GIBSON DUNN

November 8, 2019

COMPETITION 4.0 IN GERMANY: PROPOSED CHANGES TO GERMAN ANTITRUST RULES TARGETING DIGITAL PLATFORMS

To Our Clients and Friends:

The German Ministry of Economics and Energy (the "Ministry") is suggesting a significant revamp of the country's competition rules, targeting the increased scrutiny of digital platforms.

In October, the Ministry published the Act on Digitalisation of German Competition Law ("*GWB-Digitalisierungsgesetz*"). The new rules shall enter into force in 2020, after the draft has passed through Parliament. Parliament might request changes to the draft bill. However, it can be expected that the main principles will become applicable law. This briefing focuses on the proposed provisions that specifically target digital platforms.[1]

Germany has always had stricter rules than EU law on the control of unilateral behaviour of companies. Under German law, not only dominant companies but also companies with 'relative market power' i.e. companies on which SME's as suppliers or purchasers depend, are subject to the same strict behavioural rules as dominant companies. The draft bill seeks to widen that concept.

- ***"Digitalisation" of the abuse of dominance rules***. The draft bill suggests that a company's access to data shall be laid down in the law as a relevant element for the assessment of market dominance. Furthermore, the importance of the services offered by an intermediary on multi-sided markets (*vulgo*: digital platforms) for other companies' access to supply and sales markets shall be taken into account for the assessment of such intermediary's market position. The refusal to grant other companies access to data shall, under certain circumstances, be considered an abuse of dominance by the intermediary.

- ***Giving up the 'SME' requirement for determining 'relative market power'***. The draft bill also suggests foregoing the SME requirement for determining 'relative market power' so that, going forward, also larger enterprises could claim to depend on platforms. In particular, the draft bill suggests that 'relative market power' may arise from the fact that a company depends on access to data controlled by another company and that the refusal to grant access to that data may constitute an impediment to competition, even if the data does not yet have commercial value.

- ***Introduction of a new type of market power***. To facilitate the scrutiny of digital platforms that cannot be found either to be dominant or to possess 'relative market power', the draft suggests a new form of market power, namely a company with 'paramount significance for competition

across markets' (*vulgo*: successful digital platforms). If a company has that significance, the competition authority shall get the power to prohibit: preferential treatment of own services; the impediment of competition on markets where the intermediary is not dominant; the creation of entry barriers by the use of data collected on a dominated market; or the restriction of the interoperability of products, services or data.

- ***Easier interim measures***. These proposed substantive changes are accompanied by the suggestion to allow Germany's competition authority to step-in with interim measures already based on the probable cause of an infringement (if it deems the order necessary for the protection of competition or because of an imminent threat of serious harm on another undertaking).

The direction of the draft bill is clear. It is looking to codify tools that allow for greater scrutiny of digital platforms, with a particular focus on their specific business models/roles as digital intermediaries and their access to data. The draft explicitly introduces data as an essential facility, similar to the treatment that traditionally applies for example to harbours or railway infrastructure. Although, unlike such infrastructure, data is not a facility whose access is limited in nature but is rather reproducible. As the President of the Bundeskartellamt, Andreas Mundt, stated in a recent interview the goal of the bill is to "crack open data treasures."[2]

It remains to be seen whether the introduction of new legal concepts and vague terms and of a relatively low threshold for the authority to take action will facilitate faster and more robust decisions, whilst allowing sufficient legal certainty and ensuring a reliable legal framework for the digital economy. These new rules could as well result in an increase in litigation (e.g. against the authority's measures) and, potentially, the inconsistent application of competition rules across the EU.

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[1] The draft bill also suggests other changes to the country's competition rules concerning e.g. the merger control thresholds, antitrust investigation procedure, leniency and cartel damage claims.

[2] Interview of 16 September 2018 with the German *Frankfurter Allgemeine Zeitung* newspaper.

The following Gibson Dunn lawyers assisted in preparing this client update: Jens-Olrik Murach.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or any member of the firm's Antitrust and Competition practice group:

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