ARNOLD & PORTER LLP

ADVISORY

January 2012

Recent Developments in German Competition Law

Since our last Advisory on the subject in July 2011,[1] there have been again major developments in German competition law. At the legislative level, the German Federal Ministry of Economics and Technology has presented a draft bill for a major revision of the German Act against Restraints of Competition (ARC), which is intended to align the German competition regime even closer to the EU rules. Furthermore, in a landmark decision, the Federal Court of Justice clarified key aspects of the legal framework for private cartel enforcement in Germany by recognizing the standing of indirect purchasers and the admissibility of the passing-on defense. In addition, the Federal Court of Justice also confirmed the strict limits of successor liability in cartel cases under German law, which are in stark contrast to the approach at the EU level. Finally, the German Federal Cartel Office (FCO) has continued with its aggressive prosecution of cartels, adopting a significant number of fining decisions against companies and individuals.

Legislative Initiatives and Administrative Developments

Draft bill for the 8th amendment of the ARC. On November 10, 2011, the German Federal Ministry of Economics and Technology published its draft bill for the 8th amendment of the ARC (Draft Bill). The Draft Bill is envisaged to enter into force in January 2013. The suggested changes are significant and relate to all areas of competition law. The most important proposals can be summarized as follows:

Merger control:

Introduction of the SIEC test. The Draft Bill foresees the introduction of the so-called “significant impediment of effective competition” (SIEC) test as the substantive merger review standard. Mirroring the approach taken in the EU Merger Control Regulation (EMCR) since 2004, the current test, which refers to the creation or strengthening of a dominant position, will survive as an example of the SIEC test. With this change, the Draft Bill aims at filling a perceived gap of the current regime, under which it is not possible to prohibit certain transactions involving unilateral effects without triggering the relevant dominance thresholds. However, the experience with the corresponding amendment of the EMCR suggests that the practical impact of this revision will be quite limited.

Increased threshold for presumption of single-firm dominance. The Draft Bill provides for an increase of the market share threshold triggering a rebuttable presumption of single-firm dominance from one-third to 40 percent—the same figure as mentioned in the European

1 *See* Arnold & Porter LLP, “Advisory: Recent Developments in German Competition Law” (July 2011), *available at:* http://www.arnoldporter.com/public_document.cfm?id=17762&key=26C2.

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Commission's Horizontal Merger Guidelines. Importantly, however, the controversial thresholds for the presumption of collective market dominance—three or fewer undertakings reaching a combined market share of 50 percent and five or fewer undertakings reaching a combined market share of two-thirds (Section 19(3) ARC)—will remain unchanged.

Retroactive validity of non-notified transactions. The implementation of a transaction in disregard of a notification obligation under German merger control regime leads to the invalidity of the implementing steps (Section 41(1) ARC). According to the FCO's current practice, a post-closing notification in this scenario is dealt with under the rules for divestiture proceedings and thus is not subject to any deadlines. The Draft Bill does not alter this approach irrespective of wide-spread criticism; however, it clarifies at least that the closing of the divestiture proceedings due to the absence of competitive concerns retroactively cures the invalidity of the implementation measures (though the parties will still be subject to administrative fines for premature implementation).

Anti-competitive behavior:

Limited access to leniency files. In its landmark *Pfleiderer* judgment of June 14, 2011,[2] the European Court of Justice (ECJ) held that it is for the national courts to decide under applicable national rules whether and, if so, under what conditions access to leniency applications and the related documentation must be granted to private plaintiffs in the context of follow-up damage actions. In reaction to this judgment, the Draft Bill provides that access to leniency applications and the corresponding evidence in the FCO's file shall be denied to private plaintiffs and other interested third parties; only the remainder of the leniency file (such as the index, as opposed to the indexed documents themselves) shall be accessible. This proposal is the subject of controversy and debate. On the one hand, such strict access rules will render it more difficult for potential plaintiffs to prepare follow-on damage actions; but on the other hand, a greater disclosure arguably would undermine the readiness of cartelists to submit leniency applications, which have been the key driver of cartel enforcement in Germany in recent years. It remains to be seen whether the proposal in the Draft Bill will be maintained, not least in view of a recent request by the Austrian Cartel Court for a preliminary ruling of the ECJ on the strict conditions governing the access to leniency files in Austria.

