GERMAN COMPETITION LAW AFTER THE 7th AMENDMENT TO THE GERMAN ACT AGAINST RESTRAINTS OF COMPETITION – AN OVERVIEW

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On 1 July 2005, the 7th amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – "GWB") entered into force. It implies major changes in German competition law. The objective of the amendment is to harmonize German with European competition law. In principle, cases having only a national scope will now be judged by similar provisions as cases that have a European dimension. As a consequence, the substantive analysis of a case does no longer depend on whether the trade between Member States of the European Union is affected.

The new principle of self-assessment under European competition law

The amendment to the GWB has been inspired by European Regulation No. 1/2003 of the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (EC) which entered into force on 1 May 2004. Regulation No. 1/2003 put end to the previous notification and exemption system for anticompetitive agreements and replaced this system by a directly applicable exemption system. Consequently, since May 2004, companies may no longer notify anticompetitive agreements with the European Commission ("Commission") and apply for an exemption. Moreover, they are obliged to assess themselves whether a particular practice is prohibited by European competition law or is subject to an exemption (principle of self-assessment). The Commission monitors compliance with European competition law and, if the case may be, opens proceedings for the imposition of fines.

The Europeanization of German competition law

Like European competition law, the new GWB provides for a general prohibition of restraints of competition. This includes restrictive horizontal practices between competitors active in the same market as well as restrictive vertical practices between companies active in up- and downstream markets. The new GWB also replaced its previous notification and exemption system with a directly applicable exemption system and, thus, introduced the principle of self-assessment.

In place of the previous special exemptions, German competition law now contains a general exemption from the prohibition of restrictive practices which has been adapted to Art. 81 para. 3 EC. To qualify for an exemption, a restrictive practice has to contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. It shall furthermore not impose restrictions which are not indispensable to the attainment of these objectives and shall not afford the possibility of eliminating competition in respect of a substantial part of the products in question. The adoption of Art. 81 para. 3 EC into German law implicates that companies also have to take account of the jurisdiction of the European Courts as well as of the legal practice of the Commission even if a given practice has only a national dimension and does not affect the trade between Member States.

The Commission enacted certain block exemptions from the prohibition of restrictive practices which now apply *mutatis mutandis* on agreements having only a national affect. There are block exemptions for certain agreements

- between competitors regarding horizontal co-operation in the fields of R&D and specialization;
- between companies active on up- and downstream markets;
- on the transfer of technologies;

- in the insurance sector;
- in the field of maritime and air transport;
- regarding car distribution.

Notwithstanding the Europeanization of the exemption system, the previous exemption for so-called "cartels between medium-sized businesses" with national or regional effect has been maintained. This exemption facilitates the co-operation between small and medium-sized companies to rationalize their economic operations. At least until 30 June 2009, small and medium-sized companies may ask the German Federal Cartel Office (*Bundeskartellamt*) for a non-objection decision in case they can prove a special legal and economic interest.

Abuse of a dominant position

Companies with high market shares are subject to particularly strict regulations: Under German as well as European competition law, the abuse of a dominant market position is prohibited. In this area, Member States are entitled to enact more strict provisions than the Commission. The German legislator made use of this authorization and maintained most of the pervious provisions and even aggravated some of them. For example, under German competition law, the prohibition of discriminatory practices applies explicitly in favor of small and medium-sized companies that depend on the supply or demand of companies with strong market power. As another example, the mere demand by a market dominant company to be awarded a competitive edge from another company constitutes an abuse of a dominant position.

Increase of fines

Under the new GWB, not only the violation of German, but also of European competition law is subject to fines. The maximum fine for substantial violations has been increased to up to Euro 1 million; the maximum fine for moderate violations to up to Euro 100,000. Like in European law, the variable fine which may be imposed on companies may reach 10% of the total turnover generated in the preceding business year.

Cartel litigation

The new GWB facilities private cartel litigation. Now, the GWB provides for a comprehensive basis for claims for damages deriving from a violation of European or German competition law. Under the new law, any market participant is entitled to claim for damages, regardless of whether the objective of a given restrictive practice was to infringe this particular person's rights. Furthermore, the new GWB clarifies that damages are not *per se* excluded just because a product or service has been passed on to another market participant at a higher price (so-called pass-on-defense).

Summary and Outlook

The GWB has substantially been changed to harmonize German with European competition law. The principle of self-assessment obliges companies to take measures to be able to prove that they have properly assessed their business practices as to compliance with competition law. Also in cases which may not affect the trade between Member States, companies have to observe European competition law and practice.

Private litigation has been facilitated. However, the practical impact remains to be seen. The main issue will still be evidencing a damage as German law does not have a system of discovery.

German competition law still contains special provisions in favor of small and medium sized business.

Also, the German merger control provisions have not been harmonized with European law.

The information and opinions contained herein are not intended to be a comprehensive study, nor to provide legal advice, and should not be relied on or treated as a substitute for specific advice concerning individual situations. For further information please contact:

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