Update Antitrust

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ARC Digitalisation Act

Practice Group Antitrust

On 19 January 2021, a significant amendment to German competition law came into force. The 10th amendment to the Act against Restraints of Competition ("ARC") primarily introduces rules for stronger regulation of the digital economy. Therefore, the law has been designated as "ARC Digitalisation Act". In addition, however, the amendment also changed and supplemented a number of other regulations, including in merger control and procedural competition law.

Modernisation of abuse control under competition law

The 10th amendment of the ARC focuses on the modernisation of abuse control under competition law. It incorporates in particular the findings of the study commissioned by the Federal Ministry of Economics and Technology (BMWi) from the professors Schweitzer/Haucap/Kerber/Welker on the "Modernisation of abuse control for companies with market power" and the work of the Commission Competition 4.0. The short title of the Act "GWB-Digitalisierungsgesetz" (ARC Digitalisation Act) says it all as it is primarily about adapting the ARC to the challenges of digitalisation.

Section 19a ARC - extended abuse control for "super market dominators"

With Section 19a ARC, the legislator creates a new element of intervention for companies "**with outstanding cross-market significance for competition"**. According to the legislator, such "super market dominators" occupy key positions for the development of competitive structures. They can therefore be obliged to refrain from specific anti-competitive behaviour.

Two-step procedure

The procedure consists of two stages: In the first stage, the Federal Cartel Office must declare that the respective company has an overriding importance for competition in the market. In the second stage, specific obligations to cease and desist are imposed on the company according to the catalogue in Section 19a (2) ARC. The two stages can also be combined (Section 19a (2) sentence 5 ARC).

Multilateral markets and networks

The legislator sees an overriding cross-market significance above all in the area of the digital economy: The instruments under Section 19a ARC only apply to companies that are active "to a considerable extent" in so-called "multi-sided markets" or in the area of "networks". This follows from the reference to Section 18 (3a) ARC. When it comes to potential "super market dominators", the legislator therefore has primarily the large platforms and digital groups such as Google, Facebook or Amazon in mind.

Criteria for determining the competitive potential of a company

Section 19a (1) sentence 2 ARC lists the following, **non-exhaustive criteria for** determining superior cross-market importance:

- dominant position on one or more markets (no. 1);
- Financial strength and access to other resources (no. 2);
- vertical and conglomerate integration or activity (no. 3);
- Access to competition-relevant data (no. 4); and
- Importance for and influence on the business activities of third parties, in particular their market access to sourcing and sales markets (no. 5).

Temporary declaration; appeal

Pursuant to Section 19 (1) sentence 3 ARC, the declaration of an overriding importance for the entire market must be limited to five years. It can be challenged also independently by means of an appeal to the Federal Supreme Court pursuant to Section 73 (5) no. 1 ARC.

Prohibition obligation

Once an overriding cross-market importance is declared, these companies can - in addition to the general abuse provisions that continue to apply - be explicitly prohibited under Section 19a (2) sentence 1 ARC from

- favouring themselves over competitors without objective reason (no. 1);
- taking measures which entail an impediment of other undertakings in their business activities on sourcing or sales markets, in the event that the activity of the super dominant undertaking has significance for access to these markets (no. 2);
- unfairly hindering competitors on a market where these undertakings, even without being dominant, can rapidly expand their position (no. 3);

- erecting or appreciably raising barriers to entry by processing competitively sensitive data or requiring terms and conditions that permit such processing (no. 4);
- hindering other undertakings by refusing or making more difficult (i) the interoperability of products or services or (ii) the portability of data (no. 5);
- gaining advantages by providing other companies with inadequate information about the scope, quality or success of their services for no objective reason (no. 6); and
- demanding advantages for the treatment of another company's offers that are disproportionate to the reason for the demand (no. 7).

Rule examples

The legislator has attempted to clarify the potential economic damage it assumes for each of the aforementioned offences by mentioning standard examples.

