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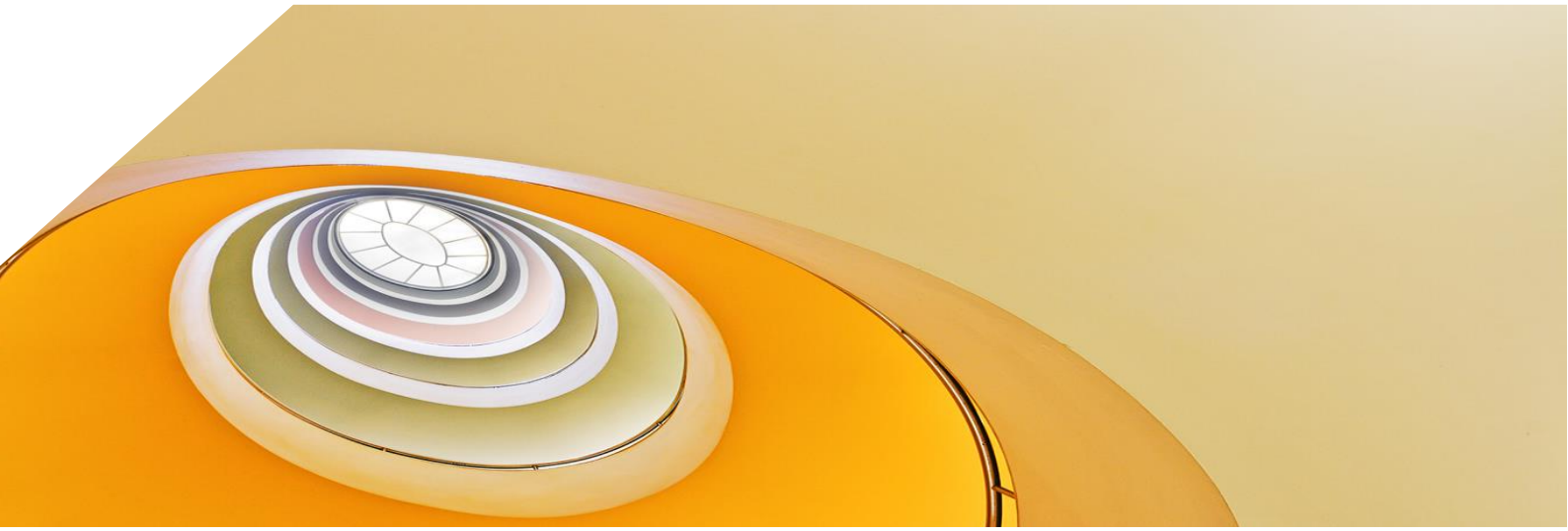

The 10th Amendment to the German Act Against Restraints of Competition

Digital markets and the ECN+ Directive

20 January 2021

On Thursday, 14 January 2021, the German Federal Parliament (*Bundestag*) finally adopted the 10th Amendment to the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; **GWB**). Dubbed the **GWB Digitalisation Act**, it is in fact an updated version of the government's original bill introduced by the Committee on Economic Affairs substantially amended at the last minute. The German Federal Council (*Bundestag*) endorsed it on 18 January 2021. It was promulgated on the same day and **entered into force on 19 January 2021**.

The law sets down **a new framework for allowing the German economy to enter the digital age**. Following the proposals made by the (reform) commission established by the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*) in 2018, the Act establishes a **focussed, proactive and digital "competition law 4.0"**, this is shorthand for a set of rules focussing on the "data economy, platform markets and 'industry 4.0'". In this context, a **new instrument for regulating market power abuse below the level of market dominance** has been developed in order to enable the German Federal Cartel Office (*Bundeskartellamt*; **FCO**) to react more quickly to a build-up of market power in the digital sector. **Data access regulations** aim to promote innovation and keep markets open. The enforcement of antitrust law has received a boost through the transposition of the **ECN+ Directive** and the **smoothing** out of certain perceived hindrances in the plaintiff's path to successful **follow-on damages actions**. Finally, **merger control** has been scaled back at its lower end.

