



7 September 2022

Harbinger of Things to Come – Takeaways from the German Way to Deal with Big Tech

In January 2021, the 10th amendment to the German Act against Restraints of Competition ("ARC") came into force and heralded the dawn of a new era in international digital antitrust law. With the so-called "ARC-Digitalization-Act" Germany introduced, as first country in the world, an innovative set of rules which intends to put its competition watchdog in a position to intervene earlier and more effectively against competitive practices of Big Tech that are widely regarded as anti-competitive today. The new rules aim to tackle dysfunctional competitive structures in the digital sector and corresponding detrimental effects – to the benefit of competitors, consumers, and the society overall.

However, the new German regulatory environment is only one piece of the larger puzzle. As legislators all over the world bolster the powers of their regulatory agencies to effectively address anti-competitive conduct of Big Tech, public enforcement will be on the rise in the coming years. Yet, in view of notorious tight budgets and limited (personnel) resources of the public hand, effective enforcement of the new rules will also require supplementary private enforcement, as we are already accustomed with in the field of antitrust law. Market participants that deal with Big Tech will, thus, have to assess whether their business partners comply with the multitude of obligations arising under the new digital competition regulations. Private initiative via complaints with the authorities or private enforcement before the national courts will likely be a big factor.

Against this background, the following blogpost looks at the initial public enforcement activities of the German Federal Cartel Office ("FCO") with respect to Sec 19a ARC against Google, Amazon, Meta, and Apple. In this regard, the post provides a first impression of Big Tech's business conduct as well as its fields of activities which the FCO will likely address in the coming years. This should help market participants to keep an eye on relevant developments in order to monitor and – if needed – to enforce compliance.

CURRENT STATUS OF THE FCO'S PROCEEDINGS AGAINST GAFA

Introduction

Shortly after the ARC-Digitalization-Act came into force in early 2021, the FCO picked up the ball and initiated proceedings against Google, Amazon, Meta/Facebook, and Apple under the newly introduced Sec 19a ARC. Pursuant to Sec 19a(1) ARC, the FCO may – in a first step – declare that a certain company has a "paramount significance for competition across markets". In a second step, pursuant to Sec 19a(2) ARC, the FCO may prohibit such a company from engaging in certain practices, e.g., self-preferencing, raising barriers to entry for other market participants, etc. Should the addressee of the FCO's decision not comply, it will automatically violate the German ARC without the FCO having to prove any further effects on competition in an individual case.

Until September 2022, the FCO has issued three decisions under Sec 19a(1) ARC, namely concerning Google, Meta, and Amazon. Decisions pursuant to Sec 19a(2) ARC will surely follow (see below). Apple's case is still pending but expected to close soon with the fourth consecutive declaration under Sec 19a(1) ARC.

Google

Google (with revenues of approximately USD 260 billion in 2021) was the first target of the FCO. On 20 December 2021, the FCO declared that Google has "paramount significance for competition across markets". Google accepted the verdict and did not lodge an appeal.

While the FCO did not rule on any specific conduct yet, the decision finds that Google has a superior, if not dominant, position in a variety of markets, including (i) general search services, (ii) search-linked advertising, (iii) Android and Play Store, (iv) Chrome and (v) Youtube. These findings may already prove helpful for market participants who are contemplating about bringing an individual case against Google – be it with a view to non-compliance with existing competition rules or new regulatory regimes or with a view to claiming damages suffered as a result of Google's market conduct in the past, e.g., app-publishers or companies from the advertising industry.

Moreover, the FCO has already identified certain practices it intends to scrutinize with a view to possible prohibition decision pursuant to Sec 19a(2) ARC:

- The FCO is investigating a variety of restrictive practices regarding the combination of Google's map services with third-party map services. The FCO intends to examine, inter alia, whether Google impedes the integration of location data from Google Maps, the search function, or Google Street View data into non-Google applications. Furthermore, the FCO investigates Google's licensing conditions for the use of its maps services in vehicles.
- Also, the rollout of Google's News Showcase service in Germany is subject to the FCO's scrutiny. Google's news offering provides the opportunity for highlighted and in-depth presentation of publisher content and was made available to several German publishers in

2020. Based on a complaint filed with the FCO by Corint Media, the agency is examining a variety of issues, namely (i) the integration of Google's News Showcase into Google search and its presentation with a view to self-preferencing, (ii) the contractual conditions with a view to unreasonable disadvantages for cooperating publishers (in particular, a possible impediment to intellectual property rights) and (iii) the conditions for access to Google News Showcase with a view to whether non-discriminatory access for press publishers is guaranteed. Google has already modified some of its Showcase practices and has agreed to address further ambiguities and concerns through changes in the underlying agreements and through clarifying statements. Stakeholders were consulted on Google's proposed measures in January 2022, but no decision has been reached yet.