Possibility of justification

Companies with cross-market significance can defend themselves against a prohibition order by claiming that the respective conduct is objectively justified; however, the burden of proof for this lies with the company (Section 19a (2) sentences 2 and 3 ARC).

Access to data relevant for market dominance test

There are also changes relevant for the market dominance test: Access to **competition-relevant data** is now explicitly included in the catalogue of circumstances to be taken into account when assessing the market position of a company in Section 18 (3) no. 3 ARC (new version). This is intended to clarify that access to data in all economic sectors is to be considered as a criterion for the assessment of the market position of an undertaking and not only for multilateral markets and networks. Up to now, access to competition-relevant data only has to be considered as a circumstance especially to be taken into account when assessing the market position of a company in the case of multilateral markets and networks (Section 18 (3a) no. 4 ARC).

“Intermediation power” relevant for market dominance test

In addition, the new Section 18 (3b) ARC establishes the concept of **"intermediation power"** in order to be able to take into account the mediation and control function of platforms (intermediaries). According to this, the significance of the intermediary services it provides for access to procurement and sales markets must also be taken into account when examining the

dominant position of a company that is active as an intermediary on multilateral markets.

Extension of the "essential facilities doctrine" to access to platforms, interfaces, competition-relevant data and intellectual property rights

The new version of Section 19 (2) no. 4 ARC adapts the German codification of the **"essential facilities doctrine"** to the development in European application practice and case law. The previous regulation was characterised by a narrow understanding of an abusive refusal of access, especially in the case of physical infrastructure. The new version, on the other hand, is intended to clarify with its more open wording that a refusal of access to platforms or interfaces or to competition-relevant data can also be abusive, as can a refusal to license intellectual property rights.

Restriction of the scope of protection of relative market power to "small or medium-sized" companies is abolished

The new version regulating relative market power in Section 20 (1) sentence 1 ARC **removes the restriction of the scope of protection to "small or medium-sized" undertakings**. As a result, the relative market power of an undertaking can also arise vis-à-vis large undertakings that are dependent on the undertaking with relative market power. However, it is clarified in a restrictive manner that a norm addressee status does not exist if the dependent companies are equipped with a corresponding degree of power with regard to the respective concrete dependency situation. This amendment will be of considerable practical significance far beyond the digital economy.

Relative market power also in case of "intermediary power"

The new Section 20 (1) sentence 2 ARC clarifies that the concept of **"intermediary power"** of companies acting as intermediaries in multilateral markets must also be taken into account in the context of the dependency test.

Dependency due to dependence on access to data

The new Section 20 (1a) ARC clarifies that a dependency can also result from the dependence **of an undertaking on its access to data**. In this context, it is clarified that an unreasonable impediment can also exist if commercial transactions for this data have not yet been opened.

Unreasonable impediment in case of risk of tipping on platform markets

The introduction of the new Section 20 (3a) ARC serves to establish a new element of intervention to reduce the competitive problems caused by so-called **tipping**, i.e. the transformation of a market characterised by strong positive network effects with several suppliers into a monopolistic or highly concentrated market. In this respect, the new regulation provides that

an unreasonable impediment also exists if a company with superior market power on a market within the meaning of Section 18 (3a) ARC hinders the independent achievement of network effects by competitors and thereby creates the serious risk that competition on the merits is restricted to a not inconsiderable extent. This makes it possible for the competition authorities to intervene at an early stage, when the company concerned has not yet crossed the threshold of market dominance, because once tipping has taken place it can practically no longer be reversed. The legislator was thinking in particular of the prohibition or hindrance of so-called multi-homing (parallel use of several platforms) and the impediment of platform switching, without limiting the regulation to these cases.