The following pages offer a summary of the key new features and our comments on their implications in practice.

Abuse control: Stricter controls for digital powerhouses

The modernisation of the rules on market power abuse form the cornerstone of the Amendment. Since companies in the digital sector may grow very quickly, leveraging power across markets and creating entire eco-systems, they may have a large impact on other companies' routes to market. The GWB takes changed relationships between market participants in the digital economy into account. This means **stricter abuse controls and broader access to data**.

After the 9th GWB Amendment (section 18 (3a) GWB) broadened the definition of market power to include additional criteria, such as network effects, for identifying market power in multi-sided markets (also known as "platforms"), the concept of **intermediary power** has now been added as a criterion for identifying dominance as part of a new section 18 (3b) GWB. This refers to companies acting as intermediaries on platform markets (known as "gatekeepers") which play a significant role in enabling other market players to access supply and sales channels. The GWB Digitalisation Act aims to ensure that "positions of power that are susceptible to abuse" are within the scope of abuse control.

Section 19 (1) GWB removes **the causal relationship between market dominance and abusive conduct** as a requirement for making a case of **exploitative abuse**. For the variant of exclusionary abuse, this was already reflected in both German and European practice; drawing on the Facebook case the amendment now also extends this to the case of exploitative abuse. It remains to be seen whether this will manifest in a greater number of cases in which the authority deals with undertakings unduly exploiting consumer data in internet markets (following the *Facebook* case, by which this change was triggered).

In relation to the essential facilities access rule set out in section 19 (2) no. 4 GWB, **data has been added as an essential facility** and thus a claim to access can be asserted in return for payment of a reasonable fee. Contrary to the previous understanding, the term has thus been broadened to match European jurisprudence, which for some time has allowed parties to seek access to essential facilities other than physical infrastructures.

Section 19a GWB is not just the most significant innovation but was also the most contentious in the bill's evolution, as an **additional instance of abuse** is introduced, enabling the FCO to intervene in cases where competition may be compromised by digital powerhouses. The addressees are companies operating on several multi-sided markets and enjoying **paramount cross-market significance for competition (PCMS)**. This market position does not require the addressee to hold a dominant position in one or more markets; the provision thus **lowers the threshold for intervention** in the context of abuse control below the level of market dominance for the first time and creates an entirely **new category of addressees**. The FCO has the power to formally attribute that position – PCMS – to an undertaking for a maximum period of up to five years, a decision which can be appealed (*Beschwerde*). Should the FCO conclude so, the FCO may in a second step prohibit that undertaking, *inter alia*, from: **self-preferencing** when it acts as an intermediary for access to markets; or from **employing abusive data strategies**, including using a combination of data from origin and target markets, to erect market entry barriers or otherwise foreclose competitors; or from **hampering interoperability of products or services, or the portability of data** and thereby impeding competition, eg in order to achieve lock-in effects or limit third party market entry or expansion. While it is possible to objectively **justify such conduct**, the **burden of proof** has been reversed, and thus a *non liquet* situation is now deemed to apply to the detriment of the addressees. The FCO may find PCMS and issue a prohibitive ruling in a single case. However, due to the fact that this "ad hoc" regulation applies *ex nunc*, damages claims have been ruled out and fines will not apply. Rather, the acknowledged goal is to protect digital markets by way of rapid intervention against the accumulation of excessive market power, since traditional abuse control cannot exert sufficient clout once a company has established market dominance. In the interests of accelerating proceedings, the **German Federal Court of**

Justice (*Bundesgerichtshof*; **BGH**) will have sole jurisdiction, pursuant to section 73 (5) no. 1 GWB, as the **first and final instance** for the review of these decisions issued by the FCO; this will cut out the poised and fiercely independent appeals court in Düsseldorf (as aptly demonstrated by the standoff between BGH and appeals court in the *Facebook* case). This was deemed constitutional in view of the parallel doctrine contained in section 50 of the German Rules for Administrative Courts Procedure (*Verwaltungsgerichtsordnung*). Simplifying the court review process facilitates, in the view of the legislator, more effective control of market power in the digital sector.

