# Update Antitrust

June 2017

## Overview of the main reforms under the 9th ARC Amendment

**The 9th Act Amending the German Act against Restraints of Competition (9. GWB-ÄndG – 9th ARC Amendment) came into effect on 9 June 2017. The aim of the act is in particular to facilitate the enforcement of private actions for damages against cartel members and dominant undertakings. Our Update Antitrust provides an overview of the most important new regulations.**

The lawmaker responsible for the 7th ARC Amendment and the case law established concerning Section 33 ARC had already anticipated a series of regulations that were to be implemented by 27 December 2016 on the basis of the EU Cartel Damages Directive. Against this background, the regulations of the 9th ARC Amendment implementing the EU Cartel Damages Directive do not mean a change of paradigm, but in part however a further notable improvement in the prospects of damaged companies in terms of being able to successfully enforce their claims for damages against cartel members and dominant undertakings, and, under certain circumstances, also against their parent companies.

### I. Further facilitation in the enforcement of private actions for damages

#### 1. Presumption of causal harm

Claims for damages are significantly facilitated by the **rebuttable presumption of causal harm** through a cartel agreement.[1] The presumption extends to the existence of harm and its cause by the cartel agreement, not however to the amount of harm[2] or to the fundamental fact that a claimant is affected by the cartel. Yet, reference is made to the possibility of judicial estimation of the amount of harm.[3]

[1] Section 33a Subsection 2 ARC new version
[2] See also recital 47 of the EU Cartel Damages Directive
[3] Section 33a Subsection 3 ARC new in conjunction with Section 287 Civil Procedure Code (ZPO)

## 2. Passing-on defence by cartel members

Further reforms concern the **passing-on defence**: initially, the starting situation remains that the onward sale of the product does not by itself cause harm to lapse.[4] If however a product has been sold on with a price mark-up (*so-called passing-on defence*), any original harm lapses.[5] Even in this case however, the possibility of harm in the form of lost profit remains, as the overpriced onward sale has resulted in a decline in sales.[6] According to the legislative intent, the passing-on defence and the preconditions for this passing-on are shaped mainly by the *ORWI* decision of the Federal Court of Justice (BGH). The regulation is therefore above all for the purpose of clarification. The courts are expressly empowered to estimate the scope of the passing-on at their complete discretion, with the result that no full evidence has to be kept concerning this.[7]

## 3. Presumption of passing-on to second purchaser

If a **second purchaser** (indirect purchaser) takes measures against a cartel member within the framework of the request for damages, it is fundamentally required to demonstrate and prove the passing-on by the direct customer to it. Nevertheless, there is a **presumption of passing-on** in favour of the indirect purchaser under three cumulative preconditions: (i) the defendant has committed an infringement of Sections 1 or 19 ARC or Art. 101 or 102 of the Treaty on the Functioning of the European Union, (ii) the infringement has resulted in an overcharge for the direct purchaser and (iii) the indirect purchaser has purchased the goods or services that were the object of the infringement, or has purchased goods or services derived from or containing them.[8] Undermining the presumption requires prima facie evidence of facts that exclude partial or complete passing-on to the indirect purchaser.[9] Consequently, there is no requirement for evidence to the contrary by the damaging party.

[4]Section 33c Subsection 1 Sentence 1 ARC new version
[5]Section 33c Subsection 1 Sentence 2 ARC new version
[6]Section 33c Subsection 1 Sentence 3 ARC new version
[7]Section 33c Subsection 5 ARC new version in conjunction with Section 287 ZPO.
[8]Section 33c Subsection 2 ARC new version
[9]Section 33c Subsection 3 ARC new version

It is made clear that cartel members also remain liable as **joint and several debtors**.[10] The internal settlement between the cartel members is carried out according to the contributions to the cause of the harm, among other methods.[11] Under certain circumstances, there is a **limitation of liability in favour of small and medium-sized enterprises ("SMEs")** in both the internal relationship between the cartel members as well as in the external relationship to the damaged parties,[12] and also a general **corresponding limitation of liability in favour of immunity recipients**.[13]

