Shiny new toy? New enforcement tool against Big Tech

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When the arsenal of enforcement tools for the German Federal Cartel Office (FCO) was stocked up in January 2021 with the overhauled German competition law, bets were high which of the GAFAM would be hit first. Wasting no time, the FCO immediately put its new powers into action in two high-profile cases: Facebook came first, Amazon followed foot with an investigation announced yesterday. At the same time, the FCO has reallocated staff and resources to increase its focus on e-commerce and the digital economy and even created an entire new division for this. What should players in the digital economy watch out and prepare for?

Sec. 19a ARC: How does the new enforcement tool work?

The recently opened investigations are based on Sec. 19a ARC, which forms the centerpiece and most controversial change of the recent German antitrust law reform: It aims at curbing the power of gatekeepers – particularly platform operators in the digital economy – and allows the FCO to intervene even before they have become dominant in a specific market. Sec. 19a ARC sets up a two-step approach: In a first step, the FCO must formally establish that a company has 'paramount significance for competition across markets'. In a second step, it can then prohibit the targeted company from engaging in specific conduct as set out in Sec. 19a (2) ARC. Both stages can be combined in a single act.

When assessing whether a company has 'paramount significance for competition across markets' the FCO will consider several factors, particularly

- whether it is dominant on one or more markets;
- its financial strength or its access to other resources;
- its activity across multiple markets (i.e. potential vertical integration or activities on otherwise related markets);
- its access to data relevant for competition;
- the importance of its activities for third parties' access to supply and sales markets as well as its influence on third parties' business activities.

If the FCO considers a company to meet some or all of these criteria, it can formally designate it as a gatekeeper or rather 'an undertaking with paramount cross-market significance for competition. To be clear, the FCO does not have to establish that a

company is dominant on a specific market. However, dominance in a key market may be an indicator of 'paramount significance' for competition in other markets.

Such designation is effective for five years. Given that the legislator has made no secret of the fact that the new provision primarily targets a limited number of 'big tech' players, Sec. 19a ARC mostly concerns companies operating to a significant extent in multi-sided digital platform markets or networks. However, it cannot be completely ruled out that Sec. 19a ARC may be applied to a wider range of companies and sectors one day, provided they meet the criteria for paramount cross-market significance.

Which conduct will the FCO target?

Once the FCO has formally designated a company as an 'undertaking with paramount significance for competition across markets', it may prohibit it from engaging in specific types of abusive conduct, namely

- **self-preferencing** , i.e. presenting its own products or services in a preferred manner on its platform (e.g better placement within displayed search results) or exclusively pre-installing its own products on devices;
- **exploitation of a gatekeeper function**, e.g., by obstructing advertising efforts of third-party providers or preventing access to third-party services;
- **abusive expansion strategies**, in particular using predatory pricing strategies, exclusivity agreements or bundling offers to quickly expand its market position in not-yet dominated markets;
- **obstructive practices in connection with the collection and/or processing of competitively sensitive data**;
- **restrictions on interoperability** of products or services;
- **withholding data** (e.g., data on usage, costs incurred, click behavior or ranking criteria) if this results in competitively relevant information deficits for others;
- **demanding disproportionate benefits or compensation** for the (better) treatment or placement of another company's offers.

This (exhaustive) list is largely inspired by cases lodged against large digital companies at national or EU level in recent years. It targets behavior that exploits an existing gatekeeper position in order to strengthen an existing market position in the given market or to leverage and expand it into other markets. In particular, the list includes types of conduct that German lawmakers considered partly responsible for 'tipping' digital platform markets in favor of one player in the past (before becoming dominant).

Conduct covered by this list is legally presumed to be abusive, i.e. the FCO may prohibit it without assessing anti-competitive effects. The company concerned can attempt to rebut the presumption by demonstrating objective justification (with the burden of proof on the side of the company).

Both the formal designation as a gatekeeper and the subsequent prohibition decision can be challenged in court. Affected companies should carefully consider their options: Appealing the initial designation decision will – if successful – also quash all subsequent prohibition decisions based on Sec. 19a ARC. However, it may be easier to demonstrate objective justifications for specific conduct than to challenge a company's gatekeeper position across multiple markets. Finally, it should be noted that Sec. 19a ARC is flanked by a leapfrog procedure: Complaints against FCO decisions will be heard by the Federal Court of Justice immediately, i.e. bypassing the Higher Regional Court.

Hitting the ground running

The FCO wasted no time to employ its new enforcement tool: Less than ten days after Sec. 19a ARC came into force, the FCO invoked it against Facebook (albeit in an investigation that was already ongoing based on abuse of dominance allegations). The FCO assesses whether the linking of Oculus virtual reality headsets with Facebook's social media network is abusive – and now also whether Facebook is a gatekeeper in the sense of Sec. 19a ARC. Yesterday, the FCO initiated a second proceeding based on Sec. 19a ARC against Amazon. This adds up to two already ongoing investigations against Amazon based on the existing abuse of dominance regime.

Both cases suggest that the FCO may view Sec. 19a ARC as a complimentary instrument increasing the scope of existing enforcement tools, rather than a whole new alternative: While the conduct in question could, in principle, be addressed based on existing abuse of dominance rules, the new Sec 19a ARC enables the FCO to intervene even the stage of "dominance" has been reached (or at least without having to establish dominance) provided the threshold of 'paramount significance for competition across markets' is met.

To utilize its new enforcement powers, the FCO has recently reshuffled department responsibilities and even created a special division primarily responsible for the application of Sec. 19a ARC and antitrust enforcement in the area of e-commerce. This organizational change is further facilitated by the fact that some of the FCO's existing resources have recently been freed up by elevated merger control thresholds which lead to fewer notifications and allows the FCO to focus on investigations into the digital economy.

Parallel developments at EU level

The German legislator has taken a pioneer role in Europe. However, the new rules may foreshadow a comprehensive new enforcement toolkit which is currently discussed in Brussels: The Digital Markets Act (DMA) and the proposed New Competition Tool (NCT), which also target "structural competition problems" and (if ultimately adopted) will give the European Commission additional enforcement powers. Similar to Sec. 19a ARC, these new regulatory instruments may enable the European Commission to specifically target large gatekeeper companies in the digital economy. It remains to be seen how the scope and application of both frameworks will overlap and/or relate to each other. One thing is for sure: A rough wind is currently blowing against companies operating in the digital sector and they will need to closely monitor competition law developments in order to navigate safely and stay on the compliance track.

BLOMSTEIN will continue to monitor and inform about antitrust enforcement trends in the digital economy in Germany and across Europe. If you have any questions on the topic or the recent overhaul of German competition law in general, Anna Huttenlauch, Max Klasse, and BLOMSTEIN's entire competition law team will be happy to advise you.