Today, a number of important amendments to Germany’s Act against Restraints of Competition (the “Gesetz gegen Wettbewerbsbeschränkungen”) came into force. These changes are set to further strengthen the tools available to the nation’s antitrust enforcer to rein in Big Tech. In addition, by raising the jurisdictional thresholds under which companies need to notify their transactions for merger control approval, the new law will also reduce the number of transactions the Federal Cartel Office (FCO) will have to review, thereby freeing up resources the agency will now be able to dedicate to regulating technology markets.

At a time when the European Commission, the UK’s Competition and Markets Authority, and other agencies around the world are still exploring how best to enforce the traditional antitrust toolkit in the digital age, the German legislature has taken decisive action to ensure the FCO is well-equipped to protect competition in the new economy.

For example, the new law clarifies how existing powers can be applied in the online space. A company’s access to competitively relevant data, and its role as an intermediary for other industry participants’ access to procurement or sales markets, are now specifically mentioned as criteria that need to be taken into account when assessing a company’s market power or its role as a “gatekeeper” on whom others may depend for market access. The new law also introduces an entirely new competence that will allow the FCO to take preemptive measures when effective competition is threatened or when markets are about to “tip.” Such situations may arise, for example, when platform operators self-preference their own products or services to the detriment of their rivals who use these platforms to reach consumers. Another example is the monopolization of data that may be used to foreclose competitors’ access to the market.

As of today, the FCO will be able to prohibit such potentially harmful practices (and, for instance, force companies to share their data in return for a reasonable compensation) before such harm actually materializes. This paradigm shift from the traditional ex post enforcement towards an ex ante approach to protecting competition before it is too late is seen as critical; once a market has tipped, it may be very difficult to re-establish functioning competition—especially in digital markets where network effects entrench market positions and make a reversal particularly difficult.
In order to ensure the FCO is able to effectively use its new pre-emptive powers without being bogged down in years-long court disputes, the law introduces a fast-track appeal process pursuant to which such appeals will be escalated straight to Germany’s Federal Court of Justice for a final verdict—leapfrogging the traditional first-instance appeal to the Higher Regional Court in Düsseldorf.

Beyond its impact on the tech industry, the amendments to the Competition Act are significant for other sectors as well. By raising the jurisdictional thresholds for Germany’s merger control regime, many transactions that would have triggered an FCO filing requirement in the past will now stay below the agency’s radar. Specifically, where previously a transaction would have been notifiable amongst others if at least two of the parties involved had German revenues of at least EUR 25 million and EUR 5 million, respectively, those thresholds have now been raised to EUR 50 million and EUR 17.5 million. The same changes apply to the transaction value threshold (of EUR 400 million) that was introduced to the law in 2017 and which remains in force. For an agency that is used to reviewing, on average, around 1,200 merger cases each year, the new thresholds are a welcome development and one that will allow it to focus on the critical cases. The statistics show those cases represent just a fraction of the overall workload (e.g., in 2019, of around 1,400 merger decisions, only 14 required an in-depth investigation).

While many future transactions will escape FCO scrutiny, the new law introduces a new “call-in” power under which the FCO may require parties to notify their transactions even if the standard thresholds are not met, but where the transaction is deemed problematic because it has a specific nexus to a market that has been subject to a previous sector inquiry by the FCO.

Other important amendments include the strengthening of the FCO’s cartel-busting powers to further align them with EU law.

Germany’s revised Competition Act is a bold step. Time will tell how and to what effect it will be applied in practice. It is worth recalling, however, that in the hands of the FCO, the new law will be enforced by an agency that has a track record of using antitrust rules in unorthodox ways, such as its 2019 decision to challenge Facebook’s practice of collecting and commercialising users’ data. While the FCO’s jurisdiction is limited to Germany, the new law is set to have significant implications well beyond. As Big Tech companies may find it difficult to adjust their core operations and business models from country to country, the German law can be expected to affect consumers and competitors around the world. It may also serve as a blueprint for similar legislative initiatives in other countries.
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