Germany overview: The seventh amendment and a more economics-based approach

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The German Federal Cartel Office continues to pursue an active role in the enforcement of German antitrust laws during the modernisation process of the European Competition Law. This approach applies in particular to merger control, which is the subject of a separate chapter.

The following will principally focus on:
- the seventh amendment to the German Act against Restraints of Competition, implementing fundamental changes triggered by Regulation 1/2003; and
- a possible tendency for a more economics-based approach in German competition law.

Fundamental revamping of German competition law

More than 45 years ago, on 1 January 1958, both the German Act against Restraints of Competition (ARC) and the Treaty of Rome came into effect. At that time EU competition law did not prevail over national competition law except in specific situations and EU and German competition law existed side by side. As a result, German competition law could and did develop quite independently of European competition law and has become one of the most well-developed national competition laws among EU member states.

Under Regulation 1/2003, article 81 EC will prevail over national competition law in all situations where EC law is applicable. Only with respect to unilateral conduct by companies with market power will national competition law be allowed to prevail over article 82 EC, in cases where the national law is stricter.

Recognising these prescriptions of EU law, the German legislator, firmly supported by the German Federal Cartel Office and the German business community, has now completely overhauled the ARC.

Concept of the reform

The reform is based on the concept that, in the area of article 81 EC, German national law should be identical to EU competition law. This solution has the great practical advantage that no determination needs to be made whether the particular conduct in question has an effect on trade between member states, since the legal rules are identical in both cases. In addition, there is simply no sound conceptual basis for subjecting smaller companies, whose business tends not to cross borders and whose conduct thus is less likely to be caught by EU competition laws, to a different standard of competition law than their larger rivals. As a result, German competition law has had to say good-bye to many time-honoured concepts, such as the concept that vertical restrictions, even if anti-competitive, normally will not invalidate the agreement in which they are contained.

Restrictive agreements (article 81 EC)

Section 1 ARC, which originally applied only to restraints of competition between competitors has now been made identical to article 81(1) EC, with the exception, of course, that there need not be an effect on trade between member states. Thus, it will apply to both horizontal and vertical relationships. The old exemption provisions (sections 2–7) have been replaced by article 2 which is identical to article 81(3); this provision thereby also implements the principle of direct applicability, ie, abolishing the need for a particular exemption decision.

Unilateral conduct (article 82 EC)

By contrast, as regards article 82, where article 3(2) of Regulation 1/2003 permits stricter national laws, the German provisions of sections 19 and 20 ARC are being retained with only marginal modifications. The prohibition against discrimination between customers or suppliers and the prohibition against obstructing a competitor’s business will continue to apply well below the threshold of dominance. In particular, these prohibitions apply to companies on which small and medium-sized companies are dependent as a supplier or purchaser and companies that have superior market power vis-à-vis smaller competitors.

New instruments for the Federal Cartel Office

The amendment provides the enforcement authorities with new instruments. They will be able to adopt commitment decisions of the kind that article 9 of Regulation 1/2003 empowers the Commission to take, and they will also be able to decide, as foreseen by article 5 of Regulation 1/2003, that there is no reason for them to intervene in a given case.

Increased fines

The level of fines for infringements has been harmonised with the EU ceiling of 10 per cent of a company’s global revenues in the last financial year. This change, which was introduced very late during the legislative process, very much aligns the German sanctions with the sanctions under EU law, including the relatively vague ‘gravity and duration of the infringement’ as the only criterion that will guide the authorities in arriving at the actual fine. The reason for harmonising the FCO’s fining power with that of the Commission is obvious: if Germany had retained its old very restrictive law where fines exceeding £500,000 could only be assessed if the companies had derived profits from the infringement, it would have put Germany at a disadvantage in the case-allocation process within the network of competition authorities. Whether the provision, which gives the FCO discretion to choose within an extremely wide range of fines, will pass muster under the German constitution remains to be seen.

Private suits and civil damages

The amendment specifically addresses private suits for damages. Companies infringing competition law will be required to pay (single) damages to those that are the victims of the infringement; the previous jurisprudence from the Federal Supreme Court limiting damage claims has been abolished by legislative fiat. The defence that the victim was able to pass the inflated purchase price on to its downstream customers (passing-on defence) has been specifically excluded. Further, final decisions of competition enforcement authorities determining that a company participated in a cartel and assessing sanctions against the company are to be considered res judicata on the issue of the existence of an infringement. This effect
is to be accorded not only to decisions of the FCO but also to decisions of the European Commission and other enforcement agencies within the EU.

Information exchange in the European Competition Network
The amendment introduces provisions legalising cooperation and in particular the exchange of information with other competition authorities of EU member states and the European Commission. This includes specific rules on the admissibility of evidence collected by foreign competition authorities to prove an infringement, provided certain rights of defence have been respected in its collection.

