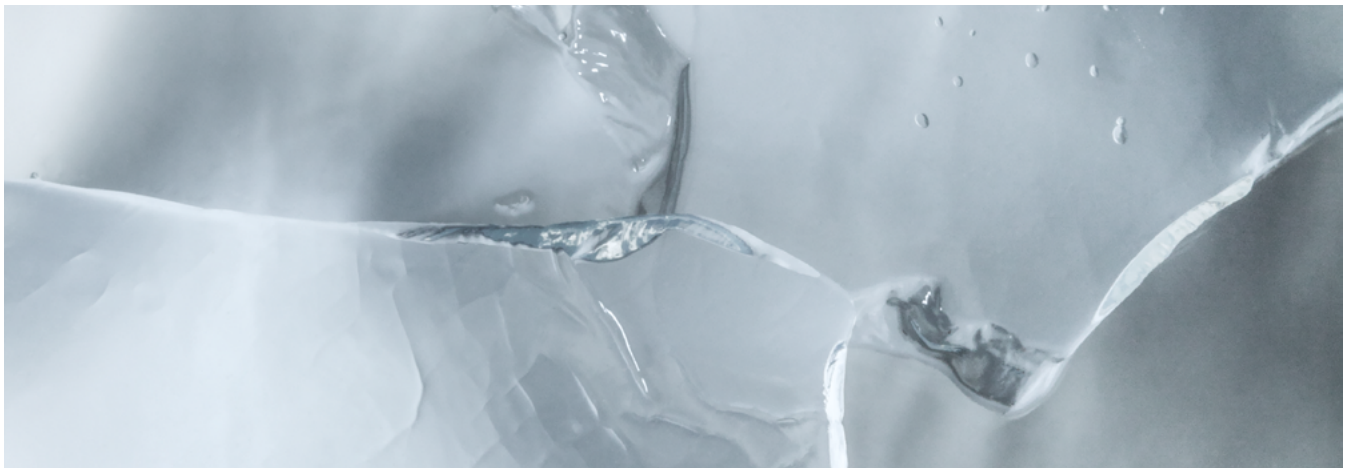

CLIENT INFO

The "Digitalization Amendment" of the German Act Against Restraints of Competition –

Overview of Major Changes

On January 19, 2021, the tenth amendment to the German Act Against Restraints of Competition ("GWB") entered into force. In addition to a series of minor adjustments, the changes relate to two key areas:

(I.) Changes in the area of merger control, in particular, a significant increase of the so-called domestic turnover thresholds and an extension of the review period in Phase II cases from four to five months

(II.) Tightening of the control of abusive behavior in the context of digital markets

While the German Federal Cartel Office ("FCO") estimates that, each year, several hundred merger control reviews will no longer be necessary, the legislator expects that there will be an increase in the number of proceedings with regard to abusive behavior.

I. Merger Control

1. Turnover Thresholds (section 35 GWB)

In future, mergers will be subject to merger control if one undertaking concerned generated domestic turnover of more than EUR 17.5 million (instead of the previous EUR 5 million) and another undertaking concerned generated domestic turnover of more than EUR 50 million (instead of the previous EUR 25 million) in the last full financial year. The threshold for the combined aggregate worldwide turnover generated by all of the undertakings concerned remains unchanged, i.e. more than EUR 500 million in the last full financial year.

If an undertaking concerned generated domestic turnover of more than EUR 50 million (rather than the previous EUR 25 million) in the last full financial year, but neither the company to be acquired, nor another undertaking concerned generated domestic turnover of more than EUR 17.5 million (rather than the previous EUR 5 million), the transaction is still subject to merger control if the transaction value threshold of EUR 400 million, which was introduced with the ninth amendment to the GWB, is exceeded. Again, the threshold for the combined aggregate worldwide turnover generated by all of the undertakings concerned remains unchanged, i.e. more than EUR 500 million in the last full financial year. Furthermore, the company to be acquired must (as before) be active to a significant extent in Germany.

2. So-Called Affiliation Clause (section 35(2)(1) GWB)

In the past, there was no obligation to notify a concentration if an undertaking, which was not dependent on another undertaking and which generated worldwide turnover of less than EUR 10 million in the last full financial year, merged with another undertaking. This exemption is now obsolete due to the increased turnover thresholds in sections 35(1) and (1a) GWB and has therefore been deleted.

3. De minimis Market Clause (section 36(1)(2)(2) GWB)

Mergers cannot be prohibited if the reasons for prohibition relate exclusively to de minimis markets with a domestic volume of up to EUR 20 million (instead of the previous threshold of EUR 15 million) in the last calendar year.

