Merger Control

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Overview of merger control activity during the last 12 months

In 2016 and until June 2017, Germany's Federal Cartel Office ("FCO") reviewed around 1,200 merger filings. A detailed review in Phase II proceedings has been initiated and/or concluded in 14 cases. Out of the transactions reviewed in Phase II proceedings, five transactions were cleared unconditionally, and one transaction subject to conditions and obligations. In seven cases the parties withdrew the notification themselves. None of the Phase II proceedings resulted in a prohibition. At the time of writing this article, one Phase II case is still ongoing.[1]

In comparison to 2015, the number of cases under Phase II control increased slightly; there had been 11 cases in Phase II proceedings in 2015 and 14 in 2016. While there had been one prohibition in 2015, there was no prohibition in 2016. Although the number of prohibitions appears low, a more realistic approach would be to count the notifications withdrawn as if the respective transactions would have been prohibited. Withdrawing a notification is often preferred by the parties to receiving a prohibition decision, since the latter usually generates more (unwelcome) publicity and also would explicitly establish a precedent as regards market definition or other issues that have been contentious during the Phase II investigation. Furthermore, in case of withdrawal, only 50% of the filing fees have to be paid by the parties, thus providing an additional financial incentive.

One case highlights this practice very well: in September 2016, the sanitary wholesaler Cordes & Graefe KG notified its plans to acquire the business of Wilhelm Gienger GmbH, a sanitary wholesaler active in South-West Germany. The FCO initiated Phase II proceedings, since its investigation showed that the transaction raised serious competition concerns in the region around the city of Ulm. After the FCO informed the parties about its objections, they withdrew the notification in December 2016 in order to restructure the contemplated acquisition. After having sold a subsidiary of the target company that was active in the Ulm area, Cores & Graefe KG re-notified the acquisition of the remainder of Wilhelm Gienger GmbH in February 2017 and the FCO granted clearance to this transaction within Phase I.[2]

Since five out of 14 of the transactions reviewed in Phase II proceedings were cleared unconditionally, while in only one case commitments were deemed necessary for granting clearance, one may conclude that the initiation of Phase II proceedings does not equal "certain death" to the transaction, but that there is a chance of dispelling the FCO's competition concerns.

New developments in jurisdictional assessment or procedure

The long-awaited 9th Amendment to the Act against Restraints of Competition (ARC)[3] was adopted by the German Federal parliament (*Bundestag*) on 9 March 2017, and by the

Chamber of Federal States (*Bundesrat*) on 31 March 2017. The Amendment entered into force on 9 June 2017.

While the Amendment's main purpose is to transpose the European Directive 2014/104/EU on antitrust damage claims into national law, several changes to merger control procedures are introduced in addition.

New merger control threshold

Until now, German merger control has been based solely on turnover thresholds. In particular, merger control applies if, in the last business year prior to the transaction, the participating undertakings generated an aggregate worldwide turnover of more than €500m, with one participating undertaking having achieved turnover in Germany of more than €25m, and another participating undertaking of more than €5m.

The Amendment introduces an additional merger control threshold which refers to the "consideration for the concentration", i.e. the transaction value. A concentration will be subject to German merger control if: the consideration for the concentration exceeded €400m, while the participating undertakings generated an aggregate worldwide turnover of more than €500m; at least one participating undertaking generated turnover in Germany of more than €25m; and another participating undertaking has significant activities in Germany, albeit without having generated turnover of more than €5m in Germany.

The classic example for a transaction which would fall under the new transaction value threshold is the acquisition of the messaging service WhatsApp by Facebook in 2014. Since WhatsApp did not generate sufficient turnover in Germany, the transaction was not subject to review by the FCO. Even the European Commission became involved only because the parties requested a referral instead of pursuing three merger control reviews in member states in parallel. Against this backdrop, the FCO successfully argued with the legislator that competitively significant transactions, particularly in new, digital markets where services are provided free of a monetary charge and users' data forms the "income", may escape preventive antitrust scrutiny. Therefore, in the opinion of the FCO and the legislator, the transaction value will be useful to indicate whether the acquisition of a company with low turnover concerns a market participant with high innovation potential and thus a considerable risk that the concentration will result in a dominant market position of the acquirer.

