

Reform of German Competition Act adopted. Overview on main amendments and outlook on new reforms.

On 31 March 2017, the German Federal Assembly approved the reform of the German Competition Act, following the preceding vote of the German Parliament. The new rules will most likely enter into force end of April 2017.

- The main amendments are: (1) the extension of group and successor liability for cartel infringements, (2) a new size-of-transaction test in German merger control and (3) new provisions implementing the EU cartel damage claims directive (see also our [Newsletter from January 2017](#)).
- Recent calls for a revision of the German *Ministererlaubnis* proceedings and the extension of the Federal Cartel Office's powers into consumer protection were rejected – except for some minor amendments.

A new consolidated version of the German Act Against Restraints of Competition (ARC) is available [here](#).

Further reforms are already in the pipeline. The German government put forward a proposal for a national “blacklist” for public tenders. The European Commission has tabled a draft directive to make national competition authorities more effective enforcers. Finally, there are intense discussions in Germany on the adaption of competition law to new developments in the area of digital platforms.

1 Reform of German Competition Act: Overview on main ARC amendments

- **Group and Successor Liability:** The new rules establish a liability of group entities. A company will be held liable for infringements by its (directly or indirectly) controlled entities provided that the breach was committed by the entity's management staff pursuant to Section 30(1) of the German Administrative Offences Act (*Ordnungswidrigkeitengesetz*).

The reform closes gaps in the area of successor liability. Both the universal legal successor and the economic successor will be liable for fines imposed on the predecessor company. This applies also in the event of a corporate restructuring irrespective of whether the initially

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sanctioned legal entity persists or not. Older cases could fall into a separate liability category (so-called *Ausfallhaftung*) with retroactive effect.

- **New size-of-transaction test in German merger control:** Concentrations will also be notifiable to the Federal Cartel Office, if the second domestic turnover threshold of € 5 million is not met, provided that the value of the transaction exceeds € 400 million and the target has significant activities in Germany.
- **Cartel damage claims:** The implementation of the EU cartel damages directive will facilitate cartel damage claims – essentially by extending the limitation period for bringing a claim to five years and with respect to providing supporting evidence. Plaintiffs are able to rely on a (rebuttable) presumption that cartels cause harm. Further, they have better access to information and documents in possession of the defendants, in particular via an independent right to seek disclosure. Leniency applicants are privileged. Generally, their submissions are excluded from disclosure and they are only liable for claims of their direct and indirect customers and suppliers. Therefore, they no longer bear the main risk of joint and several liability (see also our [Newsletter from April 2017](#) on the retroactive application of the EU cartel damages directive in key European jurisdictions).
- **Ministererlaubnis proceedings:** Basically, the ministerial proceedings stay as they are. However, the Federal Minister for Economics now has to decide within a new maximum time limit of 6 months on the submission – if he goes beyond the regular 4 months-period for authorising a concentration which had been prohibited by the Federal Cartel Office. A prolongation of the 6 months-period for a further 2 months is possible. Further, the right to appeal a *Ministererlaubnis* decision has been restricted. While under the previous rules third parties were admitted to appeal proceedings if their interests were substantially affected by the decision, they now have to claim the violation of individual rights.
- **Free of charge services:** Markets, for the purpose of competition law, do also include free of charge services. This will in particular have an impact on proceedings for abuse of dominance against companies active in digital markets.
- **Multi-sided markets and networks:** The assessment of market dominance in multi-sided markets and for networks shall in particular take into account the following criteria: indirect network effects, multi-homing, economies of scale, data access and competition in innovation.
- **Consumer rights:** The legislator did not opt for a comprehensive extension of the Federal Cartel Office's powers to the area of consumer protection. However, the Authority is entitled to carry out

sector inquiries and to participate in court proceedings in relation to consumer rights.

- **Press and broadcasting sector:** Cooperation agreements between press publishers (excluding editorial matters) are exempted from German competition law. The multiplying factor for turnover calculation of broadcasting companies is reduced to 8, therefore the same merger control thresholds apply to press and broadcasting companies.
- **Credit sector:** Concentrations between members of banking associations are exempted from German merger control if they do not provide own end consumer services.
- **Protection of medium-sized companies:** The prohibition of tapping, i.e. the attempt of market dominant companies to gain advantages without any objective justification (*Anzapfverbot*) and the prohibition of sales below costs will be further defined to become more effective. The prohibition of sales below costs for food retailing will apply without any time limitation.

2 Wrap up for the next round?

Further legislative proposals and reforms affecting German competition law in a medium to long term perspective are in the pipeline.

2.1 *National Register for Public Contracting*

On 29 March 2017, the German government published a draft proposal for a national register for bans on bids for public tenders. This will affect Sections 123 and 124 of the German ARC. Government bodies will have to consult the so-called blacklist before awarding contracts worth more than € 30,000. Companies can be banned from bids if they have committed specific offences such as bribery, money-laundering, the non-payment of social contributions or tax fraud. Also included will be employment and competition law infringements. The current draft generally provides for a listing of final judgments and penalty orders, however, competition law infringements will already be marked on the basis of a simple fine issued by the competition authority. A company registration will be automatically cleared after three to five years, or earlier if a company can prove “self-cleaning” measures (including compensation for damages).

2.2 *EU Directive Proposal to strengthen national competition authorities*

On 22 March 2017, the European Commission put forward a draft directive that aims to strengthen the enforcement of EU competition law by member states (see our [Newsletter from March 2017](#)). The draft determines that all national authorities in the EU shall use a similar toolkit and standards for competition law enforcement. These standards and tools refer to the authorities' independence in the decision-making process (no political/external influence) and the use of enforcement instruments, sanctions and leniency programmes. Generally, the German Federal Cartel Office's competences should be in line with the draft directive. However, the directive provides for more detailed rules on leniency programmes. In Germany, questions could arise with respect to dawn raids (e.g. prohibition of self-incrimination) and the scope of the

cooperation obligation for leniency applicants. So far it is not clear whether the directive will also apply to Germany's federal states' cartel authorities (*Landeskartellbehörden*), which could imply further changes at this level.

2.3 Competition Law for Digital Platforms

On 21 March 2017, the German Federal Minister of Economics presented a White Paper on Digital Platforms for further consultation. From a competition law perspective, the White Paper sets out concerns about network effects and concentration trends leading to market foreclosure, the undermining of contractual freedom following information asymmetries through control of data as well as the erosion of price mechanisms by free of charge services on two-sided markets.

The White Paper proposes a variety of measures for the implementation of a digital "ordoliberal" policy. These include the introduction of basic transparency and information duties for digital platforms, enhanced protection against illegal content (fake news) and a clear legal framework for the use of data (data sovereignty and data portability). The White Paper further suggests the establishment of a government agency, the "Digital Agency", which should be entitled to intervene in case of abusive behaviour of digital platforms irrespective of a dominant position. Parties will be able to claim infringements of the German Unfair Competition Law and German rules on General Terms and Conditions before the new agency in addition to civil courts. Interested parties now have four months to submit any comments. Once the consultation process is closed, the government will decide how to take the proposal forward.

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