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IMPORTANT CHANGES BROUGHT ABOUT BY THE 10TH AMENDMENT TO THE GERMAN COMPETITION ACT

After several delays in the legislative process, the 10th Amendment to the Act Against Restraints of Competition, the so-called ARC Digitization Act, came into force on 19 January 2021. In the process, there were some last-minute changes of considerable practical relevance that were not included in the previously published drafts. This newsletter provides an overview of the most important changes brought about by the 10th Amendment.

I. Merger Control

While the public focus lies mainly on the modernization of abuse control, it should not be overlooked that the 10th Amendment also brings some important changes in the merger control area.

1. Increase in Domestic Turnover Thresholds

The domestic turnover thresholds are drastically increased, also compared to the government draft. Pursuant to Section 35 (1) ARC, a notification is now only required if, in addition to a combined worldwide turnover of **EUR 500 million**,

- the sales of a party to the concentration in Germany exceed **EUR 50 million** (previously EUR 25 million), and

- another involved company has domestic sales of more than **EUR 17.5 million** (previously EUR 5 million).

The stated aim of these upward adjustments is to relieve the German Federal Competition Authority (FCO) from examining supposedly "unproblematic" transactions so that it can concentrate its resources on other investigations, in particular under the new Section 19a ARC. A decrease of approximately 40% in the number of transactions subject to notification is expected (even in the Corona year 2020, the FCO received more than 1,200 merger filings).

The **transaction value threshold** of EUR 400 million introduced in the course of the 9th Amendment in Section 35 (1a) ARC remains unchanged. However, the cumulative domestic

turnover threshold to be fulfilled pursuant to this provision has also been raised from EUR 25 million to **EUR 50 million**.

2. Notification Order Pursuant to Section 39a ARC

Another important change concerns the introduction of a completely new instrument called a "notification order" in Section 39a ARC. According to this provision, the FCO is authorized to issue an order requiring an undertaking to notify any concentration in one or more specific economic sectors for an (initial) period of three years.

The issuance of such a notification order is subject to restrictive requirements, which were further tightened in the course of the legislative process. For example, it may only be addressed to a company with worldwide sales of more than EUR 500 million (originally EUR 250 million). In addition, the company must have a share of at least **15% of supply or demand in Germany** in the **industry sector concerned**. In this respect, no traditional market share analysis is to be carried out; instead, reference is to be made to all goods and services that are characteristic of the industry at issue. Furthermore, there must be objective indications that mergers involving the addressee could "**significantly impede**" effective competition.

However, the presumably biggest hurdle in the practical application of the new standard is likely to be the requirement of a preceding **sector inquiry**. The legislator made it clear that, for reasons of legal certainty, only sector inquiries that are completed after the 10th Amendment has entered into force can be considered. In addition, there must be a certain temporal proximity between the sector inquiry and a notification order based on it.

If the FCO has issued a notification order, this generally covers all merger projects of the addressee in the sector(s) concerned. An exception applies only if the target company has sales of less than EUR 2 million or achieves more than one third of its revenues outside Germany.

The new approach is difficult to reconcile with the traditional system of German merger control, and it remains to be seen how relevant it will be in practice. The legislator highlighted **concentrations on regional markets**, which are detrimental to medium-sized companies, as a focus area. FCO representatives had repeatedly criticized in the past that projects in the waste disposal industry in particular were exempt from scrutiny. It is expected that the FCO will issue around three notification orders per year, which seems quite optimistic in view of the strict requirements.

3. *De Minimis* Markets

Since the 8th Amendment to the ARC in 2013, the *de minimis* market clause in Section 36 (1) sentence 2 No. 2 ARC only provides for a notification requirement, but no longer allows for a substantive review by the FCO. This provision was now amended in two respects. First, the relevant threshold for the maximum market-wide turnover was raised from EUR 15 million to EUR 20 million. Secondly, the 10th Amendment introduces the possibility to consider several *de minimis* markets together, to the effect that the *de minimis* market clause is only applicable if the total sales on the markets bundled together remain below the new threshold. In the past, the FCO and the courts had developed a detailed but, in the opinion of many, insufficiently stringent case law in this respect. The 10th Amendment is intended to create greater legal certainty and to expand the powers of the FCO.