The usefulness of the additional transaction value threshold is questionable. First of all, even the legislator estimated that the new threshold will cause only approximately three additional notifications per year, if at all.[4] However, this estimate does not sufficiently address the fact that the threshold is not only applicable to transactions in the digital economy. It will also catch transactions in the "old economy" where low turnover of the target in Germany, coupled with a transaction value of more than €400m, does not indicate any innovation potential. For example, a Chinese car parts manufacturing company with worldwide turnover of €1bn and limited sales to Germany of slightly more than €25m intends to acquire a competitor from the US of similar size who has only limited sales in Germany of less than €5m. If the purchase price exceeds €400m, the new threshold will lead to a notification obligation in Germany, even though the case does not show any of the risk factors brought forward by the FCO in favour of the new threshold. In other words, in line with the "law of unintended consequences", the new threshold might make transactions subject to a notification obligation which until now, correctly, have been regarded as irrelevant from the viewpoint of safeguarding effective competition in Germany.

The new threshold further raises several practical challenges:

- First, it is left to the practice of the FCO and ultimately to be decided by the courts what is to be considered as "significant domestic activities". The legislator unfortunately avoided giving any guidance in this regard. Therefore, parties of a transaction will face serious uncertainties whether a turnover of €1m might be "significant enough", for example. In particular, it remains unclear whether significance should be measured against the (average?) turnover of competitors in Germany or another factor.
- Secondly, the term "consideration for the concentration" will be sufficiently easy to assess only in cases where consideration of the target's shares (or assets) is set as a cash amount or a fixed number of the purchaser's shares. However, the statutory provisions – as well as the legislator's explanatory memorandum to the Amendment – do not address purchase price calculation methods which include *ex post* purchase price adjustment mechanisms. For example, the parties may agree on an upfront purchase price of €395m and a potential additional payment or deduction of up to €25m, subject to a post-closing due diligence of the target's accounts and business activities. If the post-closing due diligence results in an additional payment of more than €5m, a notification requirement in Germany might come into existence (if all other thresholds are fulfilled too), while the transaction has already been closed. As a result, the parties may – at least in theory – face a penalty fine for having closed a reportable transaction prior to clearance. In practice, however, one might expect leniency by the FCO in such a case. However, such an expectation might not be seen as a sufficient safeguard for some investors.

Increase of turnover thresholds in case of acquiring TV and radio broadcasters

In case of mergers and acquisitions in the media sector, German law provides that the companies' turnover shall be multiplied with a factor between Eight (production and distribution of newspapers and magazines) and Twenty (TV and radio broadcasting and sale of advertisement time in TV and radio broadcasts). Accordingly, in case of the latter standard, turnover thresholds of German law would already be fulfilled if the parties' worldwide turnover exceeded €25m, one participant having Germany-wide turnover of €1.25m and another participant having generated turnover in Germany of more than €250,000. The Amendment now reduces the multiplier for transactions in the TV and radio broadcasting sector to Eight.

Exemption from merger control for banking associations

Furthermore, the Amendment introduces an exemption from merger control for transactions concerning service providers controlled by banking associations. This exemption relates particularly to the so-called "back-office", i.e. parts of companies that undertake tasks that do not relate to the main activity of the company, for instance credit risk management, IT-support or accounting.

New criteria for the assessment of market power in digital markets

Digital markets have already been under closer inspection by the FCO in the past. Already in the last year, the FCO has dealt with mergers of real estate and dating portals and identified the specific characteristics of internet platforms and networks in the respective decisions. In addition, in collaboration with the French Autorité de la Concurrence, the FCO published a paper on "Competition Law and Data", where the two authorities examined the significance of "big data" as an instrument for market power.[5] The Amendment now explicitly introduces the following factors that shall be taken into consideration for assessing the market power of multi-sided markets and networks: i) direct and indirect network effects; ii) the parallel use of several providers by users (single-homing/multi-homing); iii) economies of scale

in combination with network effects; iv) access to competitively relevant data; and v) competitive pressure due to innovation potential (see more on these criteria under "Key policy developments").

