

# Proposed amendments to the German Act Against Restraints on Competition

On July 1, 2016, the German Federal Ministry for the Economy published its draft for the ninth amendment to the German Act Against Restraints on Competition (“ARC”).<sup>1</sup> The draft covers three main areas: (i) changes to the merger thresholds and minor adjustments to the substantive test, (ii) changes to address and expand group liability for cartel offenses under German law, and (iii) amendments to implement the EU private damages directive.<sup>2</sup>

The draft will now be debated by the German Parliament and one should anticipate implementation by the end of the year to ensure timely implementation of the EU private damages directive, which is due no later than December 27, 2016.<sup>3</sup>

## 1 | Amendments to the German merger thresholds and the substantive test

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The draft proposes two main changes to the German merger control rules: (i) a new merger review threshold in Section 35 ARC and (ii) clarifications in the substantive test in Section 18 ARC.

<sup>1</sup> See (last checked July 22, 2016): <http://www.bmwi.de/DE/ThemenWirtschaft/Wettbewerbspolitik/wettbewerbsrecht,did=162818.html>.

<sup>2</sup> There are also some smaller changes and clarifications, in particular an antitrust exemption for certain print media, which are not discussed here.

<sup>3</sup> Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, of December 5, 2014, pages 1-19.

A German merger filing is required if the global revenues of all parties to a merger are EUR 500 million or more or if one party has revenues of EUR 25 million or more in Germany and one other party has revenues of EUR 5 million or more in Germany. The draft proposes to include a new Section 35(1)(a), amending the German merger threshold to capture transactions where the combined global revenues are EUR 500 million or more, one party has revenues in Germany of EUR 25 million or more, the value of the transaction is EUR 350 million or more, and at least one other party is active in Germany or plans to be active in Germany. The nexus requirement in the last prong is not further defined, but one may assume that revenues, even if below EUR 5 million or an intent to start selling to German customers, or any other potential connection to Germany, will be considered sufficient.

One may recall that in 2009, the ARC threshold, which could be triggered by one party alone, was amended to require that a second party have revenues of at least EUR 5 million in Germany, which significantly reduced the number of transactions that were notified each year. However, the Federal Cartel Office considered that it should have had an opportunity to review some transactions (or at least one: Facebook/WhatsApp), especially in the technology sector, where the EUR 5 million revenue threshold was not met. The draft accommodates this desire. The change is

somewhat unfortunate and is likely to effectively erase the positive effect of the previous amendment and lead to a significant increase in merger notifications.

The draft also amends the substantive test in Section 18 ARC, which applies to the assessment of transactions as well as to the assessment of unilateral conduct. Section 18(2)(a) states that one may consider that a market exists even if services are provided free of charge. This is rather controversial, because it subjects free offerings to the antitrust rules.<sup>4</sup> It will be especially important in the assessment of new business models. Section 18(3)(a) clarifies that the assessment of multisided markets or networks should include an analysis of the parallel use of multiple services and switching costs, and the advantages of size in connection with network effects, access to data and innovation competition.

## 2 | Expansion of liability of groups for cartel fines under German law

The draft proposes to amend Section 81 ARC to clarify and expand the liability of corporate groups for cartel offenses under German law. Corporate liability for antitrust offenses was previously assessed based on the general rules applying to antitrust offenses in Germany. There were several cases, namely relating to the insurance and the sausage cartel cases, where cartel participants escaped fines through corporate restructuring measures. The German Federal Supreme Court requires in its consistent practice that for a succession to liability by way of a merger, the original entity and the new entity must be “almost identical.” Where the cartel participant is merged into a significantly larger unit this is not the case, and so the cartel offender disappears and cannot be fined by

the Federal Cartel Office.<sup>5</sup> The amendment addresses this (actual or perceived) enforcement gap and creates a special liability regime for administrative offenses that are subject to the ARC.

## 3 | Implementation of the EU private damages directive

Finally, the draft significantly expands the cartel damages provisions of Section 33 ARC. It includes amendments to implement the EU private damages directive and clarifies a range of previously unaddressed or controversial issues, such as access to files, settlements, joint and several liability, etc. The amendments include a rebuttable presumption that a cartel agreement has caused damages, the right of the judge to estimate the damages and the obligation to pay interest on damages claims, detailed rules on the assessment of the passing on of cartel damages, including a rebuttable assumption in favor of the indirect purchaser that the damages were passed on to it, joint and several liability of cartel participants, with exceptions for small companies and leniency applicants, rules addressing the effect of a settlement in the context of joint and several liability, extensive provisions detailing the access of a potential claimant to the file, documents and other evidence, and, last but not least, extension of the statute of limitations from three to five years as well as detailed provisions for start, tolling and expiration of the statute of limitations.

<sup>4</sup> See OLG Duesseldorf, Judgment of January 9, 2015, VI-Kart1/14 (V); Wiedmann/Jaeger, *Kommunikation & Recht*, 2016, 217ff, Bundeskartellamt gegen Facebook: Marktmißbrauch durch Datenschutzverstöße.

<sup>5</sup> See Federal Supreme Court, Decision of August 10, 2011, KRB 55/10 (insurance); see also Federal Supreme Court, Decision of December 16, 2014, KRB 47/13 (roof tiles); Monopolkommission, *Sondergutachten, Criminal Sanctions for Antitrust Offences*, BT-Dr. 18/7508, page 4 (Nr. 1) (sausages).