

Newsletter, 13 August 2013

Key amendments of the German Act Against Restraints of Competition

Amendments effective since 30 June 2013

The German Act Against Restraints of Competition („ARC“) has been partially reformed in the context of the 8th amendment which became effective on 30 June 2013.¹ Main purpose of the amendment was to gently align German merger control to European law and to restructure the provisions on the control of abusive practices. The amendment only affects certain parts of the ARC and does not fundamentally change the German law on competition.

Background

The amendment has been announced after long-lasting political debates. It has taken four years from the idea, laid down in the coalition agreement in 2009, to the first draft presented by the responsible ministry in 2011, until the amendment finally came into effect in June 2013. Until the end, the political point of issue has been the question whether public fees - especially in the area of communal water supply - should be subject to the control of abusive practices and whether competition law should apply to the relationship among statutory health insurance organizations. The results come as no surprise in times of the current election campaign: Communal fees are exempted from the control of abusive practices. The ban on cartels and the control of abusive practices do not apply to the relationship among statutory health insurance organizations, yet they are now subject to merger control.

Other amendments, which are more important for the daily legal practice, came into force nearly unnoticed. The key changes are highlighted in the following:

Merger Control

SIEC test

With the 8th amendment of the ARC the so called SIEC („*significant impediment to effective competition*“) test has been introduced to German merger control.² In line with the European Commission, the Federal Cartel Office („FCO“) investigates whether a merger significantly impedes effective competition. So far, the FCO has used a test to analyze whether a merger was creating or strengthening a dominant market position. This test will remain a prime example of how a merger can significantly impede effective competition. Substantial changes in the decision making practice of the FCO are therefore not expected.

Increase of market dominance thresholds

The threshold for the (rebuttable) presumption of market dominance was increased from one third to 40%.³ The threshold also applies to the control of abusive practices. The (rebuttable) presumption of oligopolies has, however, not changed (= combined market share of $\geq 50\%$ by three or less companies and total market share of \geq two thirds by five or less companies).

De minimis markets

Transactions which concern a *de minimis* market, i.e. a market which existed for at least five years and in which total sales in Germany did not exceed € 15 million in the previous calendar year, now need to be notified, but cannot be prohibited by the FCO.⁴ So far, a transaction on a *de minimis* market had been exempted from merger control altogether.

¹ „Achstes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen“, [Official Gazette](#) (German version only).

² Sec. 36 (1) sentence 1 ARC as amended.

³ Sec. 18 (4) ARC as amended.

⁴ Sec. 36 (1) sentence 2 No. 2 ARC as amended.

However, since it was up to the transaction parties to assess whether a *de minimis* market was affected, a lot of transactions have been unnecessarily notified as a precautionary measure because of the parties' uncertainty as regards the market definition.

Consecutive transactions

In line with European merger control, transactions between the same companies which take place within two years are now treated as one transaction as soon as the thresholds are met for the first time.⁵

"Stop the clock" and extension of the review period during phase II proceedings

Newly introduced to German merger control is the so called "stop the clock" rule: If the parties to a transaction do not comply in time with a formal decision by the FCO requesting information, so that the FCO has to repeat its request, the review period of four months in total will be suspended until the parties have provided the full answers.⁶

The duration of the main examination proceedings will be prolonged by another month (to a total of maximum five months), if the parties involved submit commitments for the first time during phase II proceedings.⁷

Curing of legal transactions in case of non-notification

Legal transactions carried out with regard to a concentration that was not duly notified to and cleared by the FCO violate the suspension obligation and are null and void. However, if the parties notify the transaction post-closing to the FCO and if the FCO terminates the so called "dissolution proceedings" because the concentration does not fulfil the conditions for a prohibition under Section 35 ARC, all legal transactions will now be cured retroactively.⁸

New thresholds for press sector

Concentrations in the press sector have been significantly facilitated. For the determination of the relevant turnover in order to assess whether the merger control thresholds are met, the multiplication factor for the sales of newspapers and magazines has been reduced

from 20 to eight.⁹ Smaller transactions in the press sector will therefore less often reach the thresholds triggering a notification.

Control of Abusive Practices

The former provisions of the control of abusive practices have been fundamentally restructured to make them more user-friendly. The material substance of the provisions has not been changed with the exemption of the increased market dominance threshold (as mentioned above). Companies with "relative market power" - i.e. companies which small and medium-sized firms are dependent on - continue to be subject to the control of abusive practices.

Fine and Administrative Procedures

Legal succession

With the 8th amendment the legislator has closed a legal gap which - under certain circumstances - allowed companies to escape liability for fines by way of restructuring in the past.¹⁰ However, more far-reaching requests for a 100% liability of the parent company accordant to European law have not been realized.

Disclosure obligations

Companies now face stricter disclosure obligations in administrative fine proceedings. The obligations in particular relate to data which is required to calculate the fine¹¹ such as the turnover achieved from the infringement.¹²

Power to impose measures relevant to corporate substance

The 8th amendment explicitly empowers the FCO to order behavioural and structural measures (such as the divestiture of certain assets) in administrative procedures in order to bring an infringement to an end.¹³

Private Antitrust Enforcement

Consumer associations now have the standing to litigate for remediation or a cease and desist

⁵ Sec. 38 (5) sentence 3 ARC as amended.

⁶ Sec. 40 (2) sentence 4 ARC as amended.

⁷ Sec. 40 (2) sentence 6 ARC as amended.

⁸ Sec. 41 (1) sentence 3 No. 3 ARC as amended.

⁹ Sec. 38 (3) ARC as amended.

¹⁰ Sec. 30 (2a) Act on Administrative Infringements; please see [Commeo Newsletter](#) of 16.11.2011.

¹¹ Please see to the new Fining Guidelines of the FCO [Commeo Newsletter](#) of 28.06.2013.

¹² Sec. 81a ARC as amended.

¹³ Sec. 32 (2) sentence 1 ARC as amended.

order as well as to skim off the profits in case of mass and dispersed damage.¹⁴

Comment

The 8th amendment brings about a punctual reform of the ARC and does not change the law fundamentally.¹⁵ If there is a regulatory leitmotif behind the amendment at all, it would be the alignment of German to European merger control which has been deliberately implemented with care. German merger control features such as the notifiable acquisition of 25% of the shares and the notifiable acquisition of “competitively significant influence” as well as the balancing test clause (“*Abwägungsklausel*”, outweighing the positive impacts of a concentration with the disadvantages in terms of market dominance) and the *de minimis* clause remained unchanged. Accordingly, the term “relative market power” which is foreign to European law was retained in the field of unilateral conduct. Other provisions of the ARC have been adjusted to the current economic conditions such as the statutory presumption of market dominance, while in other areas administrative practices already applied such as the treatment of several economically linked transactions as one concentration have been codified for reasons of clarification.

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¹⁴ Sec. 33 (2) No. 2 in conjunction with Sec. 4 Injunctive Relief Act and Sec. 34a ARC as amended.

¹⁵ Please see the preamble of the [draft amendment](#), sentence 21 (German version only) stating that the provisions of the ARC have proven worth in practice and that there was no need for conceptual changes.