However, from now on, there is a general rule that several de minimis markets can be considered together. If the conditions for a prohibition are met on each of several small domestic markets, the total combined volume of which exceeds the de minimis market threshold, a prohibition will be possible, even if the total volume of each of the individual markets does not exceed the de minimis market threshold in its own right. This will be the case even if the individual markets are not neighboring markets in terms of their geographic scope or relevant product focus.

4. Press Clause (section 38(3) GWB)

Turnover generated by print media only has to be multiplied by a factor of four (and no longer by a factor of eight) to determine the turnover thresholds. This will likely reduce the number of press mergers in the print sector that are subject to merger control.

5. Combining Two or More Concentrations (section 38(5)(3) GWB)

Two or more concentrations that take place within a period of two years between the same persons or companies are treated as a single concentration. Until now, the obligation to notify only applied at the point at which the German merger control turnover thresholds were exceeded for the first time. The term "for the first time" has been deleted in order to avoid circumvention of the obligation to notify. It is therefore no longer possible to split a merger into a larger, unproblematic part, which must be notified and will be cleared by the FCO, and a smaller part, which raises competitive concerns and yet is not subject to merger control clearance.

6. Request for Notification by the FCO (New section 39a GWB)

The FCO can insist, by way of an administrative order, that individual undertakings notify every acquisition (i.e. including transactions that do not normally fall within the scope of merger control, except for de minimis transactions), for a period of three years following receipt of the order. This only applies to certain economic sectors which the FCO has previously investigated within the scope of a sector inquiry pursuant to section 32e GWB. The obligation to notify can be renewed after three years.

There must be "objectively justifiable indications that future mergers could significantly impede effective competition on the domestic market in the relevant economic sectors". The acquirer must have a share of at least 15% of supply or demand of goods or services in Germany in the relevant economic sector.[1] Furthermore, the following turnover thresholds must be met:

- the acquirer has a worldwide turnover of more than EUR 500 million; and
- the target company has a worldwide turnover of more than EUR 2 million, and more than two-thirds of its turnover is generated in Germany.

7. Review Periods (section 40(2)(2) GWB)

The deadline for the FCO to assess mergers in Phase II proceedings has been increased from four months, from the date of submission of the notification, to five months.

1 This is not a market share.

8. Notification of Implementation (section 39(6) GWB)

The obligation to inform the FCO that a concentration, which has been cleared by the authority, has been implemented, no longer applies. The obligation to inform the FCO, retrospectively, of the implementation of concentrations which should have been notified to the FCO for merger control clearance, however, remains in force.

II. Control of Abusive Behavior

1. Introduction of the Concept of Intermediation Power

Absolute and relative market power now encompass the concept of "intermediation power", meaning that a dominant position or dependence can also result from the importance of the intermediation services of a company on multi-sided markets. This addition is primarily aimed at hybrid platforms where the platform operator competes with its customers through its own offerings.

2. Easier Access to Data

The amendment softens the conditions under which a refusal to grant access to data by a dominant company, a company with a strong position on the market or a company of paramount cross-market significance for competition, may be prohibited or considered abusive (sections 19(2)(4), 19a(2)(5), 20(1a) GWB).

3. New Type of Intervention (New section 19a GWB):

The revised GWB creates a new type of intervention tool, which targets certain types of conduct of large platforms and similar companies whose "paramount cross-market significance for competition" has been established by the FCO for a period of five years by way of an administrative order. In order to accelerate the implementation of the new tool, an FCO decision under this provision can only be appealed directly to the German Federal Supreme Court (rather than going first to the Düsseldorf Higher Regional Court, as would normally be the case with FCO decisions).

The new intervention tool is targeted at companies that operate to a significant extent on multi-sided markets and networks. The FCO determines "paramount cross-market significance for competition" by taking into account a range of factors. The revised law lists, for example, a dominant position, access to resources and data, and vertical integration, as relevant factors. The required assessment is a cross-market analysis, which takes account of the fact that digital platforms and networks can be of central importance for a multitude of markets due to conglomerate structures and the key positions they hold, without necessarily being dominant on each of these markets.

Even if there is no abuse of a dominant position, the FCO can prohibit such a company from engaging in certain types of conduct, unless the company can prove that the conduct is objectively justified. Such conduct encompasses restrictive practices that have been identified as relevant on digital markets and includes self-preferencing, as well as the safeguarding of the unassailability of digital ecosystems through restrictive measures.

In future, companies with paramount cross-market significance for competition will, therefore, be subject to stricter rules than companies that hold a "classic" dominant or strong position on the market. The legislator expects that there will be up to three proceedings to determine paramount cross-market significance for competition within the first five years following entry into force of the revised law.

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