10th ARC Amendment: New Rules for Abuse Control of the Digital Economy, Merger Control and the Assessment of Fines

Dr. Maxim Kleine
Dr. Christian Bürger
Katja Weiss
Dr. Tobias Teichner

On January 14, 2021, after tough discussions, the Bundestag passed the 10th amendment to the Act against Restraints of Competition (officially: GWB Digitization Act). The Bundesrat already approved the amendment on January 18 and it was published in the Federal Law Gazette. The 10th amendment thus entered into force on January 19, 2021 (BGBl. 2021 I, p. 2). The original aim of the amendment was to implement the so-called ECN+ Directive (2019/1/EU), which was intended to strengthen the national competition authorities in the EU. In the course of this, the legislator took the opportunity to implement an antitrust regulatory framework for the digital economy, to revise the provisions on merger control, to take into account the latest case law of the Federal Court of Justice in antitrust damages proceedings, and to add new criteria in the assessment of fines for antitrust violations.

The most exciting in advance - the new regulatory framework for the digital economy

German lawmakers are leading the way internationally and are giving the abuse control provisions of the ARC a fresh look in order to respond to the often fast-moving developments in the digital economy. Central to this is the creation of the new Section 19a ARC, with which the Federal Cartel Office (BKartA) will in future be able to impose obligations on undertakings with overriding cross-market significance for competition to behave and refrain, including, among others, the prohibition of self-preferencing. Compared to the draft bill, the version of Section 19a of the ARC that has now been adopted contains a more detailed catalog of examples of possible obligations to behave and refrain that the Federal Cartel Office can order. In its press release of January 19, 2021, the BKartA expressed its satisfaction with the new possibilities for action, but in particular also with the shortening of the legal process - appeals against decisions pursuant to Section 19a ARC now go directly to the Federal Court of Justice.

Other innovations in abuse control concern:

- the extension of the market dominance test of Section 18 of the ARC to include the criteria of "*data access and intermediation power*";
- the softening of the requirement for causality in the case of abuse of a dominant position, Section 19 (1) ARC: the amendment clarifies in this respect that "strict causality" is not required for the assumption of abuse of a dominant position, i.e., it is not necessary that the abusive conduct was possible for the company solely as a result of its dominant position; and
- the clarification of relative market power in Section 20 ARC: now, small and medium-sized enterprises can also exercise relative market power vis-à-vis large enterprises; in this respect, the concept of "*intermediation power*" was included in the assessment of relative market power and the introduction of an element of intervention against the obstruction of competitors in the independent achievement of network effects (so-called "tipping") in Paragraph 3a.

Comment: With the new regulations on abuse control, the German legislature is deliberately breaking new ground in order to create a regulatory framework for what the rapporteur of the CDU/CSU parliamentary group, Hansjörg Durz, also called the "social digital market economy". Many of the regulations will initially only affect the so-called GAFA undertakings (Google, Amazon, Facebook, Apple). For all other undertakings, the elimination of the SME privilege in the case of relative market power under Section 20 of the ARC deserves particular attention.

Revision of merger control - significantly higher thresholds

With the adopted amendment, the legislator intends to relieve the BKartA in the area of merger control. To this end, the domestic turnover thresholds above which a merger

project must be notified to the BKartA will be significantly increased. According to the explanatory notes to the legislation, this change was also necessary because the previous thresholds were very low by international standards and also had to counteract inflation. In concrete terms, the thresholds for German merger control under Section 35 (1) ARC are now as follows:

- It remains the case that both undertakings together must have generated global sales of more than 500 million euros in the past fiscal year.
- In addition, a participating company X must have generated sales of EUR 50 million in Germany under the first domestic threshold instead of EUR 25 million.
- Another company Y must now have generated sales of EUR 17.5 million under the second domestic sales threshold instead of EUR 5 million.

The purchase price threshold of Section 35 (1 a) ARC remains unchanged.

As partial counterbalance to the increase in the threshold values, the legislator added a new instrument in Section 39a of the ARC under which the BKartA can oblige companies by administrative act to notify mergers that would not have to be notified under the threshold values (so-called Remondis clause). This is intended to prevent the creation of a dominant position in certain markets.

Comment: According to the Bundeskartellamt's annual review for 2020 (available here), 1,200 mergers between undertakings were examined. As intended, the now significantly higher turnover thresholds are likely to result in a noticeable decrease in merger notifications to the Bundeskartellamt already this year. At the same time, the BKartA should be able to devote more resources to cases that fall within the regulatory scope of Section 35 (1a) ARC (the so-called purchase price threshold, which was also introduced in the wake of Facebook's acquisition of WhatsApp, which did not meet the second domestic turnover threshold due to WhatsApp's low turnover and could therefore not be examined in Germany). It remains to be seen how often the BKartA will use the instrument of Section 39a ARC in the future. Due to the narrow criteria, this is likely to be an infrequently used method for the time being. However, companies operating in markets that have already been or will be the subject of a sector inquiry by the BKartA should keep this provision in mind.

