ALLEN & OVERY

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MODERNISATION ON ALL FRONTS

Today's Adoption of 2017 Amendments to the German Act against Restraints of Competition

THE MOST IMPORTANT CHANGES AND THEIR PRACTICAL IMPACT

The EU antitrust damages directive (2014/104/EU) (the Damages Directive) should in fact have been transposed into national law by the end of 2016—however, the ninth amendment to the German Act against Restraints of Competition (GWB), correspondingly overdue, has only now been adopted. The new provisions, which are based on the Damages Directive, primarily **facilitate the bringing of actions for damages by victims of anti-competitive conduct**. However, legislators have also used this as an opportunity for a broad range of additional modifications. Areas of particular focus include closing the **legal loophole in relation to liability for fines** and strengthening enforcement powers in view of the challenges of **digitalisation**.

For the most part, the new provisions come into force with **retroactive effect as of 27 December 2016**. Yet the new substantive law on damages is only applicable to claims for damages arising after 26 December 2016 (with the exception of the provisions on limitation, which apply to all pre-existing claims that are not already time-barred); similarly, the new procedural rules, including the (substantive) claims for disclosure of evidence and exchange of information, are only applicable to actions filed after 26 December 2016. As a matter of fact, the new law will take effect on the day after its publication in the Federal Law Gazette, most likely at the beginning of April.

In the following alert we briefly summarise the most **significant changes** and comment on their **practical impact**.

Content

Key Changes

1. MERGER CONTROL: INTENSIFICATION FOR THE DIGITAL ECONOMY; MODERATION FOR BROADCASTING AND COOPERATIVE / SAVINGS BANKS SERVICES PROVIDERS

The scope of merger control has been extended to incorporate certain transactions that until now have not been notifiable due to a failure to meet the turnover thresholds. Going forward, **acquisitions of start-up companies with particularly high purchase prices** will be subject to review by competition authorities. The non-notifiable **Facebook/WhatsApp** acquisition for a purchase price of EUR 19 billion was an **important trigger** for this amendment. In the view of legislators, a remarkable transaction value may reflect significant competitive potential. In the future, a concentration involving total worldwide turnover of EUR 500 million and domestic turnover of one of the undertakings concerned of less than EUR 5 million will still be notifiable provided that: (a) one other undertaking concerned achieves domestic turnover of more than EUR 25 million; (b) the value of the consideration is more than EUR 400 million; and (c) the undertaking being acquired is active to a considerable extent on the domestic market.

By contrast, the regulation of **broadcasting mergers**, following that of press mergers, has been **relaxed**; going forward, only eight times turnover rather than twenty times turnover will be taken into account for turnover threshold purposes. At the same time, the amendment provides for an exception to the prohibition on anti-competitive agreements in relation to cooperation between press publishers (s.1 GWB) insofar as the collaboration strengthens the economic basis for competition between media platforms and no collaboration in the editorial sphere occurs. Since no such exception is established under EU law, the question of the effect on trade between Member States will be decisive in determining the applicability of this derogation.

As for **digitalisation**, the amendment codifies in law the decisional practice of the European Commission (the EC) (Decision of 03.10.2014, COMP/M.7217 – Facebook/ WhatsApp) and the Federal Cartel Office (the FCO) (e.g. Decision of 22.10.2015, B6-57/15, WuW 2016, 32 – Online-Datingplattformen) in the recent past: in particular, the fact that a service is provided free of charge does not defeat the assumption that a market for that service exists (s.18 para 2(a) GWB, new version). This legal clarification is targeted at two-sided and multi-sided markets, or so-called '**platform markets'**. Classic examples of such markets are social media networks, most notably Facebook; while private users can use its platform for free, it is financed by payments from the advertising industry.

Alongside the classic market power criteria, **additional factors for assessing market power** will be taken into account in future when determining market presence in the **digital sector**. These include: direct and indirect network effects; parallel use of multiple services and switching costs; economies of scale in the context of network effects; access to competitively sensitive data; and competitive pressure driven by innovation. Again this tracks the decisional practice of the FCO.

There are also minor amendments affecting other areas of merger control law:

Given the current low interest rate environment and correspondingly poor financial performance in the credit industry, concentrations between members of **savings or cooperative banking associations** (e.g. the Deutscher Sparkassen- und Giroverband (DSGV), Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)) will in
future be beyond the scope of merger control to the extent they look to pool back office services. This relates to so-called transaction management (e.g. payment and securities transaction processing) as well as internal administration (e.g. finance and accounting).

The derogation does not apply to central banks and giro banks.