Moreover, the Amendment provides that for the purposes of competitive assessment, a market can exist even if services are being provided free of charge. This change serves the purpose of encompassing activities in which consumers benefit of services free of financial charge but grant at the same time the right to the service providers to monetise the users' data.

Ministerial authorisation

The Amendment also introduces some changes to the procedure of ministerial authorisation of a concentration that has been prohibited by the FCO. Such a ministerial authorisation can be granted if, in the opinion of the Federal Minister of Economic Affairs and Energy, the restraints of competition caused by the concentration are outweighed by macroeconomic advantages and justified by an overriding public interest. Within the last 40 years, only 21 requests for ministerial authorisation of a prohibited merger have been made, out of which only two have been approved unconditionally, and a further six requests were approved only in part or subject to conditions. Until now, the ARC provided that the Federal Minister of Economic Affairs and Energy should take his decision within four months. This was not a strict deadline and thus some proceedings in the past were concluded only after eight months. The Amendment now requires the Minister to take his decision within six months, whereas the parties to the transaction may request only one extension by an additional two months. If the Minister does not adopt a decision within this deadline, the request is deemed to be denied. Prior to his decision, the Minister has to request an expert opinion by the Monopoly Commission, an independent advisory body of the Federal Government, as well as for the opinion of the affected German federal states' competition authorities. Although the Minister is not bound by these expert opinions, he has to justify his decision if it deviates from the expert opinions.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Food retail sector

The food retail sector continued to be in the FCO's spectrum of interest in 2016 as well.

Already in 2015, the FCO had to deal with the planned acquisition of the regional food retailer Kaiser's Tengelmann by its competitor and market leader, Edeka. While the FCO prohibited the acquisition, on application by the participating undertakings the Federal Minister of Economic Affairs and Energy granted a ministerial authorisation for the transaction. The ministerial authorisation was granted mainly for the reason that the acquirer Edeka pledged to preserve employment of most employees of Kaiser's Tengelmann for a certain period of time. Edeka further committed itself not to close down outlets and not to terminate the collective agreements with trade unions within the next five years and 24 months, respectively, among other ancillary commitments. The parties' main competitor, REWE, appealed against the ministerial authorisation before the Higher Regional Court Düsseldorf, claiming that the remedies imposed by the Minister were of a behavioural nature and as such, in general inadmissible under German law. REWE later withdrew its appeal in view of its settlement with Edeka to acquire 67 of Tengelmann's outlets (63 in Berlin; two each in North Rhine-Westphalia, and in the area of Munich). The planned takeover was cleared by the FCO in December 2016 since it was deemed to be a relative improvement of competition following the ministerial authorisation's outcome that was "*not pleasing from a*

competition point of view", according to the FCO.[6] It is to be noted that in the *REWE/Edeka* case, the FCO followed its standard practice of engaging in pre-evaluation of a proposed transaction prior to notification. In this context, the FCO made a preliminary assessment regarding the market areas where the divestment of outlets to REWE would not result into anticompetitive concerns. This assessment was based on data provided by the parties, and served as a basis for the parties' negotiation process.

In October 2016, FCO also cleared the acquisition of the food retailer Coop (brand name "Sky") by REWE, subject to the condition that some outlets be sold to an independent third party.[7] In the assessment of this transaction the FCO followed the same approach as in the aforementioned *Edeka/Kaiser's Tengelmann* case. The FCO assessed the effects of the proposed transaction both on the sales and the procurement side. On the sales side, the FCO came to the conclusion that the acquisition would restrict competition in eight regional markets in northern Germany and in two districts of Hamburg. Therefore, already during the merger control proceedings the parties offered to divest 11 outlets in these markets to an independent medium-sized retailer. On the procurement side, the FCO found that the acquisition would not raise anticompetitive concerns mainly because Coop's procurement volume amounted to less than 0.5% of the total procurement volume of the retail sector in Germany. Another reason for the absence of anticompetitive concerns was that 65–70% of Coop's products are being purchased via a purchasing cooperation which REWE is also a member of. Therefore, the FCO held that Coop was, irrespectively of the takeover, not an independent competitor to REWE *vis-à-vis* the suppliers.