After all, compliance measures preceding antitrust infringements are now taken into account in the calculation of fines

Contrary to the planned provision in the draft bill for the amendment, a frequently requested consideration of compliance measures in the run-up to antitrust violations in the calculation of fines was introduced in the parliamentary procedure. Thus, the new Section 81d (1) no. 4 ARC provides,

- that "*adequate and effective precautions taken prior to the infringement to prevent and detect infringements*" may also be taken into account as circumstances to be weighed when calculating the fine.

The explanatory notes to the law restrict this to the extent that compliance measures are "generally" only taken into account if they have led to the discovery and reporting of the infringement. In addition, according to the explanatory notes to the law, the "effectiveness" of compliance measures is not likely to be fulfilled if the management or other persons responsible for the management are involved in the antitrust violation. According to the explanatory notes to the law, the " adequacy" of compliance measures is intended to make it clear that these depend in each case on various factors such as the size of the company, the organization, the riskiness of the business or the number of employees - for SMEs, of course, different requirements are to be placed on the compliance measures than for large undertakings.

Comment: With the inclusion of these assessment aspects, the importance of a functioning compliance system for a company is clearly emphasized for antitrust law and can be further emphasized in the future. At the same time, compliance measures in the company must not serve as a fig leaf. Should antitrust violations occur despite compliance measures, a compliance system may only be taken into account in the calculation of fines in the exceptions described above. It is not clear from the explanatory notes to the law whether a company must also report a violation of antitrust law that it has itself discovered to the competition authorities; in case of doubt, this must therefore be clarified by the courts.

In this context, the the leniency program is regulated by law for the first time in the new Section 81 h to n ARC. Until now, the leniency program, with which companies could obtain immunity from and reduction of fines in administrative proceedings, was only regulated in a notice of the

BKartA. The legal implementation became necessary due to requirements of the ECN+ Directive, whereby it remains to be seen whether the BKartA will adapt or continue its discretionary considerations in this respect. It should be noted, however, that the requirements only apply to the fine proceedings of the BKartA, but not to the calculation of fines by the courts in appeal proceedings.

Evidentiary facilitation in antitrust damages proceedings

In recent years, the question of whether the direct suppliers or customers of a cartel are "affected" by legal transactions with cartel-participating undertakings has frequently arisen in cartel damages proceedings. With the introduction of the new Section 33a (2) sentence 4 ARC, a rebuttable presumption was introduced with regard to legal transactions with undertakings involved in a cartel. Under this provision, cartel participants must rebut the presumption that a specific transaction was not "affected" by the cartel agreement.
Comment: The regulation follows the general trend in legislation and case law to facilitate the enforcement of antitrust damages claims. It should be noted, however, that the rebuttable presumption can only be applied to claims for damages that arise after the effective date of the amendment.

Résumé

The 10th amendment to the ARC goes far beyond what the legislator would have been obliged to do by the implementation of the ECN+ Directive and reflects the ambitious ambition of the German legislator, especially in the area of abuse control. The increase in the domestic turnover thresholds also underscores the legislator's ambition to free up resources for the BKartA for more proceedings in the area of the digital economy. In addition, the legislator made a few fine adjustments in the area of fine assessment and antitrust damages proceedings. The implementation of a compliance defense for the assessment of fines should be an incentive for companies to review their own compliance measures in the area of antitrust law and, if necessary, to review and improve them with regard to their suitability for consideration as part of a "compliance defense" in the event of a violation.
You can find an unofficial translation of the most relevant changes by the team of D'Kart, the antitrust blog run by Heinrich Heine University Düsseldorf, here.

Note

This overview is for general information only and does not substitute for specific legal advice in individual cases. Please contact the authors if you have any questions. Information on the authors can be found on our homepage www.goerg.de.

Our locations

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN
Kantstraße 164, 10623 Berlin
Tel. +49 30 884503-0, Fax +49 30 882715-0

COLOGNE
Kennedyplatz 2, 50679 Cologne
Tel. +49 221 33660-0, Fax +49 221 33660-80

FRANKFURT AM MAIN
Ulmenstraße 30, 60325 Frankfurt am Main
Tel. +49 69 170000-17, Fax +49 69 170000-27

MUNICH
Prinzregentenstrasse 22, 80538 Munich
Tel. +49 89 3090667-0, Fax +49 89 3090667-90

HAMBURG
Alter Wall 20 - 22, 20457 Hamburg
Tel. +49 40 500360-0, Fax +49 40 500360-99