Newsletter, 9 June 2017

Legislative Amendments to German Antitrust Law

Long-awaited amendments to, *inter alia*, rules on cartel damages, market dominance, merger control, and cartel fines found their way into German law on 9 June 2017

Today, the legislative amendments to the German Act against Restraints of Competition ("ARC") finally entered into force.[1] The new law 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 amendments to the ARC concerns the implementation of the EU cartel damages directive[2] (the "**Damages Directive**"), which should have been implemented into national law by 27 December 2016. The Damages Directive 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 considerably change and further fuel private antitrust enforcement activities in Germany. Since some of the new procedural provisions only apply to antitrust cases and deviate significantly from certain general rules of German civil procedure, they are occasionally referred to as a "sectoral Code of Civil Procedure" (*bereichsspezifische Zivilprozessordnung*).

The following are the most important new substantive and procedural provisions:

- 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 indeed 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.[3]
- The so-called "*passing-on defense*" – according to which cartelists may argue that no harm remained with the claimant as it has passed on the overcharge to the supply chain's next level – has already been 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 claimants and (ii) the other jointly and severally liable debtors (co-infringers):
  - (i) the full immunity recipient is jointly and severally liable to its own direct or indirect customers or suppliers,[4] 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.
- A person who is in possession of evidence which is required to substantiate an action for damages (usually a cartelist, but theoretically also a third party), must *disclose the evidence and grant access to information* upon request from a person who (i) shows to have been harmed by the cartelists' infringement, and (ii)

---

1 BGBl. I (2017) S. 1416 et seqq. We have previously informed about the corresponding Ministerial Draft; please see Commeo Newsletter "Proposed legislative amendments to German antitrust law" of 14 July 2016.

2 Directive 2014/104/EU of the European Parliament and of the Council 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 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 November 2015, 14d O 4/14, para 219 et seq.

4 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 EUR 50 million or a balance sheet total not exceeding EUR 43 million.

identifies said evidence, provided that the disclosure and the access to information are not inappropriate. Vice versa, evidence that is required to *defend* against an already pending action for damages must be disclosed upon request from a cartelist. It is, however, important to note that leniency statements and settlement submissions are excluded from disclosure – again in order not to jeopardize the leniency program and the settlement procedure, respectively.

- The regular *limitation period* (subject to knowledge) has been extended from three to five years. This limitation period begins to run only after the claimant has or should have obtained knowledge of (i) the relevant behavior, (ii) the fact that this behavior constitutes a competition law infringement, and (iii) the identity of the infringer. Further, the regular and the maximum ("absolute") limitation period of 10 years (which is independent of the relevant knowledge) start to run only after the infringement has ended. The suspension period following the conclusion of cartel proceedings has been extended from six months to one year.
- In order 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 could also be reached under German tort and related case law – however so far 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 they have, if they were to lose the case, to reimburse only the legal fees of the intervening third party according to the amount that is determined by the court at its discretion. The total sum of reimbursement of all third party interventions' amounts in dispute must not exceed the main proceedings' amount in dispute.
- Whereas Secs. 33a to 33f ARC (most of which contain rules relating to substantive law) are not applicable to claims that arose before 27 December 2016 (the date by which the Damages Directive should have been implemented into national law), the procedural provisions in Secs. 89a to 89e ARC may also be of relevance for such "old cases". An exemption applies to the rules on the disclosure of evidence (Sec. 33g ARC) which are, despite their substantive character, also applicable to "old cases", and to the provisions on limitation (Sec. 33h ARC): the new rules, except for the rules on the (re-)commencement and the suspension of the limitation period, apply to claims that are not yet time-barred.

Assessment of Market Dominance

The amendments to the provisions on the abuse of a dominant position are mainly aimed to better cope with the assessment of a market position in times of digitalization. Furthermore, the legislator took the opportunity to clarify the prohibition for market strong/dominant dealers to request unjustified advantages as well as the prohibition to sell below purchase price.

