

# Germany adjusts Antitrust Law to Digital Economy and proposes new Regulatory Agency

June 28, 2017

On June 9, 2017, the 9<sup>th</sup> Amendment to the German Act against Restraints of Competition (“ARC”) entered into force, bringing about several significant changes to German competition law. Besides implementing the EU Cartel Damages Directive, the amendments adjust the ARC in several respects against the background of the digital economy.

- The ARC now expressly acknowledges that products or services that are provided for free can constitute a relevant antitrust “market” for purposes of applying German antitrust law.
- The ARC sets out a non-exhaustive list of factors to be taken into account when assessing market power in digital markets. These factors include: (i) direct and indirect network effects; (ii) the “parallel use” of several online services and the possibility to switch; (iii) economies of scale; (iv) access to competitively relevant data; and (v) the role of innovation in digital markets.
- The ARC includes a new transaction value merger notification threshold, based on which transactions with a value of more than €400 million will potentially be notifiable if the target has “*significant activities*” in Germany.
- The implementation of the EU Cartel Damages Directive is discussed in a separate alert memorandum (available [here](#)).

Separately, Germany recently published a White Paper on Digital Platforms. The White Paper outlines a series of ambitious regulatory and policy goals that Germany intends to pursue in the digital economy and announces the introduction of a broadened regulatory framework for the digital economy, including a new agency with far reaching regulatory powers.

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## Background

In 2015, the German Federal Cartel Office (*Bundeskartellamt*) had set up a think tank to consider the latest economic research on platforms and networks and discuss how to best apply the results to antitrust case practice. It then published several working papers discussing various aspects of the digital economy and their potential impact on competition, including most recently a paper on “Market power of platforms and networks” (June 2016) and a paper on “Competition Law and Data” (May 2016), which it published together with the French *Autorité de la concurrence*.<sup>1</sup> These latest amendments to the Act against Restraints of Competition (ARC) are in essence based on the conclusions drawn in these working papers.

Separately, on March 20, 2017, the German Ministry of the Economy published a White Paper on Digital Platforms. This White Paper outlines areas of potential future reform in Germany and at EU-wide level, including the potential establishment of a new regulatory agency.

### Free products and services can be a “market”

The amended Act against Restraints of Competition now stipulates that free products or services can constitute a relevant “market” (Section 18(2a) ARC).<sup>2</sup>

It has been a long-standing debate among the antitrust legal community whether non-monetary transaction can qualify as “market activities” and whether products or services that are supplied for free (*i.e.*, without money changing hands) can constitute relevant “markets” for purposes of antitrust law. Examples of such “free” products or services where a customer does not need to pay in direct exchange for using a product or a service include online internet search services (such as

Google or Bing), online communication services (e-mail, text, or chat services such as Whatsapp), or social and professional networks (such as Facebook or LinkedIn), as well as, *e.g.*, free television.

German courts have until recently taken the view that such free products or services cannot constitute relevant antitrust markets.<sup>3</sup> The German Federal Cartel Office (*Bundeskartellamt*) has been critical of this view, arguing that this approach would not adequately reflect the realities of the Internet-economy. The Internet-economy is characterized by the existence of platforms which involve two or more groups of users (two-sided or multi-sided platforms). The different sides (user groups) of a platform are closely interconnected, and if one user group does not have a monetary relationship to the platform, that alone cannot exclude the existence of a “market”. Both the monetary and the non-monetary side of a platform can be relevant for the assessment of the interdependence of the different user groups connected via a platform and would not necessarily need to be viewed as being separate from each other. The notes to the draft law however acknowledge that, ultimately, whether or not a separate “market” exists for a given “free” product or service remains subject to a case-by-case assessment.

### Assessment of market power in digital markets

The 9<sup>th</sup> Amendment introduces a non-exhaustive list of factors to be taken into account when assessing market power in digital markets, including, in particular, multi-sided markets and networks:<sup>4</sup>

- Direct and indirect network effects;
- The “parallel use” of several online services and the possibility to switch;
- Economies of scale;
- Access to competitively relevant data; and

antitrust assessment; see, *e.g.*, the merger clearance decisions in cases M.7217 – *Facebook / Whatsapp* (2014) or M.6281 – *Microsoft / Skype* (2011) and the ongoing antitrust investigation involving Google’s treatment of comparison shopping services in Google’s online search results (see European Commission press release of April 15, 2015, IP/15/4780).

