

Transaction-value merger threshold soon to be in force in Germany - update on the 9th ARC revision

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Werner Berg, Lisa Weinert (Baker McKenzie)

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On 31 March 2017, the German Federal Council (Bundesrat) has voted in favour of passing the ninth amendment to the Act against Restraints of Competition (ARC) (Gesetz gegen Wettbewerbsbeschränkungen). According to the 31 March plenary report^[1], the draft law is now about to be presented to the president for signature and will enter into force on the day subsequent to its proclamation - **which may likely be the case in the course of April 2017.**

On 9 March, 2017, the German Federal Parliament (Bundestag) had also passed the amendment, just one day after the committee for economy and energy had decided on the changes that will have an impact on all aspects of German antitrust law, in particular with regard to damage claims, but also regarding merger control notifications.^[2]

The reform has originally been driven by the requirement to implement the EU Damages Directive, Directive 2014/104/EU, into national law and to eliminate certain discrepancies between EU and German cartel enforcement provisions. However, the more recent debate about the amendment has mainly touched upon the amendments relating to so-called “big data” issues and challenges that come with the increased use of data in today’s economy. This includes the definition of

markets without the requirement of consideration for service providers (big data and platform markets) and the implementation of a new, additional transaction-value based threshold for concentrations that may not be caught by the traditional thresholds due to the small actual size in value of the target company. These amendments are now communicated as the main driver of the changes.

As an overview, the three most significant changes the ninth amendment is about to bring along are the following:

- new transaction-value based threshold for transactions that need to undergo review by the German Federal Cartel Office (Bundeskartellamt);
- specification of “market power” in the context of big data and network effects in digital markets;
- changes to rules regarding cartel damage claims in order to implement the Damages Directive.

Newly included as a result of the committee consultations are now certain rights of the Bundeskartellamt based on consumer protection laws: When the new law becomes applicable, the Bundeskartellamt will also be empowered to carry out sector inquiries based on possible infringements of consumer protection laws; in addition, the Bundeskartellamt will be entitled to participate in civil law proceedings relating to consumer protection laws as an *amicus curiae*.

Another change worth mentioning are certain procedural amendments to the ministerial approval, which are intended to streamline the process of obtaining exceptional approval for transactions prohibited by the Bundeskartellamt.

The new transaction-value based threshold

Until now, the German merger control thresholds follow a purely turnover-based approach which is similar to the European merger notification test. Concentrations where both parties have combined worldwide turnover of more than EUR 500 million and, in addition, one party to the transaction has German turnover of more than EUR 25 million whilst another party has more than EUR 5 million, need to be notified to the BKartA for clearance.

The new threshold, which will be met provided that the transaction value exceeds

EUR 400 million and the target has “significant” business activities in Germany (“local nexus”), applies in addition to these thresholds and reads as follows:

“(1a) The provisions on the control of concentrations shall also apply, where

- 1. [the combined aggregate worldwide turnover of all undertakings concerned exceeds EUR 500 million],*
- 2. in Germany, in the last financial year preceding the transaction,*
 - a) one of the undertakings concerned had turnover of more than EUR 25 million and*
 - b) neither the target nor any other undertaking had turnover of more than EUR 5 million respectively,*
- 3. the value of the consideration paid in return for the transaction is more than EUR 400 million and*
- 4. the target according to No. 2 is significantly active in Germany.”*

The first two requirements are equal to those of the traditional, turnover-based threshold which will continue to be the cause for most merger cases. Under the new threshold, which will only apply if the third requirement of the traditional test is not met (see para 1a, No 2b), this third requirement can however be replaced by the new “transaction value” test, consisting of two limbs: the first limb, the “transaction value” according to Nr. 3, needs to be determined based on the consideration for the target company (paid in any form), including assumed liabilities. The local nexus test according to Nr. 4 is fulfilled if the target carries out activities in Germany that might monetize sooner or later, i.e. a high number of German users in case of a service or substantial R&D in case of research companies and start-ups.

The purpose of this adjustment is to capture deals that – despite the low turnover figures of the target company – may have a significant impact on competition in the future. One example provided for this is a pharma R&D company that has just invented a healthcare-changing pill being acquired by a big pharma company in

order to realize and sell the medical product. Another is a case where huge amounts of data that have been collected by a free-of-charge network which shall be turned into financial benefits by the acquirer through commercialisation of the data (Facebook's acquisition of WhatsApp that almost escaped full review under the EU merger regulation is usually mentioned as the underlying key case). Other sectors in which the new thresholds may become relevant apart from pharmaceuticals and digital economy are basic / heavy industries, the energy sector as well as other innovation-driven economic areas the future of which are heavily depending on innovative inventions and game-changing developments.

Side note 1

As a result of the discussions in the legislative meetings of the German Federal Parliament, a new exception from merger control has been introduced with regard to concentrations between particular service providers who are members of associated banking groups. Provided that these service providers fulfil particular criteria outlined in Sentence 3 of § 35 ARC[3], they are exempted from merger control in order to stabilize the German fiscal system through cost efficiencies and synergies that, among others, can be achieved through mergers.