The FCO had also to deal with two proposed co-operations between food retailers. The first one concerned a joint venture of the relatively small food retailers Bartels-Langness, Bünting, Georg Jos. Kaes, Klaas & Kock, Netto ApS and Real.[8] The joint venture would perform services for the parties in purchasing, e-commerce, logistics and administration. The FCO assessed the data provided by the parties and stated that it would not examine further the cooperation project at this stage, since the effects in the food retail market were limited while the cooperation would also have significant positive effects. Although the market shares of the parties on the sales side were relatively high, the authority held that the parties would still face significant competition by the major players Edeka, REWE, the Schwarz group and Aldi, whose market shares amount to more than 85% of the overall market. The cooperation project would thus enhance the parties' competitiveness both on the procurement and the sales side. However, the FCO pointed out that a more detailed examination in the future could not be excluded, should the parties expand their cooperation.

The second co-operation concerned the drugstore market and consisted of a joint venture of the market leader in the food retail sector Edeka and the drugstore retailer Budnikowsky, active in the area of Hamburg.[9] The proposed co-operation concerned the creation of a new company that would comprise Budnikowsky's procurement, IT, e-commerce, administrative and logistic activities. Edeka would also participate with a share in this company and the parties would pursue joint purchasing activities. On the side of Edeka, the cooperation would facilitate the company's endeavours to set up its own drugstore chain nationwide. On the side of Budnikowsky, the co-operation with Edeka would help the locally active company overcome its disadvantageous position regarding procurement and costs in comparison to its nationwide active competitors, Rossmann and dm. The FCO assessed the planned co-operation on the grounds that, *post merger*, it would confer Edeka a competitively significant influence[10] over Budnikowsky. The FCO cleared the proposed co-operation already in Phase I proceedings, since no significant impediment of effective competition could be identified. As in the food retail markets, the authority examined

the drugstore markets both in relation to the procurement and the supply side. On the procurement side, the FCO found that the share of both companies amounts to less than 15% in Germany. On the supply side, despite the higher market shares of the parties, the authority held that the cooperation would enhance Budnikowsky's competitive position towards the large players Rossmann and dm, this resulting also to the benefit of consumers.

Aviation sector

In January 2017, the FCO cleared the wet-lease agreement on 38 passenger aircraft between Lufthansa and Air Berlin.[11] With this agreement Air Berlin will lease 38 aircraft stationed in Germany and Austria, including cockpit and cabin crews, to Lufthansa and its subsidiaries for six years with a possible extension. The flight operation, crew planning and maintenance will remain the responsibility of Air Berlin, as is common in such agreements. This case raised complex legal issues for the FCO. First of all, the FCO clarified that the lease of aircraft from a competitor has to be examined differently than the acquisition of the competitor itself. In this specific case, the FCO refrained from the usual approach adopted by the European Commission in mergers in the aviation sector and held that an assessment of the competitive conditions on the basis of routes is not appropriate in this case. The reason for this is that this wet-lease agreement does not comprise any takeover of Air Berlin's slots from Lufthansa, at least in legal terms. Consequently, the FCO found that there was also no immediate relation between the wet-lease agreement and the routes that have been operated until now by Air Berlin. The FCO acknowledged that the wet-lease agreement will potentially help Lufthansa expand its business; this was, however, according to the FCO, not a sufficient reason to prohibit the agreement.