Merger control: turnover thresholds increased

Shortly before the Bundestag passed the amendment, the Economic Committee included a significant increase of the turnover thresholds relevant for merger control. In future, concentrations will only have to be notified to the Federal Cartel Office based on the turnover of the undertakings concerned (Section 35 (1) ARC) if, in the last fiscal year before the concentration, the following conditions are met

- the undertakings concerned generated a total worldwide turnover of more than EUR 500 million and
- in Germany, at least one undertaking concerned generated a turnover of more than EUR 50 million (previously: EUR 25 million) and
- in Germany, another undertaking concerned generated a turnover of more than EUR 17.5 million (previously: EUR 5 million)

This increase of the turnover thresholds is intended to relieve the Federal Cartel Office from examining smaller mergers.

Some further facilitations...

In addition, the "*de minimis*" market threshold (Section 36 (1) no. 2 ARC) was raised, so that in future a concentration cannot be prohibited if domestic sales on a market in the last calendar year were less than EUR 20 million (previously: EUR 15 million). Also the media calculation clause (Section 38 (3) ARC) has been reduced, so that in the case of concentrations of press and broadcasting companies, the turnover is only multiplied by four, rather than by eight.

The obligation to inform the Federal Cartel Office of the implementation of notified mergers has also been dropped.

...but also intensified scrutiny

However, the amendment does not only bring relief in the area of merger control: In future, following a sector inquiry, the Federal Cartel Office may oblige companies according to Section 39a ARC to notify any merger in one or more specific sectors of the economy if, in particular

- there are indications that future concentrations could significantly impede effective competition in Germany, and
- the undertaking has a share of at least 15% of the supply of or demand for goods or services in the aforementioned industry sectors in Germany.

This possible expansion of the merger control rules is intended to cover cases in which a company carries out several smaller, non-notifiable transactions on the same relevant product markets, especially if these are closely related in time. This can lead to problematic concentrations if larger companies acquire a dominant position in regional markets.

The amendment also extends the Federal Cartel Office's time for the in-depth examination of concentrations ("main examination proceedings") from previously four months to five months (Section 40 (2) ARC). In practice, the Federal Cartel Office has already extended many proceedings with the consent of the parties, so that the new regulation is likely to have only a limited impact.

Hospital mergers

In the future, concentrations in the hospital sector across several locations completed before 31 December 2027 will be exempt from the application of merger control, provided they do not conflict with any other provisions of competition law and they meet the requirements for public funding under the relevant provisions of hospital law (see Section 186 (9) ARC).

Cartel damages: Facilitation of evidence

Unlike the 9th amendment to the ARC, this amendment does not focus on cartel damages law. However, Section 33a (2) ARC introduces a rebuttable presumption that legal transactions with companies involved in a cartel are affected by the cartel in terms of subject matter, time and location. This presumption is also to apply in favour of indirect customers.

This is the legislator's reaction to the recent case law of the Federal Court of Justice (BGH) in the "rail cartel cases" (KZR 26/17 and KZR 24/17), which rejected prima facie evidence of the existence of a cartel.

According to general principles, however, this new presumption is only likely to apply to claims for damages arising after the Act comes into force. It remains to be seen whether it will have any practical impact, as the courts can already work with actual presumptions and estimates. With regard to the amount of damages, the general judicial power of estimation pursuant to Section 287 of the German Code of Civil Procedure (ZPO) continues to apply in any case; a specific rule for determining or estimating damages has not been newly included in the ARC.

Procedural law: Numerous changes

The 10th amendment to the ARC contains numerous changes to procedural law. These changes mainly concern the inclusion of an independent right to file inspection in the ARC as well as the implementation of numerous regulations of the ECN+ Directive, in particular the codification of the leniency programme, which was previously only regulated on the basis of administrative regulations of the Federal Cartel Office:

Codification of the inspection of files

With Section 56 (3) to (6) ARC, the legislator regulates for the first time the inspection of files in administrative competition proceedings. Parties involved must assert a legal interest in file inspection. Likewise, third parties are granted a right to inspect files, provided they have a legitimate interest.

Insofar as the inspection serves to prepare a claim for damages, the inspection of files is restricted. This is intended to ensure that the right to inspect the authorities' files regulated in Section 89c ARC is not undermined in the case of cartel damages proceedings.