<sup>4</sup> See the new Section 18(3a) ARC.

<sup>1</sup> These papers are available [here](#).

<sup>2</sup> In German: “*Der Annahme eines Marktes steht nicht entgegen, dass eine Leistung unentgeltlich erbracht wird.*”

<sup>3</sup> Most recently OLG Dusseldorf in case IV Kart 1/14 – *HRS* (2015) in relation to online hotel booking systems. The European Commission, in contrast, considers non-monetary relationships as amenable to

— The role of innovation.

While the principal question when assessing the existence of market power remains whether an undertaking is able to act without being constrained by its competitors, customers, or suppliers, the Federal Cartel Office (*Bundeskartellamt*) has acknowledged that in the digital economy, price competition is often less relevant than in other sectors of the economy (as many digital services are provided for free).

Against this background, the Federal Cartel Office considers the factors listed above as relevant with a view to duly taking into account the specific characteristics of the digital economy in a sound competitive assessment:

- Direct and indirect network effects. Network effects can lead to a self-reinforcing tendency and ultimately lead to a tipping effect, resulting in a monopoly of just one network. Network effects can increase switching costs for users and also act as effective barriers to entry of new network providers.
- The “parallel use” of several online services and the possibility to switch. Whether users use just one network (“single-homing”) or several networks in parallel (“multi-homing”) can be relevant for the assessment of network effects. For example, if multi-homing is prevalent, barriers to switching and entry will typically be lower than if single-homing is the principal way a network is used.
- Economies of scale. Economies of scale are particularly relevant in network-based services, as operating a network can require significant upfront investment and fixed costs, while variable costs – *i.e.*, costs for each additional user – will typically be marginal or zero. Large networks will therefore have a material competitive advantage over small or nascent networks.
- Access to competitively relevant data. Many services in the digital economy consist of or depend on large volumes of data. Access to such data can therefore be an important parameter of competition in the digital economy, although the Federal Cartel Office acknowledges that having

exclusive control over data alone “are not an indicator of market power”. Whether data can confer market power depends, on a case-by-case basis, on the nature of the data, how competitively relevant they are, whether they can be duplicated, or whether data from different sources can be combined and commercialized.

- The role of innovation. Digital markets are often characterized by ongoing and dynamic innovation. The role of innovation in the competitive process is however subject to an assessment on a case-by-case basis, and the existence of a market power in the digital economy cannot be denied by a blanket reference to digital markets being characterized by regular disruptive innovation.

### **New transaction-value merger notification threshold**

Based on the new German transaction value thresholds, a transaction that qualifies as a “concentration” under German merger control law requires notification if the following cumulative criteria are met:

- The parties’ combined worldwide revenues exceeded €500 million; and
- One party’s revenues in Germany exceeded €25 million, and neither the target’s nor any other party’s revenues in Germany exceeded €5 million each; and
- The transaction consideration exceeds €400 million; and
- The target undertaking has “*significant*” activities in Germany.

The law defines “*transaction consideration*” as “*any type of consideration of monetary value*” (such as the purchase price or assets) that the acquirer receives from the seller “*in connection with*” the transaction, including the value of any seller or target liabilities assumed by the acquirer.

The new transaction value threshold applies in the alternative to the pre-existing revenue-based thresholds, which will remain in force unchanged.<sup>5</sup>

The existing *de minimis* exemption – transactions where the acquirer’s or the target’s (in certain circumstances including the seller’s) worldwide revenues were below €10 million do not require notification – does not apply to transactions that meet the transaction value threshold.

The new thresholds entered into force on June 9, 2017.<sup>6</sup>

### White Paper on Digital Platforms

On March 20, 2017, the Germany Ministry of the Economy published a White Paper on Digital Platforms.<sup>7</sup> The White Paper outlines a series of ambitious regulatory and policy goals that Germany intends to pursue in the digital economy, including the potential establishment of a new “Digital Agency” with far reaching regulatory powers.

