New German Competition Act. 
Alignment to European Merger Control and further developments in cartel fine proceedings.

The New German Act Against Restraints of Competition (ARC) will most likely enter into force in July 2013. The amendments will further align the German Merger Control Rules with European Merger Control Law. The core of the reform is the introduction of the SIEC test as the decisive benchmark for the assessment of whether a concentration is to be prohibited. Accordingly, in future, mergers can be prohibited if they lead to a significant impediment to effective competition. The effect of the new rules on the liability of the universal successor for fines forfeited by its legal predecessor might go beyond cartel law. The German Federal Cartel Office will not be entitled to review public fees for municipal services. Further essential alterations concern industry-specific rules in the areas of the press and of statutory health insurance companies.

1 Innovations regarding Merger Control

Prohibition of Concentration

In future, a concentration will generally be prohibited if a significant impediment to effective competition can be expected (Section 36(1)(1) ARC as amended). The previous prohibition criterion, the creation or strengthening of a dominant market position, will – in accordance with the European level – be maintained as an example of the rule. The introduction of the SIEC test is also intended to better encompass anticompetitive concentrations on oligopolistic markets, where undertakings are not or will not become dominant. This may apply to markets with few suppliers, e.g. to a 3-to-2 merger between the second and third largest undertakings. In all complex merger control proceedings, the German Federal Cartel Office will now most likely focus more on the undertaking’s competitive market behaviour, and therefore less on the analysis of the market structure. However, this was already the trend in its more recent decisional practice.

The presumptions for market dominance will remain. However, the threshold for an assumed single dominance will be increased from 33% to 40% (Section 18(4) 4 ARC as amended), which in principle is a positive development. However, most of the cases will then at the same time fulfill the conditions for the presumption of single and joint
market dominance (Section 18(6)(2) ARC as amended – three undertakings with a joint market share exceeding 50%). The increase of the presumption of single market dominance will therefore again raise the question of the relationship between the individual legal presumptions.

There will be no alignment to European Law with regard to the notification obligation for non-controlling minority shareholdings and to the control of non-full-function joint ventures. Further, the Balancing Clause ("Abwägungsklausel") and the Ministerial Authorisation ("Ministererlaubnis") will remain unaltered.

Notification Obligation

The legal nature of the so-called de minimis market clause ("Bagatellmarktklausel") will change. While until now concentrations concerning (only) a market with a national turnover of EUR 15 million were exempt from merger control, they will in future have to be notified, but cannot be prohibited (Section 36(1)(2)(2) ARC as amended). Although this will increase legal certainty as the Federal Cartel Office itself will examine and assess whether a de minimis market is affected, it will also require more time and effort from the undertakings concerned. Undertakings will no longer be allowed to rely on their own legal assessment and can not implement de minimis cases without filing a notification and obtaining clearance from the Federal Cartel Office.

Municipal reforms are explicitly not subject to merger control review (Section 25(2)(2) ARC as amended). In practice, this rule will in particular affect hospitals.

Further, as in European Law, several acts of acquisitions between the same undertakings (and with the same acquirer) within two years will be calculated together for the assessment of whether the turnover thresholds are exceeded (Section 38(5)(3) ARC as amended). However, this applies only to transactions which are not legally or economically linked to each other. Legally or economically linked transactions are qualified as one concentration. The prohibition to implement the transaction therefore already applies to the first acquisition (contrary to Section 38(5)(3) ARC as amended).

Proceedings

In future, the examination period during which the Federal Cartel Office must make a decision will be put on hold if the undertakings concerned do not provide all required information in due time (Section 40(2)(5) ARC as amended). When the parties submit proposals for conditions and obligations the examination period will be extended by one month (Section 40(2)(7) ARC as amended).

Public takeover bids and the acquisition of shares via stock exchanges will be exempt from the suspension obligation (Section 41(1a) ARC as amended), but not from the notification obligation.
Finally, the remedy of the nullity of a transaction due to the lack of a required merger control clearance will be regulated by law. The closing of the demerger proceedings will in its effect be tantamount to a clearance (Section 41(1)(3)(3) ARC as amended). Although this will finally provide legal certainty for the participating parties, the closing of the demerger proceedings is not subject to any deadline which may have other practical inconveniences for the undertakings concerned.

