

# Legal Update

## Competition Law

### German Competition Laws Amended The 8th Amendment of the German Act against Restraints of Competition

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On 30 June 2013, the 8th Amendment to the German Act against Restraints of Competition (ARC) took effect after a lengthy political stalemate. The Amendment will bring some important changes to German competition law without, however, fundamentally reforming it.

The Amendment brings German merger control more in line with the European Merger Control Regulation (see I). Regulations regarding the control of abusive practices will become more systematic and clear (see II). Changes to procedural and enforcement rules will strengthen the enforcement of competition law (see III). The special regulations for the press (see IV) as well as the plan to extend the application of cartel law to statutory health insurance (see V) were politically controversial.

The following is an overview of the most important changes:

#### I. Merger Control

Important aspects of the German merger control regime will be aligned with European merger control. In particular, the current market dominance test will be replaced by the SIEC (Significant Impediment to Effective Competition) test. However, some uniquely German provisions will remain:

##### Thresholds

In contrast to European merger control, German merger control will continue to apply to concentrations that are below the threshold of an acquisition of control.

*"Also the acquisition of a minority stake may be notifiable."*

Both the acquisition of control and the acquisition of 25% of shares or voting rights as well as the acquisition of a competitively significant influence constitute a notifiable concentration if the turnover thresholds contained in the regulations regarding the control of concentrations are exceeded (section 37 ARC).

The turnover thresholds in section 35 subsection 1 ARC remain unchanged. A concentration is subject to German merger control if, in the last business year preceding the concentration the combined aggregate worldwide turnover of all the undertakings concerned exceeded EUR 500 million and the turnover in Germany of at least one undertaking concerned was more than EUR 25 million and that of another undertaking concerned was more than EUR 5 million.

The so-called minor market clause will become a part of the substantive assessment of German merger control: Concentrations in markets with only minor economic importance (market volume EUR 15 million p.a. or less) will now have to be notified with the German Federal Cartel Office (FCO). However, they still cannot be prohibited. On the other hand, the so-called company *de minimis* exemption will remain unchanged. This exemption provides that a concentration is not notifiable where an undertaking with a worldwide turnover of less than EUR 10 million (including any controlling entity and its affiliates) merges with another undertaking.

German merger control will adopt a regulation similar to Art. 5 II (2) of the EC Merger Regulation. This regulation provides that two or more concentrations which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration. The purpose is to prevent an artificial division of concentrations in order to fall below the scope of German merger control (so-called salami-slicing).

## **New substantive test**

A core element of the Amendment is to introduce the SIEC test into German merger control. The previous test, namely, whether the concentration is expected to create or strengthen a dominant market position, will remain in place as one example of an impediment of

competition. This change is intended to align German law with European law and to better address unilateral effects within a tight oligopoly.

*"Core of the amendment is to introduce the SIEC-test but certain German peculiarities will stay in place."*

However, a concentration will still not be prohibited if the participating undertakings prove that the concentration will also lead to improvements to the conditions of competition and that these improvements will outweigh the disadvantages of the impediment to competition. In addition, a prohibition by the German FCO may still be overturned by ministerial approval of the German Federal Minister of Economics.

The market share thresholds for the presumption of the dominance of a single undertaking will be increased from one third to 40% (also see II below).

## **Merger Control Procedure**

The proceedings before the FCO are more flexible compared to proceedings before the European Commission. A merger notification typically needs to contain less information. In some cases, clearance may be obtained within a few days. These significant differences will survive the Amendment. However, some minor adaptations to European practice are provided for:

The FCO will examine the concentration notified to it within one month of receipt of the complete notification. If the FCO initiates main examination proceedings within that one-month period, the examination must be completed within four months of receipt of the complete notification. The Amendment introduces an automatic extension of the examination period by one month if the participating undertakings concerned first offer commitments during the main examination proceedings in order to avert an impending FCO prohibition of the con-

centration. The decision period for the FCO will also be suspended in the future if and for as long as the undertakings concerned do not answer requests for information by the FCO on a timely basis.

*"Introduction of a stop the clock rule if information requests are not complied with on the due date and of an automatic extension of the examination period by one month if commitments are offered"*

Just like under European law, concentrations by way of a public takeover offer or through an acquisition via a stock exchange will be exempt from the prohibition against implementing a concentration into effect if the concentration is notified to the FCO without undue delay and if the acquirer's voting rights are not exercised.

Legal certainty will be enhanced by the new rule that a concentration that was not notified will retroactively become effective at civil law if the concentration is reported late, dissolution proceedings are carried out and if the concentration does not significantly impede effective competition.

