大成 DENTONS

New German Antitrust Law Targets Digital Markets and Significantly Raises Thresholds for Merger Notification

January 18, 2021

On January 14, 2021, the German Bundestag passed the tenth amendment to the Act Against Restraints of Competition (ARC). While the amendment was initiated to address changes required by the ECN+ Directive (implementation deadline February 4, 2021), its main focus quickly shifted to the digital economy, earning it the moniker "**ARC Digitization Act"**. The main changes are:

- Of the many provisions that specifically target digital industries, the most groundbreaking is the introduction of a **new category of supervision**, which is aimed in particular at large digital corporations. Germany is the first country to explicitly adopt such regulatory powers for its competition authority vis-à-vis digital industries.

- In addition, the **relevance of data and digitalization** in the modern economy is a clear focus of the amendment. Hence, amended provisions on an abuse of market power underline this relevance. In addition, the amendment introduces a provision that effectively forces companies to grant others **access to data** under specific circumstances.

- However, the amendment also contains various further changes, out of which the most important one is surely the **significant increase in the merger control thresholds,** which was only included at a late stage of deliberations.

- Finally, the amendment includes a provision ensuring that (effective) **compliance measures** will be taken into account when calculating fines for violations of competition rules.

The amendment has now also passed the Bundesrat and will most likely come into force on January 19 or 20, including the new thresholds.

In detail:

A. Abuse of a dominant position

Provisions regarding an abuse of a dominant position will be modernized and strengthened.

- **Strict oversight of the new category of companies with "paramount cross-market importance**": The amendment creates much stricter rules for companies with "paramount cross-market importance for competition" that exert influence over multiple markets as "gatekeepers". The new instrument is set up in two steps: First, the Federal Cartel Office will determine individual companies to fall into this category. Based on this determination, the Office may then take measures against the company based on the new provision.

- The law explicitly states that certain conduct by digital groups that have been identified as of paramount cross-market importance can be abusive:

- giving preferential treatment to their own products and services through special presentation, pre-installation of their own software on devices or integration into other software;

- inducing exclusionary pre-installation or integration of their own software;

- demanding unreasonable advantages, including demanding data not necessary for a service, or making the quality of a service dependent on whether such data is provided;

- preventing or impairing another company's ability to advertise its own products or services or reach customers;

- making the use of a service dependent on the processing of data by other services;

- processing competition-relevant data received from other companies for purposes other than those necessary for the provision of its own services, insofar as the other company cannot decide on the purpose, manner and method of the processing; and

- **"tipping"** markets into monopolies, including via automatically linking the use of a service to the use of another service and making the use of one service dependent on the use of another service.

This list mostly reflects already established practice by competition authorities. However, the proposal to make all these practices illegal per se was rejected.

The **Federal Court of Justice** (BGH) becomes the first and last instance court for companies of paramount cross-market importance. This is intended to shorten proceedings and ensure greater legal certainty. Especially in the digital world, drawn-out legal proceedings can come too late for a market under threat. However, this provision constitutes a clear deviation from the normal jurisdictional system in Germany. The Federal Court of Justice is practically never the court of first instance and it is extremely rare not to have more than one court instance. While there is no constitutional guarantee for having at least a second instance, it is frequently considered to constitute good policy.

In addition to these special provisions for companies of paramount cross-market importance, the amendment also contains the following new rules for digital companies:

- New criterion of **access to competition-relevant data** for assessing a company's market position. Accordingly, it will henceforth be possible to be classified as dominant or strong in a market on the basis of data access alone.

- Inclusion of the concept of so-called **intermediation power** to better capture the role of platforms as intermediaries in multi-sided markets.

- The threshold for determining "**superior or relative market power**" is lowered. Previously, Section 20 of the ARC already extended abuse control to companies that offer products or services that other companies depended on for their market activities, as the provider of such products or services is frequently in a position to exert control over other companies and can hence act akin to a dominant undertaking. However, the special obligations arising from this provision only applied in relation to small and medium-sized enterprises. In the future, this restriction will no longer apply, so that, e.g., a large multinational corporation could also invoke this provision if it is dependent on another company's products or services.

- A **dependency** vis-à-vis other companies can now also explicitly result from the need for data access. In this case, refusing access to data may constitute an unfair restraint of competition or an abuse of power.

- From this may result an **extremely far-reaching data access obligation**. Due to the amended definition of superior and relative market power, this obligation not only applies to large digital corporations but also to smaller companies that are not dominant.

- The "**essential facilities doctrine**" is extended to include any form of "**gatekeeper**," particularly those that control data access. "Gatekeepers" are companies that, by virtue of their positions, can decide on market access for product or service suppliers. In today's digital world, platforms can frequently be considered as gatekeepers.

