

New Competition Law in Germany

June 2017

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Today, significant changes to the German Act against Restraints of Competition have entered into effect. This newsletter provides an overview of the most significant aspects of the 9th amendment to the German competition law.

Cartel Damages

The amendment strengthens the procedural and legal position of undertakings that claim damages from one or more members of a cartel. It implements the EU Cartel Damages Directive (2014/104/EU), which was designed to ensure effective private enforcement throughout the EU. The amendment introduces the following key changes:

- statutory, rebuttable **presumption** that a cartel leads to damages;
- rebuttable presumption in favor of indirect customers that the overcharge has been passed on to them; a cartel member may still invoke the **passing-on defense** vis-à-vis direct customers, by proving that the claimant has in fact passed on the damage to its own customers;
- leniency applicants and small and medium-sized companies are exempted from the **joint and several liability** of cartel members; they are only liable to their direct and indirect customers; a secondary liability to other claimants remains however in place where these cannot obtain full compensation from the other cartel members;
- right of claimants and defendants to claim **disclosure of specific evidence** from the other party and/or third parties, which can be brought in an independent action prior to the actual damages claim; leniency and settlement submissions are excluded from disclosure; and
- extension of the standard **limitation period** for damages claims from three to five years.

Liability for Fines

Apart from the implementation of the EU Cartel Damages Directive, the amended law extends the liability for fines imposed by the Federal Cartel Office (FCO – Bundeskartellamt). Accordingly, a parent company can be held liable and fined for cartel infringements of its controlled subsidiaries, even if it did not participate in the infringement itself (**group liability**). The introduction of such liability, regardless of negligence or fault, has raised concerns with respect to German constitutional law.

Furthermore, fines can also be imposed on the legal or economic successor of the entity whose representatives violated competition law (**successor liability**). The aim of this change is to eliminate a legal loophole that had allowed cartel members to escape their liability by restructuring their business. The new liability provisions will apply to all infringements that have not already ended prior to today. For those infringements that are already subject to a cartel investigation, additional transitional rules for **contingent liability** (Ausfallhaftung) of the controlling entities will apply.

The new liability rules also need to be closely considered in the context of M&A transactions.

Merger Control

The amendment also includes an additional **merger filing threshold** based on transaction value. The new threshold primarily, but not exclusively, aims at transactions in the digital economy, where having low or even no turnover is not an accurate reflection of the true value of assets such as customer data. The reasoning in the legislative proposal cited the acquisition of WhatsApp by Facebook as a prime example of a high-value deal that did not trigger German merger control due to the target's low turnover.

Under the amended law, merger control in Germany will also be required if:

- (i) the combined worldwide turnover of all undertakings concerned exceeds EUR 500 million (worldwide turnover threshold),
- (ii) one of the undertakings concerned has a turnover in Germany of more than EUR 25 million (first domestic turnover threshold), but neither the target nor another undertaking concerned has a turnover in Germany of more than EUR 5 million,
- (iii) the value of the consideration for the transaction exceeds EUR 400 million (transaction value based threshold), and
- (iv) the target undertaking is active in Germany to a significant extent (local nexus).

The new transaction value test is accompanied by a technical provision on the **calculation of the “consideration”**. Accordingly, the consideration shall include

- all assets and other monetary values or services which the seller receives from the acquirer in the context of the transaction (purchase price), and
- the value of any obligations to be taken over by the acquirer.

The purchase price includes all cash payments, the transfer of voting rights, securities and (in)tangible assets, and option rights. The notifying parties will basically be free to choose the basis on which they wish to calculate the consideration, as long as it is a recognized method of business valuation. An assessment based on liquidation value is not allowed.

As regards the requirement of “significant domestic activities”, the amended law leaves room for interpretation. According to the reasons of the legislative proposal, such local nexus is given if the target undertaking has a customer base in Germany or carries out research and development activities in Germany.

Given the relevant time of closing for the merger control approval, the new test also needs to be considered for transactions where the signing has already taken place, but not the closing.

In addition, the amendment makes changes to the procedure for **ministerial authorization**. German competition law allows the Federal Minister of Economics, upon request, to authorize a merger that has been prohibited by the FCO based on overriding advantages to the economy or overriding public interests. Among other things, under the amendment, the request will be deemed rejected if no decision is made within six months (but the applicant may request an extension of this deadline).

Impact of Digitalization

With regard to the digital economy, the amended law further clarifies that services rendered free of charge may nevertheless constitute a market in terms of competition law. This is particularly relevant to **online platforms** such as search engines, comparison websites, hotel booking portals or social networks, which offer their services free of charge.

The amendment also introduces specific criteria for the assessment of the **market power** of companies on platform markets, including:

- direct and indirect network effects;
- parallel use of multiple services and switching costs for users;
- economies of scale in the context of network effects;
- access to competitively sensitive data; and
- innovation-driven competitive pressure.

Consumer Protection

Finally, the amendment provides the FCO with the competence to conduct **sector inquiries** when there are significant, continuous or repeated violations of consumer protection rules affecting a large number of consumers. This relates in particular to unfair competition practices and unlawful terms and conditions. However, this competence is limited to situations in which no other federal authority has that duty.

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