

Draft Bill for the Reform of the German Competition Act, January 2020 – Unofficial Translation

Englische Übersetzung des Referentenentwurfs zum GWB-Digitalisierungsgesetz (10. GWB-Novelle) vom 24.1.2020

The German version of the proposal of the Ministry for Economics and Energy for the 10th amendment of the German Act against Restraints of Competition (ARC) is available here:

<https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf>

The ministerial draft bill is the 10th amendment of the act, and it is official called “ARC Digitization Act” (GWB-Digitalisierungsgesetz).

Here, D’Kart, the Düsseldorf antitrust blog (www.d-kart.de), provides an unofficial translation of key provisions on abusive practices, competencies in administrative proceedings and merger control, including section 19a and 39a – two provisions that would be entirely new in the German law.

For your convenience we included the official translation of rules that are not changed, too. Please find the [official translation of the current rules here](#). It is provided by the language service of the Bundeskartellamt and Renate Tietjen. We highlighted the passages that are new (apart from 19a and 39a that are completely new).

We thank the anonymous contributors who provided us with an excellent translation of some of these provisions. We cannot take any liability for mistakes in our translation or misinterpretations. This is just meant as [a little help from your friends](#). Please let us know if you have better ideas for translation (or for the law...).

Enjoy! The team of D’Kart

Section 18 Market Dominance

(1) An undertaking is dominant where, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market, it

1. has no competitors,
2. is not exposed to any substantial competition, or
3. has a paramount market position in relation to its competitors.

(2) The relevant geographic market may be broader than the area of application of this Act.

(2a) The assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge.

(3) In assessing the market position of an undertaking in relation to its competitors, account shall be taken in particular of the following:

1. its market share,
2. its financial strength **and its access to data relevant for competition**,
3. its access to supply or sales markets,
4. links with other undertakings,
5. legal or factual barriers to market entry by other undertakings,
6. actual or potential competition from undertakings domiciled within or outside the area of application of this Act,
7. its ability to shift its supply or demand to other goods or commercial services, and
8. the ability of the opposite market side to resort to other undertakings.

(3a) In particular in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of:

1. direct and indirect network effects,
2. the parallel use of services from different providers and the switching costs for users,
3. the undertaking's economies of scale arising in connection with network effects,
4. the undertaking's access to data relevant for competition,
5. innovation-driven competitive pressure.

(3b) When assessing the market position of an undertaking acting as an intermediary on multi-sided markets, account should be taken in particular of the importance of the intermediary services it provides for access to supply and sales markets.

(4) An undertaking is considered to be dominant if it has a market share of at least 40 per cent.

(5) Two or more undertakings are dominant to the extent that

1. no substantial competition exists between them with respect to a certain type of goods or commercial services and
2. they fulfil in their entirety the requirements of paragraph 1.

(6) A body of undertakings is presumed to be dominant if it

1. consists of three or fewer undertakings reaching a combined market share of 50 percent, or
2. consists of five or fewer undertakings reaching a combined market share of two thirds.

(7) The presumption of paragraph 6 can be refuted if the undertakings demonstrate that

1. the conditions of competition are such that substantial competition between them can be expected, or
2. that the body of undertakings has no paramount market position in relation to the remaining competitors.

(8) The Federal Ministry for Economic Affairs and Energy shall report to the legislative bodies on the experience made with paragraphs 2a and 3a three years after the entry into force of the provisions.

Section 19 Prohibited Conduct of Dominant Undertakings

(1) Any abuse by one or more undertakings of a dominant position shall be prohibited.

(2) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services

1. directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification;
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;
3. demands less favourable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;
4. refuses to supply another undertaking with this product or commercial service against adequate remuneration, including access to data, networks or other infrastructure, provided that the supply is objectively necessary in order to operate on an upstream or downstream market and there is a risk that the refusal to supply would eliminate effective competition on that market, unless the refusal to supply is objectively justified;
5. requests other undertakings to grant it advantages without any objective justification; in this regard particular account shall be taken of whether the other undertaking has been given

plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request.