The restriction of file inspection is possible, in particular due to company and business secrets. Explicitly excluded from the inspection of files are drafts of the competition authority’s decisions, work on their internal preparation and internal documents relating to votes. It remains to be seen whether courts

will regard this provision as being as conclusive as the explanatory memorandum to the draft Act with regard to the Freedom of Information Act.

Implementation of the ECN+ Directive

The legislator is implementing the ECN+ Directive with numerous, sometimes very detailed provisions. The ECN+ Directive is intended to ensure a more effective enforcement of European competition provisions. The focus is on the exchange of information and administrative assistance between national competition authorities.

Specification of the powers in case of dawn raids

Section 59b ARC specifies the powers of the competition authorities in the case of dawn raids (previously: Section 59 (4) ARC). What is required is an initial suspicion on the part of the competition authorities. In particular, representatives and employees of the company concerned now have a duty to cooperate with questions from the competition authorities. However, the information provided may be subject to a conditional ban on the use of evidence. The competition authorities may enforce compliance with the dawn raid by imposing a fine.

Duty to provide administrative assistance

The newly introduced Sections 50a to 50e ARC regulate the Federal Cartel Office's duty to provide administrative assistance with regard to investigations as well as with regard to servicing documents and with regard to enforcement measures by competition authorities of the Member States.

Section 50a ARC, for example, deals with the cooperation of national competition authorities in **investigations**, while Section 50b ARC regulates the **servicing of documents** (e.g. decisions of a competition authority of a Member State) to the company concerned by the Federal Cartel Office. The **enforcement** of decisions by the competition authorities of other Member States is now also the responsibility of the Federal Cartel Office under Section 50c ARC. In the event of disputes regarding the legality of servicing documents and enforcement measures, the court with jurisdiction under the ARC shall decide in accordance with German law.

Within the framework of the exchange of information pursuant to Section 50d ARC (formerly: Section 50a ARC), restrictions now apply to the disclosure of leniency applications.

Changes to the provisions on fines

With the implementation of the ECN+ Directive, the legislator has revised the provisions on fines fundamentally which are now laid down in Sections 81a to 81g ARC.

The legislator has extended the liability of associations of undertakings, such as trade associations, and introduced Section 81b ARC to ensure that the members of the association ultimately pay the fine imposed on an association of undertakings.

The statutory rules on the imposition of fines, which were previously mainly governed by the Federal Cartel Office's Guidelines on Fines, have also been fundamentally expanded. Section 81d ARC contains a non-exhaustive list of criteria for the assessment of fines. This is intended to make it easier for competition authorities and courts to apply the legal framework and to promote consistency in the assessment of fines. The rules expressly stipulate that positive post-offense behaviour may reduce a fine. In particular, compliance measures taken after the offence to remedy the compliance deficits revealed by the violation of competition law can now be taken into account by the competition authorities when calculating the fine. Efforts made by the company to investigate the offence and to compensate the damage are also taken into account in the assessment.

Section 81g ARC contains a far-reaching change: in deviation from Section 33 (3) of the Act on Regulatory Offences (OWiG), Section 81g (4) sentence 2 ARC suspends the absolute limitation period for the duration of court proceedings. In ongoing court proceedings, the absolute statute of limitations can thus no longer be asserted. According to the underlying regulation of the ECN+ Directive, the legislator could have left the absolute limitation period untouched. Due to the long duration of many court proceedings, the legislator decided to suspend the statute of limitations in these cases.

Statutory regulation of the leniency programme

The ECN+ Directive requires statutory regulation of a **national leniency programme**. The leniency programme, which has so far been regulated in the so-called Leniency Programme of the German Federal Cartel Office, will be transferred to Section 81h to 81n ARC without major modifications. The leniency programme only covers horizontal agreements. According to the explanatory memorandum to the draft Act, consideration

of vertical agreements is also at the discretion of the competition authorities. The public prosecution is not limited by the leniency programme: A conviction of persons, e.g. under Section 298 of the Criminal Code, is possible despite leniency.

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