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Recent Developments in German Competition Law

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In recent months, again there have been major developments in German competition law. Some of these developments have unfolded in high-tech industries, such as chipboard panel manufacturing, online video services and telecommunications, while others have arisen in more traditional contexts.

At the legislative level, the German government has presented a draft bill for a major revision of the German Act against Restraints of Competition (ARC), which is intended to align the German competition regime even closer to the EU rules. In the merger field, the German Federal Cartel Office (FCO) has made headlines with the prohibition of a planned video-on-demand joint venture between the two main privately held TV channel operators. Moreover, while the FCO has continued with its aggressive prosecution of cartels, the Federal Court of Justice confirmed the strict limits of successor liability in cartel cases under German law, which is in stark contrast to the approach at the EU level. Finally, there have been two judgments clarifying key aspects of the legal framework for private cartel enforcement in Germany—the Federal Court of Justice recognized the standing of indirect purchasers and the admissibility of the passing-on defense while a lower court issued an important decision on access to the FCO's leniency files.

Legislative Initiatives and Administrative Developments

On March 28, 2012, the German government published its draft bill for the eighth amendment of the ARC (Draft Bill). The Draft Bill is intended to enter into force in January 2013. The suggested changes are significant and relate to all areas of competition law. The most important proposals can be summarized as follows:

Merger Control

Introduction of the SIEC Test. The Draft Bill foresees the introduction of the so-called "significant impediment of effective competition" (SIEC) test as the substantive merger review standard. Mirroring the approach taken in the EU Merger Control Regulation (EMCR) since 2004, the current test, which refers to the creation or strengthening of a dominant position, will survive as an example of the SIEC test. With this change, the Draft Bill aims at filling a perceived gap of the current regime, under which it is not possible to prohibit certain transactions involving unilateral effects without triggering the relevant dominance thresholds. The experience with the corresponding amendment of the EMCR suggests that the practical impact of this revision will be quite limited, however.

Increased Threshold for Presumption of Single-Firm Dominance. The Draft Bill provides for an increase of the market share threshold triggering a rebuttable presumption of single-firm dominance from one-third to 40 percent—the same figure as mentioned in the European Commission's Horizontal Merger Guidelines. Importantly, however, the controversial thresholds for the presumption of collective market dominance—three or fewer undertakings reaching a combined market share of 50 percent and five or fewer undertakings reaching a combined market share of two-thirds (Section 19(3) ARC)—will remain unchanged.

Retroactive Validity of Non-Notified Transactions. The implementation of a transaction in disregard of a notification obligation under German merger control regime leads to the invalidity of the implementing steps (Section 41(1) ARC). According to the FCO's current practice, a post-closing notification in this scenario is dealt with under the rules for divestiture proceedings and thus is not subject to any deadlines. The Draft Bill does not alter this approach irrespective of wide-spread criticism; however, it clarifies at least that the closing of the divestiture proceedings due to the absence of competitive concerns retroactively cures the invalidity of the implementation measures (though the parties will still be subject to administrative fines for premature implementation).

Additional Enforcement Powers of the FCO

The Draft Bill clarifies that the FCO is empowered to impose structural remedies in order to bring a competition law infringement to an end. Again, this is in line with the European competition rules, which introduced the possibility of structural remedies almost a decade ago.

Moreover, the FCO will be entitled to request, in the framework of a decision ordering the termination of a competition law infringement, the repayment of any additional proceeds derived from the infringement.

FCO Issues New Guidelines on Substantive Merger Control

On March 29, 2012, the FCO published new guidelines on substantive merger control (Guidelines). The Guidelines are an update of a previous guidance paper dating back to 2000 and are intended to summarize the current practice of the FCO and German courts. Compared to the 2000 paper, the Guidelines put considerably more emphasis on the need for a holistic approach when analyzing a transaction under the merger control rules. Furthermore, the Guidelines stress the importance of economic concepts in the decision-making process. The Guidelines were prepared before the publication of the Draft Bill and therefore still focus on the dominance test. As stated above, however, it is to be expected that this concept—and the corresponding case law of the FCO and the courts—will remain the preeminent yardstick in German merger control even after the envisioned shift to the SIEC test.

Merger Control

In 2011, the FCO received more than 1,100 merger notifications, of which only 15 were subject to close scrutiny in second phase proceedings.

Only Two Prohibition Decisions in 2011

On March 17, 2011, the FCO blocked plans by the TV channel operators RTL and ProSieben/SAT.1 to form a joint venture for the operation of an online video platform reminiscent of the US TV streaming site HULU. The two parties had planned to create an Internet platform financed by advertisements and targeted at German and Austrian consumers for reruns of TV content free of charge within seven days after the program's original airing. The platform was intended to be open to content from other private and public channels, which would have remained responsible for the editorial control and marketing of their offerings on the platform, but would have had to pay a fee to the joint venture for the use of its technical infrastructure.