## 4. Joint and several liability of the cartel members

A significant facilitation of the de facto enforcement of a claim for damages results from the newly introduced claim of the damaged party to the **return of evidence, and to the provision of information** required as evidence for a request for damages.[14] The claim exists against the party in possession of evidence, e.g. against a cartel member, but also against a directly damaged party. Here, the justified interests of the obliged party must be taken into account within the framework of a check on proportionality.[15] Additionally, leniency statements and settlement submissions are exempt from the disclosure;[16] other documents are privileged up until conclusion of the proceedings before the competition authorities.[17] The party obliged to provide information also has a claim to reimbursement of necessary expenses.[18] The obligation to provide information is secured by an obligation to pay damages in cases of intentionally or grossly negligent false, incomplete or refused information.[19] A claim for disclosure also applies in favour of the party against whom damages are asserted, and who requires specific evidence for its defence – for example for the pleading of the *passing-on defence*.[20]

## 5. Claim for disclosure of evidence

[10] Section 33d Subsection 1 ARC new version
[11] Section 33d Subsection 2 ARC new version
[12] Section 33d Subsections 3 – 5 ARC new version
[13] Section 33e ARC new version
[14] Section 33g Subsection 1, Subsection 10 ARC new version
[15] Section 33g Subsection 3 ARC new version
[16] Section 33g Subsection 4 ARC new version
[17] Section 33g Subsection 5 ARC new version
[18] Section 33g Subsection 7 ARC new version
[19] Section 33g Subsection 8 ARC new version
[20] Section 33g Subsection 2, Subsection 10 ARC new version

### 6. Statute barring of claims for damages

The **limitation period** for claims for damages is now **five years**.[21] It begins at the end of the year in which (i) the claim has been created, (ii) the party entitled to the claim has gained knowledge, or should have gained knowledge without gross negligence, of (a) the circumstances creating the claim and of the fact that this results in a competition law infringement as well as (b) of the identity of the infringer, and (iii) of the end of the cartel infringement creating the claim.[22] The claims shall become statute barred ten years after creation of the claim and ending of the infringement, without consideration for knowledge or grossly negligent lack of knowledge.[23] The maximum limitation period is 30 years from the infringement.[24]

## II. Group liability: closure of the "sausage loophole"

In order to close the so-called "sausage loophole" (named after the internal restructuring measures in the context of the sausage cartel), the 9th ARC Amendment provides for the Office also being able to impose administrative fines on a parent company or a legal successor in future.[25]

Thus far, administrative fines have not been imposed against economic entities, but rather against the infringing legal person. If this legal person no longer exists, for example because it has been shut down or significant assets have been sold to group-internal or external buyers, it was frequently no longer possible to impose an administrative fine. Only in the rare cases of "almost complete economic identity" was it still possible to impose administrative fines on the legal successor.

In the 8th ARC Amendment in 2013, the lawmaker had, through Section 30 Subsection 2a OWiG (Law on Administrative Offences), enabled the imposition of administrative fines on the legal successor and the partial successor in the event of splitting up. Nevertheless, liability was limited to the value of the assets taken over.

The 9th ARC Amendment now finally adapts German law to EU antitrust law, which has always provided for liability of the entire undertaking, i.e. of the economic entity, for cartel in-

[21] Section 33h Subsection 1 ARC new version
[22] Section 33h Subsection 2 ARC new version
[23] Section 33h Subsection 3 ARC new version
[24] Section 33h Subsection 4 ARC new version
[25] Section 81 Subsections 3a to 3c ARC new version

fringements by individual group companies. This means that, in future, liability to administrative fines will also extend to parent companies of a cartel infringer. This also applies even if the infringing company is sold prior to imposition of the administrative fine; in this case, the new parent company will also be liable, and indeed not only up to the value of the assets taken over.

The same also applies in the event of restructuring by way of an asset deal, in cases in which the originally infringing legal person no longer exists. In this case, liability will lie with the acquiring party who assumes the assets of the legal person in full or in part, and who carries on the business activities in economic continuity.

In practice this means that internal restructuring for the purpose of avoiding administrative fines will no longer be possible. Even within the framework of share or asset deals, the acquiring party will in future be required, as part of the due diligence, to carry out an even more thorough check on whether the target is involved in unlawful cartel practices, and to protect itself via contractual guarantees if necessary.

## III. Extensions of controls on abusive practices

In order to adapt the control of dominant undertakings to the challenges of digitalisation, it has now been made clear that a market can also exist in cases of **services provided free of charge**.[26] This is intended to ensure application of the prohibition on abusive practices, above all in multi-sided markets (in particular online platforms): for example, platforms such as Facebook provide their users with a service free of charge that is financed through advertising customers – in future, the relationship between the platform and its users will also be clearly covered by the prohibition on abusive practices. In the proceedings concerning the best price clauses of the hotel booking portal HRS, the Higher Regional Court Düsseldorf had thus far remained of the opinion that an activity can only be assignable to a market if it is not provided free of charge. By contrast, in the case of Internet platforms, the Federal Cartel Office has tended to assume that the user side can also be regarded as a market from which the platform does not demand a counter-performance in money (e.g. in the merger

[26]Section 18 Subsection 2a ARC new version

control proceedings concerning the online dating platforms Elitepartner/Parship).