- Finally, the FCO is taking a detailed look at Google's data processing conditions. A key question in this context is whether companies and consumers have sufficient choice regarding the use of their data by Google if they want to use any of Google's services.

Amazon

On 5 July 2022 the FCO, based on Sec 19a(1) ARC, determined that Amazon has a "paramount significance for competition across markets" and found that Amazon's multi-market relevance stems, inter alia, from its e-commerce activities as a retailer and marketplace provider. The FCO emphasized, however, that Amazon has supplemented its core products with a large variety of further services over the years, including its prime offers as well as logistics, advertising, and payment processing services. Finally, Amazon is considered a global leader in the field of cloud computing, where it generated approximately 56% of its net revenues in 2021.

In its decision, the FCO highlights that Amazon has a unique position in German online retailing through its trading platform and has, in terms of marketplace services for commercial retailers in Germany, a revenue-based market share of over 70% leading to market dominance. Furthermore, due to its position as the central only sales platform, Amazon is able to set the rules for competition on the platform and influence its competitors' success. The FCO further found that Amazon can control other companies' access to a variety of supply and demand markets, while playing out its dual role as retailer and marketplace.

Unlike Google and Meta/Facebook (see below), Amazon has challenged the FCO's finding under Sec 19a(1) ARC before the Federal Supreme Court. It will be the first time the new rules will be tested before court.

As regards the potential for prohibition orders under Sec 19a(2) ARC against Amazon in the future, the situation is somewhat unclear. While the FCO has initiated proceedings against Amazon under the traditional abuse of dominance framework (Art 102 TFEU, Sec 19 et seq ARC), it remains to be seen whether the FCO will follow through or whether it will take advantage of its powers under Sec 19a(2) ARC. The current abuse of dominance proceedings concern

- the extent to which Amazon uses price control mechanisms or algorithms to abusively influence the pricing of other retailers operating on the Amazon marketplace and

- to what extent agreements between Amazon and brand manufacturers (including Apple) exclude third-party retailers from selling branded products on the Amazon marketplace.

In any event, companies relying on the Amazon marketplace including other services should be mindful of the FCO investigation and possible effects on its business.

In this context it should be kept in mind that the European Commission is also investigating Amazon under Art 102 TFEU with a view to Amazon's BuyBox and Marketplace. The European Commission is assessing whether Amazon has abused its dominance by systematically relying on non-public data that it obtains as marketplace operator to the benefit of its own retail business, and by artificially favoring its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services. While Amazon does not agree with the Commission's findings, it has offered commitments pursuant to Art 9 of Regulation (EC) No 1/2003 to address the Commission's competition concerns. The Commission has invited interested third parties on 20 July 2022 to comment on Amazon's proposed commitments by 9 September 2022 ([Link](#)). It remains to be seen what the outcome of the proceedings will be and which relation it will have to comparable decisions of national competition authorities (such as the FCO's decisions under Sec 19a para 2 ARC) or to Amazon's obligations under the DMA.

Meta/Facebook

Meta' prominence predominantly stems from its social media services Facebook (including the Facebook Messenger), Instagram, and WhatsApp. However, the company is building towards an all-encompassing ecosystem, the metaverse – a comprehensive virtual 3D world for a new-generation Internet – and is thus investing substantial resources in innovative hard- and software appliances.

Against this background, the FCO held in its Sec 19a(1) ARC decision, which Meta – like Google, but unlike Amazon – did not contest, that Meta's market dominance, its vertical integration, its conglomerate ties as well as its data access are of particular importance and, thus, that the company has "paramount significance for competition across markets". In its decision, the authority found that Meta holds a dominant position, if not a monopoly, on the market for social networks for private users in Germany and at the same time has a very strong position in social media advertising. As a result of Meta's position in private social networks, access to the company's channels is indispensable for advertisers. Due to its role as owner of the core online social communication infrastructure, access to Meta's services/advertising spaces has a considerable influence on the opportunities for commercial communication and, thus, on the ability to successfully advertise and market a multitude of products and services in social networks.