4. Combination of Several Acquisition Transactions

Pursuant to Section 38 (5) sentence 3 ARC, the so-called **aggregation clause**, several transactions are to be treated as one if they are carried out by the same parties within two years. The aim of the provision is to counteract market

concentrations through successive transactions, each of which remains below the FCO's radar.

Previously, the provision was confined to the situation that the notification requirement was only fulfilled by the addition of the subsequent transaction(s). This opened the way for a notifiable transaction, which was not problematic from a competition perspective to be implemented prior to more difficult transactions, which then did not trigger a notification obligation.

The 10th Amendment eliminates this circumvention possibility so that in the future such a case will also have to be assessed as one integrated (and thus notifiable) merger.

5. Other Changes

In the future, **press mergers** will be subject to merger control less frequently since sales from publishing activities will have to be multiplied only by four (instead of by eight) when it comes to assessing whether the turnover thresholds are met. It is expected that about 20 transactions per year will benefit from this change. For revenues from broadcasting, on the other hand, the calculation of revenues remains unchanged.

The 10th Amendment also creates a temporary exemption from the notification obligation for certain **hospital mergers** irrespective of turnovers and transaction value in an attempt to facilitate consolidation in the hospital sector.

As regards **procedural changes**, it is worth mentioning that the obligation to inform the FCO about the implementation of a properly notified (and cleared) transaction has been abolished. However, the obligation to send the FCO such an implementation notice remains in force for those transactions, which were not notified in violation of Section 39 (1) sentence 1 ARC. Thus, the FCO continues to have the option of initiating unbundling proceedings and/or to impose fines for a violation of the standstill obligation.

In addition, the **review period for an in-depth investigation (Phase 2)** was extended from four to five months. As justification, the legislator referred to the additional investigation efforts to be undertaken by the FCO due to the introduction of the SIEC test, which often requires a more detailed economic examination. In the past, the Phase 2 deadline often had to be extended, which requires the consent of the parties. The additional month will give the FCO more leeway.

II. Abuse of Dominance

The new rules on abuse of dominance and – as a novel category – of paramount significance for competition across markets are at the very core of the 10th Amendment. While the changes focus on companies in the **digital economy**, they are not limited to certain industries. However, one of the primary goals of the 10th Amendment is to counter abusive behavior by large digital corporations such as Google, Amazon, Facebook or Apple (**"**GAFA**"**) in a more targeted manner and, above all, more quickly. As, for example, the various proceedings against Amazon and Facebook have shown, the FCO was not shy to take action against suspected abuses even under the legal regime. But in terms of timing, the conventional legal instruments regularly put the FCO at a disadvantage compared to the rapid development of the digital economy.

1. Precautionary Interventions against Large Digital Corporations

Probably the most debated change concerns the introduction of a novel intervention instrument for German competition law, which allows the FCO to impose behavioral obligations on certain undertakings **preventively**, *i.e.* before they even engage in illegal behavior. Addressees of the new Section 19a ARC are companies that are of **paramount significance for competition across markets**. The legislator intended to cover companies that frequently not only hold a

dominant position on individual platform or network markets, but also have resources and a strategic positioning, which enables them to exert considerable influence on the business activities of third parties or to expand their own business activities into new markets and sectors. A dominant position on one or more markets is therefore not a prerequisite for the FCO's authority to issue orders pursuant to Section 19a ARC. The aim is rather to protect the competitive process in markets that are not (yet) dominated.

