Germany adopts competition law reform

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Following the Parliament's approval in early March, the Federal States Council, Germany's second legislative chamber, has approved the most recent reform to German competition law on March 31, 2017. The new law will enter into force upon publication in the German official journal, presumably end of April/beginning of May.
The reform was triggered by the requirement to implement the EU Damages Directive into national law, but the reform is much broader and also covers other areas of competition law. The law even includes some industry specific rules (*e.g.*, exception from the cartel prohibition under national law for certain types of press cooperation and exception from merger control rules for certain public savings banks deals). The most important general changes are highlighted below.

I. Damages

German law already provided for specific rules on damages for antitrust law infringements prior to the EU directive. The reform introduces the following main changes, largely mirroring the directive, but with some interesting deviations:

• A statutory, rebuttable ***presumption*** that cartel infringements lead to damages. (Already under existing law, the amount of damages may be estimated by the court.)

• The ***passing-on*** defense is available, but the defendant bears the burden of proof. Conversely, an indirect customer of a cartelist can rely on a rebuttable

presumption that the damages were passed on. The issue of potential overcompensation if cartelists are sued by direct and indirect customers is not specifically addressed.

• ***Joint and several liability*** of cartel members: the concept already exists, and the reform provides limitations in line with the directive: immunity applicants are generally only liable to their own (direct or indirect) customers; and cartelists that settled litigation with a customer are relieved from joint liability for the remainder of the damages (caused by non-settling cartelists) in that case (and protected against related contribution claims), in both scenarios only unless the other cartelists cannot pay. SME may also benefit from limitation of liability to their own customers under certain circumstances.

• ***Disclosure***: the claimant has a material claim for disclosure, even prior to litigation. N.B.: this goes well beyond the directive's procedural requirement that a court can order disclosure. In addition, the claimant can use interim relief proceedings for disclosure of a final decision by the European Commission or another national competition authority within the ECN.
The defendant has a disclosure claim against the claimant regarding the passing-on defense, but only during ongoing litigation. In addition to the boundaries for disclosure set out in the directive (relevant, reasonably specific and proportionate in scope; leniency and settlement statements excluded) disclosure costs are to be reimbursed by the other side.

• ***Statute of limitations*** is increased from three to five years.

• ***Temporal applicability***: the new law only applies to future damages claims, *i.e.*, only those arising after the reform has entered into force in Germany, with the exception of the disclosure obligations which may apply to claims arisen prior to that, provided that damages litigation has not started prior to December 26, 2016.

II. The notion of market definition and market power in light of digitization

In the future, performances rendered can be treated as a "market" even if no payment is involved. This aims, *e.g.* at covering unpaid services or content of (digital) platform markets (search engines, comparison websites, information services, entertainment websites, *etc*.), which under previous caselaw could not be assessed as separate markets. The change brings German competition law largely

in line with standing EU practice.

For assessing a company's market power, in particular in two-sided platform markets, the law clarifies that the following aspects are relevant: direct and indirect network effects, the extent of users' parallel use of several services (multi-homing) and switching costs, the company's economies of scale in combination with network effects, and the company's access to competitively relevant data as well as innovation-driven competitive pressure.

III. Merger control

New alternative merger control threshold. If the parties meet the combined worldwide turnover threshold (> €500 million), one party meets the domestic turnover threshold (>€25 million), but neither the target nor any other party meets the second domestic turnover threshold (>€5 million), a transaction will nevertheless be notifiable if (i) the transaction's size exceeds €400 million and (ii) the target has significant activities in Germany. This new threshold aims at catching acquisitions of start-ups without any or significant turnover in Germany – inspired by the Facebook/Whats's App transaction, which would not have been notifiable there. However, the threshold does not only apply to digital markets, but is of general nature, *i.e.*, it may also apply to any other area in which start-ups play a role, notably pharmaceuticals, medical devices, *etc*.

Streamlined ministerial authorization proceedings. German law allows the Minister of Economics to authorize a merger prohibited by the FCO based on overriding public interest considerations. In the future, the duration of proceedings is limited to six months, with the possibility to extend the review period by two months upon request of the merging parties. In addition, third parties will only have standing to appeal a ministerial authorization if their rights might be harmed – mere participation in the proceedings is not sufficient any longer. These changes follow the most recent, controversial ministerial authorization proceedings concerning grocery retail merger *Edeka/Kaiser Tengelmann*.

IV. Cartel Sanctions: parental liability and legal succession

The reform will allow fining a parent company for antitrust infringement of its controlled subsidiary in addition to fining the subsidiary (joint and several liability). Previously, the parent company could only be sanctioned if it failed to prevent the subsidiary's infringement and thereby violated its own supervisory duty, which was difficult to establish. The reform aligns the approach to sanctions with the EU law

concept of single economic undertaking.

The reforms also closes previously existing gaps of liability in case of legal succession, mainly regarding certain asset deals or internal split or spin offs. This will close the so-called “sausage gap” (internal restructuring used in the sausage cartel). It is an open question whether this may lead to parallel parental liability in civil damages litigation.

V. New consumer protection powers for FCO

The FCO will obtain limited powers regarding consumer protection: it can carry out sector inquiries or inquiries into particular agreements across sectors in case of suspected significant, repeated and continuous infringements of consumer protection rules, affecting multiple consumers. It can also act as amicus curiae in related litigation. The FCO, however, will only have secondary power, *i.e.*, to the extent that no other federal agency is competent to deal with these cases. It will be interesting to see how this plays out with a potential future digital antitrust agency envisaged by the Ministry of Economics.