German Parliament Approves Statutory Amendments Addressing Private Competition Enforcement

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Both houses of German parliament, the German Bundesrat (German Federal Council) and the Bundestag (German House of Representatives), have finally approved the long-awaited ninth amendment to the Act against Restraints of Competition, which in particular addresses private antitrust enforcement in Germany. The amendment will enter force on the day after it has been published in the German Federal Law Gazette, which is expected shortly.

The amendment became necessary *inter alia* to implement the Cartel Damages Directive that was approved by the Council of the European Union in November 2014 (the "EU Directive"), which was intended to enable victims of infringements of EU antitrust law to claim compensation for the damages they suffered. This article will address a number of the key aspects of the amendment.

Strengthening of private antitrust enforcement.

German law has already been claimant friendly since the seventh Amendment to the Act against Restraints of Competition entered into force in 2005. The ninth amendment to the Act against Restraints of Competition now strengthens the position of claimants further:

- **Decisions in which a competition authority finds a breach of German or European competition law have a binding effect on German courts in follow-on damages proceedings**. Such a binding effect was already provided for under previous German law. This binding effect not only applies to decisions of the European Commission or the Federal Cartel Office, but also to decisions of competition authorities of other Member States. The binding effect means that an infringement of German or European competition law is proven and cannot be contested in court. In follow-on damages proceedings, the plaintiff only has to prove damages due to the defendant's infringement of competition law.
- **The new law introduces a statutory presumption that a cartel leads to damages.** Such a presumption had already been acknowledged by German courts and has now been codified. The presumption can be rebutted, but it is for the cartelists to prove that their cartel did not cause damages. While there is no presumption as to the amount of damages suffered by a claimant, German courts are entitled to estimate the amount of damages based on points of reference presented by the claimant.
- **A broad right to disclosure of evidence has been introduced.**
    - Both claimants and defendants will be entitled to demand disclosure of evidence from the other party as well as from

third parties. While the right to disclosure does not apply to leniency applications and settlement submissions, it does encompass pre-existing documents that were submitted to a competition authority together with a leniency application (provided that the disclosure request is formulated specifically, and does not ask for the disclosure of all documents in the files of the competition authority).

- While even under current law the German courts can – in their discretion – order the disclosure of certain documents, the courts were reluctant to do so in practice. Under the new law, courts will be bound to do so unless a disclosure request is disproportionate. The right to disclosure can be enforced either in a separate proceeding or as part of damages proceedings. With this provision, the draft law goes beyond the requirements of the EU Directive, which only requires courts to be able to order disclosure as part of damages proceedings. Disclosure of the competition authority's fining decision can even be enforced by way of interim injunction. Since reasonable disclosure-related costs must be reimbursed by the party demanding disclosure, it will be difficult for courts to reason that disclosure is disproportionate due to high costs (however, it is questionable whether such a reimbursement of costs is compatible with the EU Directive).

- **Cartelists are jointly and severally liable for the damages caused by a cartel.** As has already been the case under previous German law, plaintiffs in principle can claim the whole damages amount from one of the cartelists, who in turn can demand compensation from the other cartelists in accordance to their share in causing the damages. There is an exception from this rule for small and medium-sized companies ("SMEs") and leniency applicants. SMEs and leniency applicants are in general only liable to their direct and indirect customers. However, if companies that suffered damages due to the cartel cannot recover these damages from other cartelists, they are entitled to compensation from SMEs and leniency applicants.

- **Individual settlements become more attractive for cartelists under the new law.** The new law provides that in case of a settlement between the claimant and an individual cartelist, the overall damages claim is reduced by the share of the settling cartelist in causing the damages. The other cartelists can no longer demand compensation from the settling cartelist for the remaining claim. Thus, the new law solves the problem that a settling cartelist still had to face potential compensation claims of the other cartelists in the past.

- **The normal limitation period is extended from three years to five years.** The regular limitation period begins to run at the end of the year in which (i) the claim arose, (ii) the claimant obtained or – without gross negligence – should have obtained knowledge of the circumstances giving rise to the claim, the identity of the infringer(s), and the fact that the circumstances amounted to an antitrust infringement and (iii) in which the antitrust infringement ended. The new law also changes the conditions under which the absolute limitation period of 10 years (independent of any knowledge of circumstances) applies. It only begins to run once the antitrust infringement has ended. This condition makes the application of the absolute limitation period a lot less likely, especially since many antitrust infringements only end because a competition authority opens an investigation. The limitation period is suspended during an investigation by the European Commission, the Federal Cartel Office, or the competition authority of another Member State. Under the new law, the suspension only ends one year after the decision becomes final. The new limitation rules are applicable to all claims that are not time-barred when the new law enters into force. However, it is questionable whether the changes to the absolute limitation period (i.e., that it only begins to run once the infringement has ended) can actually apply to cases in which the limitation period had already started to run under old law. While such a result would not be compatible with the EU Directive, it remains to be seen how the German courts will deal with this question.