What is also interesting in this case is that the wet-lease agreement was proactively notified by the parties to the FCO. In September 2016 and prior to the notification with the FCO, the parties had notified the planned agreement to the European Commission, which came to the conclusion that the agreement did not constitute a concentration within the meaning of Art. 3 of the European Merger Control Regulation. Subsequently, the parties notified the agreement to the FCO, pointing out that the wet-lease agreement did not constitute a concentration under the German merger control rules (asset acquisition or acquisition of control, Sec. 37 para. 1 Nr. 1 or 2 ARC). The parties stated in their notification that although the turnover threshold was met, the agreement concerned a mere "permission to use" and did not constitute a concentration. Their notification was, therefore, just a precautionary one. With regards to this matter, the FCO examined whether the wet-lease agreement qualifies as an acquisition of significant assets, which is a separate type of concentration under German law. One argument in favour of this was that under German law the concentration type, "acquisition of assets", does not necessitate acquiring full ownership rights to the assets. In addition, the duration of the agreement is particularly long in comparison to similar agreements in the sector. Furthermore, the number of leased aircraft constitutes a significant amount – almost one quarter – of Air Berlin's entire fleet. However, in light of the absence of anticompetitive concerns, the FCO left open the question whether the wet-lease agreement qualifies as a concentration. The FCO also pointed out that it would decide at a later stage whether the agreement has to be examined within the framework of the prohibition of restrictive agreements and concerted practices (Art. 101 TFEU, Sec. 1, 2 ARC).

Sector inquiries

Sector inquiries allow the FCO to review the market conditions, if there are suspicions that competition may be restricted, and make policy decisions without taking measures in

specific cases. In May 2017, the FCO presented the final report[12] on its sector inquiry into the market for sub-metering and billing of heating and water supply. The sector inquiry was launched two years ago and resulted in the FCO finding strong indications that an oligopoly of the two leading providers exists. The FCO found that certain structural characteristics of the market, alongside certain practices, do not allow customers to change providers easily and are thus likely to distort competition. In particular, the results of the inquiry indicated long contract periods as well as weak price sensitivity on the demand side, due to the fact that landlords are the contractual partners of the sub-metering providers but tenants are the ones that have to bear the respective costs. Other reasons for the difficulties in switching providers are the lack of interoperability between metering systems, the restricted capability of consumers to compare prices, and the quality of the sub-metering services. In light of recent legislative developments towards more interoperable systems that will make the switching between providers easier, the FCO proposed the following additional measures: (i) improvement of interoperability of meters; (ii) standardisation of calibration periods and service life of meters; and (iii) improved transparency for tenants through information rights and obligations to tender.

In December 2016 the FCO launched a sector inquiry into the regional markets for the collection and transport of household waste.[13] The FCO's interest into this sector was triggered by the fact that the market has been lately particularly concentrated, while small- and medium-sized undertakings were abstaining from tender procedures.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

In 2016, there have been no major developments with regard to economic appraisal techniques applied by the FCO. In general, the FCO follows the same approach as the European Commission in the assessment of unilateral effects and coordinated effects as well as vertical and conglomerate mergers. The FCO's "Guidelines on market dominance in merger control"[14] set out in detail the FCO's – also economic – approach with regard to market dominance, joint market dominance, vertical and conglomerate mergers.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Remedies in Phase I investigation

First of all, it has to be noted that the FCO may not accept remedies within Phase I proceedings, but only within the main investigation proceedings (Phase II). Against this statutory background, the parties to a merger may avoid Phase II proceedings only by structuring the transaction in a way, insofar as possible, by which possible competition concerns are removed prior to notification, and thus ensuring (or rather, increasing) the likelihood of receiving clearance within Phase I. In case the parties face difficulties in identifying the precise nature and scope of potential competition concerns, it is not uncommon to initiate informal pre-notification discussions with the FCO and, respectively, withdraw a notification after the authority's concerns have been identified, in order to take rectifying measures prior to a subsequent second notification.

Remedies in Phase II investigation

As far as remedies within Phase II proceedings are concerned, the FCO is in general terms strongly opposed to behavioural ones, not least because German law provides that remedies must not make it necessary to permanently monitor the merging parties' behaviour.

Accordingly, remedies need to have reasonably verifiable, structural and long-term effects.