In order to be able to impose the behavioral obligations provided for in Section 19a ARC, the first step is for **the FCO to issue an order** finding that the undertaking in question is of paramount significance for competition across markets. This initially requires that the addressee is active to a significant extent on markets pursuant to Section 18 (3a) ARC, *i.e.*, on multilateral (platform) markets or networks.

Once the FCO has established that an undertaking is of such paramount significance, it may impose behavioral obligations on the undertaking - if necessary, at the same time as issuing the aforementioned order. In doing so, the FCO may prohibit the addressee to engage in one or more of the seven types of conduct listed exhaustively in Section 19a (2) ARC by means of a **prohibition order** even if the company has not yet engaged in any of the relevant types of conduct.

The types of conduct that can be prohibited are based on the case law of the European Commission and national competition authorities. They include self-preferencing hindering business activities of other companies on procurement or sales markets, for example through the exclusive pre-installation of one's own offers; creating barriers to entry through the processing of competition-relevant data; or hindering competition through denying or impeding the interoperability of products.

A prohibition order is inadmissible if the behavior in question is justified. However, the burden of proof for a justification rests entirely with the undertaking concerned (Section 19a (3) ARC).

If an undertaking defies a prohibition order, it faces a fine of up to 10% of its annual turnover. Compliance with a prohibition order is subject to the company's self-evaluation. This results in considerable additional risks and the need to be able to claim effective legal protection against the far-reaching powers of the FCO to issue prohibition orders.

In this respect, the 10th Amendment contains an highly questionable novelty: In the interest of **accelerating proceedings**, as called for not least by the FCO, Section 73 (5) ARC stipulates that appeals against the FCO's orders under Section 19a ARC are to be decided exclusively by the Federal Court of Justice. The usual chain of appeal, according to which an appeal must first be lodged with the Düsseldorf Higher Regional Court, is thus curtailed.

Even though the legislator assumes that Section 19a ARC will only come into play in a few individual cases, it did not take long for the FCO to at least seriously consider applying the new provision: In the context of its "conventional" abuse investigation against Facebook for possibly abusive tying of the use of Oculus virtual reality products with Facebook's social network services, the FCO announced only a few days after the 10th Amendment came into force that it would now also examine the possibility of a prohibition order under Section 19a ARC.

Section 19a ARC also attracted international attention; at the EU level, the introduction of a comparable set of instruments is being considered. In this respect, it is to be hoped that such new rules will be compatible with each other, both in terms of procedural and substantive aspects.

2. Adjustments to the "Conventional" Rules on Abuse of Dominance

In addition to the introduction of Section 19a ARC, "conventional" market abuse rules were also adapted to the digital reality. For example, the 10th Amendment added criteria for **access to data and intermediation power** to the catalogue of criteria for determining a dominant market position under Section 18 ARC. Pursuant to Section 18 (3) No. 3 ARC, access to data relevant for competition is now also a criterion in the assessment of market dominance. When assessing the market position of an undertaking that operates as an intermediary on multilateral markets, also the importance of its intermediary services for access to procurement and sales markets must be taken into account pursuant to Section 18 (3b) ARC.

The 10th Amendment also extended the scope of abusive behavior under Section 19 ARC. Pursuant to Section 19 (2) No. 4 ARC, the refusal of access to data in return for an appropriate fee is now also deemed to constitute an abuse of a dominant position, provided such access is objectively necessary to operate on an upstream or downstream market. Refusal to access that is objectively justified continues to be exempt from this rule.

This change raises issues of legal certainty. The conditions under which data (which the legislator did not define further) are objectively necessary in the sense of an "essential facility" for operating on upstream or downstream markets have not been clarified so far. The same is true for the justification of any refusal of access, for which the dominant company will bear the burden of proof in civil litigation concerning access claims. In this respect, too, considerable risks are emerging for companies with a dominant market position.

