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“Digitalization Act”: Significant Changes to German Antitrust Rules

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On January 19, 2021, the 10th Amendment of the German Competition Act (“*ACR*”) entered into force, also known as “GWB Digitalization Act” (the “**Amendment**”).

With the passing of the Amendment[1], Germany is setting the pace for an ambitious goal: the regulation of digital platforms. As noted during the parliamentary discussion[2], the new provisions are specifically designed to provide the German Federal Cartel Office (*Bundeskartellamt*) with an efficient instrument against alleged “Wild West methods” in the digital sector to keep digital markets open. The Amendment also introduces a number of other changes to the German Competition Act concerning, *inter alia*, antitrust investigations procedure, leniency and cartel damage claims.

In the legislative process, the German Parliament has also implemented some last-minute changes to the merger control provisions: the two domestic turnover thresholds were increased from EUR 25 million to EUR 50 million, and from EUR 5 million to EUR 17.5 million. This major policy shift will result in a significant decrease of notifiable transactions, thereby freeing up capacities within the *Bundeskartellamt* for scrutiny of the digital space. However, as highlighted in our 2020 Year-End German Law Update, the “GWB Digitalization Act” provides the *Bundeskartellamt* with the authority to require companies, which are deemed to reduce competition through a series of small acquisitions in specific markets in which the *Bundeskartellamt* has conducted sector inquiries, to notify every transaction provided that certain thresholds are met.

A brief overview of the most important provisions with regard to the regulation of digital platforms and related procedural changes is provided below.

NEW PROVISIONS AIMED AT DIGITAL PLATFORMS

Similar to the competition law regime(s) within the European Union, the German Competition Act features rules on the abuse of market dominance. However, unlike many other EU jurisdictions, Germany always had a stricter regime, in that provisions on market abuse also apply to companies, which are not dominant but possess so called ‘relative market power’. Now, the Amendment introduces an additional category of market power, which is clearly aimed at digital platforms. The most important changes include the following:

- ***“Digitalization” of the abuse of dominance rules.*** The amended ACR provides that in assessing market dominance, particular account shall be taken of a company’s access to data relevant for competition. Further, the role of a company acting as an ‘intermediary on multi-sided markets’ (i.e. digital platforms) shall be considered when assessing market dominance, in particular with regard to the role the intermediary plays for access to procurement and sales markets. Additionally, the Amendment explicitly stipulates that an abuse of dominance shall occur if a company is considered dominant and (i) refuses to grant other companies access to data, to networks or other infrastructure facilities in return for an appropriate consideration, (ii) such access is objectively necessary in order to operate on an

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upstream or downstream market, and (iii) the refusal threatens to eliminate effective competition on that market.

- ***Giving up the 'SME' requirement for determining 'relative market power'.*** In light of the structural changes digital services and platforms have created in the economy, the German legislator decided to drop the requirement that small or medium-sized enterprises have to be dependent on another company, in order for the latter to be deemed to have 'relative market power'. Under the amended ACR, irrespective of size, a company is considered to have 'relative market power', if another company is dependent on it in such a way that sufficient and reasonable possibilities of switching to other third companies do not exist and provided that there is a clear imbalance to the countervailing powers of the other company. Again, the provision also explicitly mentions 'intermediaries on multi-sided markets' (*i.e.* digital platforms) and extends the definition of 'relative market power' to such intermediaries, provided that other companies are dependent on them for access to procurement and sales markets in such a way that there are no sufficient and reasonable alternatives to those intermediaries.
- ***'Access to data' as a crucial criterion.*** Pursuant to the Amendment, the dependency on another company, and thus its 'relative market power', might also arise from the fact that a company is dependent for its own activities on access to data controlled by another company. The refusal to provide access to such data in exchange for an adequate fee may also constitute an abuse. This provision might affect not only digital platforms, but also industry players which have collected significant amounts of data through intelligent products and networked devices.
- ***Introduction of a new type of market power.*** The Amendment introduces a completely new category of market power, namely companies with 'paramount significance for competition across markets'. The rationale behind the new category can be summarized as follows: While large digital players may not have significant market shares in all affected markets, they may nevertheless have significant influence on these markets due to their key position for competition and their conglomerate structures (also referred to as gatekeepers).