In order to improve the **ministerial approval procedure** a maximum time limit of six months will apply going forward; if this time limit expires without a decision, the application for ministerial approval will be deemed rejected (s.42 para 4(2) GWB, new version). The time limit may be extended by up to two months on request. The ministry will issue supplementary procedural guidelines in due course.

2. PUBLIC ANTITRUST ENFORCEMENT: TIGHTENING OF GROUP LIABILITY PROVISIONS AND NEW CONSUMER-ORIENTATED POWERS OF ENFORCEMENT

By way of the legislative amendment, the liability of undertakings for administrative fines has moved towards '**group liability'** by the adoption of the European concept of what constitutes an 'undertaking'. Liability on the part of a controlling group parent company for its trading subsidiary requires that the companies formed an economic unit at the time of the cartel infringement and the parent exercised, directly or indirectly, decisive influence over its subsidiary (s.81 para 3(a) GWB, new version). With regard to the latter requirement, a majority shareholding gives rise to a presumption of decisive influence in European law. The constitutionality of this new provision is disputed.

A central concern for legislators was also to **eliminate a well-known legal loophole**, which was already exploited for quite a while, but first came to prominence in the financial press during the 'processed meat cartel'. Namely, undertakings should no longer be able to circumvent liability for administrative fines by restructuring their business. To this end, the option is now open to the competition authorities to impose a fine on the legal or economic successor of a dissolved company, whereas previously only the legal successor could be implicated and only in cases involving a prevailing economic identity.

Since the specific prohibition on retroactive effect (Article 103(2) of the German Constitution) precludes the law (as amended) from providing grounds for a prohibition or aggravation of cartel offences that have already ended by the time the amendments come into force, **contingent liability** will apply during the transitional period. This means that controlling and successor companies may be found liable if, after the initiation of administrative fine proceedings, the imposition or enforcement of a fine against an undertaking that is prima facie liable under s.30 OWiG is frustrated by a corporate restructuring or reorganisation.

Finally, in the event that other federal authorities do not have jurisdiction, the FCO may **investigate individual economic sectors or types of agreements in the future on the basis of a substantiated suspicion of considerable, persistent or repeated violations of consumer protection provisions** which, by their nature or scope, affect a large number of consumers. This provision supplements the existing power of the FCO to conduct sector investigations. Further, the FCO can now also participate as *amicus curiae* in **civil law disputes relating to consumer protection**, rather than being restricted to participating only in antitrust disputes.

3. PRIVATE ANTITRUST ENFORCEMENT: TRANSPOSITION OF THE DAMAGES DIRECTIVE

Ultimately, the amendment implements the EU Damages Directive, the central aim of which is the **enhancement of private antitrust enforcement**. The amendment establishes special procedural rules for antitrust actions, which is an entirely new feature of the German legislative framework. The purpose of this is to facilitate the bringing of damages actions by consumers who have been subject to anti-competitive pricing for goods and services.

This is provided for by a whole range of new procedural and substantive provisions:

(a) Claimant-friendly provisions

First, by **restricting costs arising from third-party interventions to the value of the main proceedings**, greater foreseeability is established with regard to the cost risks associated with a claim for damages. This reduces the potential burden on the party claiming damages.

The notion that cartels cause higher prices, which until now has served as *prima facie* evidence rule, has been elevated to a **legal presumption** that all horizontal infringements cause harm (i.e. no longer only price and output-fixing cartels, as established by case law, but also information exchange (to the extent it concerns future market behaviour), market sharing and collective boycotts). This is a rebuttable presumption; however, precisely how it is to be rebutted will only become clear through legal practice. This presumption does not address whether the claimant has suffered loss as a result of the infringement; nonetheless, going forward a presumption introduced by the courts should take effect, pursuant to which the goods or services purchased by the claimant are also deemed to have been affected.

The amendments also address the so-called '**passing-on' defence**. This concept refers to a defence to claims for damages where it is submitted that direct purchasers have passed on the anti-competitive price increases directly to their own customers, and have subsequently suffered no damage themselves. Going forward, the loss suffered as a result of the overcharge will be presumed to have been suffered by the indirect purchasers. This considerably reduces the burden on potential claimants, although the presumption can be undermined by credible evidence on the part of the defendant that the overcharge was not in fact passed on. Whether and to what extent this will affect claims brought by direct purchasers remains to be seen.

(b) Publication of decisions, disclosure claims and rights to information

It is only with access to information regarding cartel infringements and the damage they have caused that potential claimants can establish their legal right to damages (which has been acknowledged since 2005). To this end, the **FCO's fines decisions will be published** from now on. This has long been the case for EU decisions (both in the form of non-confidential versions and 'summary decisions'), whereas in Germany press releases and case reports have been issued in the place of the actual decisions. This led to protracted requests for information and file inspections on the part of victims, with such proceedings in some cases lasting for more than a year. The publication practice of the FCO has now been brought in line with practice at the EU level.