(3) Subsection 1 in conjunction with subsection 2 nos 1 and 5 shall also apply to associations of competing undertakings within the meaning of Sections 2, 3, and 28(1), Section 30(2a) and (2b) and Section 31(1) nos 1, 2 and 4. Subsection 1 in conjunction with subsection 2 no. 1 shall also apply to undertakings which set prices pursuant to Section 28(2) or Section 30(1) sentence 1 or Section 31(1) no. 3.

Section 19a Abusive Conduct of Undertakings of Paramount Significance for Competition across Markets

(1) The Bundeskartellamt may issue a decision declaring that an undertaking which is active to a significant extent on markets within the meaning of Section 18(3a) is of paramount significance for competition across markets. In determining the paramount significance of an undertaking for competition across markets, particular account shall be taken of:

1. its dominant position on one or more markets,
2. its financial strength or its access to other resources,
3. its vertical integration and its activities on otherwise related markets,
4. its access to data relevant for competition,
5. the importance of its activities for third parties' access to supply and sales markets and its related influence on third parties' business activities.

(2) In case of a declaratory decision pursuant to subsection 1, the Bundeskartellamt may prohibit such undertakings from

1. treating the offers of competitors differently from its own offers when providing access to supply and sales markets;
2. directly or indirectly impeding competitors on a market in which the respective undertaking can rapidly expand its position even without being dominant, provided that the impediment is likely to significantly obstruct the competitive process;
3. creating or raising barriers to market entry or impeding other undertakings in another way by using data relevant for competition that has been collected from the other side on a dominated market, also in combination with other data relevant for competition from sources beyond the dominated market, or demanding terms and conditions that permit such use;
4. making the interoperability of products or services or data portability more difficult and thereby impeding competition;
5. informing other companies insufficiently about the scope, the quality or the success of the performance they provide or commission, or making it difficult in other ways for them to assess the value of this performance.

This shall not apply if the respective conduct is objectively justified. In this respect, the burden of presenting facts and the burden of proof lie with the undertaking in question. Section 32(2) and (3) and Sections 32a and 32b shall apply mutatis mutandis. Decisions pursuant to subsection 2 can be combined with an assessment pursuant to subsection 1.

(3) Sections 19 and 20 shall remain unaffected.

Section 20 Prohibited Conduct of Undertakings with Relative or Superior Market Power

(1) Section 19(1) in conjunction with subsection 2 no. 1 shall also apply to undertakings and associations of undertakings to the extent **that undertakings** as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist **and, because of a significant imbalance,**

the dependence is not offset by a corresponding countervailing power of the suppliers or customers of the undertaking with a strong market position (relative market power). Section 19(1) in conjunction with subsection 2 no. 1 shall also apply to undertakings acting as intermediaries on multi-sided markets insofar as undertakings are dependent on their intermediary services with regard to access to supply and sales markets in such a way that sufficient and reasonable alternatives do not exist. A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

(1a) Dependence within the meaning of subsection 1 may also arise from the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities. Denying access to such data may constitute an unfair impediment even if no commerce has been opened for such data yet.

(2) Section 19(1) in conjunction with subsection 2 no. 5 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them.

(3) Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of sentence 1 exists in particular if an undertaking

1. offers food within the meaning of Section 2(2) of the German Food and Feed Code (*Lebensmittel- und Futtermittelgesetzbuch*) below cost price, or
2. offers other goods or commercial services not just occasionally below cost price, or
3. demands a price for the delivery of such goods or services which is higher than the price it itself offers on such markets from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services, unless there is, in each case, an objective justification. Cost price within the meaning of sentence 2 shall be the price agreed between the undertaking with superior market power and its supplier for the provision of the good or service; general discounts that can be expected with reasonable certainty at the time the offer is made shall be proportionally deducted from the agreed price unless explicitly agreed otherwise with regard to the specific goods or services. The offer of food below cost price is objectively justified if such an offer is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises through a timely sale, or in equally severe cases. The donation of food to charity organisations for use within the scope of their responsibilities shall not constitute an unfair impediment.

(3a) An unfair impediment within the meaning of subsection 3 sentence 1 shall also be deemed to exist where an undertaking with superior market power on a market within the meaning of Section 18(3a) impedes competitors' independent attainment of positive network effects and thereby creates a serious risk of a considerable restriction of competition on the merits.