If the *Bundeskartellamt* issues an order declaring that it considers a company to have paramount significance for competition across markets, the authority can prohibit the company from, *inter alia*, (i) preferential treatment of own services, (ii) the impediment of competition on markets where the company is not dominant, (iii) the creation of entry barriers by the use of data collected on a dominated market, or (iv) the restriction of the interoperability of products, services or data. The *Bundeskartellamt* shall also have the power to prohibit measures, which impede other companies conducting their business activities on procurement or sales markets (*e.g.* through pre-installation or integration of the dominant company's offers) and to prohibit the demanding of benefits for the treatment of offers from another company, which are disproportionate to the reason for the demand (*e.g.* if the dominant company requires the transfer of data or rights for the presentation of the offers, which are not strictly necessary for this purpose).

PROCEDURAL CHANGES

Some stakeholders have complained that, so far, the *Bundeskartellamt* has not been able to react swiftly enough to the fast-paced developments in the digital realm[3]. To address this perceived lack of 'clout', as the German Federal Minister for Economic Affairs and Energy, Peter Altmaier has put it, the Amendment introduces new provisions with regard to interim measures. The *Bundeskartellamt* will have the power to step in already on the basis that it finds an infringement of antitrust rules 'predominantly likely' and it deems the interim measure necessary for the protection of competition or because of an imminent threat of serious harm on another company. For appeals against such interim measures and all measures taken by the *Bundeskartellamt* in connection with the new category of 'super dominant' market players, the Amendment introduces a fast-track to the Federal Court of Justice, Germany's highest civil court. All disputes in connection with these

measures, including all independently contestable procedural acts, are decided in the first and last instance by the Federal Court of Justice. By establishing the Federal Court of Justice as the first and final authority to decide on these measures, the German legislator makes clear that they are well aware of the sweeping scope of the *Bundeskartellamt*'s new powers and the potential harm they may cause. However, for companies seeking judicial relief under the new rules, one layer of judicial review has been stripped away. This could raise some constitutional concerns.

OUTLOOK

It is hard to predict, how these new provisions will play out in practice. Nonetheless, Germany has certainly rung in the first round. Regulators around the globe are increasingly trying to curb digital platforms' powers and to tackle the competitive challenges resulting from the mass collection of data, which is perceived as the new gold of the 21st century. In light of the recent publication of the draft regulation on an EU Digital Markets Act by the European Commission, it remains to be seen how the German provisions will fit into the proposed European framework. However, the EU Digital Markets Act is not expected to come into force before 2022. Thus, the "GWB Digitalization Act" might prove to be a welcome opportunity for all stakeholders to put these new legal concepts to the test.

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[1] Please also refer to our previous alerts in this respect: "Competition 4.0 in Germany: Proposed Changes to German Antitrust Rules Targeting Digital Platforms", November 8, 2019 (available at: https://www.gibsondunn.com/competition-4-0-in-germany-proposed-changes-to-german-antitrust-rules-targeting-digital-platforms/) and Section 9.3 in the 2020 Year-End German Law Update, January 14, 2021 (available at: https://www.gibsondunn.com/2020-year-end-german-law-update/#_Toc61506166).

[2] https://www.cducsu.de/themen/wirtschaft-und-energie-haushalt-und-finanzen/dr-matthias-heider-wollen-einen-moderaten-aber-effektiven-regulierungsansatz-ueber-das-kartellrecht-waehlen.

[3] See for example, the results of an expert working group regarding the topic "Industry 4.0 – Antitrust Considerations", which was established by the Federal Ministry for Economic Affairs and Energy in 2018 (available in German at: https://www.plattform-i40.de/PI40/Redaktion/DE/Downloads/Publikation/hm-2018-kartellrecht-ag4.pdf?__blob=publicationFile&v=6).

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