Finally, the provision prohibiting companies with **relative market power** from impeding competitors and discriminating against customers, which is contained in section 20 (1) GWB, has been tightened and will in future **no longer protect small-and medium-sized enterprises alone**. Major corporates are considered equally exposed, in particular if they need **access to data** and thus depend on digital platforms. Such alleged dependence does not exist, however, if it is offset by a company's own negotiating power. At the same time, the provision has been extended to include intermediaries with relative market power which control access to supply or sales channels (gatekeepers). Such intermediaries will now be obliged to provide data access, even if the data in question has only ever been used internally ("captive use"), a step that may end a long-standing tenet that each undertaking should decide independently which product or service it will market to third parties. Finally, section 20 (3a) GWB will create a new prohibition designed to prevent platforms with market power from hindering competitor efforts to generate their own positive network effects, and thereby impair competition (eg via exclusive relationships). This measure aims to counteract monopolising (or **tipping**) strategies in multi-sided markets at an early stage.

Procedural law: Strengthening of interim measures and new declaratory decision

The legislature has **lowered** the **requirements for the passing of interim measures** pursuant to section 32a GWB by the FCO. The previous 'risk of serious and irreparable damage to competition' is to be replaced by lesser requirements. In future an infringement must be more likely to exist than not and the interim measure be required in order to protect competition or protect an undertaking against a direct and serious threat. The only acceptable counterargument against such an interim measure is unfair hardship provided it is not outweighed by public interest. The motivation behind these changes is the perceived need to quickly react to suspected anti-competitive behaviour, particularly in the fast-moving digital economy. A cease-and-desist order, which may be passed after multi-year proceedings, could come too late, as damage beyond repair could have been caused by this time.

A declaratory **FCO decision** pursuant to the section 32c GWB ruling that there are **no grounds for action** against certain conduct was rarelyused in the past. This instrument has now been **strengthened** by way of a written **right to a (declaratory) decision** within a "soft" (target) six-month deadline (section 32c (4) GWB), where a cooperation project between competitors is at stake (vertical conduct, eg procurement or distribution agreements, is thus not included) and the companies have a substantial legal and economic interest in receiving such a decision. This provision removes legal uncertainties which stand in the way of investing in such projects, in particular in the digital economy (shared data use, platform building, etc).

In addition, the existing **practice of the "chairman's letter" has been codified** (section 32c (1) GWB). In future, the FCO will be able to issue an informal letter of comfort to the effect that it will be exercising its discretion to refrain from launching proceedings. In addition, it can issue guidelines on exercising discretion in these cases.

The **subject of sector inquiries** (if conducted at cross-sector level) will be **extended to cover unilateral conduct**. This affects potential infringements of the prohibition on market power abuse and consumer protection rules in particular. Only bi-/multilateral conduct was covered previously.

The **duty to cooperate**, which is incumbent on individuals in the context of company-specific **information requests** and during FCO **dawn raids**, will in future be extended to also include an obligation to provide **self-incriminating information**, instead of granting every individual obliged to provide information an unlimited right to refuse disclosure, as was previously the case. In implementing the ECN+ Directive, this applies not only to antitrust administrative proceedings but also to quasi-criminal proceedings. The constitutional *nemo tenetur* principle is reflected in a ban on relying on such evidence which will only cover individuals rather than undertakings that do not enjoy the same constitutional protection.

Merger control: A "lift" of the first and second domestic turnover threshold and a new notification requirement rule

The German merger control thresholds have so far been very low compared to other jurisdictions. In order to take sufficient account of inflation since the last adjustment in 2002 (which at that time was in the context of the conversion of the DM turnover threshold into EUR), a "lift" was warranted in the legislator's view. Accordingly, the **first domestic turnover threshold** pursuant to section 35 (1) no. 2 GWB has been increased from EUR 25 million to **EUR 50 million** and the **second domestic turnover threshold** from EUR 5 million to **EUR 17.5 million**. This increase is expected to reduce the FCO's caseload by more than 20% and to unburden medium-sized enterprises. The **exemption** (*Anschlussklausel*) permitting the acquisition of a company with a turnover of up to EUR 10 million (including any controlling companies), ieie above the earlier EUR 5 million threshold, without undergoing formal merger control, has been rendered obsolete by the increase of the second domestic turnover threshold and no longer applies. FCO president Andreas Mundt fears that due to the increase of the domestic turnover thresholds, it will no longer be possible to control all cases which might give rise to concern, but sees scope for official enforcement emerging in other respects: "*With the resources freed up, we will be able to focus even more effectively on the really critical cases*".

