SULLIVAN & CROMWELL LLP

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German Antitrust Law

Major German Competition Law Reform Introduces Merger Control Changes and Claims Role as Leading Tech Antitrust Enforcer

SUMMARY

Just a few weeks after the European Commission (**EC**) unveiled its proposal for a future EU-level tech regulation[1], Germany has moved ahead and enacted its own set of national rules aimed partly, and notably, at curbing Big Tech's power. While it may take the EU's planned platform regulation (the so-called Digital Markets Act, **DMA**) several years to see the light of day, Germany's newly "digitized" antitrust rules have already taken effect, giving the German competition authority (**FCO**) a first mover advantage as leading tech antitrust enforcer. In a nutshell:

First, with regard to merger control, Germany has increased substantially its infamously low jurisdictional revenue-based thresholds. Not without safety net, of course. After all, starting this year, the EC intends to accept referrals by Member States of certain problematic transactions that fall below both EU and national merger control thresholds. Furthermore, in order to capture pre-emptive acquisitions of smaller and niche competitors, the new German law provides for a three-year window during which the FCO can oblige a company in certain (previously investigated) sectors to file any of its future mergers and acquisitions (whether they meet the thresholds or not).

Secondly, with regard to antitrust enforcement, the new rules give sweeping new powers to the German watchdog to investigate and punish abusive behavior by dominant firms, including, in the case of certain blacklisted practices (such as self-preferencing) by digital gatekeepers, through an accelerated investigation procedure with limited judicial review. Having learned its own and the EC's lesson from the prior numerous antitrust investigations of Big Tech, the new German rules also lower the thresholds for the FCO to grant interim measures.

Finally, the amendment codifies the FCO's leniency program and implements the EU's ECN+ Directive to harmonize Member States' rules governing antitrust investigations (including dawn raid inspections and limitation periods). Ironically, the implementation of the ECN+ Directive was the original trigger for the new reforms. The result, however, may not necessarily be viewed by the EC as a harmonization success – with Germany giving itself the potential to be on a collision course with the EC as far as enforcement against inherently cross-border conduct by global tech players is concerned.

MERGER CONTROL

A. JURISDICTIONAL CHANGES

- The amendment **raises the domestic revenue thresholds** for mandatory notifications from EUR 25 million to EUR 50 million and from EUR 5 million to EUR 17.5 million respectively (with the EUR 10 million **de minimis target exemption** being abolished).
- In order to compensate for the increased thresholds and to address early-stage acquisitions of smaller and niche competitors with low revenue, the **FCO may single out certain companies and require them to file any merger or acquisition** for a period of three years if:
  i. the company's worldwide revenue exceeded EUR 500 million in the last financial year;
  ii. the company's share of demand or supply in the relevant economic sectors specified by the FCO exceeds 15%;
  iii. the target's worldwide revenue exceeded EUR 2 million in the last financial year, two thirds of which was generated in Germany; and
  iv. the FCO concluded a prior sector investigation in the relevant economic sector and reasonably considers that future acquisitions might seriously hamper competition in the sector.
- To cater for pre-emptive acquisitions, the acquirer's 15% share does not require the FCO to define the relevant market, but will be assessed more broadly (similar to the UK's jurisdictional "share of supply" test).

B. SUBSTANTIVE CHANGES

- The threshold for the **de minimis market exemption** (below which a deal may not be prohibited by the FCO) has been raised from EUR 15 million to EUR 20 million (with the possibility for the FCO to measure the market volume by reference to a "bundle" of related markets).

C. PROCEDURAL CHANGES

- Procedurally, the amendment extends the **in-depth Phase II review period** from four months to five months in light of merger control proceedings becoming increasingly complex (due in particular to economic analysis and internal documents becoming more and more important).
- The so-called **implementation notice** has been abolished. In the future, the notifying parties are no longer required to inform the FCO once the previously approved transaction has closed.

ABUSE OF DOMINANCE

The reform mainly focuses on increased scrutiny of digital platforms by further strengthening the FCO's (*ex post*) enforcement powers while adding elements of (*ex ante*) regulation to the German competition

act. While previous legislative amendments were aimed at further harmonizing German law with EU law, Germany is now jumping ahead by adopting a number of measures that are currently still under discussion at EU level. This will further increase the FCO's role as "digital champion", a reputation t it gained by investigating Facebook and numerous online intermediaries.[2]

