecutor's office when investigating antitrust cases remain unresolved: While the antitrust authorities have a leniency programme, no such thing exists in any investigation conducted by the public prosecutor's office. If an antitrust violation at the same time constitutes criminal conduct – e.g. in the case of market-rigging – the antitrust authority may however hand the investigation over to the public prosecutor. As far as the latter is concerned, however, any leniency application is only brought to bear – if at all – when it comes to setting the amount of the penalty. It is to be hoped that this unjustifiable gap in protection will be closed during the legislative process.

It is to become easier for decisions by the competition authorities of the Member States to be enforced across borders. In future, the Federal Cartel Office will enforce foreign fine decisions by other Member States in Germany. Following the EU-wide implementation of the ECN+ Directive, this will apply vice versa as well.

Cartel damages

Since the provisions on cartel damages were fundamentally revised by the Ninth Amendment to the ARC, the current Amendment will only make selective adjustments. In response to the Federal Court of Justice's rejection of prima facie evidence of individual legal transactions being affected by the cartel (KZR 26/17 - *Schienenkartell*; KZR 24/17 - *Schienenkartell II*), the presumption of harm is to be supplemented by a refutable presumption that legal transactions with companies involved in the cartel that fall within the scope - in terms of subject matter, timing and geography - of the cartel are affected by the cartel. The presumption also applies in favour of indirect buyers of these goods. It explicitly does not extend to legal transactions with companies not party to the cartel (so-called umbrella effects) and, according to general principles, only applies to claims for damages arising after the Act comes into force. There is no practical need for such a provision, since the lower courts can manage with factual presumptions that likewise lead to a nuanced distribution of the burden of presentation and proof that does not make excessive demands on the claimant. The government draft bill continues to see no need to introduce a provision that determines or presumes the amount of the harm, since this can be assessed pursuant to section 287 Code of Civil Procedure.

Competition register

The Amendment also adapts parts of the Competition Register Act. According to the explanatory memorandum, this is to ensure that the competition register currently being developed by the Federal Cartel Office can be launched without any complications. The key point here is that the notification duty and the duty to make enquiries come into force at different times. The prosecuting authority's duty to notify infringements that must be registered to the registration authority only comes into force one month after the announcement that electronic data transfer is guaranteed. The contracting entity's duty to make enquiries takes effect six months after that.

As regards the rights to have evidence surrendered or information disclosed for the calculation of the harm as laid down in the ARC, it is to be made clear that these may also be exercised to enforce claims for damages that arose before the relevant provision came into force in 2017. Düsseldorf Higher Regional Court had seen this differently in two of its rulings (VI-W (Kart) 2/18).

Conclusion

The government draft bill generally strengthens the Federal Cartel Office's powers by giving it more extensive investigative powers. Its particular aim is to ensure that markets in the digital economy remain open. There is a clear increase in the degree of regulation and the power to intervene in this regard. Going forward, too, the Federal Cartel Office is likely to be one of those authorities most active in the area of the digital economy. However, the Amendment also contains wide-ranging new provisions concerning general data access claims. It is not necessary for a company to have a dominant position for these new provisions to apply; it need only have relative market power. The provisions may therefore have serious consequences for industrial companies, which could be forced

to hand over machine data.

The doubling of the second domestic turnover threshold – which is low compared to other countries – is to be welcomed in merger control.

The fleshing out of the criteria for setting the amount of a fine is a step in the right direction, but probably does not as yet go far enough to sufficiently reduce the risk run by companies of court rulings that are even worse. Although unavoidable based on the ECN+ Directive, the reduction of the previously higher German level of protection with regard to companies' freedom from self-incrimination to the EU level is regrettable in constitutional terms.

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Dr. Petra Linsmeier
Dr. Christian Steinle
Dr. Alexander Fritzsche