The White Paper outlines four broad policy goals:

- The digitization of the economy should be a transformative, rather than a disruptive process;
- The digitization of the economy should be part of a growth strategy to the benefit of as many people as possible;
- The digital civil society must be protected against violations and digital crimes must be subject to prosecution and sanctions; and
- The applicable regulatory framework should be uniform EU-wide.

Based on these broad goals, the White Paper presents several measures that Germany intends to implement:

- ***Proactive and systematic regulatory oversight.*** To safeguard fair competition in the digital economy and to ensure a “level playing field” in the telecommunications sector, the existing antitrust regulatory framework should be

combined with proactive and systematic regulatory oversight over companies in the digital economy. Regulatory action should not be limited to companies with a dominant market position; instead, intervention should be possible whenever a company engages in “unfair” competitive practices. The thresholds for imposing interim measures in antitrust proceedings should be lowered to accelerate antitrust investigations. The White Book mentions the suspension of contract clauses by way of interim measures as a potentially useful tool in this regard.

- ***Comprehensive legal framework for the use of data.*** The White Paper identifies a need for a comprehensive and clear legal framework for the use of data in the digital economy, including transparency and information obligations for digital platforms and specific requirements for e-commerce and e-government.
- ***Investment in infrastructure.*** Germany intends to spend around €10 billion between 2018-2025 for the construction of data infrastructure that is capable of transmitting large data volumes.
- ***Promotion of a “democratic” digital culture.*** The protection of fundamental rights in the digital economy should be strengthened and criminal activity – *e.g.*, hate speech or libel – needs to be prosecuted as effectively as in the analogue world. Germany acknowledges that government has a duty to provide such protection and that online service providers should not have primary responsibility to act against such offences. According to the White Paper, it may be necessary to introduce new criminal law rules to combat specific online crimes (such as cyber-mobbing or identity theft). Users may need to be obliged to register by disclosing their identity prior to using certain online services (such as discussion forums) to

<sup>5</sup> Under the pre-existing revenue-based thresholds, a transaction is notifiable if (i) the parties had combined worldwide revenues of more than €500 million, and (ii) at least one party had revenues of more than €25 million in Germany, and (iii) at least one other undertaking had revenues of more than €5 million in Germany.

<sup>6</sup> This new threshold is discussed in more detail in a separate alert memorandum (available [here](#)).

<sup>7</sup> The White Paper is available [here](#); a summary is available [here](#) (both in German).

enable public authorities to effectively prosecute potential violations.

To implement its vision of a “proactive and dual” antitrust regulatory framework, the White Paper envisages the establishment of a new Digital Agency (*Digitalagentur*):

- The Digital Agency would be responsible for the ongoing supervision of digital markets across the “*entire value chain in the digital economy*” and would be able to intervene proactively, irrespective of whether a company is dominant.
- The Digital Agency’s other tasks would include, *e.g.*, the review and implementation of regulatory rules, dispute settlement in competition and consumer matters, or certain advisory tasks.
- The new agency’s enforcement remit would be “*complimentary*” to the remit of existing agencies such as the Federal Cartel Office (*Bundeskartellamt*) or the Federal Network Agency (*Bundesnetzagentur*).

The proposal to establish a new regulatory agency with a broad mandate to intervene in addition to other existing agencies is particularly surprising, as it may lead to parallel jurisdiction by two or more agencies – *e.g.*, the *Bundeskartellamt* and the new digital agency – over the same conduct, potentially resulting in incongruous results, and, ultimately, regulatory uncertainty and unpredictability. The *Bundeskartellamt* has criticized the Ministry’s proposal to establish a Digital Agency and argued that the existing regulatory agencies already today have extensive investigatory powers and have sufficient experience and know-how also as regards digital markets.<sup>8</sup>

In light of the White Paper’s extensive proposals for potential additional regulation of digital markets, companies active in the digital economy would be well advised to closely follow these developments.

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<sup>8</sup> See the *Bundeskartellamt*’s position paper, available [here](#) (in German), commenting on the Ministry’s

Green Paper on Digital Platforms. The Green Paper is available [here](#) (in German).