A consequential amendment concerns section 35 (1a) GWB, where the 9th Amendment introduced a merger control threshold based on the value of the consideration. When this "**transaction value threshold**" was introduced, the turnover thresholds were set in parallel to the two domestic turnover thresholds pursuant to section 35 (1) no. 2 GWB.

The ***de minimis* market threshold** exempting minor markets from merger control in section 36 (1) GWB has also been raised from EUR 15 million to EUR 20 million. At the same time, the wording has been amended to allow for an integrated review of several *de minimis* markets, in line with previous practice.

The Amendment also extends the **period allowed for in-depth, ie phase II, proceedings** (*Hauptprüfverfahren*) from four to five months. This step is to account for the more sophisticated analysis required under the SIEC test.

The Amendment counts **multiple concentrations** between the same buyer and seller within a period of two years as one, in keeping with the parallel rule in the EU Merger Regulation, undoing a threshold requirement and thus closing a legislative loophole.

Moreover, the Amendment **removes** the obligation to file a **completion notice** for a notified concentration. In future, however, notifiable concentrations that were (inadvertently) not notified must be submitted to the FCO without undue delay. Failure to do so will continue to carry a fine.

The Amendment further introduces **new provisions** that allow the FCO to order the notification of future concentrations in a particular economic sector. This is intended to prevent "killer acquisitions", ie the

systematic acquisition of start-ups or particularly fast-growing market entrants. Pursuant to section 39a GWB, the FCO may impose an obligation on companies to notify concentrations in one or more specific economic sectors even if the target falls below the applicable domestic turnover thresholds (from a turnover of EUR 2 million, of which more than two-thirds has been generated in Germany). However, the FCO must previously have conducted a sector inquiry in line with section 32e GWB in one of the affected economic sectors. The order will be issued by an administrative act and will apply in the relevant economic sector(s) for a period of three years from the date on which the order is served.

In addition, certain concentrations in the **hospital sector** will be exempt from merger control for a limited time (sunsetting by the end of 2027). Funding from the hospital structure fund is an essential requirement.

Lastly, the federal government's draft bill provided for a tightening of both the formal and the substantive requirements for **ministerial merger approval**. It is likely that this amendment would have upended ministerial approval in practice. Ultimately, the Committee on Economic Affairs **did not** take this step.

Antitrust fines proceedings: Extended FCO Powers, substantially increased fines and penalties

Penalties, which the FCO may impose for procedural breaches such as a refusal of or delay in the submission of requested information, have been substantially increased from the previous range (EUR 1,000 to a maximum of EUR 10 million) **to up to 5% of the average daily total global turnover generated in the preceding financial year** by the company or association of companies.

Procedural breaches such as obstructing a review, breaking a seal or failing to fully or accurately respond to an information request, may incur a fine of a maximum of 1% of the global company turnover, rather than, as before, a maximum of EUR 100,000. The Amendment also expands the **scope of information requests in antitrust investigations**, which was previously limited to information concerning turnover and group structure, by way of a reference to the rules for administrative proceedings, which are now applicable *mutatis mutandis*. This expanded information request will now also be made available to the Higher Regional Court of Düsseldorf.

