

## FIRST APPLICATION OF THE NEW GERMAN PROHIBITION ON PLATFORM MARKET TIPPING

It's yet another European premiere:

For the first time, a German court has applied the new tipping prohibition in sec. 20 (3a) of the German Act against Restraints of Competition ("**ARC**"). The ARC was recently amended as part of a revamp of German competition law aimed at responding to the emergence of global technology giants. As discussed below, the new tipping prohibition, believed to be the first of its kind in Europe, essentially prohibits leading platforms engaging in conduct that limits rivals' ability to generate network effects and presents a serious risk of market tipping.

The case involved a preliminary injunction proceeding between two rival real estate platforms in Germany, applicant Immowelt which belongs to the German publishing house Axel Springer SE, and defendant ImmoScout (member of the publicly listed Scout-group). ImmoScout, the market leader, had announced a new rebate that applied if users listed their property on ImmoScout first. Immowelt requested the competent district court in Berlin to prohibit ImmoScout from implementing this new "list first" rebate. Immowelt argued that there was a serious risk that the new rebate would irreversibly tip the German real estate intermediation market in favour of ImmoScout. The Berlin court agreed and in its decision of 8 April 2021 ordered ImmoScout to halt the application of its new rebate.

The court based its decision on sec. 20 (3a) ARC. This new tipping prohibition requires

- an undertaking with superior market power over competitors on a multisided (i.e., platform) market;
- conduct that restricts the ability of rival operators on the platform market concerned from generating stand-alone network effects; and
- a serious risk of tipping caused by the restrictive conduct.

It follows from the above that the material scope of the new tipping prohibition is focused on markets with strong positive network effects. These are typically multisided B2C markets where interaction between different groups of users is facilitated through scalable intermediation services of the platform operator, which are more valuable to users the more users participate.

The new sec. 20 (3a) ARC tipping provision allows interventions at an early point in time where the leading platform has a clear competitive edge but not

### Key issues

- German competition law was recently amended to include a new prohibition on tipping by platforms with superior market power, a first of its kind in Europe
- The new provision allows for intervention by the competition authority at an early point in time where the leading platform has a clear competitive edge but not yet reached the dominance threshold
- A preliminary injunction decision by a Berlin court preventing a market leading online real estate platform from implementing new discounts is the first application of this new provision

yet reached the dominance threshold. The provision benefits competitors of all sizes. The legislator reckoned that on multisided markets platform operators may have superior market power also over large companies requiring access to the platform. Also, the law was consciously drafted to avoid adopting any detailed rules in order to leave room to apply the tipping prohibition to new types of exclusionary conduct unknown at the time the new law entered into force. Finally, the "stand-alone network effects" requirement in the tipping prohibition aims at platform market conduct that restricts rival operators from achieving their own positive network effects, rather than growth on the back of the success of the leading platform (e.g., through requests for interoperability).

ImmoScout and Immowelt are the two main competing real estate platforms in Germany trying to attract real estate agents, landlords and consumers. Although ImmoScout is the clear market leader, it has not yet reached the dominance threshold and, in any event, the market has not yet tipped in its favour. ImmoScout triggered the case by announcing two new rebates: the "*list all rebate*" and the "*list first rebate*".

The "*list all rebate*" requires that a real estate agent must publish at least 95 % of the real estate objects offered online also on ImmoScout, though the real estate agents remain free to multi-home and offer the property also on other platforms. Immowelt argued that this rebate results in a *de facto* exclusivity arrangement, but the Berlin court dismissed the argument holding that there was no evidence that real estate agents normally offer their properties only on one platform in order to avoid the additional transaction costs.

The court took a different view on the "*list first rebate*". To benefit from that rebate, a real estate agent was bound to offer the property within the first seven days exclusively on ImmoScout. The Berlin court held that the exclusivity requirement prevented real estate agents from multi-homing on other platforms, including in particular Immowelt. It rejected ImmoScout's argument that the short-term exclusivity would not have an appreciable effect on competition.

The court held that even a short-term exclusivity in many cases meant a *de facto* market foreclosure based on evidence presented by Immowelt that 56% of all contacts between customers and real estate agents took place within one week after the first publication of the property and that 30% of the properties published on ImmoScout were deactivated before the expiry of the one-week period. Especially in metropolitan markets like Berlin, the court found that more than seven days after the initial publication of the property search requests from customers usually are not successful.

In addition, Immowelt could demonstrate that "*list first rebate*" advertisements on ImmoScout reached a peak within three months after the introduction of the rebate, whereas during the same time the number of bookings on Immowelt declined. Consequently, the court took the view that the "*list first rebate*" created a serious risk of tipping of the German market for real estate platforms.

Clients involved in private litigation should be aware that sec. 20 (3a) ARC likely will apply to all leading platform operators. Even though under German civil procedure the burden of proof that the defendant falls under the tipping prohibition falls on the applicant, the requirements for proving a superior market position in practice appear to be not very high. They are still not clearly outlined in the case law even though the concept has been around for a while in German competition law.

Clients should also be aware that the tipping prohibition is very broad. Its wording appears to suggest an almost limitless scope of application and the

explanatory memorandum to the law does not add a lot of further clarity on the limits of the tipping prohibition. In fact, the explanatory memorandum makes it quite clear that the legislator deliberately decided to formulate sec. 20 (3a) ARC in an open manner and without reference to examples of typical behaviour conducive to tying (e.g., a prohibition on multi-homing or other behaviour increasing user lock-in) to preserve flexibility to cover new, yet unknown conduct restricting the ability of rival platforms from generating stand-alone network effects.

Unlike the abuse of dominance rules, where the authority always intervenes after the fact and has to find that the conduct had an appreciable impact on competition, the tipping prohibition merely requires that the conduct at issue poses a "serious risk" to competition due to a high risk of tipping in markets with strong network effects.

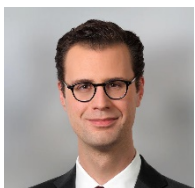
The combination of the less exact criterion of a superior market position (compared to dominance) of the infringer, the broad scope of the tipping prohibition, and the sufficiency of showing a "serious risk" instead of evidence of harm to competition will likely make the sec. 20 (3a) ARC tipping prohibition a powerful tool for competitors. It will lower the bar for competitors to obtain an (injunctive) prohibition decision on leading platforms that would have been much more difficult to obtain under the higher abuse of dominance standard.

## CONTACTS



**Michael Dietrich**  
Partner

**T** +49 211 4355 5542  
**E** michael.dietrich@cliffordchance.com



**Maximilian Zedtwitz von Arnim**  
Counsel

**T** +49 211 4355 5746  
**E** maximilian.zedtwitz@cliffordchance.com



**Anne Filzmoser**  
Senior Associate

**T** +49 211 4355 5308  
**E** anne.filzmoser@cliffordchance.com

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London, E14 5JJ

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