Additional enforcement powers of the FCO. The Draft Bill clarifies that the FCO is empowered to impose structural remedies in order to bring a competition law infringement to an end. Again, this is in line with the European competition rules, which introduced the possibility of structural remedies almost a decade ago.[3] Moreover, the FCO will be entitled to request, in the framework of a decision ordering the termination of a competition law infringement, the repayment of any additional proceeds derived from the infringement.

FCO issues a draft guidance paper on substantive merger control. On July 21, 2011, the FCO published its Draft Guidance on Substantive Merger Control (Draft Guidance). The Draft Guidance is an update of a previous guidance paper dating back to 2000 and is intended to summarize the current practice of the FCO and German courts. Compared to the 2000 paper, the Draft Guidance puts considerably more emphasis on the need for a holistic approach when analyzing a transaction under the merger control rules. Furthermore, the Draft Guidance stresses the importance of economic concepts in the decision-making process. The Draft Guidance was drafted before the publication of the Draft Bill and therefore still focuses on the dominance test. However, as stated above, it is to be expected that this concept—and the corresponding case law of the FCO and the courts—will remain the preeminent yardstick in German merger control even after the envisioned shift to the SIEC test.

Merger Control

In 2011, the FCO received more than 1,100 merger notifications, of which only 15 were subject to close scrutiny in second phase proceedings.

Only two prohibition decisions in 2011. As mentioned in our last Advisory, the FCO prohibited a planned joint venture between RTL and ProSieben/SAT.1 in the first half of 2011. There was just one other prohibition decision in 2011,

2 *See* Arnold & Porter LLP, "Advisory: Discovery of Leniency Submissions in Europe: The *Pfleiderer* Judgment: Dawn of a New Era or Nothing New Under the Sun," (June 2011), *available at:* http://www.arnoldporter.com/public_document.cfm?id=17707&key=15H3.

3 Article 7(1) of Council Regulation (EC) No 1/2003.

which concerned the plans of Tönnies, Germany's leading purchaser and slaughterer of pigs and sows, to take over the slaughterhouse operator Tummel. Based on an in-depth market investigation, the FCO considered Tönnies to be an indispensable contract partner due to its high market shares (e.g., more than 40 percent of the procurement market for sows to be slaughtered), its far-reaching vertical integration, and a multitude of other, less formal links with competitors and customers. An analysis of Tönnies' current market conduct also showed that the company has used its buyer power to influence procurement conditions to the detriment of its competitors (e.g., through predatory pricing on the procurement market for sows). The FCO rejected a remedy package offered by Tönnies and prohibited the transaction on November 17, 2011.

Liberty/Kabel BW merger cleared subject to far-reaching commitments. In another noteworthy decision, on December 15, 2011, the FCO cleared the acquisition of the cable network operator Kabel Baden-Württemberg (Kabel BW) by Liberty Global Europe Holding (Liberty) subject to far-reaching commitments.

The FCO raised serious concerns about the further strengthening of a dominant oligopoly among the large regional cable network operators (Kabel Deutschland, Liberty's Unitymedia, and Kabel BW) on the German retail TV services market by reducing their number from three to two. The companies overlap in their geographical reach and compete to provide retail TV service contracts (increasingly also including phone and internet services) to the owners of large, multi-unit housing premises. The FCO found considerable market entry barriers due to long-term contracts of 10-15 years, exclusivity arrangements, and legal uncertainty about the ownership of the house distribution networks after contract expiry. The FCO was also concerned that the transaction, as originally notified, would have had a negative impact on the competitive relationship between the cable network operators and TV channels (so-called "feed-in" market). In order to alleviate the FCO's concerns, Liberty agreed, *inter alia*, (i) to grant special termination rights for large contracts; (ii) to end its encryption of digital free TV programs; and (iii) to renounce the use of certain exclusivity clauses.