2 Cartel proceedings

The universal successor’s liability for fines is likely to have an outstanding practical significance beyond cartel law. In future, in the event that the originally liable legal entity no longer exists (e.g. the undertaking which via its board was involved in a cartel), the universal successor will be liable. If, however, the originally liable legal entity still exists, (only) this entity will be liable even if it has been “emptied” by means of singular succession. Practice will show how far any bypassing strategies can go in terms of compliance with insolvency law. The respective amendments will be codified in Section 30 of the Administrative Offences Act ("Ordnungswidrigkeitsgesetz - OWIG") and are therefore not limited to cartel law.

Of interest is the Federal Government’s statement that a regulation of the obligatory supervision within a group of companies would not be necessary as the effective rules would suffice. If there is in fact an obligatory supervision by the parent company of the subsidiary, the Federal Cartel Office will in future be entitled to fine the parent company for its subsidiary’s participation in a cartel. However, in contrast to European Law, the inadequacy of the parent company’s compliance efforts must first be established.

Further, the amendment of the ARC limits the right to refuse to give evidence of legal entities with regard to turnover information or the like (Section 81a ARC as amended). This is a departure from the principle that one is not obliged to incriminate oneself.

An initially planned rule according to which the Federal Cartel Office does not have to grant access to the file with regard to leniency applications has not become law. In any case, the courts have so far refused to grant potential damage claimants access to the file in accordance with Section 406e(2) of the Code of Criminal Procedure ("Strafprozessordnung") (in connection with Section 46 OWiG).

Further, consumers associations (and no longer only economic associations) will be entitled to claim for damages and/or skimming off of profits (Section 33(1)(2) ARC as amended).
3 Market dominance and strong undertakings

The rules on unilateral conduct will not undergo any material changes. However, the rules will be re-ordered in order to provide more clarity. The definition of market dominance and the corresponding presumptions will be found in a separate provision (Section 18 ARC as amended). Sections 19, 20 ARC as amended will then contain – now separately – the special provisions for market dominant and strong undertakings, in particular the prohibition to impede or to discriminate.

The provisions on margin squeeze (“Kosten-Preis-Schere”) and on the sale below cost price (which aim, in particular, at the sale of fuel as well as on the food retail) will no longer be limited in time or extended until the end of 2017 (Section 20(3)(2) ARC as amended).

The “objective demerger”, i.e. the enforced splitting of market dominant undertakings irrespective of whether an abuse could be established, will not become law.

4 Industry-specific rules

The new provisions on turnover calculation for press companies raising the relevant turnover thresholds in merger control will facilitate mergers between smaller publishing companies (Section 38(3) ARC as amended). Also the prohibition criterion for this industry will be modified by an explicit regulation of the failing firm defence (“Sanierungsfusion”) (Section 36(1)(2)(3) ARC as amended). The merging parties will be exempt from proving that (almost the total) market shares of the insolvent target company would have to be attributed to the acquirer even in the absence of the merger. Industry agreements between press wholesale traders and publishing companies will be permitted (Section 30(2a) ARC as amended). The Federal Cartel Office will, however, be entitled to declare such agreements invalid should they turn out to be abusive (Section 30(3) as amended).

Concentrations between statutory health insurance companies will be subject to merger control law. The Federal Cartel Office’s decisions in this area will now have to be appealed to the Social Courts (Sections 4 para. 3, 172a SGB V as amended) – unlike the standard recourse to the Düsseldorf Higher Regional Court.

Public fees will fall outside the scope of the Federal Cartel Office’s abuse review. This exception will in particular benefit the municipal water companies.

The special control of abusive practices relating to energy and gas prices will be extended until 2017 (Section 131(1) ARC as amended in connection with Section 29 ARC).
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