

Competition Law Reform in Germany

Long awaited draft legislation published

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The German Federal Ministry for Economic Affairs and Energy has presented its long awaited proposal for the draft legislation implementing the European Commission's damages directive (*the Directive*) into German law (see here: PDF). The draft legislation (*the Proposal*) is part of a wider reform of the German Act against Restraints of Competition (*ARC*), which addresses the following aspects:

- Implementation of the Directive
- Closing the so-called "sausage gap"
- Dealing with certain challenges brought about by digital transformation.

It does not address the possibility of the German Economy Minister to overturn blocking decisions issued by the Federal Cartel Office (*FCO*). In light of the heavily criticized recent approval for Germany's biggest supermarket group Edeka to buy grocery chain Kaiser's (Tengelmann group), there had been speculations on whether the German legislator might react.

Implementation of the Directive

German law already provides for many of the procedural rules stipulated by the Directive in order to ensure the effective exercise of the right to compensation for harm caused by competition law infringements. The main topics requiring legislative action are:

1. Protection of leniency and settlement documents from disclosure

According to current law, courts can already direct the parties of a litigation or a third party to produce records or documents in their possession or to which reference has been made in the submissions. The Draft now goes beyond the Directive and provides a stand-alone right to potential claimants to disclosure of information and evidence, which can be enforced even before and independently of the actual damages litigation or settlement proceedings. In line with the Directive, leniency statements (including evidence created during the leniency proceedings, such as minutes of witness hearings!) and settlement submissions (*black list* documents) are protected from disclosure at any time. *Grey list* documents produced specifically for the cartel proceedings are protected during the ongoing investigation. The standards for claimants to identify documents to be disclosed is lowered in line with the Directive's requirements, i.e. it will be easier for claimants to meet the test in the future. While the Directive did not extend the protection of *black list* documents to access to file requests, the Proposal tries to harmonize the respective standards. It explicitly makes reference to the Pfleiderer judgment in which access to file requests were rejected in relation to Leniency Statements and business secrets in confidential versions of infringement decisions.

2. Extension of the statute of limitation

The limitation period for bringing cartel damages claims is extended from three to five years; it only starts to run once the infringement has ceased and the claimant knows of the infringement, the fact that it has caused him harm and the identity of the infringer. This differs from the general rules, which continue to apply to contribution claims (albeit with a new starting point).

Irrespective of the claimant's knowledge, the Proposal provides for a maximum statute of limitation of ten years after termination of the infringement.

3. Limitations on joint and several liability

In line with the Directive, liability of immunity recipients is limited to liability to their direct or indirect purchasers or suppliers; liability towards all other injured parties shall exist only where full compensation cannot be obtained from other companies involved in the infringement (unless these are already time-barred!). The Proposal also implements similar limitations on the joint and several liability of small or medium-sized enterprises.

4. Passing on defence / Indirect purchaser claims

The possibility of defendants to claim that no harm was suffered by the claimant because it was passed on to the claimant's customers has already been recognized in Germany – at least in relation to Art. 101 TFEU infringements – since the Federal Court of Justice's famous ORWI judgment. The Proposal now clarifies that this also applies to other competition law infringements, e.g. abuse of dominance. In line with the Directive, indirect purchasers are incentivized because the burden of proof for substantiating "pass on" is eased considerably (pass on is presumed if certain criteria are met). The Proposal also provides for disclosure rights that claimants can invoke in support of their claim.

Similar disclosure rights are granted to defendants claiming "pass on" but no presumption of pass on applies to their benefit. In order to avoid multiple liability – or the absence of liability – of infringers, the Proposal makes reference to the possibility of intervention proceedings.

Other topics addressed by the Directive did not need implementation because of existing legal provisions that already address these issues adequately: these include the binding nature of decisions issued by the FCO, the power of courts to estimate the quantification of harm, and the possibility to settle disputes between the parties.

The "sausage gap"

In the area of legal succession, the Proposal closes a gap that allowed companies to escape fines through restructuring. While the current law provides for general liability of legal successors of companies fined by the FCO, such companies can potentially escape fines where the addressee of the fining decision sold its assets and subsequently ceased to exist. This loophole became famous in 2014/15 when members of the German sausages cartel restructured after having been subjected to multi-billion Euro fines. The Proposal fixes this by introducing the concept of "commercial succession" with a view to being able to recover fines from buyers in asset deal transactions following which the addressee of the fining decision ceases to exist. The Proposal also provides that fining decisions can be addressed to group companies (e.g. parent companies) similar to decisions issued by the European Commission.

Digitalization

The Proposal addresses the following three challenges brought about by digital transformation:

1. Reform of merger control thresholds

The current merger control regime does not extend to deals where – even though the transaction value is high because it reflects the economic or innovative potential of an acquisition target – the statutory sales thresholds are not met. In particular, acquisitions of start-ups with valuable business ideas are often not caught even though they may help acquirers with existing market power to achieve a "macroeconomically unwanted dominance". Famously, the acquisition of

Whatsapp by Facebook or of 6 Wunderkinder by Microsoft did not meet German merger control thresholds. The Proposal includes a new transaction-value based threshold of 350 million Euros: Transactions involving companies with a combined worldwide turnover exceeding 500 million Euro, at least one company with domestic sales exceeding 25 million Euro, at least one other company currently or prospectively active in Germany and the value of the transaction exceeding 350 million Euro, will be subject to German merger control review. The notion of ‘transaction value’ is to be interpreted broadly: it covers all kinds of consideration and also includes the debts acquired. Introduction of the new threshold had sparked a debate about whether this would hinder investments into German start-ups. However, given the significant threshold, investors should not be too worried; the new test will still only subject rather large cap transactions to scrutiny by the FCO.

2. New Markets – free services, multi-sided platforms, network effects

Traditionally, the FCO has not considered services provided at no cost to qualify as “markets” for the purpose of competition law. However, in line with recent cases, such as the Commission’s investigation against Google (search market) or the FCO’s investigation against Facebook (social networks), the Proposal clarifies that services provided for free can still constitute a market. In relation to multi-sided platforms and networks, the Proposal further clarifies certain criteria that have to be taken into account in the assessment of market power in order to reflect specific features of the digital economy, namely (a) direct and indirect network effects, (b) multi-homing and switching barriers, (c) scale benefits, (d) access to data and (e) innovation potential.

3. Safe Harbour for cooperations between publishing houses

The Proposal exempts cooperations between publishing houses from the cartel prohibition. The exemption is limited to non-content related cooperations, such as marketing and sales agreements between competing publishing houses. It is specifically designed to create more room for synergies between publishing houses with a view to (i) strengthening their economic basis against the background of declining sales and advertising revenues and (ii) thereby fostering competition with other media companies (such as TV). The exemption does not prevent the application of EU competition law and is thus limited to cooperations without a Community dimension.

Next steps

Member States have to implement the Directive by 27 December 2016. In order to meet this deadline, final draft legislation will need to be agreed by the government in the summer (*Regierungsentwurf*) so it can then be submitted to Parliament. However, there is little doubt that the new law will enter into force by the end of 2016.

In relation to the challenges put to competition policy by digital transformation, several parallel processes are ongoing, including a consultation process launched by the Federal Ministry for Economic Affairs and Energy in relation to platform regulation and the Commission’s position paper on online platforms and the digital single market; overall, certainly a space to be closely watched.

We will be monitoring these developments closely. For further information please contact

Dr. Anna Huttenlauch
anna.huttenlauch@blomstein.com

Dr. Max Klasse
max.klasse@blomstein.com