

8th Amendment to German Competition Law – Key Changes

Both chambers of the German parliament have finally achieved an agreement on the 8th Amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*). The new law is expected to come into force before September 2013. The 8th Amendment to the GWB is intended to implement the competition policy objectives set out in the coalition agreement between Germany's current governing parties. It does not fundamentally change the basic concepts of the GWB, but is rather intended to optimise it and make its implementation more efficient.

Key issues

- Overview
- Merger control
- Abusive practices
- Procedural antitrust law
- Private enforcement of competition law
- Competition law and statutory health insurance funds
- Conclusion

1. Overview

The 8th Amendment will further align merger control rules in Germany with the EU framework and reduce existing differences in the assessment of notified mergers. The specific German provisions for mergers in the media sector will, however, not be aligned. As regards abusive practices, the key change is that the threshold for presumption of single market dominance will be increased to 40%. In addition, the structure of the provisions relating to abusive behaviour will be simplified. However, the amended GWB will still contain provisions relating to abuse of relative market power vis-à-vis small and medium undertakings. In this respect, the GWB will continue to differ from the respective provisions on the EU level generally prohibiting only the abuse of a market dominant position. Furthermore, the 8th Amendment to the GWB will strengthen the position of consumer protection associations in terms of their participation in the private enforcement of antitrust law. There are also changes affecting procedural antitrust law, fines and application of the GWB to statutory health insurance funds. This newsletter sets out the key changes.

2. Merger control

2.1 Changes to substantive assessment criteria

Under the current law, the German Federal Cartel Office (*Bundeskartellamt*) has to assess whether it is expected that a notified merger will result in the creation or strengthening of a market dominant position (market dominance test). Under the EU merger control rules, the substantive criterion for assessing whether a proposed merger has to be prohibited is whether the merger will lead to a "significant impediment to effective competition" (SIEC test). The market dominance test is just one example of such an impediment. The SIEC test will now be incorporated into the GWB. However, the so-called "balancing clause" (*Abwägungsklausel*) under the current GWB will remain unchanged. This clause allows a merger to be approved even if it creates or strengthens a market dominant position, provided that the overall improvements will outweigh the disadvantages of dominance.

2.2 Presumption of market dominance

The GWB will continue to contain a statutory presumption of market dominance, which plays a key role in the market dominance test. However, the market share threshold for the (rebuttable) presumption of a single market dominance will be raised from one third to 40%.

2.3 Remedies

The provisions relating to merger remedies (conditions and obligations) will also be further aligned with EU law. In the official statement of the bill it has been clarified that merger clearances may be subject to behavioural remedies, provided that they are as effective as structural remedies in order to eliminate the identified competitive concerns. However, as under the current GWB, behavioural remedies must not lead to continued monitoring by the Bundeskartellamt.

2.4 Aggregation clause

After the 8th Amendment, the GWB will explicitly provide that two or more transactions which take place within a two-year period between the same parties are to be treated as one single transaction. This change is aimed at preventing companies from splitting a major transaction into several smaller transactions in order to circumvent the second domestic turnover threshold of EUR 5m which was introduced in 2009.

2.5 Public bids

Under EU law, the general prohibition on completing mergers prior to the respective clearance does not apply to takeovers by public bids, provided that the merger notification is filed without any delay and the acquirer does not exercise the voting rights until the merger clearance has been granted. A corresponding provision will now be included into the GWB.

2.6 Deadlines in Phase II proceedings

If the Bundeskartellamt decides to launch a Phase II investigation, a decision must be issued within four months from the date of the receipt of the complete notification. In the future, this deadline will automatically be extended by one additional month if, during the Phase II investigation, the parties submit remedies for the first time. The examination deadline may also be suspended if the parties fail to respond to a further information request from the Bundeskartellamt in full or within the set

deadline, unless the parties are not responsible for this failure.

