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COMPETITION / ANTITRUST

THE 2018 COALITION AGREEMENT – COMPETITION AND ANTITRUST LAW

Competition and antitrust law: Digitalisation and platform markets

What legislative changes does the coalition agreement call for?

- › The coalition agreement announces a modernisation of antitrust law in several places and sets the objective of creating reliable rules for the German and European digital economy and safeguarding their global competitiveness. For this purpose, a “Competition Law 4.0” Commission, among others, is to develop reform proposals designed to lay the legal foundations for building German and European digital groups with global relevance. Moreover, the establishment of a “digital agency”, which would assist the government with issues concerning platform regulation and market monitoring, is being looked into.
- › At the same time, in addition to a reformulation of the market definition in the digital economy, stricter scrutiny of digital platform markets under competition law is announced. For this purpose, competition law proceedings are to be accelerated by, for example, providing the Federal Cartel Office with more options to take interim measures to avert irreparable harm to competition.

What consequences will this have on companies?

- › With the announced reform path in connection with Competition Law 4.0, the coalition partners are continuing the efforts to modernise antitrust law that were already begun as part of Economy “4.0”. As shown by the ninth amendment to the Act against Restraints of Competition, which entered into force last June, these announcements must indeed be taken seriously. Of course, it remains to be seen to what extent specific reform proposals are actually suitable for helping strengthen the local digital economy. What also remains very unclear is the focus of the announced “digital agency” and possible effects on companies (keywords: duties to cooperate in market investigations, etc.). Finally, the national legislator’s leeway in the area of antitrust law is likely to remain limited since, as is generally known, EU law takes precedence. Attention should be paid, in particular, to the directive proposal “ECNplus”, which is in the Brussels legislation pipeline and is aimed at harmonising the law governing antitrust proceedings. A future German government will have to keep within this framework.
- › It is unclear as to what specific consequences digital platform operators can expect. Although, parallel to the existing activities of the European Commission, increased market monitoring of major platform companies is expected in Germany as well, the Federal Cartel Office, which is responsible for this, acts independently. Moreover, given the large number of proceedings already conducted “through Brussels”, from the point of view of the companies affected, the German initiative will likely only develop additional threat potential to a limited extent. It is true that, when it comes to market abuse oversight, the Federal Cartel Office generally has discretion to institute proceedings and market investigations parallel to those of the Commission (and to apply stricter standards, as well, in some cases). However, given the coordination and cooperation

› mechanism in the European Competition Network (ECN), doubt remains as to whether the German – as stated: independent – watchdogs will actually compete with their counterparts in Brussels (and also reach different conclusions). In addition, due to the European notification thresholds, a large number of the relevant cases in the area of merger control will likely not fall within the scope of the German authorities anyway. Finally, also in the broad field of possible cooperations between digital companies (keyword: big data, etc.), the national leeway is considerably limited due to the fact that the competition authorities are not allowed to proceed in a manner that contradicts European law – the Commission is likely to remain at the helm here, too.

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