- **The position of indirect purchasers in cartel damages proceedings will be strengthened.** The new law introduces a presumption in favor of indirect purchasers that the direct purchasers passed on the overcharge to them if the indirect purchaser proves: (i) that the defendant infringed Art. 101 or Art. 102 TFEU or the corresponding provisions of the Act against Restraints of Competition; (ii) the infringement resulted in an overcharge for the direct purchaser; and (iii) the indirect purchaser bought products that were affected by the infringement. The presumption can be rebutted, but the defendant bears the burden of proof in this regard. Only indirect purchasers benefit from the pass-on presumption. The presumption only applies to damages claims that arose after 26 December 2016 (i.e., basically only to all those cartels that have not yet been uncovered). Again, there are strong arguments that this is not in line with the provisions of the EU Directive so that the presumption should nonetheless apply to already existing claims (as long as the court action was

initiated after 26 December 2014). It may ultimately be up to the European Court of Justice to decide upon this question.

- **Defendants may have the burden to prove that an overcharge was passed on by the direct purchasers wholly or in part to their own customers.** The German Federal Court of Justice already accepted the existence of such a defense, but set high requirements for proving passing-on. The new law states that a passing-on defense is available, but does not contain any explanations on how passing-on needs to be proven. Therefore, there may be good arguments that the requirements set by the Federal Court of Justice still apply.

- **The new law considerably reduces the cost risk of litigation for claimants.** Under German procedural law, plaintiffs who (partly) lose a case must pay the statutory fees for the defendant(s). These statutory fees are dependent on the amount claimed and can be up to EUR 270,000 per defendant in the first instance. Suing all cartelists could thus mean a high cost risk for the claimant. While in the past some tried to advert that risk by suing only one or a few member(s) of a cartel for the full amount of damages. The defendants then had to bring the other cartelists into the proceedings by impleading them to be able to claim compensation from them later. Some courts found that in case the plaintiff lost, all intervenors were entitled to the same statutory fees as the defendant. The new law limits the risk exposure for the plaintiff by stipulating that the overall amount of statutory fees all intervenors may demand if the case is lost may not exceed the amount of statutory fees to be reimbursed to one defendant.

- **Liability of parent companies.** It is noteworthy that the new law is silent on the question of whether a parent company is liable for a competition law infringement (directly) committed by a subsidiary. It is generally accepted – and has repeatedly been stressed by European Commission officials – that the EU Directive establishes the liability of a parent company for antitrust infringements by subsidiaries. The new law thus leaves the clarification of this important question to the German courts (and ultimately the European Court of Justice).

Criteria to be considered in assessing two- and multi-sided, as well as platform markets.

The new law clarifies that the following criteria have to be considered in assessing the market power of an allegedly dominant company in case of two- and multi-sided or platform markets:

- Direct and indirect network effects,
- Parallel use of several services and switching costs for the users,
- The company's economies of scale in connection with network effects,
- The company's access to data, and
- Competitive pressure caused by innovation.

Clarification that markets can exist even if services are provided for free.

The new law clarifies that a market for purposes of competition law can exist even if services are provided free of charge, which is often the case with services provided over the internet (e.g. search engines, comparison portals). Under German competition law, a "market" traditionally required that customers were charged for goods or services. However, in recent years the German Federal Cartel Office has broken with this tradition and applied competition law to free services to meet the challenges of digitalization. The new law now endorses the Federal Cartel Office's approach.

Extending thresholds of German merger control.

The new German law extends the scope of merger control also to cover mergers that do date were not notifiable in Germany, but in which a very high purchase price is paid for the target.

New thresholds. Under the new law, German merger control will apply if:

- The combined worldwide turnover of the undertakings concerned exceeded EUR 500 million;

- The turnover of one other undertaking concerned exceeded EUR 25 million;
- The value of the consideration for the transaction exceeds EUR 400 million worldwide; and
- The target is active to a considerable extent in Germany.

This amendment to the thresholds of German merger control particularly serves to capture mergers that may have a competitive effect as they pertain to innovative start-ups. The change was triggered in particular by Facebook's acquisition of WhatsApp, which initially was neither notifiable to the European Commission nor to the German Federal Cartel Office as WhatsApp did not meet the turnover thresholds of European or of German merger control. The transaction ultimately was only notifiable to the European Commission as the merger control thresholds in three other European countries were triggered and as Facebook requested the Commission on this basis to review the merger.

Closing the "sausage gap" in public cartel enforcement.

The new law eliminates a legal loophole for enterprises to circumvent their liability for administrative fines imposed for an antitrust infringement by certain corporate restructurings.

- **"Sausage gap."** This loophole is known in Germany as the "sausage gap," based on a large German producer of processed meat's ability to avoid liability by merging two enterprises, circumventing the EUR 128 million fine that was originally imposed by the German Federal Cartel Office on each of the two companies individually. As the individual companies had ceased to exist due to the merger, the addressee of the original fine no longer existed and no fine could be imposed.
- **Avoidance of the "Sausage Gap."** The new law provides that the competition authorities can impose fines not only on undertakings directly involved in antitrust infringements, but also on the legal or economic successors of dissolved enterprises, or on a controlling parent company, by adopting the European law concept of what constitutes an "undertaking." Previously, the competition authorities were only able to impose fines on the legal successor of a dissolved enterprise, but only if there was a prevailing economic identity between the legal successor and the dissolved company.

Outlook

The new German law brings about a number of significant changes to German competition law. While the focus of the changes is on the rules regarding private antitrust enforcement, other notable changes not summarized in this Article include other clarifications on merger control and on abuse of dominance proceedings. With respect to private antitrust enforcement, the changes make Germany an even more attractive forum for claimants than it was before, even though some of the changes stay behind the requirements of the EU Directive.

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