- The amendment clarifies that market dominance can also be found on markets for which services are rendered *free of charg*e. The addition was triggered by an adverse decision of the Düsseldorf Higher Regional Court against *HRS*.[5] The new law now corrects the *HRS-decision* according to which on two sided markets the market side offering free of charge services to consumers would not be subject to competition law rules.[6]
- Furthermore, the new law introduces an additional set of *criteria for establishing dominance in digital markets*, which are particularly relevant with respect to assessing multi-sided markets and network effects. Here, the law now requires to take into account: Network effects, parallel use of services/multi homing, lock-in effects and switching costs, economies of scale in connection with network effect and access to competitively relevant data as well competitive pressure following from innovation. The legislative changes are intended to ensure a better assessment of the significant changes triggered by digitalization. The importance attributed to introducing a toolkit that allows the assessment of market dominance on digital markets in a way that can indeed be handled in practice is underlined by a new paragraph which imposes an obligation on the German Ministry of Economy and Energy to report to the legislator on the experience with the newly introduced provisions three years after their enactment.
- A further clarification relates to the prohibition against market strong/dominant buyers to *induce unjustified bonuses from their suppliers*.

5 For more details concerning two-sided markets see Commeo Newsletters "Most favored nation clauses under scrutiny" of 27 May 2014 and "Most favored nation clauses under scrutiny (II)" of 1 March 2016.

6 Düsseldorf Higher Regional Court, Judgment of 9 January 2015, VI-Kart 1/14 (V), para 43 – *HRS.*

The reform was triggered after the Higher Regional Court Duesseldorf quashed a decision of the Federal Cartel Office against Edeka.[7] Even though a final decision from the German Supreme Court on the Edeka case is still outstanding, the legislator took the opportunity to revise the provision to strengthen its practical relevance. Under the new law, an unjustified bonus can already be assumed if the market dominant/strong buyer requests from its suppliers additional bonuses absent an objective justification. In this context it is relevant whether the buyer gives reasons for the requested bonuses and whether the bonuses can be brought in an appropriate relation with the reason for the request.

- Finally, with its reform the legislator intends to bring another provision back to life which – once again - almost lost its practical impact following the decision practice of the Higher Regional Court in Düsseldorf:[8] the *prohibition to sell below purchase price*. The prohibition addresses market strong/dominant dealers in order to protect their smaller rivals. Contrary to the decision practice of the court, the revised provision now prohibits market strong/dominant dealers to allocate bonuses and rebates granted by suppliers almost discretionaryly to individual products with the consequence to substantially lower their purchase price. The revised provision now requires that general bonuses and rebates can only be allocated pro rata if their payment could be sufficiently foreseen at the time.

Merger Control

– New transaction value threshold

With regard to merger control, the introduction of a threshold for the purchase price for target companies was vividly discussed during the legislative procedure. The new threshold now provides that a transaction has to be notified if:

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

(ii) the turnover of one party exceeds EUR 25 million in Germany while neither the target company nor any other party achieves turnover of more than EUR 5 million in Germany;

(iii) the value of the consideration for the concentration exceeds EUR 400 million; AND

(iv) the target company is to a considerable extent active in Germany ("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 EUR 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 – appeared obvious. In the end, the EU Commission was competent to review the merger since three EU-Member States had referred the case 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 significant impact in the hands of an acquirer, even though the target's turnover is small or even neglectable. To solve this issue, the threshold relating to the consideration of the transaction, i.e. the purchase price, was introduced.

In order to properly calculate the purchase price the commercial value of the transaction for the buyer has to be determined, in addition to specific payments, the transfer of voting rights, shares and other assets to the seller as well as the assumption of any debt by the buyer have to be taken into account.[9] Further, so called "earn out"-provisions under which a certain amount of the purchase price only has to be paid if certain conditions are met in the future have to be considered as well.[10] So far, further guidance is not available, but could be provided by the German Federal Cartel Office at a later stage via guidelines.[11] Determining whether a company is "to a considerable extent active in Germany" leads to further legal uncertainty. Generally, this term will be interpreted broadly, as such an activity is not connected to specific revenues in Germany and can therefore be any factual business activity (e.g. "for-free" services to customers). It remains unclear, though, how to measure a "considerable extent".

The practical impact of the new threshold is expected to be marginal. Initial assessments assume that the number of merger cases that will

---

7 Düsseldorf Higher Regional Court, Judgment of 18 November 2015, VI-Kart 6/14 (V).

8 Düsseldorf Higher Regional Court, Judgment of 12 November 2009, VI-2 Kart 9/08 OWi.

9 Draft law of 7 November 2016, BT-Drucks. 18/10207, p. 77 et seq.

10 Ibid, p. 77.

11 Ibid, p. 78.

trigger a filing on the basis of the new consideration-based threshold will be in low single digits.[12]

– Ministerial permission

Further amendments pertain to the ministerial permission for mergers under which a merger can be cleared even though it was prohibited by the German Federal Cartel Office. The Minister of Economics and Technology can issue such a permission if the overall efficiencies achieved outweigh the negative effects of the market concentration or a predominant public interest is identified. The most crucial amendment in this context is the narrowed access to courts for third parties which require them to show that their individual rights are infringed by the ministerial permission. This amendment was triggered by the merger between Edeka and Tengelmann that was followed by epical court proceedings and public turbulences.