Specification of “market power” in the context of big data and network effects in digital markets

The editorial amendments to Section 18 ARC, clarifying that also non-remunerated services can constitute a market, aims to adapt the ARC to the digital sector and to settle dissensions upon the antitrust relevance of certain digital free-of-charge offers. The amendments include the introduction of criteria which are particularly relevant for the assessment of such markets, i.e. direct and indirect network-effects, multi-homing and switching efforts for users, economies of scale based on network effects, access to data, or innovation-driven competitive pressure. However, these amendments are not bringing along significant change, as they mainly aim to specify what is already part of the practice in data-related cases at the Bundeskartellamt.

The changes based on the damages directive

The ninth amendment improves the position of claimants in follow-on damages cases by changing certain procedural and substantive provisions relating to damage claims under German competition law. It seeks to harmonize cartel damage rules across the EU and is based on the EU Damages Directive which is in force since 2014. Among others, the amendments include:

- rebuttable presumption of harm: cartel infringements generally cause damages – no need for claimant to prove existence of damage as well as causal link in case of a cartel decision issued by an authority against the defendant – claimant “only” needs to prove the amount of damages suffered;
- specification and facilitation of passing-on defence and claims from indirect buyers (presumption that direct purchaser passed on the overcharge if indirect purchaser can prove supply with cartelized products);
- extension of limitation period for damage claims to 5 years (previously 3);
- facilitation of discovery for the purpose of civil damages litigation: both parties can request access to the other party’s internal documents provided that they can argue to need these documents for the specification of damages amounts or passing-on (subject to proportionality test);
- possibility to settle damage claims becomes easier due to reduced likelihood of contribution claims of other cartelists.

The new provisions apply for claims that have accrued after 26 December 2016, except for the changes in rules on disclosure which also apply for claims that have accrued earlier, provided that the claim had not been raised until 26 December 2016.

The Bundeskartellamt and Consumer Protection

A further novelty based on the 9th amendment will be the role of the Bundeskartellamt as regards consumer protection. Under the new ARC, the Bundeskartellamt will be entitled to carry out sector inquiries or participate in civil law proceedings as an *amicus curiae* based on infringements of consumer protection laws which may impair the interests of many consumers and therefore

are of significant interest to the public. According to the legislative proposal, this should in particular apply in case of infringements of Sections 8 – 10 of the German Act against Unfair Competition. An example mentioned is the use of unlawful terms & conditions, which may have an adverse impact on many consumers. The participation right in civil proceedings will be excluded for individual claims or where another specific authority is competent (i.e. the Federal Network Agency in case of unauthorized calls).

Other envisaged changes

The revision also includes several other changes and amendments, such as:

- amendments to cartel prohibition enforcement so that company groups cannot evade monetary penalties through restructurings;
- particular rules for the press sector which enable stronger cooperation between publishers;
- complementation of procedural provisions regarding the ministerial approval in order to speed up procedure;
- exemption of SMEs and the applicant in leniency cases from joint and several liability for damages;
- harmonization of parental liability under German law with EU provisions;
- increased possibility for cooperation and exchange of information between national antitrust authorities and other agencies, such as in particular the data protection authorities;
- sector-specific exemption for cooperation among publishers in the press sector with regard to non-editorial cooperation.

Side note 2

As a result of the expedited procedure against the ministerial approval in EDEKA/Tengelmann,^[4] the legislative discussions have led to certain amendments with regard to the exception foreseen under German law for mergers that have been blocked by the Bundeskartellamt due to restraints of competition, but which are otherwise beneficial for economy as a whole (Section 42 ARC, Ministerial Approval).

Among others, additional reporting obligations and deadlines will be introduced to streamline the procedure and provide more transparency, the most crucial one being the deemed dismissal of the application provided that the approval is not granted within 6 months.[5] In addition, the role of the German Monopolies Commission will be strengthened: a deviation from its opinion must be particularly reasoned by the Minister. Certain consultation obligations will also apply in the area of television broadcasting.[6] The Ministry is asked to issue guidelines on the new ministerial approval procedure (new Section 42 para 6).

[1] Available via [http://www.bundesrat.de/SharedDocs/drucksachen/2017/0201-0300/207-17\(B\).pdf?__blob=publicationFile&v=1](http://www.bundesrat.de/SharedDocs/drucksachen/2017/0201-0300/207-17(B).pdf?__blob=publicationFile&v=1) (German only).

[2] The legislative documents of the German Federal Parliament relating to this ninth revision of the ARC can be found via <http://dipbt.bundestag.de/extrakt/ba/WP18/772/77250.html> (German only).

[3] The service providers need to fulfill the following criteria: (1) be an undertaking which is member of an associated banking group according to Section 8b paragraph 4 sentence 8 of the German Corporate Income Tax Act; (2) provide services predominantly to undertakings which are members of their associated banking group and (3) not have own end-customer relationships when carrying out the provision of services according to (2).

[4] OLG Düsseldorf, Decision of 12 July 2016, VI-Kart 3/16 (V)

[5] According to the protocol of the final legislative meeting, the parties may apply for a prolongation of up to 2 months.

[6] As regards television broadcasting through private providers, the ministry will have to obtain the opinion of the Commission on Concentration in the Media ("KEK") before making a decision.