This case is yet another example of the FCO's skeptical approach towards three-to-two mergers—but also of its willingness to clear such deals if the parties are willing to make appropriate concessions.[4] According to a press report of January 27, 2012, Deutsche Telekom and the telecommunication service provider Netcologne appealed against the clearance decision before the Düsseldorf Court of Appeals.

Cartels

Statistics. In 2011, the FCO imposed fines of approximately €193 million on 42 companies and several individuals in 17 cartel cases in a multitude of sectors, including fire engines, concrete pipes, dishwasher detergent, chipboard panels, flour, and hydrants. The fact that the FCO received 37 leniency applications relating to 28 cases underlines that the FCO's leniency program is, more than ever, a key driver in uncovering cartels. In 2011, the FCO conducted 11 dawn raids at 42 companies and the homes of five individuals. Due to the ever-increasing number of cartel cases, the FCO has set up a third division dedicated to cartel prosecution.

In the second half of 2011, the FCO adopted the following decisions on hardcore cartels:

- Fines of €42 million for a cartel relating to chipboard panels and oriented strand boards;
- Fines of €24 million for a flour and dishwasher detergent cartel;
- Fines of €17.5 million for a fire engine cartel;
- Fines of €15.5 million for a hydrant cartel;
- Fines of €12 million for a concrete pipe cartel; and
- Fines of €9 million for an instant cappuccino cartel.

In these proceedings, the FCO's focus was on three types of anti-competitive arrangements, namely (i) illegal agreements on prices, quotas, discounts and/or specific conditions for customers, (ii) the allocation of (regional) markets and/or (iii) the exchange of commercially sensitive information. In most cases, at least some of the companies and/or individuals involved agreed to enter into a settlement with the FCO in order to secure a lower fine.

4 On May 21, 2010, the FCO prohibited the planned acquisition by Magna, an automotive parts supplier, of the convertible roof systems business of Karmann since the merger would have resulted in a symmetric duopoly with little incentive for internal competition. *See* Arnold & Porter LLP, "Advisory: Recent Developments in German Competition Law" (January 2011), *available at:* http://www.arnoldporter.com/public_document.cfm?id=17115&key=1F3.

FCO initiated cartel proceedings regarding a video-on-demand platform of the public broadcasters ARD and ZDF. On November 28, 2011, the FCO announced that it had started an investigation under Section 1 ARC into the plans of ARD and ZDF to set up a joint video-on-demand platform. The broadcasters intend to use the joint platform in order to offer content from their own pool of broadcasting material as well as from third parties. The downloading (on demand or via subscription) will be possible for a certain fee or free of charge (financed by advertising). While the FCO prohibited a similar project planned by RTL and ProSieben/SAT.1 in March 2011 under the merger control rules on account of the parent companies' collective dominance in the TV advertising market, the FCO did not have any objections from the merger control perspective against the ARD/ZDF venture. However, similar to the RTL/ProSieben/SAT.1 case, the FCO is concerned that the project might involve unlawful cooperation among direct competitors (the FCO has yet to elaborate on the nature of its concerns). The fact that several third parties have applied for admission to the proceedings demonstrates the high public interest in this case.

Private Cartel Enforcement

Federal Court of Justice affirms the standing of indirect purchasers and the admissibility of the passing-on defense. As already mentioned in our last Advisory, on June 28, 2011 the Federal Court of Justice handed down a key judgment regarding the legal framework for private cartel enforcement in Germany. The Court clarified that also indirect purchasers are entitled to claim damages from cartel members. The Court argued that this principle takes account of the fact that the impact of illicit cartel arrangements is not necessarily felt by the direct purchasers since they may be able to pass on the overcharge to their customers. Thus, market participants at all levels of the supply chain should be allowed to claim damages for competition law infringements. This ruling is in line with the jurisprudence of the ECJ, which also allows both direct and indirect purchasers to seek damages if they had to bear overcharges due to an illegal price arrangement at the upstream level.

At the same time, the Court allowed the cartel members to invoke the passing-on defense, i.e., to argue that the direct purchasers passed on the overcharge to the next market level and thus did not suffer any damage. In the Court's view, the admissibility of the passing-on defense is a necessary corollary to the standing of indirect purchasers. The Court clarified that the cartelists bear the burden of proof for the passing-on defense and, in this context, explicitly denied a general duty of the direct customers to provide information on the passed-on overcharge. However, if a cartelist is sued simultaneously by direct and indirect purchasers, he may ask the indirect purchasers to make available information at their disposal, which can help to substantiate a passing-on defense against the direct purchasers.