One change that will have implications beyond the digital economy concerns the causal link between dominance and abusive conduct. While Section 19 (1) of the ARC previously sanctioned the "abusive exploitation" of a dominant position, it now refers merely to the "abuse" of a dominant position. The new wording is intended to clarify that strict causation between the dominant position and the conduct in question is not required and that instead **causation** with regard to the **result** should suffice. The question of causation has been controversial to date, particularly in cases concerning the use of abusive terms and conditions, and led to differing assessments by the FCO and the Higher Regional Court of Düsseldorf. In the *Facebook* case, the Düsseldorf court found that the FCO had failed to show that Facebook's dominant position was strictly causal for its ability to commit the data protection violations it was accused of. The Federal Court of Justice overturned this decision in June 2020, among other things because it did not consider strict causation necessary. The 10th Amendment now confirms this view.

3. Chances to the Rules on Relative Market Power

Finally, Section 20 ARC on the abuse of relative market power also has undergone far-reaching changes.

First, the 10th Amendment broadened the scope of undertakings protected by Section 20 ARC, which used to be confined to small or medium-sized enterprises (SMEs). This requirement was abolished. Instead, it is now decisive whether there is a "clear imbalance with the countervailing power" of the undertaking allegedly enjoying relative market power. This change is based on the consideration that under certain circumstances, in particular on digital markets, even **large companies** can be dependent on other undertakings as suppliers or customers. However, it remains to be seen whether the revision may now play to the disadvantage, in particular of SMEs. Section 20 ARC is mainly relevant in civil litigation. In this context, the party invoking protection under Section 20 ARC must prove, *inter alia*, that it is

protected by the rule. In this respect, proving a "clear imbalance with the countervailing power" of the other undertaking entails even greater imponderables than the previously required proof of an SME position. At the same time, even prior to the 10th Amendment the courts used to base their assessment of the SME status on a "vertical" comparison, which was nothing more than a comparison of the balance of power on the relevant market. Thus, it remains to be seen which added value the new provision will bring in practice.

Section 20 (1) sentence 2 ARC now clarifies that the prohibition of abuse by unfair impediment or discrimination also applies to platform operators ("intermediaries on multilateral markets") insofar as other companies (i) are dependent on their intermediary services with regard to access to procurement and sales markets and (ii) do not have sufficient and reasonable alternative options. Already under the old rules, the FCO had used the concept of platform dependency, for example, of small and medium-sized hotels in the *booking.com* case.

A further addition is made to the provision in Section 20 (1a) ARC, according to which a dependency can also result from the fact that an undertaking is dependent on access to data controlled by another company ("data-related dependency"). The change includes the clarification that the refusal of access to such data for an appropriate fee can also constitute an unfair impediment even if the data in question is not being traded. However, the legislator rightly points out that in such situations, a particularly careful balancing of interests is required and that care must be taken to ensure that the incentives for data collection are not unreasonably impaired.

Finally, Section 20 (3a) ARC contains a new enforcement tool aimed at preventing the so-called "**tipping**" of markets. Tipping describes the transformation of a market characterized by strong positive network effects with several providers into a monopolistic or highly concentrated market. According to this new provision, it amounts to an unfair obstruction if a company with superior market power on a platform market hinders the independent achievement of network effects by competitors, resulting in a serious risk of a restriction of competition. This latter factual condition is alien to the German abuse of dominance rules and once again demonstrates the proactive nature of the 10th Amendment. The provision is likely to lead to considerable uncertainties in its application because it relies heavily on a prognosis of future market developments. It is hardly possible for the undertakings concerned reliably to predict at what point their conduct will lead to a market threatening to "tip" so that they will no longer be operating within the framework of competition on the merits.

III. Cartel Proceedings

Most of the changes regarding cartel proceedings are based on the implementation of the so-called "ECN+ Directive" (Directive (EU) 2019/1). However, the legislator also used the occasion to include a detailed description of the fining criteria, in an effort to achieve greater legal certainty and coherence between the FCO and the courts.