The FCO found that the joint venture would further strengthen the existing duopoly of RTL and ProSieben/Sat.1 in the market for TV advertising inGermanyand would likely also result in collaboration between the companies outside of the joint venture. The FCO took the potential pro-competitive effects of the proposed deal into account—the platform would have been the first "one-stop shop" for free content inGermany—but was not convinced that these effects would outweigh the anti-competitive effects of the cooperation.

Interestingly, on November 28, 2011, the FCO announced that it had started an investigation under Section 1 ARC into similar plans of the two public TV broadcasters ARD and ZDF to set up a joint online video platform. While the FCO did not raise any objections from the merger control perspective in this case, the authority is concerned that the project might involve unlawful cooperation among direct competitors (the FCO has yet to elaborate on the nature of its concerns). The fact that several third parties have applied for admission to the proceedings demonstrates the high public interest in this case.

The FCO issued just one other prohibition decision in 2011, which concerned the plans of Tönnies, Germany's leading purchaser and slaughterer of pigs and sows, to take over the slaughterhouse operator Tummel. Based on an in-depth market investigation, the FCO considered Tönnies to be an indispensable contract partner due to its high market shares, its far-reaching vertical integration, and a multiple links with competitors and customers. The FCO therefore concluded that Tönnies enjoyed a dominant market position, which would be further strengthened by the envisaged transaction. After rejecting a remedy package offered by Tönnies, the authority prohibited the transaction on November 17, 2011.

Liberty/Kabel BW Merger Cleared

In another noteworthy merger ruling, on December 15, 2011, the FCO cleared the acquisition of the cable network operator Kabel Baden-Württemberg (Kabel BW) by Liberty Global Europe Holding (Liberty), subject to far-reaching commitments.

The FCO raised serious concerns about the further strengthening of a dominant oligopoly among the large regional cable network operators (Kabel Deutschland, Liberty's Unitymedia, and Kabel BW) on the German retail TV services market by reducing their number from three to two. The companies overlap in their geographical reach and compete to provide retail TV service contracts (increasingly also including phone and Internet services) to the owners of large, multi-unit housing premises. The FCO found considerable market entry barriers due to long-term contracts of 10-15 years, exclusivity arrangements, and legal uncertainty about the ownership of the house distribution networks after contract expiry. The FCO also was concerned that the transaction, as originally notified, would have had a negative impact on the competitive relationship between the cable network operators and TV channels (so-called "feed-in" market). In order to alleviate the FCO's concerns, Libertyagreed, *inter alia*, (1) to grant special termination rights for large contracts; (2) to end its encryption of digital free TV programs; and (3) to renounce the use of certain exclusivity clauses.

This case is yet another example of the FCO's skeptical approach towards three-to-two mergers—but also of its willingness to clear such deals if the parties are willing to make appropriate concessions. According to press reports, Deutsche Telekom and the telecommunication service provider Netcologne appealed against the clearance decision before the Düsseldorf Court of Appeals.

Cartels

Statitistics

In 2011, the FCO imposed fines of approximately €193 million on 42 companies and several individuals in 17 cartel cases in a multitude of sectors, including fire engines, concrete pipes, dishwasher detergent, chipboard panels, flour, and hydrants. The fact that the FCO received 37 leniency applications relating to 28 cases underlines that the FCO's leniency program, more than ever, is a key driver in uncovering cartels. In 2011, the FCO conducted 11 dawn raids at 42 companies and the homes of five individuals.

Due to the ever-increasing number of cartel cases, the FCO has set up a third division dedicated to cartel prosecution. In the second half of 2011, the FCO adopted the following decisions on hardcore cartels:

- Fines of €42 million for a cartel relating to chipboard panels and oriented strand boards;
- Fines of €24 million for a flour and dishwasher detergent cartel;
- Fines of €17.5 million for a fire engine cartel;
- Fines of €15.5 million for a hydrant cartel;
- Fines of €12 million for a concrete pipe cartel; and
- Fines of €9 million for an instant cappuccino cartel.

In these proceedings, the FCO's focus was on three types of anti-competitive arrangements, namely (1) illegal agreements on prices, quotas, discounts and/or specific conditions for customers, (2) the allocation of (regional) markets and/or (3) the exchange of commercially sensitive information. In most cases, at least some of the companies and/or individuals involved agreed to enter into a settlement with the FCO in order to secure a lower fine.