(4) If, on the basis of specific facts and in the light of general experience, it appears that an undertaking has abused its market power within the meaning of paragraph 3, the undertaking shall be obliged to disprove this appearance and to clarify such circumstances in its field of business which give rise to claims and which cannot be clarified by the competitor concerned or by an association within the meaning of § 33(4), but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which claims are made.

(5) Business and trade associations or professional organisations as well as quality mark associations may not refuse to admit an undertaking if such refusal would constitute an objectively unjustified unequal treatment and place the undertaking at an unfair competitive disadvantage.

Section 32a Interim Measures

(1) The competition authority may order interim measures ex officio if an infringement within the meaning of section 32(1) appears predominantly probable and the order is necessary for the protection of competition or because of an imminent threat of serious harm to another undertaking. This shall not apply if the undertaking concerned credibly presents facts according to which the order would result in an unfair hardship not required by overriding public interests.

(2) Orders pursuant to paragraph 1 shall be limited in time. The time limit may be extended. It should not exceed one year in total.

Section 32c No Grounds for Action

(1) The competition authority may decide that there are no grounds for it to take any action if, on the basis of the information in its possession, the conditions for a prohibition pursuant to §§ 1, 19 to 21 and 29, Article 101(1) or Article 102 of the Treaty on the Functioning of the European Union are not satisfied. The decision shall state that, subject to new findings, the competition authority will not exercise its powers under §§ 32 and 32a. It does not include an exemption from a prohibition within the meaning of sentence 1.

(2) Irrespective of the conditions set out in paragraph 1, the competition authority may also announce that it refrains from initiating proceedings in accordance with the scope of its discretionary powers.

(3) The Federal Cartel Office may lay down general administrative guidelines concerning the exercise of its discretion under paragraphs 1 and 2.

(4) Undertakings or associations of undertakings shall be entitled to a decision pursuant to paragraph 1 from the Federal Cartel Office if they have a substantial legal and economic interest in such a decision with regard to cooperation with competitors. The Federal Cartel Office shall decide on an application pursuant to sentence 1 within six months.

Section 35 Scope of Application of the Control of Concentrations

(1) The provisions on the control of concentrations shall apply if in the last business year preceding the concentration

1. the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and
2. the domestic turnover of at least one undertaking concerned was more than EUR 25 million and that of another undertaking concerned was more than EUR 10 million.

(1a) The provisions on the control of concentrations shall also apply if

1. the requirements of paragraph 1 no. 1 are fulfilled,
2. in the last business year preceding the concentration
 - a) the domestic turnover of one undertaking concerned was more than EUR 25 million and
 - b) neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than EUR 5 million,
3. the consideration for the acquisition exceeds EUR 400 million and
4. the target undertaking pursuant to no. 2 has substantial operations in Germany.

(2) Paragraph 1 shall not apply to concentrations of public entities and enterprises arising from the territorial reform of municipalities. Paragraphs 1 and 1a shall not apply where all undertakings participating in the concentration

1. are members of a banking association [*kreditwirtschaftliche Verbundgruppe*] within the meaning of § 8b(4) sentence 8 of the German Corporation Tax Act [*Körperschaftsteuergesetz*],

2. mainly provide services for the other members of that banking group, and
3. in their activities under no. 2, do not themselves maintain any contractual relations with end consumers.

Sentence 2 shall not apply to concentrations of cooperative central banks and regional institutions of savings banks within the meaning of § 21(2) no. 2 of the German Banking Act [*Kreditwesengesetz*].

(3) The provisions of this Act shall not apply where the European Commission has exclusive jurisdiction pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, as amended.

Section 36 Principles for the Appraisal of Concentrations

(1) A concentration which would significantly impede effective competition, in particular a concentration which is expected to create or strengthen a dominant position, shall be prohibited by the Bundeskartellamt. This shall not apply if

1. the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impediment to competition;

or

2. the **requirements for a prohibition under sentence 1 are only fulfilled on markets** on which goods or commercial services have been offered for at least five years and which had a sales volume of less than **EUR 20 million** in the last calendar year, unless the market is a market within the meaning of § 18(2a) or § 35(1a) applies.