A. CHANGES TO EXISTING POWERS

- The amendment supplements the list of criteria to be taken into account when assessing the dominance of a company under antitrust scrutiny. While network effects, economies of scale and access to competition-related data had already been introduced with the previous amendment in 2017, the German parliament has now introduced the **concept of intermediary power**. Intermediary power denotes the ability of "information intermediaries," such as Facebook, Google or Amazon, to steer consumers to certain information or offers, thereby acting as "gatekeepers" to a number of markets.
- German competition law traditionally protects small and medium-sized companies against abuse by companies they depend on and which enjoy so-called relative market power, a position that falls short of dominance. The prohibition of abuse of a position of relative market power applies equally within and outside the digital industry. With regard to digital platforms' intermediary power, the reform has extended the protection given under German competition law to large companies. The amendment recognizes that large companies can be as dependent on a digital platform controlling access to market places and data as small and medium-sized companies.
- To allow the FCO to intervene early in fast-moving digital markets which can be prone to "tipping", the FCO has been empowered to intervene against **companies that are not dominant but hold "superior" market power**, if they prevent competitors from achieving network economic effects. As a complementary measure, the threshold for **interim measures** has been lowered, allowing the FCO to impose such measures if it is more likely than not that an infringement has taken place (without having to show irreparable harm, as was previously the case).
- Building on the "essential facilities doctrine", the amendment introduces a **data-sharing obligation** in certain circumstances to neutralize competitive advantages of particularly data-rich undertakings, which will be to the benefit of undertakings dependent on such access. In this context, the FCO's president has gone on record with his intention to "crack open data treasures".
- In terms of procedure, the amendment increases legal certainty for businesses by introducing the possibility to seek the FCO's **legal guidance on *horizontal* cooperation agreements**; upon request by a party, the FCO may, within six months, assess the compliance of a proposed cooperation between competitors and issue a "comfort letter".

B. NEW POWERS FOR THE FCO

- Under the amendment, the FCO is given a **new set of powers to intervene against companies with "paramount significance for competition across markets"** (such as gatekeepers).[3] Subject to finding that a company enjoys such a position, the FCO may prohibit the company for a maximum period of five years from, *inter alia*:
  - favoring its own products and services over those of its competitors when providing access to supply and sales markets (so-called "self-preferencing");
  - hindering competition on the merits in markets where the company may not be dominant but able to grow its position considerably (*e.g.*, by employing strategies of aggressive pricing, exclusivity agreements and bundling);

  - hindering competition in markets in which competitors rely on the company's services or products for access (*e.g.*, by exclusively pre-installing own apps or by hindering communication between other companies and customers);
  - hindering the interoperability of products and services with those of competitors or restricting the portability of data; and
  - using competitively relevant user data to create or materially raise barriers to market entry or impede other undertakings.
- The FCO's enforcement efforts on the basis of these new powers will be further facilitated by certain procedural changes: Generally, the FCO may not prohibit behavior that is objectively justified. However, unlike in other abuse of dominance cases, in proceedings under this new regime, **the investigated party bears the burden of proof** of whether or not a business practice is objectively justified. Notably, with the aim of speeding up proceedings, the FCO's decisions in these cases can be appealed only to **the Federal Supreme Court, which will be court of first and final instance,** and as such in charge of reviewing the FCO's factual as well as legal findings – a late and highly controversial addition to the amendment.

OTHER CHANGES

- An entire new chapter of the ACR, introduced in order to implement the ECN+ Directive, is dedicated to **enhanced cooperation within European Competition Network**. By way of example, the FCO may now, upon request, enforce antitrust enforcement decisions taken by authorities in another Member State of the European Union.
- The amendment codifies the **FCO's leniency program**, which offers companies involved in horizontal cartel activity immunity or a reduction of fines in return for their cooperation with the authorities. However, the rules on prosecution under criminal law, as well as private damage claims, remain unaffected by any leniency measures granted by the FCO.
- At the same time, the amendment **weakens the protection against self-incrimination of companies and individuals under investigation**: The amendment requires investigated parties to submit information, even if they could incriminate themselves with respect to antitrust or criminal law. While use of such information is restricted in case of proceedings against individuals, it may be admitted as evidence in proceedings against corporate entities.
- With regard to cartel damages, which is a fertile area of litigation in the German courts, the amendment introduces a **rebuttable presumption that could significantly facilitate private damage claims** by customers and suppliers: under the amendment, any relevant transaction with a cartel member during the period in which the cartel was active, and within the geographic scope of the cartel, is presumed to have been affected by the cartel's anticompetitive conduct. Accordingly, the burden of proving that the particular transaction was unaffected by the cartel falls to the defendant.

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ENDNOTES

1 For more information on the draft regulation proposed by the EC see S&C Memo of December 20, 2020 – "Regulating Big Tech: The Draft EU Platform and Online Content Legislation Reveals an Ambitious Plan".

2 For more information on the FCO's antitrust investigation of Facebook, see FCO case summary of February 15, 2019 – "Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing".

3 In assessing whether or not a company is of "paramount significance for competition across markets", the FCO may consider various factors including (i) its market dominance in one or more markets; (ii) its financial strength and access to other resources; (iii) its vertical integration and activities on related markets; (iv) its access to competitively relevant data; or (v) the significance of its activities for third parties' access to procurement and sales markets and the influence on third parties' business activities that stems from it.

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