However, the new regulation does not yet answer the question of in what cases an abusive practice is given in a market where services are provided free of charge. At least in terms of assessing the market position of the providers in these **multi-sided markets**, the lawmaker now names further criteria that should be taken into account in addition to the previous criteria:[27] the checking of network effects, of the possibility of multi-homing and of switching costs for users (when switching between the networks) as well as of access to competitively relevant data, shall facilitate an adequate assessment, in particular of platform markets. This is also intended to counter the phenomenon that, following intense competition between the platform operators for the market, only minor competition exists on the market once a critical number of network or platform users is reached ("tipping effect"). In practice, it will therefore be necessary to clarify – taking account of economic analyses – in what constellations "big data" creates market power.

## IV. New regulations on the "Anzapfverbot" and on selling below cost price

The amendment contains further reforms or clarifications concerning the review of abusive practices under competition law. One aspect newly regulated is the so-called "Anzapfverbot".[28] Here, it has been made clear that even a request for the granting of an objectively unjustified privilege constitutes abuse of market power, without a need for the privilege requested to be causally based on the abuse of market power. The lawmaker has now also extended the regulation on the sale of food at below cost price to include a definition of the term cost price (“*Einstandspreis*”).[29] However it remains to be seen whether the clarifications on the "Anzapfverbot" as well as on selling below cost price, introduced by the amendment, will achieve the intended aim of restricting the buying power, above all of the major food retail chains.

## V. Facilitation for press companies

For press companies, **cooperation in the publishing sector** outside of the editorial field is facilitated.[30] This implements a

[27] Section 18 Subsection 3a ARC new version
[28] Section 19 Subsection 2 No. 5 ARC new version
[29] Section 20 Subsection 3 Sentence 3 ARC new version
[30] Section 30 Subsection 2b ARC new version

stipulation under the Coalition Agreement to take account of the stricter economic conditions for press publishers in competition with other media.

In future, business cooperation arrangements between press publishers in advertisement marketing, sales, in the production and delivery of newspapers and magazines (print and online) will no longer be covered by the German prohibition of anti-competitive agreements. This means for example that above all small and medium-sized publishers will be able to engage in even more intensive joint marketing of their publications in future - in this context they can now also agree their prices, divide up territories or offer advertising packages exclusively in combinations. The exemption ruling applies in so far as the agreement enables the parties involved to strengthen their economic basis for competition with other media, but is expressly not applicable to any cooperation in the editorial field.

As the ruling, which is limited until 31 December 2027, is applicable only to the national level, authorities and courts will in future have to decide in what cases a cooperation could affect trade between the European Member States: Because in these cases, the European prohibition of anti-competitive agreements, which fundamentally prohibits practices such as price agreements, remains applicable. In addition, there has thus far been no final clarification as to whether the facilitation for press publishers should also apply in the field of merger control.

## VI. Extension of the scope of merger control

The 9th ARC Amendment also extends the scope of merger control.[31] This is intended to ensure that the merger control can fulfil its function comprehensively even in an increasingly dynamic economic world, and can keep pace with the ever faster economic cycles, including against the background of the advancing digitisation and interlinking of business and society.

### 1. Legal prerequisites for the new conditions for actions

Under the newly added subsidiary conditions for actions,[32] the regulations on merger control will in future also be applicable if (1) the undertakings involved have collectively achieved

[31] Section 35 ARC
[32] Section 35 Subsection 1a ARC new version

global sales revenues of more than 500 million euros, (2) at least one of the undertakings involved has achieved sales revenues of more than 25 million euros in Germany in the last financial year prior to the merger, but none of the other undertakings involved has achieved sales revenues of more than 5 million euros in Germany, (3) the value of the counter-performance for the merger is more than 400 million euros and (4) the undertaking to be acquired operates in a significant scope in Germany.

**a. Value of the counter-performance**

A basic prerequisite for the notification requirement under the new conditions for actions is that the merger has a specific dimension.[33] This is measured according to the value of the counter-performance. The role model for this approach is the "size of transaction test" that has been established in the USA since the introduction of its merger control in 1976, and that has proven itself in practice.