## II. Abuse control

### General abuse control

The Amendment will make the German rules regarding abuse control more systematic and comprehensible. It will not lead to material changes:

*"The threshold for the statutory presumption of single dominance will be increased from one third to 40%"*

The definition of single dominance in section 19 ARC and the rules pertaining to presumptions will in future be concentrated in section 18 ARC. The threshold for the statutory presumption of single dominance will be increased from a market share of one third to a market share of 40 %. The market share thresholds for the stat-

utory presumption of collective dominance will, however, remain unaltered. Three or fewer undertakings will continue to be presumed to have collective dominance if their combined market share is 50% or more. Five or fewer undertakings will be presumed to have collective dominance if their combined market share is two thirds or more.

Section 19 ARC will contain the prohibition to abuse control for dominant undertakings.

*"Also undertakings that while not being dominant have superior market power are subject to a prohibition of discrimination and of unfair hindrance."*

Section 20 ARC provides for a prohibition of discrimination and unfair hindrance for undertakings with superior market power, i.e. market power below dominance. For this reason, German abuse control will continue to be stricter than abuse control under European law.

The restricted control of price abuse in the energy sector will be prolonged for another five years. However, an extension of the price abuse control to district heating suppliers (demanded by the FCO in the legislative proceedings) will not become law. This issue will continue to be addressed by general abuse control.

The Amendment will put the special rules regarding the water industry (presently scattered) into a more clearly arranged structure.

Under the amendment the rules governing abusive conduct will not be applicable to public sector levies and charges.

### III. Procedural and enforcement rules

The Amendment contains some changes to procedural and enforcement rules.

#### Administrative procedure

The Amendment clarifies that the FCO may penalise a breach of competition law in a way that modifies the structure of an undertaking (so-called structural measures). Furthermore it will be possible for the FCO to demand reimbursement of the benefits obtained by the breach of competition law. The German Federal Court of Justice had already confirmed this practice in a disputed *obiter dictum*.

#### "No statutory right of access to files in leniency applications"

In contrast to earlier plans, the Amendment did not include a restriction of access to files in leniency applications and to other voluntary intelligence. This question will therefore have to be decided by German or European courts in time. To date, German courts have been very restrictive in granting access to leniency application files.

#### Administrative fines

Violations of competition law will be penalised by applying the fines contained in the German Law on Administrative Offences.

The FCO may penalise violations of competition law with administrative fines of up to 10% of the total group turnover. In contrast to European law, according to a February 2013 judgment issued by the Federal Court of Justice (case: *Grauzement*), this 10% limit is not a cap but, interpreting it in conformity with German constitutional law, the upper limit of the fining range. As a reaction to this judgment by the Federal Court of Justice, the FCO has issued new fining guidelines on 25 June 2013.

A new legal basis for the levying of fines on full or partial legal successors will be created in the German Code of Administrative Offences. This new legal basis was critically required; according to the decisions of the Federal Court of Justice, a fine could only be imposed on a legal successor if – from an economic point of view – the successor entity was identical or almost identical to the undertaking that committed the offence, even where universal succession had taken place.

In contrast to a proposal made by the Federal Council (*Bundesrat*), the Amendment will not impose a statutory duty upon a parent company to supervise the compliance of its subsidiary with competition laws. In legislative proceedings, the Federal government (*Bundesregierung*) declared that the existing rules are sufficient. The FCO will regard this position as a reinforcement of its view that a parent company has such a duty to supervise its subsidiary and that in the event of a violation by the subsidiary, the parent company as well may be subject to a fine of up to 10% of the group turnover. This view is being criticised by legal scholars.

### IV. Special rules for press products

In the past, when applying the merger control thresholds the turnover with press products was required to be multiplied by 20. This factor will now be reduced to 8. The minor market clause as well as the company *de minimis* exemption will also apply to concentrations in the press sector.

In the press sector it will also become easier to invoke the failing firm defence; an exception from the general prohibition will be codified. A concentration will also be cleared if it strengthens the dominant position of a newspaper or magazine publisher that acquires a small or medium-sized publisher, provided that the undertakings prove that the publisher being acquired

has incurred significant losses during the last three years and that without the concentration, its existence would be endangered in the absence of another buyer offering a preferable competitive solution.

Industry trade agreements entered into between publishers and press wholesalers are exempt from the general cartel prohibition to the extent these provide for a wide and non-discriminatory distribution of newspaper and magazine selections by press wholesalers. Industry trade agreements must contain specific provisions on

distribution terms and on the allocation of compensation for such distribution.

## V. Statutory health insurance

The Amendment will not – as originally intended – provide for of the application of competition law to anti-competitive behaviour among statutory health insurance providers. However, as a compromise, concentrations of statutory health insurance providers will be subjected (once again) to merger control.



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## Note

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