Strict Limits of Successor Liability for Cartel Infringements

On August 10, 2011, in a landmark ruling the Federal Court of Justice confirmed the severe restrictions under German law regarding the successor liability of a merged entity for cartel infringements committed by one of the merging entities. In the case at stake, the FCO in 2005 had imposed a fine of €19 million on Gerling Konzern Versicherung AG (GKA) for its involvement in the industrial insurance cartel.

In 2006, GKA merged with another insurance company to form a new legal entity, HDI-Gerling. HDI-Gerling refused liability for GKA's cartel infringement and won the appeal proceedings before theDüsseldorf Higher Regional Courtand now also before the Federal Court of Justice.

Under German law, the liability of legal persons for administrative fines is dealt with in Section 30 of the German Administrative Offences Act (OWiG). Pursuant to this provision, a fine can be imposed on a legal person if one of its organs or a senior manager infringed the company's obligations by committing an administrative offense. The Federal Court of Justice held that the requirements of this provision were not fulfilled in the case at hand because it had been the legal predecessor's (*i.e.*, GKA's) organs and senior managers who had participated in the illicit arrangements, but not the organs or employees of the merged entity.

The court further argued that an extension of liability to the legal successor is possible only in the exceptional case that both entities are "virtually identical" from an economic point of view. This requires, in particular, (1) that the assets of the former entity are used in the same or a similar way as before the merger, and (2) that they account for an "essential part" of the (total) assets of the merged entity. (At least) the second criterion is not fulfilled if the merger parties had approximately the same size. The court stated that any broader interpretation of Section 30 OWiG in order to extend the scope of successor liability would be contrary to the clear wording of this provision. Furthermore, it would violate the requirement of legal certainty and the prohibition of double jeopardy in criminal matters laid down in Article 103(2) of the German Constitution.

In the case at hand, the court rejected successor liability because GKA's assets accounted only for 28 to 56 percent (depending on the reference base) of the assets of the combined HDI-Gerling group. Interestingly, the court explicitly criticized the current status of the law, which in stark contrast to the EU competition rules enables companies to circumvent fines for cartel infringement through mergers and restructuring, and urged the legislator to take appropriate action.

Private Cartel Enforcement

The Standing of Indirect Purchasers and the Admissibility of the Passing-On Defense

On June 28, 2011, the Federal Court of Justice handed down a key judgment regarding the legal framework for private cartel enforcement inGermany. The court clarified that indirect purchasers also are entitled to claim damages from cartel members. The court argued that this principle takes account of the fact that the impact of illicit cartel arrangements is not necessarily felt by the direct purchasers because they may be able to pass on the overcharge to their customers. Thus, market participants at all levels of the supply chain should be allowed to claim damages for competition law infringements. This ruling is in line with the jurisprudence of the ECJ, which also allows both direct and indirect purchasers to seek damages if they had to bear overcharges due to an illegal price arrangement at the upstream level.

At the same time, the court allowed the cartel members to invoke the passing-on defense, that is, to argue that the direct purchasers passed on the overcharge to the next market level and thus did not suffer any damage. In the court's view, the admissibility of the passing-on defense is a necessary corollary to the standing of indirect purchasers. The court clarified that the cartelists bear the burden of proof for the passing-on defense and, in this context, explicitly denied a general duty of the direct customers to provide information on the passed-on overcharge. If a cartelist is sued simultaneously by direct and indirect purchasers, however, it may ask the indirect purchasers to make available information at their disposal, which can help to substantiate a passing-on defense against the direct purchasers.

No Access to Leniency Files

On January 18, 2012, the Local Court of Bonn (Case no. 51 GS 53/09) denied a private claimant for cartel damages access to leniency applications and the supporting documentary evidence in the

FCO's file. This is the first decision of a national court implementing the landmark Pfleiderer judgment of June 14, 2011, in which the European Court of Justice (ECJ) had held that it is up to the national court to determine under the applicable national rules on a case-by-case basis whether and under what conditions access to leniency files must be granted. The ECJ had further ruled that in making that determination, the national court must balance the interests of the damage claimants against the necessity of effective cartel prosecution, for which leniency programmes are acknowledged to be significant.

In applying the criteria outlined by the ECJ and the German rules on access to files in criminal investigations, the Bonn court held that disclosure of the leniency documents would undermine the effectiveness of the FCO's leniency program since cartel members could be deterred from making leniency applications with self-incriminating information. On the other hand, the court concluded that the refusal of access to the leniency documents would not render it "impossible or excessively difficult" for the claimant to pursue its damage action. First, it would receive access to the non-confidential versions of all other documents in the FCO's file; and second, it could rely on the FCO's fining decision to prove the existence of a competition law infringement as the FCO decisions are binding in that regard for German courts in follow-on damage claims.

The decision at issue reflects the position of the FCO and is expected to have a significant impact not only inGermanybut also in other EU Member States where similar cases are pending or bound to come up.

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