



Concurrences

Revue des droits de la concurrence
Competition Law Journal

The wait is over: German Parliament adopts new competition law rules

Horizons | Concurrences N° 4-2013 – pp. 210-215

Ulrich A. PFEFFER

ulrich.pfeffer@uni-wuerzburg.de

| *Research Assistant and PhD-Candidate, Law Faculty,
University of Würzburg*

Ulrich A. PFEFFER
ulrich.pfeffer@uni-wuerzburg.de

Research Assistant and PhD-Candidate,
Law Faculty, University of Würzburg

Abstract

After months of political controversy Germany overhauled its competition law regime and adopted a new Amendment to the Act against Restraints of Competition (ARC). In effect since 30 June 2013, the Amendment has led to further alignment of German competition law with its European counterpart. Most noteworthy in this regard is the implementation of the European SIEC test into the substantive merger control assessment. Further changes affect the field of unilateral conduct, general antitrust enforcement and sector-specific aspects of antitrust supervision. The article summarizes and briefly examines the most relevant and crucial changes to the ARC.

Après plusieurs mois de controverse politique, le législateur allemand a adopté un nouvel amendement de la loi contre les restrictions à la concurrence (GWB). Entré en vigueur depuis le 30 juin 2013, cet amendement a pour objectif d'harmoniser le droit allemand de la concurrence avec le droit européen. L'innovation la plus remarquable est le recours au "SIEC-Test" pour le contrôle des concentrations des entreprises tel qu'appliqué en droit européen. D'autres changements concernent notamment le domaine de la conduite unilatérale, l'application générale des règles de la concurrence ainsi que le contrôle des secteurs spécifiques. L'article résume et examine brièvement les changements les plus importants apportés par le nouvel amendement.

The wait is over: German Parliament adopts new competition law rules

1. In the legislative pipeline since 2011, the German competition law reform, known as the 8th Amendment to the Act against Restraints of Competition (ARC)¹ has finally come into effect on 30 June 2013. After a long and sometimes heated debate a mediation committee between the two chambers of the German Parliament—*Bundestag* and *Bundesrat*—has reached a compromise and brought months of political controversy to an end.

2. Already in October 2012 the *Bundestag* accepted the original reform proposal, initiated by a liberal-conservative government led by the Christian Democratic Union, with only few modifications.² However, despite mostly positive reception the *Bundesrat*, representing Germany's states on federal level, objected to the proposal and invoked a joint committee to mediate between *Bundestag* und *Bundesrat*. The *Bundesrat* wanted to see transactions between public health insurance providers be exempted from any antitrust supervision. The chamber also demanded that fees for services provided by public authorities should not be considered an economic activity covered by the ARC. As the left-of-center parties (Social Democrats, the Green Party and the Left Party) held the majority in the *Bundesrat* a mutually acceptable compromise was needed and thus a lengthy mediation process followed. In the end, the *Bundestag* conceded on most points and after months of waiting the ARC has been successfully amended.

3. As previous amendments to the ARC, the present reform further aligns German competition rules with its EU counterpart. Particularly the implementation of the "significant impediment to effective competition" (SIEC) test into the substantive merger assessment stands out in this regard (I.1.). Further changes concern substantive and procedural aspects of merger control (I.2.-5.), the abuse of dominance (II.), specific industry sectors (III.), and aspects of general antitrust enforcement (IV.).

I. Merger control

1. Implementation of the European SIEC test³

4. Arguably the most significant change in the field of merger control concerns the introduction of the SIEC test to the ARC. The test that lies at the heart of EU merger control since it had been implemented in the Merger Regulation⁴ in 2004 replaces the original market dominance test and becomes the standard criterion for assessing market concentration (cf. sec. 36 para. 1 sent. 1 ARC). However, as under the European Merger Regulation, the creation or strengthening of a dominant market position has been preserved as a statutory example for a significant impediment

¹ Aches Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, *Federal Law Gazette (Bundesgesetzblatt, BGBl.)* 2013, Part I, 1738 et seqq.

² For the original government proposal see *Bundestags-Drucksache* 17/9852 of 31 May 2012; for the modified proposal see *Bundestags-Drucksache* 17/11053 of 17 October 2012.