2.7. Retroactive effects of a subsequent merger notification

Under the current GWB, it is not clear whether transactions are permanently or only provisionally invalid under German civil law in cases where a merger is completed prior to merger clearance. The 8th Amendment provides for more certainty in this regard and stipulates a provisional invalidity. In future, if unwinding proceedings are initiated on grounds of a merger having been completed without prior clearance and if such unwinding proceedings are subsequently closed due to the absence of competition concerns, the closing proceedings will have the effect of a subsequent clearance.

2.8 De-minimis market

Under the current de-minimis market clause, certain types of mergers are not formally subject to merger control proceedings if they only relate to de-minimis markets. However, the precise volume of the relevant market is often difficult to determine. Therefore, and for the sake of legal certainty, the question of whether the de-minimis market clause applies will be made a part of the substantive merger control assessment (as it was previously before the 6th Amendment to the GWB). After the 8th Amendment, mergers relating (exclusively) to de-minimis markets must be notified to the Bundeskartellamt. However, they cannot be prohibited.

2.9 Print media mergers

The changing market conditions in the print media sector (e.g. increasing competition from the Internet, changing of consumer habits) are taken into account by the 8th Amendment. The multiplier for determining the relevant turnover in the press sector has been reduced from 20 to 8. As a consequence, fewer mergers in the print media sector will be scrutinised by the Bundeskartellamt. However, the reduced multiplier does not apply to the broadcasting sector. In addition, under certain circumstances, it will not be possible to prohibit acquisitions of loss-making publishing houses.

2.10 Mergers resulting from territorial reforms at the municipal level

Mergers between public facilities and undertakings resulting from territorial reforms at the municipal level will

not be caught by the merger control rules. A respective clarification was included into section 35 para 2 GWB.

3. Abusive practices

3.1 Restructuring of the provisions relating to abusive practices

Sections 19 and 20 GWB contain far more detailed provisions on abusive practices supervision than under EU law. In order to simplify the structure of these provisions, the definition of market dominance is now contained in new section 18 GWB, which is followed by the sections on abuse of a market dominant position (section 19) and abuse of relative market power (section 20). As stated in 2.2 above, the increase of the threshold for the (rebuttable) presumption of a single market dominance to 40% is likely to constitute the most important change here.

3.2 Expiry/extension of special provisions

The Act on the Prevention of Price Abuse in the Areas of Energy Supply and Food Trade (*Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels*) temporarily tightened up the ban on discriminatory conduct by introducing a section into GWB which prohibited offering of food below cost price. The section expired on 31 December 2012 and has now been reintroduced with the 8th Amendment to the GWB for another five years. The ban on abusive pricing practices by market dominant electricity and gas providers (section 29 GWB) has also been extended for another five years. The recently expired ban on margin squeezes has now become permanent law in the GWB.

3.3 Divestiture

Under the current section 32 GWB, it is unclear whether the measures imposed for the purpose of bringing an antitrust infringement to an end can only be behavioural or also structural such as divestiture. This legal uncertainty has now been removed by introducing a new section 32 para 2 GWB. The new provision explicitly states that the Bundeskartellamt is also entitled to impose structural measures. In addition, the Bundeskartellamt will have the power to issue an order by which it can request companies to repay any financial advantages resulting from antitrust law infringements.

3.4 Water supply

In a landmark ruling (Wetzlar water prices), the German Federal Supreme Court confirmed the applicability of stricter provisions relating to abusive practices with regard to water prices. The corresponding provisions, which were set out in a transitional provision implemented by the 6th Amendment, will now be included in sections 31 to 31b GWB. However, the compromise between both chambers of parliament provides that the refusal by municipal bodies to grant access to the local water supply network does not constitute an abusive practice if certain conditions are met. In addition, the new law stipulates that public levies and charges fall outside the scope of the abusive practices as well.