Furthermore, legislators have provided potential claimants with a **far-reaching right to the disclosure of evidence and exchange of information**. This right shall only be precluded where the disclosure or provision of information is deemed to be disproportionate. Settlement declarations and leniency applications are exempt from disclosure. This right can already be asserted before the action has been brought in order to aid in the preparation of a claim for the recovery of damages. To ensure effective enforcement, the amendment provides for a catalogue of procedural rules which include, for example, the possibility of an interim injunction where this concerns the disclosure of the competition authority's decision (which will be binding for the purposes of the damages litigation). This interim injunction may be granted without proof of the conditions traditionally required for such an order.

(c) Limitation

The standard limitation period has been extended from three to **five years**. This will also apply to pre-existing claims that are not yet time-barred. This allows undertakings affected by anti-competitive conduct more time to bring actions for damages. Further, the limitation period will not start to run until the end of the infringement, which will considerably increase the length of the absolute limitation period, particularly in relation to long-term cartels.

Going forward, the **suspension of the limitation period** will only cease **one year after the definitive or legally effective termination of proceedings** (rather than six months thereafter). The existing legal position relating to the beginning of this suspension period has also been clarified. Accordingly, the suspension of the limitation period begins when either the competition authority, courts acting with such authority or the EC take measures (such as the acknowledgement of a leniency application or the application for a search warrant) relating to an investigation of a possible violation of national or European competition law, even though no

formal proceedings have been instituted. A claim for the exchange of information or disclosure of evidence will also lead to the suspension of the limitation period.

The **limitation period for contribution claims** among joint and severally liable cartelists will now only commence on satisfaction of the damages claim. This means recourse claims against cartelists who are also liable for damages can no longer face limitation where the claim only materialises through the actions of a third party (i.e. where damages claimants exhaust their own limitation period).

(d) Whistleblower privilege

A key feature of the amendment to the GWB is the **privilege accorded to whistleblowers**. In future not only will declarations by a whistleblower enjoy absolute privilege from disclosure (cf. the position above), but a whistleblower will also only be liable in damages to its own direct or indirect customers. As against other victims, a whistleblower will only face contingent liability in the event that these victims cannot obtain full redress from the other cartelists. These provisions are also intended to affect rights of recourse among cartelists. The reason for this is to ease concerns among potential whistleblowers about imminent actions for damages and to ensure that the willingness to apply for leniency is maintained, notwithstanding the increasingly claimant-friendly legal environment.

With regard to the liability for damages, the same privilege is introduced for small and medium-sized enterprises (SMEs).

Outlook

The extension of liability for administrative fines in relation to group companies is expected to lead to a **marked tightening of liability**. From now on, the following principle will apply to German competition law: "Parents are responsible for their children". The new right to the disclosure of evidence and exchange of information should gain considerable practical significance. A further increase in the number of antitrust damages actions is expected as a result of the bundle of claimant-friendly provisions introduced by the amendment. In the future, cartel victims will have much more time to bring claims for damages. At the same time, the new provisions on the 'passing-on' defence will lead to more complex proceedings. The reaction in practice to the increased risks of administrative fines and liability for damages is likely to involve greater emphasis on preventative compliance measures. Conversely, we expect that the **new merger notification threshold will be met only in rare cases** and this feature will therefore not gain great significance. Nevertheless, increased awareness is necessary going forward for transactions involving a purchase price of above EUR 400 million.

Ultimately, it may be a case of "**one amendment brings two**": the EC has just published a proposal for a **Directive to empower competition authorities of the Member States to be more effective enforcers** (COM (2017 142/2)), aimed at eliminating national barriers in the decentralised enforcement of EU competition law. With this proposal, the EC is definitively abandoning its policy of restraint in the harmonisation of procedural law across different Member States. This is because it takes the view that, despite more than 850 national enforcement decisions across the EU since 2004 (when Regulation 1/2003 on competition came into force), national competition authorities still do not have all the necessary means for effectively enforcing EU competition law, for example the power to search data carriers such as laptops, mobile phones and tablets. Many of the provisions in this proposed Directive are **already in force under German law**. Nonetheless, if the EC succeeds in im-

plementing its proposals then **further procedural developments** will come before the German legislators, for example regarding the **EU-wide coordination of leniency programmes** or **foreign enforcement of administrative fines within the EU**. The next amendment appears already on the horizon.

Seminars & Events

SEMINARS AND EVENTS ORGANISED BY ALLEN & OVERY IN GERMANY

27 April 2017 | starting at 18.30 h | Düsseldorf

In dialog with Allen & Overy: Spring reception 2017

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Your contacts

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