Federal Court of Justice affirms strict limits of successor liability for cartel infringements. On August 10, 2011, the Federal Court of Justice confirmed the severe restrictions under German law regarding the successor liability of a merged entity for cartel infringements committed by one of the merger partners. In the case at stake, the FCO in 2005 had imposed a fine of €19 million on Gerling Konzern Versicherung AG (GKA) for its involvement in the industrial insurance cartel. In 2006, GKA merged with another insurance company to form a new legal entity, HDI-Gerling. HDI-Gerling refused liability for GKA's cartel infringement and won the appeal proceedings before the Düsseldorf Higher Regional Court and now also before the Federal Court of Justice.

Under German law, the liability of legal persons for administrative fines is dealt with in Section 30 of the German Administrative Offences Act (OWiG). Pursuant to this provision, a fine can be imposed on a legal person if one of its organs or a senior manager infringed the company's obligations by committing an administrative offence. The Federal Court of Justice held that the requirements of this provision were not fulfilled in the case at hand because it had been the legal predecessor's (i.e. GKA's) organs and senior managers who had participated in the illicit arrangements, but not the organs or employees of the merged entity. The Court argued that an extension of liability to the legal successor is possible only in the exceptional case that both entities are "virtually identical" from an economic point of view. This requires, in particular, (i) that the assets of the former entity are used in the same or a similar way as before the merger and (ii) that they account for an "essential part" of the (total) assets of the merged entity. (At least) the second criterion is not fulfilled if the merger parties had approximately the same size. The Court stated that any broader interpretation of Section 30 OWiG in order to extend the scope of successor liability would be contrary to the clear wording of this provision.

Furthermore, it would violate the requirement of legal certainty and the prohibition of double jeopardy in criminal matters laid down in Article 103(2) of the German Constitution.

In the case at hand, the Court rejected successor liability since GKA's assets accounted only for 28-56 percent (depending on the reference base) of the assets of the combined HDI-Gerling group. Interestingly, the Court explicitly criticized the current status of the law, which—in stark contrast to the EU competition rules—enables companies to circumvent fines for cartel infringement through mergers and restructuring, and urged the legislator to take appropriate action.

Competition Law and the Healthcare Sector

German Social Court intensifies debate on the lack of the health care sector's exposure to competition law review. On September 15, 2011, a German Social Court denied the FCO's entitlement under the ARC to send a request for information to a statutory health insurer whom the FCO alleged of having colluded with other health insurers on the increase of the monthly insurance premiums.

The court argued that the German Social Security Code (SGB) only provides for the applicability of the German competition rules regarding the activities of the statutory health insurers on the *demand* side but that it does not contain corresponding provisions regarding their dealings on the *supply* side. The court justified this distinction by reasoning that on the supply side the statutory health insurers do not follow any economic purpose but exclusively fulfill their legal obligation to provide the same standard services to everybody under the same conditions. In this context, so the court concluded, the statutory health insurers therefore do not qualify as "undertakings," which is a prerequisite for the applicability of the ARC.

This decision highlights the long-standing debate regarding the relationship between the health sector and competition law. The President of the FCO, Andreas Mundt, has urged the German government explicitly to allow the FCO the effective monitoring of mergers and agreements among statutory health insurers. However, the Draft Bill is silent on this issue.

Sector Investigations

FCO analyzes the competitive conditions in the food retail sector. In September 2011, the FCO has initiated a sector inquiry into the competitive conditions on the procurement markets for food and beverages by sending out detailed questionnaires to 21 food retailers and 200 manufacturers of food and beverage products. The German food retail sector is highly concentrated (with four major retailers accounting for combined shares of sales of approximately 85 percent on the downstream sales markets). The FCO announced that its analysis will focus on the existence and nature of any advantages enjoyed by the leading food retailers at the procurement level vis-à-vis their smaller competitors.

We hope that you have found this Advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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