4. Procedural antitrust law

The 8th Amendment to the GWB also aims for greater efficiency with regard to the provisions on competition law offences and fines. However, dispute has arisen as to how to achieve this goal:

- In order to accelerate the final phase of competition proceedings, a duty of disclosure for legal entities was introduced, based on the rights of the European Commission. This duty relates to company and market data, such as turnover for the last five years.
- Responsibility for dealing with cartel damage claims will switch from the chambers for commercial matters at the regional courts (*Landgericht*) to the chambers for civil matters.
- According to the case law of the German Federal Supreme Court, fines can only be imposed on legal successors under the specific condition that, from an economic point of view, the assets of the original and the successor entity are almost identical. An explicit legal basis for determining fines to be imposed on legal successors will be created by adapting section 30 of the Regulatory Offences Act. No such fine imposed on a legal successor may exceed the value of the assets taken over or the amount of the fine that would have been imposed on the legal predecessor.
- The confidentiality of whistleblower documents, i.e. leniency and immunity applications (including any accompanying evidence) provided for in the draft bill was not ultimately included in the 8th Amendment to the GWB. In fact, the legislator leaves it up to the courts to determine the scope of access to the files.

- The Bundeskartellamt will continue not having a right to ask questions in appellate proceedings going beyond its existing right to call a hearing. The German government felt that the expertise of the authorities was sufficiently taken into account under the existing provisions.

5. Private enforcement of competition law

Consumer protection associations will be able to actively participate in private enforcement of competition law. The 8th Amendment to the GWB amends section 33 para 2 of the GWB to allow certain institutions/associations, including consumer protection associations, to bring actions for injunctive relief or skimming off of economic benefits in case of mass and dispersed damage. In addition, industry associations such as the German Brands Association, will also be entitled to file actions. However, damages can, as before, only be claimed by the affected party. Class actions remain inadmissible.

6. Competition law and statutory health insurance funds

The application of the GWB to statutory health insurance funds was the subject of heated debate. In its decision of 15 September 2011, the Regional Social Court of Hesse (*Hessisches Landessozialgericht*) held that any antitrust supervision of statutory health insurance funds requires an explicit statutory basis. As a result of this ruling, the Bundeskartellamt discontinued the merger control supervision over statutory health insurance funds. An amendment of the relevant provisions of the German Social Security Code V (*Sozialgesetzbuch*) now explicitly states that mergers between statutory health insurance

funds are subject to merger control by the Bundeskartellamt. However, the Bundeskartellamt has to consult the respective supervisory authority of the health insurance funds, i.e. the German Federal Insurance Office (*Bundesversicherungsamt*). In addition, the 8th Amendment to the GWB stipulates that prohibition decisions of the Bundeskartellamt relating to mergers between statutory health insurance companies can be appealed only to social courts and not to civil courts as is the case for all other mergers. Moreover, it is now clear that the ban on cartels and the provisions on abusive practices do not apply to statutory health insurance funds, both *inter se* and with respect to any dealings involving their members.

7. Conclusion

The amendments to be introduced by the 8th Amendment to the GWB are generally to be welcomed since they improve the legal certainty surrounding a range of issues, such as the subsequent notification of mergers and the application of the de-minimis market clause. In addition, the raising of the market dominance threshold to 40% can be highlighted positively.

On the other hand, the introduction of the SIEC test could be accompanied to some extent by legal uncertainty for companies since there are no precedents of the Bundeskartellamt in that respect. It is also questionable whether all of the relevant principles from the EU-level can simply be transferred. This transfer could in turn lead to a prolongation of judicial reviews. Legal uncertainties are also likely to emerge with respect to the new demerger provisions, which have already been subject to intense debate.

It remains to be seen whether the amendments will close the loophole identified by the German Federal Supreme Court regarding the enforcement of fines against legal successors. The legislator itself assumes that the new provision will not cover singular succession.

Contacts

Marc Besen

Partner, Düsseldorf

T: +49 211 43 55 5324

E: marc.besen
@cliffordchance.com**Dr Joachim Schütze**

Partner, Düsseldorf

T: +49 211 43 55 5548

E: joachim.schuetze
@cliffordchance.com**Albrecht v. Graevenitz**

Counsel, Frankfurt

T: +49 69 7199 2564

E: albrecht.graevenitz
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2013

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.