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Draft German competition rules on powerful digital gatekeepers

Silke Heinz (Heinz & Zagrosek Partner mbB, Germany) · Friday, December 11th, 2020

The government's draft for new competition rules, including on (digital) platforms, published in September 2020 (see here) includes a provision specifically aimed at powerful digital gatekeepers, draft Section 19a ARC. The proposal was debated in parliament on November 25, 2020, is largely expected to be adopted more or less in its current form and to enter into force in February 2021. This would be much earlier than any other contemplated legislation at EU level or in other Member States. Germany will thus be at the forefront of the push for legislation to tackle digital gatekeepers, and may provide the first experience with such rules as early as next year.

Draft Section 19a ARC targets companies with "paramount cross-market significance for competition" ("pcms") to be subject to special intervention powers by the FCO. The provision has some regulatory elements as well as traditional competition law aspects. The FCO's president Andreas Mundt has called the concept "competition law plus". Below is a summary of the provision's content, followed by some comments.

I. The content of draft Section 19a ARC

The rule sets out a two-step-procedure: first the FCO will issue a decision finding that an individual company has pcms.

1. **Paramount cross-market significance for competition**

The company must be active to a significant extent in multi-sided markets or networks. There are possible additional pcms criteria listed in the provision, which are not exhaustive and do not need to be met cumulatively:

- a dominant position in one or more markets;
- financial strength or access to other resources;
- vertical integration and activities in other related markets;
- access to competitively relevant data; and
- the significance of its activities for third parties' access to procurement and sales markets, as well as the influence caused by this on third-party business activities.

According to the proposal's explanatory notes the notion of pcms should catch large digital companies, often with one or more dominant position in individual markets, acting as powerful gatekeepers of digital ecosystems. The provision should not only enable the FCO to tackle an

abuse in dominated markets, but enable a cross-market analysis and to prevent abusive expansion into non-dominated markets. It is noteworthy that the provision itself does not mention "digital platforms", so its scope is not limited to these. And give that the criteria are not cumulative, it is also not a condition for pcms to actually have a dominant position in any (digital) market.

2. **Prohibited conduct**

In a second step, the FCO can decide to prohibit the identified addressee to engage in certain conduct, which is listed in five exhaustive regulatory examples, translated below. The FCO can prohibit a company with pcms:

1. when acting as an intermediary for access to procurement and sales markets to treat its own offerings favorably compared to those of competitors;
2. to directly or indirectly impair competitors unfairly in a market, in which the addressee, even without being dominant, can expand its position rapidly, to the extent that the impairment is capable of significantly impeding effective competition;
3. to use competitively relevant data that the addressee has collected in a dominated market, including in combination with more competitively relevant data from other sources, in order to create or increase market entry barriers in another market or to impair third companies in other ways or to demand business conditions allowing the said use (of data);
4. to hamper the interoperability of products or services or the portability of data and thereby impede competition;
5. to inform other undertakings insufficiently about the scope, quality or success of the provided or assigned service or to render the evaluation of the service difficult in other ways.

In short, the conduct can be roughly classified as self-preferencing by intermediaries vis-à-vis competitors (no. 1), (platform) envelopment (no. 2), leveraging through the use of data (no. 3), hampering interoperability of services or data portability (no. 4), and operating so-called "walled gardens" (no. 5). Only self-preferencing and the walled-gardens conduct do not require demonstrating any negative effects of the conduct. The other regulatory examples still require some sort of at least potential competitive harm (and thus seem more like ex-post intervention than ex-ante-regulation).

3. **Burden of proof and additional procedural rules**

The FCO cannot prohibit the said conduct if the latter is objectively justified. Importantly, regarding the type of conduct listed in no. 1 and 3-5, the burden of proof for any objective justification is upon the addressee, not the agency. The FCO can also impose remedies, interim measures or accept commitments to terminate proceedings.