Associations may in future be ordered to pay **a fine of up to 10% of the total turnover of its members** active on the market in question. The turnovers of companies that have already been fined and the company applying for leniency are not included in this calculation. The FCO may also **demand payment of a fine** calculated on the basis of members' turnover and imposed on an insolvent (or partially insolvent) association **directly from the association's members**, with those represented on the association's decision-making bodies during the relevant period being ordered to pay first, before the association's other members active on the affected market are asked to pay. Companies which have already been fined in the same proceedings and the party applying for leniency are exempted from this right of recourse. The amount claimed must not exceed **10% of the respective member's total turnover**. An association member may be exempted from the obligation to pay if it can prove that it did not implement the resolution which triggered the fine, was not aware of this resolution or actively distanced itself from the resolution before the proceedings were opened.

The Amendment introduces more specific **criteria for calculating fines** imposed on companies and associations. These are to include, in particular, the type of breach, the economic impact of the products affected, the turnover linked either directly or indirectly to the breach, and recidivism, if any. In a positive sense, **appropriate and effective compliance measures** leading to the prevention or identification of breaches which subsequently became the subject of investigations may be considered when reducing fines – a laudable addition to German law following the introduction of comparable privileges in other countries (such as France, the UK and Romania, where an efficient compliance system is rewarded by a reduction in

fines of up to 10%). This expansion of the non-exhaustive list of fining criteria seeks to achieve a more uniform fine calculation in proceedings before the FCO and the Appeals Court in Düsseldorf. The key reason for this was the *de facto* loss of a court remedy as the Court could (and would more often than not) significantly raise the fines originally imposed by the FCO; however, whether the new wording will remove this serious problem remains doubtful.

New sections 81h to 81l GWB set out the **legislative framework for the FCO's leniency programme**. The provisions largely correspond to the existing leniency rules, which have been expanded to reflect the relevant requirements of the ECN+ Directive. The proposed legislation confirms that the leniency programme is applicable to horizontal hardcore infringements. The explanatory memorandum additionally states that the FCO may, at its discretion, **acknowledge cooperation when calculating fines, outside of horizontal infringements**, which reflects the previously applied (albeit not expressly acknowledged) practice. As before, the leniency application generally applies to the applicant's current and former employees.

Finally, the Amendment strengthens the FCO's position in legal redress proceedings against fine decisions, meeting the requirements of the ECN+ Directive. The **FCO will be placed on an equal footing with the public prosecutor** in court proceedings and thus has the same procedural rights. As a result, it will be necessary in future, for instance, for both the public prosecutor and the FCO to grant approval before a complaint against a fine decision (*Einspruch*) can be withdrawn and the case closed.

Private antitrust enforcement: Correcting jurisprudence

Initially, the legislature saw no reason to amend the law governing private enforcement in follow-on cases. The 9th Amendment to the GWB, which implemented the EU Antitrust Damages Directive, already provided for comprehensive plaintiff-friendly changes. The legislature has nonetheless identified certain **hurdles for injured parties** in "recent court rulings" that have now been **eliminated**.

First, the **enforcement of disclosure rights has been simplified**. In April 2018, the Higher Regional Court of Düsseldorf rejected a claim to have a decision relating to fines surrendered by way of a preliminary injunction pursuant to section 89b (5) GWB. In its decision, the court ruled that the necessary right to disclosure of information pursuant to **section 33g GWB** was not applicable with retroactive effect to damages claims pursuant to the old version of section 33 GWB. The Amendment now expressly **states** that such **retroactive effect will apply**.

The Higher Regional Court of Düsseldorf also rejected the claim to disclosure citing a lack of **urgency**. The Amendment also **eliminates this requirement**.

The third change concerns an infringement's impact on parties, product markets and time period covered ("affectation", *Betroffenheit*). In its first decision on the *rail cartel* case passed in December 2018, the BGH rejected the *prima facie* presumption regarding scope (and causation of damages). In the course of the legislative process, this jurisprudence was criticised as unduly burdening plaintiffs (although this is no longer the case in more recent BGH practice). Nevertheless, the statutory assumption that damage has occurred, which was introduced with the 9th Amendment to the GWB, is now complemented by the **statutory assumption** of a aintiff and a transaction within the relevant product market and time period being impacted. Both assumptions will, however, have **no retroactive effect**, but will only apply to claims that arise after the 9th or, respectively, 10th Amendment to the GWB has taken effect.

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