3. the dominant position of a newspaper or magazine publisher acquiring a small- or medium-sized newspaper or magazine publisher is strengthened where it is proven that the publisher that is acquired recorded a significant net annual deficit in the profit and loss account under § 275 of the German Commercial Code [*Handelsgesetzbuch*] in each of the three preceding years and its existence would be jeopardised without the concentration. Furthermore, it must be proven that no other acquirer was found before the concentration that could have ensured a solution that would have been less harmful to competition.

(2) If an undertaking concerned is a dependent or dominant undertaking within the meaning of § 17 of the German Stock Corporation Act [*Aktiengesetz*] or a group company within the meaning of § 18 of the Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. Where several undertakings act together in such a way that they can jointly exercise a dominant influence on another undertaking, each of them shall be regarded as dominant.

(3) If a person or association of persons which is not an undertaking holds a majority interest in an undertaking, it shall be regarded as an undertaking.

Section 39a Request for Notification of Future Concentrations

(1) The Bundeskartellamt may request an undertaking to notify any concentration with other undertakings in one or more specific sectors of the economy by decision if

1. the worldwide turnover of the undertaking concerned exceeded EUR 250 million in the last business year and
2. there are any indications that future concentrations may restrict domestic competition in the above-mentioned sectors of the economy.

(2) The obligation to notify pursuant to subsection 1 shall only apply to concentrations where

1. the turnover of the undertaking to be acquired exceeded EUR 2 million in the last completed business year and
2. that undertaking achieved more than two thirds of its turnover in Germany.

(3) The obligation to notify pursuant to subsection 1 shall apply for the duration of three years from the date on which the decision to notify becomes final. The decision shall state the sectors of the economy concerned.

Section 42 Ministerial Authorisation

(1) The Federal Minister for Economic Affairs and Energy will, upon application, authorise a concentration prohibited by the Bundeskartellamt if, in the individual case, the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, and if the concentration is justified by an overriding public interest. In this context, the competitiveness of the undertakings concerned in markets outside the area of application of this Act shall also be taken into account. Authorisation may be granted only if the scope of the restraint of competition does not jeopardize the market economy system. Where the ministerial decision deviates from the Monopolies Commission's opinion provided in accordance with paragraph 5 sentence 1, the reason for the deviation shall be stated in the authorisation decision.

(1a) Permission shall be granted on condition that

1. an application for an interim injunction pursuant to § 68 first sentence, § 60 or an application for a suspensive order pursuant to § 67(3) third sentence has been rejected as unfounded by the Appeals Court, or
2. the appeal was dismissed as unfounded pursuant to § 73(1).

(2) Authorisation may be granted subject to conditions and obligations. § 40(3) sentence 2 and (3a) shall apply mutatis mutandis.

(3) If the condition laid down in § 42(1a) is fulfilled by a decision pursuant to § 42a (1a) No. 1, the application for an authorisation pursuant to § 42 shall be submitted in writing to the Federal Ministry of Economics and Energy within one month of notification of that decision. If the condition is fulfilled by a decision in accordance with § 42(1a) No. 2, the period shall begin at the time at which this decision becomes incontestable.

(4) The Federal Minister for Economic Affairs and Energy shall decide on the application within four months. If the decision is not made within this period, the Federal Ministry for Economic Affairs and Energy shall immediately inform the Bundestag in writing of the reasons for this delay. If the decision is not served upon the undertakings applying for a ministerial authorisation within a period of six months from receipt of the complete application, the application shall be deemed rejected. Upon application by the undertakings applying for the ministerial authorisation, the Federal Ministry for Economic Affairs and Energy may extend the time limit under sentence 3 by two months. In this case sentence 3 shall not apply and the decision shall be served upon the undertakings applying for the ministerial authorisation within the time limit under sentence 4.

(5) Prior to the decision under paragraph 4 sentence 1, an opinion of the Monopolies Commission shall be obtained, and the supreme *Land* authorities in whose territory the participating undertakings have their registered seat shall be given an opportunity to comment. In the case of an application to authorise a prohibited concentration in the nationwide distribution of television programmes by private broadcasters, an opinion by the Commission on Concentration in the Media Sector must additionally be obtained. The Monopolies Commission shall submit its opinion within two months upon request by the Federal Ministry of Economics and Labour.

(6) The Federal Ministry for Economic Affairs and Energy shall issue guidelines on the conduct of the procedure