The FCO can combine the first two steps in one decision. The FCO can also issue several prohibitions (step 2) based on one and the same decision under step 1. The explanatory notes clarify that the addressee can appeal each step in the proceedings, even separately.

Pursuant to the proposal's explanatory notes the first step, i.e., the decision finding that an undertaking has pcms, should typically be limited in time due to the principle of proportionality. The notes refer to a duration of 5-10 years as appropriate on average.

II. Comments

The new rule is a bold step for Germany, pushing ahead regarding enforcement in the digital economy. The FCO has welcomed the new intervention power, hopes that the new rule would allow speedier proceedings and that the reversal of the burden of proof, in particular, will provide incentives for the addressee to provide more information and do it faster than under current law.

Whether the proceedings will actually be faster remains to be seen. The possibility to appeal each step in the process may slow things down – it may well take 1-3 years to get a final decision on the first step (pcms classification) alone.

On the scope of pcms: it is curious why it is not explicitly limit to digital platforms, and to companies that have at least a dominant position or market power in one relevant digital market. This is different from the initiative at EU level, where the Commission is expected to target dominant digital platforms with ex-ante regulation. And the recently published CMA proposal for legislation in the UK, focusing on companies with strategic market status, requires substantial, entrenched market power (the definition of which sounds like dominance) in at least one digital activity. In fact, the various expert reports on competition policy and digitization only see increased competition risks regarding the conduct in question in cases of digital platforms that are dominant or have market power.

In discussions on the proposal, the Ministry of Economics confirms that the provision is aimed at "super-dominant" gatekeepers. So why make dominance (at least in one market concerned) merely an optional requirement? Even if in practice the FCO were to only go after dominant platforms, the new law would lift any obligation to demonstrate dominance. As a result, there may also be no need to properly define the relevant markets for finding pcms, as long as the FCO can find a gatekeeper position in a digital eco-system. While this may shorten proceedings, given the very broad intervention powers and that the pcms classification may last up to 10 years, the law's scope should be clear (in the provision itself) and limited to those platforms that indeed pose an increased risk for competition.

In terms of the relevant conduct, the provision breaks new grounds beyond existing abuse of dominance rules, in particular regarding the intervention possibility against self-preferencing and walled gardens. So far, without showing any potential foreclosure effects on competition, it would not have been possible to prohibit self-preferencing under German law (and even then the impact of standing jurisprudence that no company is obliged to promote rivals remains unclear). Operating walled gardens is a new theory of harm, for which there are no precedents yet.

While the other regulatory examples seem to be closer to known territory (involving platform envelopment/leveraging, increasing barriers to entry), they may still catch conduct that has not been on the radar screen so far. For example, the explanatory notes state that platform envelopment (regulatory example no.2) involves expansion into non-dominated markets through tying or bundling, predatory pricing or exclusivity agreements. Currently, all of these strategies would only be considered abusive if implemented by a company that is dominant in the products/services concerned, or if the tying/bundling occurs in combination with a dominant products/services. But this is not required under the new law.

The new provision thus provides broad intervention powers, but it does not give much guidance on when the FCO will actually intervene. The wording is abstract and rather modeled upon general (ex post) intervention norms. The examples do not provide a clear code of conduct, and for example self-preferencing may take many different forms. The new provision does not require the

FCO to meet either an essential facilities or a foreclosure test for prohibiting self-preferencing once a company is found to have pcms – so which cases of self-preferencing will the FCO tackle?

It is also unclear how detailed and concrete the prohibitions in the second step will be. The CMA has recently proposed creating a tailor-made code of conduct with a clear set of rules up front for every company that is identified as having strategic market status. This seems to go further than what the FCO would do in the second step, but things are still unclear.

The FCO will be under quite some political pressure to apply the new law in practice, and it will be interesting to see how it will use the new powers. Issuing additional guidelines on enforcement priorities under draft Section 19a ARC would certainly be helpful.

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