1. Fining Criteria

The newly introduced Section 81d ARC contains a non-exhaustive codification of fining criteria, which are meant to specify the overarching reference to the gravity and duration of the infringement.

Circumstances of the infringement. One of the main parameters for the fine calculation is the **turnover affected by the infringement**. This is supposed to prevent companies with high turnover from receiving disproportionate fines for minor infringements. At the same time, the fine can be set at a level sufficient to achieve the intended punitive and deterrent effect, even taking into account the individual sensitivity of financially strong undertakings to sanctions. In addition, the intended geographic and factual

scope of the infringement as well as the **importance of the products and services concerned** (both from an economic perspective and from the consumers' point of view) are to be taken into account. Finally, the **way in which the cartel is** implemented, in particular its degree of organization, must be considered.

Compliance measures. In addition to the circumstances relating to the infringement itself, the 10th Amendment also mentions the conduct of the companies concerned before and after the infringement as a separate fining parameter. In this respect, it is hardly surprising that previous anti-competitive conduct has a negative impact. More significant is that the legislator has put an end to the long-simmering dispute whether compliance measures taken before the sanctioned conduct may be acknowledged as a mitigating factor.

The 10th Amendment answers this question in the affirmative. As regards **post-infringement measures**, Section 81d ARC lists the elimination of identified deficiencies in the compliance strategy and the first-time implementation of such a strategy, as well as serious efforts to uncover the infringement and/or to make good the damage caused as aspects that may justify a fine reduction. In addition, **compliance measures taken prior to the infringement** may also be taken into account as a mitigating circumstance, provided they are **appropriate and effective**. This is generally to be assumed if the company's internal compliance led to the discovery of the violation. Otherwise, a case-by-case analysis needs to be carried out. If the infringement could have been prevented easily by proper compliance, the precautions taken will hardly lead to a noticeable fine reduction; the same applies if higher management was involved in the infringement.

It remains to be seen whether the desired convergence of the FCO's and the courts' fining policies will be achieved. The courts will continue to make independent decisions, in the context of which they can evaluate and weight the fining criteria quite differently than the FCO. In addition, the main cause of the sometimes considerable discrepancies between the fines imposed by the FCO and the courts is the different interpretation of the upper fine limit of 10% of the total turnover. Regrettably, the 10th Amendment is silent on this aspect.

2. Leniency Program

In accordance with a requirement in the ECN+ Directive, the 10th Amendment introduces for the first time a legislative framework for leniency applications, which largely mirrors the leniency program set up by the FCO in 2006. One of the main differences *vis-à-vis* the FCO rules is the fact that under the 10th Amendment even so-called "**ring leaders**" (*i.e.* companies that were the sole leader of a cartel) are also entitled to full immunity.

It should be noted that also the ARC's new leniency provisions apply only to **proceedings before the cartel authorities** and are not binding on the courts. Moreover, they do not protect natural persons from criminal prosecution.

3. Procedural Law

In accordance with the ECN+ Directive, the 10th Amendment strengthens the position of the cartel authorities in appeal proceedings. They are now granted the **same powers as the public prosecutor's office** in order to enable them to participate in judicial proceedings independently and autonomously as prosecuting authority, defendant or respondent.

Also based on the ECN+ Directive, the **right to remain silent** in cartel proceedings is **further restricted** as the duties to cooperate on the part of the companies concerned and their employees are considerably expanded. For example, during dawn raids employees are obliged to disclose information, which could make evidence available, and provide explanations on facts or documents that might be related to the subject matter of the search.

Information may not be refused even if it exposes employees to prosecution for a competition law infringement. As before, outright confessions must not be requested but it becomes increasingly difficult to draw the line. While the employees are protected by the fact that the competition authority must first issue a prosecution waiver, for the companies these changes lead to a massive – and constitutionally quite questionable – curtailment of their defense rights.

