

Silent as snow - New German Antitrust

19 January 2021

Today is one of the rare days where the city of Berlin is covered with a very light white layer of snow; the long expected new competition law chose this day to enter the stage and silently enter into force. We summarize the main changes, which may well make some noise in the months to come.

Higher merger control thresholds

Merger control thresholds are raised significantly, so fewer M&A transactions will be subject to notification in Germany. While the threshold of EUR 500 million of combined worldwide turnover remains unchanged, transactions will only need to be filed if – on top of that– at least one undertaking involved generated domestic turnover of EUR 50 million (instead of previously 25) and another undertaking involved generated domestic turnover of EUR 17.5 million (instead of previously 5) in the last business year. Note that the relevant date for assessing a filing obligation is the time of completion of the transaction, so some ongoing transactions may need to be reassessed.

Apart from the turnover-based thresholds, the transaction-value threshold will remain in force, catching cases with target companies generating less than EUR 17.5 million domestic turnover. This may be the case if acquirer generated more than EUR 50 million turnover in Germany, the transaction value exceeds EUR 400 million and the target company (irrespective of its turnover) is active in Germany to a considerable extent (e.g. through R&D activities or free services offered to German users).

The new rules will free up agency resources to focus on the larger, potentially problematic cases (including potentially more burdensome phase 2 merger reviews but also tech investigations and sector inquiries under the new rules as well as cartel investigations).

As a novelty, the new law allows the FCO to issue so called notification orders in certain sectors, where a sector inquiry was previously conducted (i.e. the agency is already familiar with the market conditions). Such orders oblige undertakings to notify a merger not caught by the rules explained above. However, this is only possible in very narrowly defined circumstances:

- in the last business year, acquirer generated turnover above EUR 500 million worldwide and target generated turnover above EUR 2 million, of which more than two thirds were achieved in Germany;

- there are reasonable grounds to believe that future mergers could significantly impede effective competition in the domestic market in the economic sectors concerned;
- acquirer has a share of at least 15% of the supply of or demand for goods or services in Germany in these economic sectors, and the FCO has conducted a sector inquiry.

Note that the share of supply is not assessed as a "market share" in the economic sense but refers – more broadly – to the entire sector. The FCO has a wide margin of discretion in determining the goods or services relevant for the sector and the criteria for assessing. The provision is supposed to capture attempts by companies to "build up an extensive market concentration through successive transactions without merger control", i.e. it applies to companies in old and new industries. However, contrary to some initial expectations, the new law does not introduce a general provision for so-called "killer acquisitions" (i.e. systematic acquisitions of start-ups and high-growth companies).

Finally, the new law contains some special arrangements for *hospital mergers* (which can be exempt from merger control review under certain conditions), an increased *de minimis* market threshold from EUR 15 million to EUR 20 million, lower threshold multipliers for *press and publishing merger control*, a facilitated *aggregation of several transactions between the same parties* within two years as well as an *extension of phase II reviews* by one month.

New dominance abuse regime

Under the new rules, the Federal Cartel Office (*FCO*) may intervene against certain big tech companies at an earlier stage, i.e. even before a company has been found dominant in a certain market. The FCO may prohibit certain conduct, such as, e.g., self-preferencing or restraining market access of third party players by withholding certain data, and thereby slow such companies down in *gaining* market power. This is probably the most controversial change, especially because the German legislator is taking a pioneer role compared to other European Member States. The new sec. 19a ARC is supported by a procedural provision, which allow complaints against FCO decisions based on sec. 19a ARC directly to the Federal Court of Justice, i.e. bypassing the Higher Regional Court.

Moreover, the traditional abuse regime has been extended by certain provisions targeted at data-based business models and internet-specific conduct. When assessing market power/dominance, access to competitively significant data as well as "intermediary power" of platforms (which may create dependency) will be taken into account.

In relation to undertakings with relative or superior market power (i.e. below the level of „dominance“), not only small or medium enterprises will be protected in the future. The FCO will have the possibility, under certain conditions, to fine companies for refusing access to essential data or even order that data access will be granted to dependent companies in exchange for financial compensation. Finally, specific intervention rights

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have been created in order to prevent the „tipping“ of certain platform markets in favour of one large player.

Implementation of the ECN+ Directive

The ECN+-Directive is aimed at effective cartel enforcement by harmonizing rules across the EU. For Germany, its implementation will not bring substantial changes compared to the rules that have already been in place, although some additional procedural powers are granted to the FCO by the new law, which will be reflected in the FCO's various guidance papers (including on fines).

Other changes

Apart from the main changes outlined, there are some additional changes, such as lower thresholds for issuing interim measures to allow quicker and more efficient intervention in dynamically evolving markets, additional legal presumptions for cartel damage claims, clarifications to access to file rights and a legal basis for the FCO's established practice of issuing informal guidance letters on certain matters (e.g. retail price maintenance) as a means of providing more clarity on the agency's enforcement practice in certain areas.

BLOMSTEIN will continue to monitor developments with regard to the new competition law and its implementation. If you have any questions on the topic, Anna Huttenlauch, Max Klasse and the entire competition law team will be happy to advise you.