³ For further details cf. Bardong, *Die Einführung des SIEC-Tests und weitere Änderungen in der materiellen Fusionskontrolle*, p. 11 et seqq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) 2004 O.J. (L 24) 1.

to effective competition (sec. 36 para. 1 sent. 1 ARC). In this regard, the shift to the SIEC test will not dramatically change the merger control practice of the *Bundeskartellamt* (Federal Cartel Office, hereinafter FCO). Though the new test requires the FCO to consider a more effects-based approach and to examine, whether the proposed merger will significantly impede effective competition, the FCO can—at least in most cases—still adhere to the old dominance test. Accordingly, the body of existing precedent and the FCO’s 2012 Guidance on Substantive Merger Control⁵ will largely remain applicable.⁶ Nevertheless, the new alignment with the European merger rules means that in the context of merger review the FCO has to take the commission’s practice concerning the SIEC test into account. If and to what extent its practice will be in line with the European approach remains to be seen. The FCO, which supported the SIEC test during the legislative procedure, already declined the necessity of an identical approach.

5. Art. 267 TFEU may lead to a different outcome in this respect. Art. 267 TFEU provides for the jurisdiction of the European Court of Justice (ECJ) to give preliminary ruling concerning the interpretation of the treaties and acts of EU institutions. It imposes an obligation on courts in member states, against whose decisions there is no judicial remedy under national law, to make a reference, if a question relating to the interpretation of the treaties or other EU acts arises. All other courts have discretion to refer. According to the case law of the ECJ Art. 267 TFEU also remains applicable in cases where in fact EU law does not directly govern the facts in dispute, but where the legislator has decided to align the legal assessment of domestic and European cases.⁷ Thus, even if the proposed merger is outside the direct scope of EU law, the court of last appeal may have to make a reference to the ECJ. It is argued that this depends largely on the extent to which the legislature has aligned the domestic merger control to the European regime. Only if the relevant provisions were in full harmonization with EU law, as it was the case in the underlying precedent, an obligation for preliminary reference would exist. The SIEC test was introduced, in particular, to achieve a uniform assessment criterion for merger control purposes. However, the ARC still retains various German idiosyncrasies. It will be interesting to see, which approach will prevail.

6. Irrespective of that, the so-called “balancing clause” of the ARC always has to be kept in mind, when assessing a merger. In contrast to the European Merger Regulation and according to the “balancing clause” a merger will only be prohibited, if the parties cannot demonstrate that the overall improvements resulting from the merger will outweigh the disadvantages of market dominance (cf. sec. 36 para. 1 sent. 2 no. 1 ARC).

7. A further question that arises is if a significant impediment will be affirmed by the FCO, irrespective of the extent of the strengthening of a dominant position. According to former German case law it is irrelevant for the substantive assessment whether the increase in dominance itself reaches a certain degree. Minor (and thus insignificant) increases in market shares can therefore also lead to a prohibition decision. The newly implemented SIEC criterion and the commission’s practice both suggest the opposite.

8. Despite some few problems of application, the implementation of the SIEC-test will lead to greater convergence in the application of merger rules with the EU and its member states, but also with the US, Canada and Australia, where the similar effects-based “substantial lessening of competition” (SLC) test applies. Especially for parties involved in multi-jurisdictional cross-border mergers this is of great advantage. Due to the alignment the same substantive assessment criteria will be applicable for each proposed merger, irrespective of whether the case falls under EU or national jurisprudence. This eventually leads to a level playing field and strengthens legal certainty. The SIEC-test is also expected to facilitate a more flexible approach to unilateral effects cases that do not create or strengthen a dominant market position but still lessen competition. This is in accordance with the legislator’s desire to close a potential enforcement gap in these rare cases.

9. Moreover, the SIEC test will further develop the use of economic reasoning and evidence in German merger control proceedings. This trend is in line with the new 2012 Guidance on Substantive Merger Control,⁸ which explains in detail the economic concepts underlying the theories of competitive harm.⁹

2. Presumption of market dominance

10. Unlike European competition law, the ARC will continue to contain a statutory presumption of market dominance (cf. sec. 18 para. 4 et seqq. ARC). The rebuttable presumption is of high practical relevance not only for abusive conduct cases but also for merger control proceedings with respect to the market dominance test. However, the market share threshold for presumed single-market dominance will be raised from one-third (33.3%) to 40%. The thresholds for presumed collective dominance remain unchanged: a combined market share of at least 50% held by three undertakings, or a combined share of two-thirds (66.6%) held by five or less undertakings. Compared to EU law, Germany thereby maintains its national approach.

5 See http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf.

6 Even the legislator takes the view that most cases will continue to be based upon a finding of dominance, cf. explanatory memorandum of the government proposal, Bundestags-Drucksache 17/9852 of 31 May 2012, p. 28.

7 Most recently, ECJ, 14 March 2013, Case C-32/11, para. 20 – *Allianz*.

8 Despite its official title, the guidance almost exclusively deals with only one aspect of merger control: market dominance.