– New multiplier for calculation of turnover of broadcasting companies:

In addition, the multiplier for the turnover of broadcasting companies was lowered from 20 to 8, which means that, e.g., the EUR 5 million threshold is now only exceeded by actual turnover of more than EUR 625,000.

Law on Cartel Fines: "Wurstlücke" ("sausage gap")

As a lesson learned from experiences in the past relating to the enforcement of cartel fines following corporate restructuring, the amendments modify the law on cartel fines.

Under the previous rules, fines had 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" is named after the widely discussed case regarding the German sausage cartel, in which companies avoided a fine of EUR 128 million by successfully undertaking certain group-internal restructuring measures.

The legislator had already tried to close the loophole regarding the universal successor liability for cartel fines in its previous amendments to the relevant fining rules, but has done so with insufficient precision. The President of the Federal Cartel Office highlighted at several occasions the still existing legal gap by referring, e.g., 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.[13] The amendments to the ARC adjusted the law on fines in accordance with EU competition law: a controlling parent company can now be adressed of the fining decision in addition to its affiliated companies responsible for the competition law infringements.

Exemption from cartel prohibition for press companies

Press companies are now allowed to cooperate with each other on the commercial aspects of their publishing business (advertising, printing, distribution, etc.) without being subject to the national cartel prohibition pursuant to Sec. 1 ARC – provided that editorial matters are not involved. This press specific exemption intends to strengthen newspaper as well as magazine publishers in the intermedial competitive surroundings. Since within the scope of Art. 101 TFEU German law may not provide for deviating rules, the exemption is limited to cases where trade between Member States is not affected. The exemption will be applicable for 10 years; it will be evaluated after 5 years.

Sector inquiries in connection with violations of consumer protection laws

The FCO has been given the competence to conduct sector inquiries "in case of reasonable grounds for significant, continuous, or repeated infringements of consumer protection rules that, in their nature or extent, affect the interests of a large number of consumers". This competence is, however, only subsidiary to that of other federal authorities. Also, and unlike in other sector inquiries, the FCO has no right to inspect companies' premises. These (limited) competences are obviously the result of a compromise: during the legislative procedure it was initially discussed whether the FCO should be equipped with general consumer protection powers, in particular with regard to online purchases.

Comment

Regarding the implementation of the Damages Directive, most of the provisions as proposed by the Ministerial Draft ultimately found their way into the law. With the Damages Directive and the amendments to the ARC, the (European and German) legislators primarily aim to enhance the possibilities to claim damages suffered through cartel infringements. It is, however, also intended to protect immunity recipients against damages claims in order not to jeopardize the effectiveness of leniency programs which are key for the EU Commission and the national enforcement authorities to uncover illegal cartel activities. Ac-

[12] Ibid., p. 2.

[13] FCO, Press Release of 15 June 2015.

cording to an overview on the Commission's website[14], Germany is the 17th EU Member State that has fully implemented the Damages Directive.

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

Overall, the latest amendment of the ARC "modernizes" German antitrust law and implements various regulative principles. As a result, most of the amendments will indeed form German antitrust rules in an ever more honed sword in the business life.

Dr. Thiemo Engelbracht **Dr. Christian Ehlenz**

Commeo LLP
Rechtsanwälte und Notar
Speicherstraße 55
60327 Frankfurt am Main
www.commeo-law.com

Dr. Jörg-Martin Schultze, LL.M.
Dr. Dominique S. Wagener, LL.M.
Dr. Stephanie Pautke, LL.M.
Dr. Johanna Kübler
Isabel Oest, LL.M.
Josefa Billinger, LL.B./LL.M.
Christoph Weinert, LL.M.
Christoph Krüger
Dr. Thiemo Engelbracht
Dr. Christian Ehlenz

Commeo LLP is an independent law firm specialized in antitrust law. We are an established team of experienced lawyers advising clients on all aspects of German and European antitrust law.

[14] EU Commission, overview of the national implementation process of the Damages Directive.