In addition to the ongoing Sec 19a ARC proceeding, the FCO already issued a decision against Meta under the traditional competition law framework at the beginning of 2019 and prohibited it to combine user data from different sources under the rules against an abuse of a dominant position. However, Meta has contested the decision and the respective litigation is still pending, currently at the European Court of Justice. Moreover, the FCO investigates the combination of Meta Quest's (formerly Oculus) 3D glasses service with Facebook. The investigation started in 2020 and was included into the Sec 19a ARC-proceeding later.

Apple

As regards Apple, the FCO has not issued a decision yet. However, it appears to be a foregone conclusion the Apple will follow the road Google, Amazon and Meta have taken. In fact, the FCO has already indicated the practices it intends to review under Sec 19a(2) ARC:

- The implementation of Apple's App Tracking Transparency (ATT) Framework to the detriment of advertisers and app-publishers, which rely on tracking data to monetize their content via targeted advertising. Those practices are, inter alia, subject of an antitrust litigation against Apple filed by several publishers, including French newspapers Le Figaro and L'Equipe, in the United States District Court for the Northern District of California on 1 August 2022.
- The exclusive pre-installation of Apple's own apps as a possible case of self-preferencing and the resulting damages to competing app-publishers which rely on the iOS system to market their products and services.
- The notorious obligation for app-publishers to exclusively use Apple's own payment system for in-app purchases and to pay the associated commission rates of up to 30%.

Apple's practices are the subject of an increasing number of antitrust probes following complaints from market participants. This includes proceedings, e.g., by the European Commission, which investigates Apple's conduct with regard to access to the iOS NFC technology for mobile payment services and the 30% commission on in app purchases (see [Link](#)). Additionally, more and more private antitrust litigation is pending, for instance in the United States, Australia, the United Kingdom, the Netherlands and Portugal (see [Link](#)), increasing the pressure on Apple. Especially the latter development shows that private antitrust enforcement plays a vital role and that affected undertakings should consider to take action to protect their commercial interests in the absence or even alongside public enforcement. The FCO's Sec 19a(1) and (2) ARC decisions will surely help in this endeavor.

TAKEAWAYS FOR DECISION-MAKERS

The entrenched structures on digital markets have already been identified some time ago as a major problem for both the global economy and the functioning of democratic societies. As a result, the business practices of Big Tech have not only come into the focus of antitrust authorities based on the traditional "antitrust tool kit", but have also become the subject of numerous innovative legislative initiatives around the globe. The German Sec 19a ARC and the corresponding decisions of the FCO give a taste of things to come. Beyond the German regulatory framework, the European Union with its recently adopted DMA follows suit, providing an alternative to the individual assessment of practices under antitrust law. Practices currently investigated under Art 102 TFEU – such as the 30% commission on in app-purchases (Art 5(7) DMA) or self-preferencing (Art 6(5) DMA) – will be straight out unlawful. While it remains to be seen what effects the multiple efforts of legislators and competition authorities around the globe will eventually have, it appears very likely that the impact on Big Tech's business model and, thus, on future market behavior will be rather substantial.

Yet, while the authorities will do their best to enforce the rules against Big Tech and secure compliance with the new rules (and antitrust law), tight budgets and limited (personnel) resources mean that authorities will need market input, be it with a view to input on factual questions or with information on potential violations. Finally, to make the new regulatory regimes a success story for all affected companies, private enforcement before the courts of the member states will most likely be needed to supplement regulatory activities.

From our perspective, the developing mélange of traditional antitrust standards, innovative enforcement possibilities and a deeper understanding of Big Tech's market position and effects, based on the variety of in-depth probes of antitrust authorities, has the potential to readjust the equilibrium in the market over time. Companies that have been dependent on Big Tech's goodwill can now start, especially in Germany, to develop alternative strategies to get back into control when doing business with or relying on these companies. The tide is turning, and decision makers should keep a close eye on chances (and risks) created by the latest developments in digital antitrust law.

Contact



DR MAX SCHULZ

Associate

Phone: +49 211 20052-360

Email: m.schulz@glademichelwirtz.com



DR SIMON WEISE

Associate

Phone: +49 211 20052-420

Email: s.weise@glademichelwirtz.com