**b. Significant activity in Germany**

The notification requirement concerning the proposed merger under the new conditions for actions is also dependent on significant activities in Germany of the target undertaking to be acquired.[34] Accordingly, there is a need for a certain noticeability of influencing of a specific market as a result of the merger. However, no high standards are to be placed on the noticeability. By contrast, marginal activities should not result in a notification requirement. With regard to the assessment of the activity in Germany and of the authoritative criteria and factors for this, the lawmaker did not consider statutory fixing or determination of absolute quantitative threshold values to be appropriate; these vary depending on the industry or market maturity.

**c. Aim of the new regulation**

The reform in the context of the merger control is intended to achieve a situation in which the market potential and the economic importance of the target undertaking are also covered in future. On the basis of this regulation, the Federal Cartel Office can also check mergers in which large, established undertakings wish to create or strengthen their domination through the takeover of young, innovative undertakings (e.g. start-ups) with a high economic value. As recently shown by the acquisition of the instant messenger WhatsApp Inc. by

[33] Section 35 Subsection 1a No. 3 ARC new version
[34] Section 35 Subsection 1a No. 4 ARC new version

Facebook Inc., the possibility cannot be excluded of foreclosure effects arising in the context of such transactions, market entry barriers being created and innovation potential hindered. This can occur for example if undertakings that are already market leaders integrate up-and-coming competitors completely into their own business at an early stage of their development, change the original activity of the undertaking acquired or even discontinue it completely. The introduction of the new supplementary threshold for actions is intended to enable the Federal Cartel Office to check such effects in advance and to prevent them if necessary.

## 2. Calculation of the value of the counter-performance

Parallel to this, the 9th ARC Amendment also adds a regulation on calculation of the value of the counter-performance for the purpose of the new conditions for actions.[35] Under this regulation, the counter-performance comprises "*all assets and other services in money's worth, received by the seller from the acquiring party in connection with the merger […] (selling price), plus the value of any liabilities assumed by the acquiring party*".

### a. Term "assets"

The intention of the lawmaker is a broad interpretation of the term "assets". It includes all monetary payments, the transfer of voting rights, securities, property, plant and equipment as well as intangible assets. It is also intended to cover counter-performances that are linked to the occurrence of specific conditions, as contained in so-called "*earn out*" clauses, as well as agreed additional payments to the seller in the event of specific sales or profit targets being achieved at a future date. Payments for any agreed renunciation of competition by the seller should also be added.

### b. Consideration of liabilities

Additionally, the lawmaker has expressly stated that the counter-performance also includes the value of the liabilities assumed by the acquiring party.[36] The release from debt has a positive value particularly for the seller, and must therefore logically be taken into account when assessing the value of the counter-performance. The idea is thus to cover in particular those cases in which the seller effectively receives a reduced selling price.

[35] Section 38 Subsection 4a ARC new version
[36] Section 38 Subsection 4a No. 2 ARC new version

**c. Valuation method**

The valuation method applied by the undertaking notifying the merger is fundamentally left to that undertaking. The only requirement is that the method must be recognised for valuation for continuation of the undertaking acquired. Nevertheless, valuation on the basis of liquidation values is not permitted. According to the intention of the lawmaker, the level of the selling price, calculated on the basis of a corresponding valuation and contractually agreed by the merger parties, including any liabilities assumed, should normally trigger a presumption of correctness for the valuation. As a rule, there is no need for additional attestations, for example by an auditor.

**d. Aim of the new regulation**

The aim of the new regulation is to calculate the overall amount that the acquiring party is prepared to pay for the takeover of the undertaking to be acquired. This reflects the economic importance that it attaches to the influence over the undertaking, the possibility to dispose of its assets, resources, business ideas or models as well as patents.

## 3. Reforms concerning formal requirements on notification

In the event of a merger under the new conditions for actions[37] and within the framework of notification of the intention, the Federal Cartel Office must, in addition to the information previously required, now also be informed of the value of the counter-performance for the merger,[38] including the bases for its calculation, together with additional information on the nature and scope of the activities in Germany.[39]

## 4. Evaluation of the new regulation

In practice, the very high requirements will mean that the new conditions for actions will have effects in a very manageable scope only. However, whether this covers those particular cases that the lawmaker had in mind when making this amendment, will become clear after three years in the context of the evaluation envisaged by law.[40]

[37] Section 39 Subsection 3 No. 3a ARC new version
[38] Section 35 Subsection 1a ARC new version
[39] Section 38 Subsection 4a ARC new version
[40] Section 43a ARC new version

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