9 See *supra* note 5.

3. Mergers affecting de minimis markets

11. A further significant change concerns the adjustment of another special feature of the German merger control regime, the minor market exemption. According to the former exemption, mergers on *de minimis* markets did not trigger the notification requirement. However, because of difficulties associated with determining the market and its precise annual value and as mergers usually do not exclusively affect *de minimis* markets, parties were often uncertain about whether to file. To make matters worse, in a limited number of cases the FCO bundled closely related geographic and product markets and aggregated their volumes of sales when determining the market size. This inevitably led to an area of dispute. For the sake of legal certainty the exemption has now been incorporated into the substantive merger assessment (cf. sec. 36 para. 1 sent. 2 no. 2 ARC). From now on transactions need to be notified, irrespective of whether they exclusively relate to *de minimis* markets. However, the FCO cannot prohibit a merger within such a market, even if it results in a significant impediment to effective competition. As before, a *de minimis* market is defined as a market which has been in existence for at least five years and had a total annual value not exceeding EUR 15 million in the last calendar year.

12. A separate *de minimis* exemption remains unchanged: a notification is not required if one party to the merger achieved less than EUR 10 million of worldwide turnover, provided that it is not controlled by another undertaking (cf. sec. 35 para. 2 sent. 1 ARC).

4. Consecutive transactions between the same undertakings¹⁰

13. Similar to Art. 5 (2) of the European Merger Regulation, the ARC will now explicitly provide that two or more transactions within a two-year period between the same undertakings are to be treated as one single transaction (cf. sec. 38 para. 5 sent. 3 ARC). The combined revenues of all prior transactions will consequently trigger the relevant revenue thresholds. The provision ensures that undertakings cannot escape merger control by artificially breaking down one merger into various transactions of assets, which, if looked at separately, would each fail to meet the merger control thresholds.

¹⁰ For further details cf. Hempel, Formelle Fusionskontrolle und Fusionskontrollrecht, p. 79 et seqq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

5. Further changes on merger control procedure¹¹

14. Further changes concern the waiting periods and deadlines for phase II proceedings. If a phase II assessment is launched by the FCO, a decision must be issued within four months after submission of the complete notification. The Amendment implements an automatic extension by one additional month, if the parties at that stage of the proceedings submit remedies to the FCO for the first time. Furthermore, the examination deadline may now be suspended if the parties fail to timely submit information requested by the FCO, unless they are not responsible for this failure. Finally, the Amendment provides for more legal certainty in cases, where a merger is completed prior to notification. In such cases the transaction is considered to be provisionally invalid. If the transaction has subsequently been notified, the FCO will assess the competitive issues directly as part of a “*merger dissolution procedure*,” for which a binding deadline for the FCO does not apply. If the dissolution procedure is closed due to the absence of competitive concerns, the merger will retroactively become effective and legally valid.

II. Abuse of Dominance¹²

15. The Amendment has reorganized and systemized the provisions concerning abusive practices. Sec. 18 ARC contains the definition and presumptions for single and collective dominance, sec. 19 ARC covers the provisions on abuse of dominance, and sec. 20 deals with abuse of relative market power. The above-mentioned increase of the thresholds for presumed market dominance in sec. 18 ARC constitutes the most important change in this regard.

III. Sector-specific rules

1. Printed media sector¹³

16. The 8th Amendment introduces and further develops specific rules for the printed media sector. Some of them are almost specifically aimed at the German press wholesale system. For several decades, the German press wholesale system involved press wholesalers having exclusive territories for the supply of magazines and newspapers. In addition, the National Association of Press Wholesalers (*Bundesverband Presse-Grosso*) negotiated the supply conditions for all of its members with the individual publishers, including the press wholesalers' margin. In 2012, the District Court of Cologne held that through engaging in negotiation on behalf of its members, the association illegally coordinated

¹¹ For further details cf. Hempel, Formelle Fusionskontrolle und Fusionskontrollrecht, p. 82 et seqq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

¹² For further details cf. Wagner-von-Papp, Brauchen wir eine Missbrauchskontrolle von Unternehmen mit nur relativer oder überlegener Marktmacht? Novellierung der allgemeinen Missbrauchskontrolle, p. 93 et seqq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

¹³ For further details cf. Klump, Neuausrichtung der Pressefusionskontrolle – Anhebung der Aufgreifschwelle und Regelungen der Sanierungsfusion, p. 191 et seqq. as well as Raible, Die Erweiterung der kartellrechtlichen Freistellung im Pressevertrieb, p. 209 et seqq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

price and supply conditions, and in doing so infringed sec. 1 ARC and Art. 101(1) TFEU.¹⁴ Based on broad political consensus the newly added sec. 30 para. 2a ARC safeguards these press wholesale distribution agreements by way of exemption against the prohibition of anticompetitive agreements. The exemption is meant to ensure neutrality and the supply of a comprehensive portfolio of newspapers and magazines in retail stores throughout Germany. The exemption will only apply to agreements governing the performance and consideration or other requirements of a nationwide and non-discriminatory distribution of newspapers by press wholesalers to the retailing sector. As to the European prohibition of anticompetitive agreements in Art. 101(1) TFEU the legislator qualifies the above mentioned distribution services as services of general economic interest to provide at least for a limited immunity under the terms of Art. 106(2) TFEU.