More specifically, if the merger is about to remove a significant (close) competitor, as was the case with the acquisition of Kaiser's Tengelmann by Edeka mentioned above, the remedy package offered by the parties must also be strategically meaningful, i.e. provide the potential acquirer(s) with immediate and viable market access. In the opinion of the FCO, this condition was not fulfilled in the Kaiser's Tengelmann/Edeka merger. One major point of criticism was, in particular, that the parties' offer did not sufficiently address the competitive concerns on the level of city districts. For example, the parties' divestment offer included stores in areas where the transaction did not raise any concerns, but did not contain any stores in the problematic areas. Similarly, several of the stores offered for divestment had already been closed by the parties or were due to close in the near future. Only with regard to the purchasing markets was the divestment offer considered to be sufficient. The FCO further stated, though, that it would have possibly granted clearance to the transaction if the remedy package had encompassed a more significant part of Kaiser's Tengelmann's outlets in the areas in which serious competition concerns arose.

Remedies after Phase II investigation

Following a prohibition decision, the merger parties have two options if they hope to overcome the FCO's decision. The parties may seek legal redress in court, in particular if they deem the FCO's conclusions to be legally unsound. Alternatively or in addition to that, the parties may ask for an exceptional authorisation of the transaction by the Federal Minister of Economic Affairs and Energy. He may overrule the FCO, if the restraint of competition is outweighed by macroeconomic advantages, or if the concentration is justified by an overriding public interest (see above).

Key policy developments

In June 2016, the FCO published a Working Paper on "Market Power of Platforms and Networks".[15] Already in early 2015, the FCO had launched an "Internet Think Tank" in order to assist the authority's work in cases concerning the digital economy. The Paper presents the first work results of the Think Tank, and focuses on market definition of platforms and networks as well as the factors that are relevant in the assessment of their market power for the purposes of antitrust enforcement.

Market definition of platforms and networks

Online platforms and networks are very common business models in the digital economy. Platforms are usually multi-sided markets, as they enable direct interaction between two user groups, e.g. between buyers and sellers in a real estate portal. Another characteristic of online platforms is the indirect network effects that exist where the value of the platform service for the one user group increases or decreases depending on the size of the other user group. The FCO's Paper defines two types of platforms: i) matching platforms, e.g. real estate portals and dating platforms; and ii) audience-providing platforms, e.g. advertising platforms. While matching platforms require the interaction of two user groups for the completion of a transaction, audience-providing platforms are mainly financed by the one user group that pays the platform in order to be granted advertising space. Networks, on the other hand, enable the interaction between one and the same user group, e.g. social media networks.

Factors for the assessment of market power

In principle, the FCO applies the usual approach for the assessment of market power also to platforms and networks, examining whether the company's behaviour on the market

can be controlled by competition. Nevertheless, in view of the special characteristics of digital markets, in particular the fact that usually the services are being provided free of charge, the assessment of the market power of platforms and networks shall not be based on the potential for price increase. Instead of the traditionally examined price competition, digital markets require examining competition by innovation. Consequently, due to the strong dynamics of digital markets, the assessment of their market power shall not focus on market shares. In digital markets it is rather necessary to apply a case-by-case assessment, including additional factors indicating market power inherent to the digital sector:

