CLIENT ALERT

Germany About to Amend Its Competition Laws

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On 6 June 2013, the representatives of the German Parliament (Bundestag) and the Federal Council (Bundesrat) found a compromise on the reform of German competition law. This brings months of controversy between the government and the opposition to an end. The revised bill proposal should now pass the legislative process without any further difficulties and enter into force most probably within the following months.

The amendments will further align the German competition rules with EU competition law. One of the most significant changes concerns the conditions for the prohibition of mergers. Germany will adopt a provision identical with the one at the EU-level (the so-called SIEC-Test). The threshold for the assumption of single dominance will be lifted from 33 percent to 40 percent and the enforcement powers of the Federal Cartel Office (Bundeskartellamt, FCO) will be strengthened. Ultimately, concentrations of statutory sickness funds will henceforth fall within the scope of merger control. The political controversy on the latter was the main reason why the entire bill proposal could not enter into force as initially scheduled on 1 January 2013 and even ran the risk of failing completely.

Germany will amend the "Act Against Restraints of Competition" that contains the major provisions of German competition law. Already on 18 October 2012, the Bundestag adopted a bill proposal to change the national competition law. Although most changes were generally welcomed, the bill proposal was blocked until now, as there was a disagreement on some politically sensitive points. In particular, it was highly controversial whether competition law should apply to statutory sickness funds. As the opposition in the Bundestag currently has the majority in the second legislative chamber, the Bundesrat, the bill proposal did not pass. In such cases a mediation committee with representatives of both legislative chambers is convened. After several months of controversy, a compromise has now been found.

Below is a summary of the most significant changes.

New Test for Assessment of Mergers

One major purpose of the reform is to reduce differences between EU and German competition law. The most significant amendment concerns the criteria to assess mergers. The SIEC-Test becomes standard and replaces the current dominance test. This closes a potential enforcement gap where a merger would not create or strengthen a dominant position but still lessen competition. The merger assessment practice will be more in line with jurisdictions like USA, Canada, Australia and UK, where similar effect-based merger assessment tests apply. As a result of the new test, economists will likely become more important in merger proceedings in Germany.

Revision of the Rules of Dominance

The reform also concerns the control of abuse of a dominant position. In this field the main objective was to make the provisions in the Act Against Restraints of Competition clearer and more comprehensible. To facilitate the determination of dominance,

German law contains assumptions based on market share. The threshold for the assumption of single dominance will be lifted from 33 percent to 40 percent.

Also, some provisions that were time limited will be extended, for instance the prohibition to sell food below its cost. Vertically integrated firms with a relatively strong position on the upstream market will remain prohibited from demanding higher prices for the supply of goods and services to competitors on a downstream market than the prices they offer themselves to customers in the respective market.

Enforcement

The enforcement tools of the FCO have been further aligned with EU law. It has now been clarified that the FCO is able to impose structural remedies. This means that the FCO can oblige a company to unbundle its structure and to disconnect different business areas.

Under the current law the FCO is entitled to order the skimming off of the economic benefit from an undertaking that infringed competition law. According to the interpretation of the Federal Court of Justice (Bundesgerichtshof), the FCO can order recovery of enrichment for the benefit of customers. The new rules will confirm that explicitly.

Successor Liability

An important amendment relates to liability in case of succession in law. Under the current rules companies can only be fined by the FCO if they are considered to be economically identical or virtually identical. Companies can therefore avoid fines by reorganizing their corporate structure before the fine. This loophole will now be closed.

Merger Control in Case of Statutory Sickness Funds

The European Court of Justice has pointed out in its case law that sickness funds, as those in the German statutory health insurance scheme, are involved in the management of the social security system and can therefore not be considered as undertakings in the sense of EU competition law. This case law did not block the enforcement of competition law at the national level. The German legislature made some minor changes, and the FCO still applied the competition rules to sickness funds. In 2011, however, a competent court disapproved of this practice and deemed the legal basis as insufficient. With its bill proposal, the Government clarifies the scope of application of antitrust laws to sickness funds. Initially, this proposal did not pass the mediation committee. According to the compromise that has now been found, merger control rules will apply to sickness funds whilst any other antitrust laws will not. Additionally, such merger decisions will be reviewed by the courts dealing with social security law rather than the civil courts.

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