Geographic market
The amendment also clarifies that the geographic market can be larger than the territory of the Federal Republic of Germany—this revises case law from the Federal Supreme Court of 1995, which had maintained that the geographic market could not exceed the territory of the Federal Republic of Germany, even if as a matter of economics the market was, eg, EU-wide. The new law explicitly sets out in section 19 paragraph 2 ARC that the relevant geographic market can be larger than Germany.

This reform is likely to have a number of repercussions, in particular in the area of merger control. There are many product markets that are EU-wide as an economic matter, where the total market volume in that market in the EU exceeds €15 million, but where the German market volume remains below €15 million and thus below the de minimis threshold of section 35(2) No. 2 (Bagatellmarktklausel). Mergers involving such markets in the past clearly did not need to be notified to the FCO. Under the new law there is a tendency in the FCO to apply the de minimis threshold to the economic market and thus to subject such mergers to the jurisdiction of the FCO if the total revenues of all market participants in the geographic market exceed €15 million. At present, however, it would appear that there is no uniform view on this issue in the FCO.

Merger control
Merger control was considered largely outside the focus of the amendment which implemented the changes triggered by the Commission’s ongoing work as economic theory which informs the Commission’s ongoing work as restraints as well as the horizontal merger guidelines. It is also the maintenance of the practice of the FCO to this day.

Against this background the German government, in its more recent comments on the report by the FCO on its activities during 2003/2004 has come out in favour of a gradual movement towards a more economics-based approach in German competition law. As the government’s commentary recognises, as far as article 81 EC is concerned, the economic concept of EC law will prevail and thus measures in situations where a clearance decision from the FCO is challenged before the courts.

This is in part a reaction to the extremely generous jurisprudence developed by the Oberlandesgericht Düsseldorf, which had almost routinely suspended the effect of clearance decisions upon applications from competitors, thus preventing the merging parties from consummating the merger pending the resolution of the appeal in the main proceeding. And as the Federal Ministry of Economics has recently acknowledged, a harmonisation of the substantive standard of German merger control with the standard of regulation 139/2004, to which the German Federal Cartel Office currently is opposed, will remain on the agenda.

A more economics-based approach to competition law
The second major development in German competition law to be reported is a subject that has not yet received too much attention, but which has potentially far reaching long-term implications for the development of German competition law.

Traditionally, German competition law had been very much influenced by the ideas of the Freiburg School, according to which the economic freedom of individuals and companies protected by competition law is part of the overall protection of fundamental freedoms through the Constitution. During the first decades of the practice of the German Federal Cartel Office, the conduct-structure-performance paradigm championed by the Harvard School has been particularly influential and it continues to dominate the practice of the FCO to this day.

At the same time, the European Commission, in its more recent practice has embraced the consumer welfare-oriented approach of the Chicago School. This approach is very much behind the modernisation of the substantive EU competition law as is evidenced by the block exemptions and guidelines on horizontal and vertical restraints as well as the horizontal merger guidelines. It is also the economic theory which informs the Commission’s ongoing work as regards a reform of article 82 EC.

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German law has no choice but to follow the new approach. The report goes on to suggest that this would also apply to article 82 EC where German law could be stricter, but where, according to the report the Commission’s ‘expected re-evaluation of the concept of abuse in article 82’ will likely have significant effects on the interpretation of German competition law in sections 19 and 20 ARC.

Finally, the comments acknowledge that the most significant impact of a movement away from an emphasis on market structure is likely to be felt in the area of merger control. While not suggesting an abrupt turn-about, the comments state that “more refined economic analysis can contribute to improving the assessment based on traditional criteria in order to give them a more robust foundation and thus to give as realistic as possible a picture of the market and of the effects of a merger. In individual cases this may mean that the re-evaluation on the basis of economic criteria will require a modification of existing practice (of the FCO).”

**Conclusion**

The harmonisation between German and European competition law brought about by Regulation 1/2003 has been made complete by the German legislator as far as article 81 EC is concerned. Thus the substantive standard in this area will change. In addition, the amendment brings a large number of changes whose practical effect will most likely take a few years to be truly felt. Whether the measures introduced by the German legislator to improve the possibilities of bringing damage claims against the participants in a cartel will be sufficient to make Germany a place where such claims are enforced, remains quite doubtful. In any event, many of the peculiarities of German competition law, which have existed for more than 40 years, will over time be extinguished. And the more economics-based approach, which will take some time to manifest itself, will lead to a further harmonisation with EU law.

**Notes**

1. Specific antitrust provisions have been in effect in Germany since 1923.
3. In fact, prior to the adoption of the law, this jurisprudence had been overruled by the Federal Supreme Court itself; see the Staubsaugerbeutelmarkt-Beschluss, Judgment of 5 October 2004, KVR 14/03.