- One of the factors to be taken into consideration are **network effects**. As described above, network effects exist where the value of the platform service for the one user group increases or decreases depending on the size of the other user group. Network effects can influence competition in various ways. On the one side, network effects can lead to monopolisation of the market, since users tend to choose platforms that are already popular. On the other side, network effects can facilitate market entry and rapid growth of newcomers.
- **Economies of scale** are a factor also applicable in digital markets. Online platforms and networks often generate high economies of scale, as their setting up and operation have high fixed costs but low variable costs. In addition, specialisation and learning processes are often involved, which may make it difficult for newcomers to compete with already established service providers.
- **Single-homing, multi-homing and the degree of differentiation** are other factors to be taken into consideration. Single-homing exists where users use only one platform or network, whereas multi-homing exists where users use several platforms or networks. This differentiation is relevant for the assessment of whether a certain platform or network may present the tendency to monopolise the market. Single-homing may lead to monopolisation, since it raises switching costs and increases barriers to entry for competitors. On the other hand, multi-homing enables users to easily switch platforms, which in turn lowers barriers to entry. The existence of single- or multi-homing usually depends on the degree of differentiation between platforms or networks. The differentiation between platforms is formed depending on the demand and supply on the market. If the differentiation between the platforms or networks on a market is high, multi-homing is more likely and thus the danger of monopolisation of the market is decreased.
- **Access to data** has also to be evaluated for the assessment of market power of online platforms or networks. As already mentioned, the FCO and the French Autorité de la Concurrence have published a joint paper on "Competition Law and Data" in which they examine to what extent "big data" can serve as a source of market power. Customer and user data are an important source of information for business. As many business models in the digital sector rely on them, their possession can therefore represent a barrier to entry for newcomers. Nevertheless, the mere control over user data is not a decisive factor for the existence of market power. The FCO has to make a case-by-case assessment including also other factors such as the nature of the data collected, their significance for competition and the possibility to duplicate them.
- The last factor to be taken into consideration is the **innovation potential of digital markets**. In principle, digital markets are highly dynamic and characterised by innovation. This can lead to the creation of new markets within short periods of time, but also to the rapid loss of market power of once market-leading companies.

Nevertheless, the abstract innovation potential of the internet and the possibility of disruptive changes in the market is not a sufficient argument on the grounds of which the possible market dominance of digital markets can be denied. It is rather required that in each individual case there are specific indications that such dynamic processes, e.g. the entry of a new competitor, will take place within a certain forecast period.

The Paper concludes with the observation that the FCO already possesses sufficient tools in order to address the challenges imposed by the new digital economy. In addition, it calls for: a legislative amendment with regard to the specification of market power criteria; a merger control threshold relating to transaction value; as well as a provision that free-of-charge transactions qualify as markets.

Reform proposals

The main reform proposals of the past years in relation to merger control have concerned the digital markets and the need to adapt the ARC to the new challenges of the internet economy. In particular, the reform proposals have been: the establishment of criteria for the assessment of market power of online platforms and networks; the introduction of additional merger control thresholds to "catch" mergers in the digital markets; as well as the clarification that non-monetary transactions can also qualify as market activities. All three proposals have successfully been concluded with the 9th Amendment to the ARC. It is now anticipated that the legislative clarification will help the authority conduct its proceedings more quickly and efficiently.

* * *

Endnotes

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3. BR-Drs. 18/1810207, accessible via the document archive of the Bundestag: http://dipbt.bundestag.de/doc/btd/18/102/1810207.pdf.
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5. Federal Cartel Office and Autorité de la Concurrence, 10 May 2016, Competition Law and Data, http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2.
6. http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/08_12_2016_Edeka_Rewe.html?nn=3591568.
7. http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/28_10_2016_Rewe_Coop.html?nn=3591568.
8. http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/04_04_2017_Cartagena.html?nn=3591568.
9. http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_05_2017_Edeka_Budni.html?nn=3591568.

10. The exercise of "competitively significant influence" over the target company is a merger control constellation under the ARC; it concerns the acquisition of a shareholding below 25% if it is accompanied by rights or circumstances that allow the exertion of significant influence on the target; such rights or circumstances are, for example, a *de facto* blocking minority in corporate bodies or a particular industry know-how of the acquirer.
11. http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/30_01_2017_Lufthansa_AirBerlin.html?nn=3591568; Case summary (DE): http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2017/B9-190-16.pdf?__blob=publicationFile&v=4.
12. Final report (DE): http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Submetering.pdf?__blob=publicationFile&v=3; Press release (EN): http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/04_05_2017_Sektoruntersuchung%20Submetering.html?nn=3591568.
13. http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/20_12_2016_SU_Haushaltsabfaelle.html?nn=3591568.
14. http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitfaden/Leitfaden%20-%20Marktbeherrschung%20in%20der%20Fusionskontrolle.pdf?__blob=publicationFile&v=12 (DE).
15. Summary of the Paper (EN): http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4.

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