- **Acceleration of proceedings**, inter alia through lower requirements for interim measures. The Federal Cartel Office can thus

react more quickly – because once a market has been divided up, it is of no use to a company that has been squeezed out if a court finds misconduct years later.

B. Merger Control

- In merger control, the two **domestic turnover thresholds** for the notification requirement will be raised, **from €25 million to €50 million** and **from €5 million to €17.5 million** respectively. The reason for this change – in addition to an adjustment to inflation – being that the previous thresholds were comparatively low by international standards. According to estimates regarding an earlier proposal for an increase to €30 million and €10 million respectively, already such a smaller increase would have resulted in 24% fewer mergers requiring notification. The further increase – which was a last minute change by the parliament's economic committee – will exempt even more mergers from this obligation. Companies and the Federal Cartel Office will thus be relieved from some amount of red tape. It remains to be seen, however, whether these advantages have been bought by excluding vast numbers of anti-competitive mergers from the Federal Cartel Office's supervision and whether the Office will react in applying stricter standards to those mergers that still require notification. At the same time, it should be noted that the European Commission is considering amendments to its Merger Regulation that would allow it to review so-called killer acquisitions – i.e., the acquisition of (still) small competitors before an expected increase in revenues is realized.

- However, in one regard the notification requirement has actually been extended. The newly introduced so-called **Remondis clause** will allow the Federal Cartel Office to require notifications for specific sectors (despite not reaching the thresholds) following an inquiry into that sector. The background to this is the company Remondis' purchase of small competitors in the waste disposal market that fell below the thresholds and therefore did not require a notification, despite potentially leading to anti-competitive results. However, the original – far-reaching – proposal for the Remondis clause has been somewhat tamed in the final amendment. Now, a sales threshold of €500 million is required, as well as objective indications that future mergers could significantly impede domestic competition. In addition, it is assumed that the share of the companies concerned in supply or demand in the relevant sectors of the economy amounts to at least 15%. Nonetheless, the clause still enables the Federal Cartel Office specifically to counteract potential abuses of the increased thresholds (in areas in which it performed a sector inquiry).

- The **time limit for the main review procedure** in merger control is extended from four to five months from the date of notification (or six months in case of commitments).

- The **threshold value of the small market clause** is raised from €15 million to €20 million. At the same time, the consideration of whether the threshold has been reached now not only includes individual markets, but all affected markets as a **whole**.

- In the future, it will be permissible to **determine sales revenue** on the basis of IFRS (International Financial Reporting Standards) and other internationally accepted standards. Previously, sales revenues had to be calculated in accordance with the principles of the German Commercial Code (HGB), which could result in a costly conversion of sales revenues, particularly for international actors.

- A **notification to the Federal Cartel Office after an approved merger has been implemented** will no longer be required.

- In the press sector, the so-called **press calculation clause** is amended. The multiplier for calculating sales revenues for publishing, production, and distribution of press products is reduced from eight to four times the sales revenues. This will result in fewer mergers in the media sector being subject to notification.

- Cross-site **mergers between acute care hospitals** will temporarily (under certain conditions) not require notifications. This exemption from merger control is due to the hospital structure funds created in 2018, which is supposed to improve the structure of health services via inter alia mergers between hospitals.

C. Proceedings before the Federal Cartel Office

The 10th ARC amendment also contains changes to the administrative proceedings before the Federal Cartel Office. In particular, while the general principle remains in place that companies are to determine by themselves whether their behavior is in compliance with competition law, some further possibilities to gain legal certainty have been introduced.

- For horizontal co-operations, companies can **request** the Federal Cartel Office to determine (within six months) whether the planned cooperation violates competition law rules if there is a substantial legal and economic interest in this determination.

- The amendment codifies the already existing practice of the so-called **informal chairman's letter,** i.e., a notification that the Federal Cartel Office uses its discretion to decide not to pick up a case**.** Even though this will not result in any changes to the practice itself, it is welcome that this practice has now explicitly found its way into the ARC.

- Finally, it is possible for the **Federal Cartel Office** to publish **guidelines on how it exercises its discretion** in taking up a case. These can serve as further guidance for companies in their own assessment.

D. Further changes

- New regulation of **access to files** in antitrust administrative proceedings.

- **Oral hearings** are made possible. Hence, parties can avoid more costly written hearings.

- Restriction of the right to **refuse to provide information** in fine proceedings. Any natural person may be obliged to provide information. In some cases, it will even be possible to oblige individuals to incriminate themselves, although the information obtained in this way cannot be used against the individuals concerned in criminal or misdemeanor proceedings.

