Newsletter, 14 July 2016

Proposed legislative amendments to German antitrust law

Long-awaited ministerial draft published for public consultation

On 1 July 2016, the ministerial draft with proposed legislative amendments to the German Act against Restraints of Competition ("ARC") was published for public consultation.[1] The draft includes several notable amendments to a variety of areas, e.g. actions for cartel damages, the assessment of market dominance or merger control, and closes a loophole in the law on cartel fines. This newsletter provides an overview of the key amendments to the ARC.

Implementation of EU Cartel Damages Directive

A major part of the proposed amendments to the ARC concerns the implementation of the EU cartel damages directive[2] (the "**Damages Directive**") which must be implemented into national law by 27 December 2016. It seeks to facilitate private actions for cartel damages before national courts. While many of the rules provided for by the Damages Directive can already be found in German (case) law, others are likely to notably change and further fuel private antitrust enforcement activities in Germany. Since the new procedural provisions that will be incorporated into the ARC deviate from certain general rules of German civil procedure, those new rules applicable to antitrust cases are commonly referred to as a "sectoral Code of Civil Procedure" (*bereichsspezifische Zivilprozessordnung*).

These are the main amendments to the current substantive and procedural provisions[3]:

- Whereas German case law established (only) the prima facie evidence rule that hardcore cartels cause harm, the new rules will even provide for a rebuttable presumption to that effect. As a consequence, the defendant has to rebut the presumption by proving that harm has not been caused. Such presumption will, if certain conditions are met, also be applicable in favor of indirect customers (who currently do not benefit from the prima facie evidence rule), i.e. their position will be significantly strengthened.[4]
- The so-called "passing-on defense" – according to which cartelists may argue that no harm remained with the claimant as it passed on the overcharge to the supply chain's next level – is already accepted by courts and will now be put into law.
- In order not to jeopardize the authority's leniency program, immunity applicants will be privileged both vis-à-vis (i) the obligors and (ii) the other jointly and severally liable debtors:
  - (i) the full immunity recipient is jointly and severally liable to its own direct or indirect customers or suppliers,[5] and to other claimants only where full compensation cannot be obtained from the co-infringers;
  - (ii) the amount of contribution that the co-infringers may recover from the full immunity recipient must not exceed the amount of harm the immunity recipient caused to its own direct or indirect customers or suppliers.
- Cartelists are obliged to disclose evidence that is required to file an action for damages upon request from a person who (i) shows to have been harmed by the cartelists' infringement, and (ii) identifies said evidence, provided that the disclosure is not inappropriate. Vice versa, evidence that is required to defend against an already pending action for damages must be disclosed upon request from the cartelists. Additional rights of disclosure by

1 Federal Ministry for Economic Affairs and Energy, Ministerial Draft of 1.7.2016 (in German only), including the wording of the new/revised statutory provisions ("**Draft ARC**") and explanatory notes.

2 European Commission, Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1.

3 Sec. 33a et seqq. and Sec. 89a et seqq. Draft ARC.

4 One example for the current burden of proof for indirect customers is the decision of the Düsseldorf Regional Court in the auto glass damages claim of 19.11.2015, 14d O 4/14 , para 219 et seq.

5 This rule also applies, if certain positive as well as negative conditions are met, to small and medium enterprises, i.e. undertakings that have less than 250 employees and either sales revenues not exceeding € 50 million or a balance sheet total not exceeding € 43 million.

way of court order are also provided for in the Ministerial Draft. It is, however, important to note that leniency statements and settlement submissions are excluded from the disclosure – again in order not to jeopardize the leniency program (and the settlement procedure, respectively).

- The limitation period subject to knowledge will be extended from three to five years. This limitation period will, *inter alia*, begin to run only when the obligor has knowledge or should have learned without gross negligence of the behavior and the fact that this behavior violates competition law. The maximum limitation period of 10 years will begin to run not until the infringement has ended. The suspension period following the conclusion of cartel proceedings will be extended from six months to one year.
- To encourage bilateral out-of-court settlements and in view of the risk of contribution claims from the jointly and severally liable co-infringers, the overall claim of the settling injured party is to be reduced by the settling infringer's share of harm inflicted in the settling injured party. As a consequence, the non-settling co-infringers cannot seek contribution from the settling infringer for any amount corresponding to the relative share of responsibility (*beschränkte Gesamtwirkung*). The same result can also be reached under current German tort and related case law – however only by way of negotiations and not yet based on an explicit provision in the ARC.
- In order to limit the adverse cost risk of claimants if they were to lose the case, the total amount of reimbursement of all intervening third parties' legal fees must not exceed the amount of legal fees a single defendant may claim.

Assessment of Market Dominance

According to the proposed amendments[6], widening the scope of market dominance and its assessment was ultimately triggered by the Düsseldorf Higher Regional Court's decision in the *HRS* case.[7] The decision in *HRS* led the way for German cases concerning so-called two-sided markets, e.g. online platforms where customers search free of charge for the purchase of goods or services, while the sellers have to pay a brokerage fee to the online platform acting as intermediary.[8] In *HRS*, the one side of the market related to searching was not considered as a market in terms of competition law.[9]

In deviation from this case law, the amendments explicitly include such markets in the concept of the ARC even though monetary compensation for a service or good is not paid by the customer. As a consequence, the assessment of market power regarding two-sided markets is focused on non-monetary aspects, such as network effects, switching costs, multi homing, economies of scale, data access and competitive pressure following from innovation.