4. Other Changes

From now on, the FCO is entitled to go beyond the previously applicable maximum fine of EUR 100,000 and to impose **fines of up to 1% of the total turnover** for a number of "minor" offenses (Section 81c (3) ARC). This mainly concerns breaches of duty during the authority's investigation, such as resistance to the search of business premises or the breaking of seals.

It is also worth mentioning that the maximum limit of 10% of total turnover for **fines imposed on associations of undertakings** for an infringement of EU competition law will be calculated in the future based on the turnover of the association's members which were active on the market affected by the infringement. Excluded is only the turnover of those companies, which were themselves fined for the infringement at issue. In addition, the members' **default liability** has been tightened in case the association fails to pay its fine.

IV. Access to the File in Administrative Proceedings

For the first time, the 10th Amendment introduces a right of access to the file in administrative proceedings both for parties to the proceedings and for third parties.

Pursuant to Section 56 ARC**, parties to the proceedings** may now request access to the FCO's file if they can show that this is required to assert their legal interests. However, the FCO may reject such a request for important reasons, which include the safeguarding of the effective performance of its tasks and the protection of trade or business secrets. The authority may request anyone submitting documents to indicate confidential information. The lack of such an indication can be understood as consent to disclosure in the case of a request for access.

Third parties not involved in the proceedings, including journalists, also have the right to access the FCO's files if they can demonstrate a legitimate interest in doing so. However, it is important to note that the new rules are not intended to expand the right of access to the file in follow-on damage actions pursuant to the relevant provisions under civil procedural law.

V. Private Competition Law Enforcement

The 10th Amendment brings only few changes regarding the ARC rules on private competition law enforcement – quite in contrast to the 9th Amendment of 2017, which transposed the EU Damages Directive into German law (see in detail SZA Special Newsletter, March 2017).

The first change concerns Section 33a ARC, which sets out the prerequisites of liability for damages caused by competition law infringements. Section 33a (2) sentence 4 ARC now establishes a **rebuttable presumption** that legal transactions involving a cartelist, which fell within the scope of a cartel in terms of subject matter, time and place, were covered by the cartel arrangement. According to the new version of Section 33c ARC, indirect customers are also to benefit from this presumption. These changes mirror the *Rail Cartel I* and *Rail Cartel II* judgments of the Federal Court of Justice in 2018 and 2020 where the prior standard of *prima facie* evidence was rejected. As a result, the legislator felt compelled to shift the burden of proof (in a plaintiff-friendly manner) to the cartelists. It is now up to the latter to prove that, contrary to the presumption, the transactions at issue were not affected by the cartel. It remains to be seen which role this change will play in practice. It will take some time until the first

judgments are handed down – the new standard only applies to claims that arise after the 10th Amendment has entered into force.

Further amendments concern Sections 89b and 186 ARC and expand in two ways the right to have evidence disclosed under Section 33g ARC (**"discovery light"**), which was introduced by the 9th Amendment to the ARC. First, it was clarified that such a disclosure request in the context of preliminary injunction proceedings does not require urgency. Secondly, a claim under Section 33g ARC may now be asserted independently of any underlying damage claim. The legislator considered these adjustments necessary after the Higher Regional Court of Düsseldorf had ruled to the contrary in 2018.

The few changes to the rules on private competition law enforcement should not obscure the ever-growing significance of follow-on damage actions before German courts. The evolving case law of the Federal Supreme Court (see most recently SZA Newsletter, January 2021) constantly poses new challenges for the parties and the lower courts. In particular, defendants must take care to ensure that basic principles of competition law and civil procedure are adhered to in a plaintiff-friendly environment.

This client information contains only a non-binding overview of recent developments in German competition law and is not meant to replace legal advice. In case of comments or questions, please contact:

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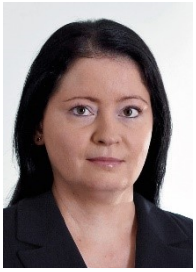

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