- Codification of the **leniency program**. In the future, it will be regulated by law for the first time in a binding manner, which will contribute significantly to legal certainty.

- Concretization of the criteria for the **calculation of fines**. The circumstances to be taken into account are now explicitly listed. These include the severity and duration of the infringement and the economic circumstances of the company.

- In the calculation of fines, **measures taken to prevent and detect antitrust violations** will have the potential to reduce fines. This provides an incentive for companies to implement **compliance measures**.

- Slight readjustment of the provisions on **civil proceedings concerning cartel damages in** response to the precedent set by the Federal Court of Justice (decision of December 11, 2018, KZR 26/17,-*Schienenkartell I*)**.** For the enforcement of claims, a rebuttable presumption is introduced into the law that legal transactions of suppliers or customers of a cartel with companies involved in the cartel were covered by this cartel. Previously, there was only an explicit presumption that a cartel as a whole caused damages. However, according to the jurisprudence, allegedly injured parties still had to show that they were affected by it.

E. Context and conclusion

Just a few years ago, the 10th ARC amendment would hardly have been conceivable in its current form.

The Federal Cartel Office's proceedings against Facebook, based on the accusation of an abuse of a dominant position by sharing data throughout its various services (B6-22/16), were still seen as an absolute novelty that kicked off a legal thriller, in which first the Düsseldorf Higher Regional Court (decision of 26. August 2019, VI-Kart1/19 (V)) ruled against and then the Federal Court of Justice (decision of 23 June 2020, KVR 69/19) ruled in favor of the Federal Cartel Office. Even this, however, has been far from the end of the Facebook saga. Until now, everything that took place was part of proceedings for interim measures, so that the main proceedings (first before the Higher Regional Court, potentially followed by the Federal Court of Justice) could still lead to different results (while these decisions will most likely not deviate from the interim decisions, there is no absolute certainty in this regard). Moreover, the interim legal proceedings have not yet been concluded either, as Facebook filed another application for interim measures after the Federal Court of Justice's decision, whereupon the Düsseldorf Higher Regional Court effectively suspended the decision of the Federal Court of Justice by means of a so-called hanging order until the Higher Regional Court rules on this renewed application. The Federal Court of Justice, in turn, is currently considering the legality of this ruling. (The provision that the BGH is the sole court instance in antitrust cases based on the new instrument is certainly at least partly inspired by such complicated and long-lasting proceedings.)

The provisions on a stricter supervision of the digital economy included in the first draft bill – which were a reaction to the Facebook case – were considered equally groundbreaking.

Even though only 12 months passed between the introduction of the draft bill and its adoption by the Bundestag, a lot has happened in the meantime. Now, the amendment no longer seems groundbreaking, but rather to entirely reflect the zeitgeist.

The European Commission, for example, has also taken up the cause of stronger regulation of digital actors with its drafts for a Digital Markets Act and a Digital Services Act and in the US, the Federal Trade Commission and the Department of Justice – which for a long period of time could have been described as rather passive – made headlines with lawsuits against Facebook and Google.

So while until not too long ago there was still a vivid debate as to whether competition authorities can and should have the power to regulate digital corporations and data at all, this development now seems unstoppable. This change also brings about various new challenges to all parties involved as German competition law enters new (and digital) territories.

Contacts

Dr. Josef Hainz
Partner, Berlin
D +49 30 264 73 241
josef.hainz@dentons.com

Dr. René Grafunder
Partner, Berlin
D +49 30 264 73 307
rene.grafunder@dentons.com

Dr. Jörg Karenfort
Partner, Berlin
D +49 30 264 73 305
joerg.karenfort@dentons.com

Dr. Florian Wiesner
Partner, Düsseldorf
D +49 211 74 074 191
florian.wiesner@dentons.com

Dr. Matthias Nordmann
Partner, München
D +49 89 244 408 416
matthias.nordmann@dentons.com

Dr. Norman Hölzel
Counsel, Berlin
D +49 30 264 73 305
norman.hoelzel@dentons.com

Laura Appell
Senior Associate, Berlin
D +49 30 264 73 165
laura.appell@dentons.com

Franziska Peters
Senior Associate, Berlin
D +49 30 264 73 317
franziska.peters@dentons.com

Anna Ritte
Senior Associate, Berlin
D +49 30 264 73 303
anna.ritte@dentons.com

Dr. Arne Karsten
Senior Associate, Düsseldorf
D +49 211 740 74 192
arne.karsten@dentons.com

Jürgen Bering
Associate, Berlin
D +49 30 264 73 302
juergen.bering@dentons.com