Merger Control

The main amendment in merger control is the introduction of a threshold for the purchase price for target companies.[10] Therefore, a transaction has to be notified if:

(i) the combined worldwide turnover of the parties exceeds € 500 million;

(ii) the turnover of one party exceeds € 25 million in Germany while none of the other parties achieves a turnover of more than € 5 million in Germany;

(iii) the value of the consideration for the concentration exceeds € 350 million and

(iv) at least one of the other parties is active or expected to be active in Germany in the near future ("local nexus").

The inclusion of the threshold (iii) is intended to close a gap that came to light in the takeover of WhatsApp by Facebook in 2014 (for a purchase price of € 19 billion). Due to the low turnover of WhatsApp neither the thresholds of the ARC nor the EU Merger Regulation were met, even though the necessity of a substantive competition assessment – reflected by the purchase price – was obvious. In the end, the EU Commission was competent to review the merger since three EU-Member States referred the case by mutual consent with Facebook to the EU Commission which finally granted its approval.

Especially on digital markets, the annual turnover does not reliably reflect the possible impact of a merger on competition. In some cases, an innovative business idea or various non-monetary sources of potential market power (e.g. a huge accumulation of personal data) may have a serious impact in the hands of an acquirer, without being reflected by the target's current turnover. To solve this issue, a threshold relating to the

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6 Sec. 18 et seq. Draft ARC.

7 Ministerial Draft of 1.7.2016, explanatory notes p. 47 et seq.

8 For more details concerning two-sided markets see Commeo Newsletters "Most favored nation clauses under scrutiny" of 27.5.2014 and "Most favored nation clauses under scrutiny (II)" of 1.3.2016.

9 Düsseldorf Higher Regional Court, Judgment of 9.1.2015, VI-Kart 1/14 (V) – *HRS*, para 43.

10 Sec. 35 et seq. Draft ARC.

consideration of the transaction, i.e. the purchase price, is in principle a valid option.

In order to properly calculate the purchase price the commercial value of the transaction for the buyer has to be reflected, i.e. that alongside with specific payments the transfer of voting rights, bonds and other assets as well as the assumption of debt have to been taken into account.[11]

The practical impact of the new threshold can be expected marginal. First estimations indicate that the number of merger cases that will trigger a filing on the basis of the new consideration-based threshold will be in low single digits.[12]

Law on Cartel Fines: "Wurstlücke"

As a lesson learned from bad experience made in the past relating to the enforcement of cartel fines following corporate restructuring, the amendments modify the law on cartel fines.[13]

Under the current rules, fines have to be imposed on the respective company responsible for the competition law infringement. Parent companies cannot be the addressees of fines merely based on their corporate ownership or control over the infringing affiliate. In past cases, group-internal restructuring measures allowed certain cartel participants to escape fines, making use of a loophole in the law. This so-called "Wurstlücke" in the law of fines is named after the widely discussed case regarding the German sausage cartel, in which companies avoided (until now) a fine of € 120 million by successfully undertaking certain group-internal restructuring measures.

The legislator already tried to close the loophole regarding the universal successor liability for cartel fines in its previous amendments to the relevant fining rules, but left certain room for dodging fines. Only recently, the President of the Federal Cartel Office highlighted the still existing legal gap in relation to the clay roof tile cartel where two cartelists managed to escape fines by restructuring their companies in a way that still was not caught by the fining rules.[14] The proposed amendments to the ARC adjust the law on fines in accordance with EU competition law: a controlling parent company can now be subject to fines in addition to its affiliated companies responsible for the competition law infringements.

Comment

Regarding the implementation of the Damages Directive, it remains to be seen to which extent the new provisions as proposed by the Ministerial Draft will ultimately find their way into the law and, if so, whether they will work in practice. With the Damages Directive and the proposed amendments to the ARC the legislator clearly aims at protecting immunity recipients against damages claims to the largest extent possible in order not to jeopardize the effectiveness of leniency programs which are key for the EU and national enforcement authorities to uncover illegal cartel activities. As regards the timing it is questionable whether the Damages Directive will be implemented within the set deadline by the end of this year. As can be seen from the Commission's website[15], the legislative procedure in Germany is already running late compared to other EU Member States.

The second overarching subject of the proposed amendments concerns handling competition law issues in the internet economy and on digital markets. The impact of the proposed amendments to the assessment of market power and the merger control filing requirements can at least be predicted as moderate.

Finally, wiping out the so-called "Wurstlücke" was a consequence of the not adequately closed loophole in the law on cartel fines and has been expected since the previous amendment of the law.


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11 Ministerial Draft of 1.7.2016, explanatory notes p. 78 et seq.
12 Ibid., p. 3 et seq.
13 Sec. 81 et seq. Draft ARC.
14 FCO, Press Release of 15.6.2015.
15 EU Commission, overview of the national implementation process of the Damages Directive.