17. There are also substantial changes in the area of merger control concerning newspaper publishers. These were triggered by recent changes of market conditions in the printed media sector, particularly due to increasing competition by the Internet and the consequential changing of consumer habits. Traditionally, the turnover calculation for purposes of merger control in the newspaper publishing industry provided that a multiplier of 20 is applied to the turnover of the respective undertakings. Otherwise the low turnover of newspaper publishers would have led to the accumulation of dominant positions without possibly being scrutinized by the FCO. The newly amended sec. 38 para. 3 ARC reduces the multiplier from 20 to 8, allowing for more mergers in the print media sector without FCO supervision. The merger notification threshold will now be triggered, if the worldwide turnover amounts to over EUR 62.5 million, the domestic turnover of one undertaking to over EUR 3.125 million and the domestic turnover of another undertaking to over EUR 625,000. Smaller transactions will therefore not be subject to merger control. On the other hand, the amendment will not significantly facilitate acquisitions of smaller, dependent press companies by large publishing houses, as most small press companies generate more than EUR 625,000 and large press companies usually reach the first and second threshold. Through the reduction of the multiplier the *de minimis* market clause will also be raised in cases of press mergers.

18. In addition the acquisition of small or medium sized undertakings in the print media sector has been facilitated within the scope of “rescue mergers.” In such cases the acquisition will not be prohibited by the FCO, even if the merger leads to a strengthening of a dominant market position. To be covered by the scope of the newly amended sec. 36 para. 1 No. 3 ARC the acquired press company must have had an annual deficit over the past three years prior to the merger and its existence must have been endangered. Furthermore, it has to be proven that there is no other potential purchaser who would have found a solution less harmful to competition.

14 Cf. District Court of Cologne, Decision of February 14, 2012, 88 O (Kart) 17/11, available in German at: www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/88_O_Kart_17_11_Urteil_20120214.html.

2. Water sector¹⁵

19. Since the 6th Amendment of the ARC in 1998, the competition rules for the water sector were made applicable by way of reference to a previous version of the ARC. The 8th Amendment reincorporates these rules into sec. 31-31b ARC. They include exemptions from the prohibition of restrictive agreements and particular rules on price control.

20. Since water supply is a natural monopoly and in order to prevent excessively high prices resulting from lack of competition, special abuse controls apply. However, if the water supplier is an entity under public law, the fees and charges fall outside the scope of any abuse control (cf. sec. 130 para. 1 sent. 2 ARC). It remains to be seen whether this will encourage municipal bodies to discontinue the use of private suppliers in order to evade price controls.

3. Statutory health insurance¹⁶

21. The application of the ARC to statutory health insurance funds was subject of a heated debate and substantial political disagreement. In 2011 the Regional Social Court of Hesse (*Hessisches Landessozialgericht*) ruled that any antitrust supervision of statutory health insurance funds requires an explicit statutory basis.¹⁷ The FCO responded by discontinuing its merger control supervision over statutory health insurance funds. An amendment to the relevant provisions of the German Social Security Code (*Sozialgesetzbuch*) now explicitly states that mergers between statutory health insurance funds are subject to FCO scrutiny. However, the FCO has to consult (“*Benahmen herzustellen*”) the respective supervisory authority of the health insurance funds before prohibiting a merger. Furthermore, the 8th Amendment determines that prohibition decisions of the FCO relating to mergers between statutory health insurance companies can be appealed only to social courts and not to civil courts, as is the case for all other mergers. It has also been clarified that the provisions on cartels and abusive practices do not apply to statutory health insurance funds, both amongst themselves and with respect to any dealings involving their members. However, the prohibitions still apply to the relation between statutory health insurances and service providers.

15 For further details cf. Gussone/Heymann, *Verschärfte Missbrauchsaufsicht über die Energie- und Wasserwirtschaft*, p. 234 et seqq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

16 For further details cf. Schweitzer, *Die Anwendung des Wettbewerbsrechts auf Krankenkassen: Sozialpolitische Agenden als Bruchstelle der Wettbewerbsreform*, p. 157 et seqq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

17 LSG Hessen, 15 September 2011, L1 KR 89/10 KL.

4. Market transparency units¹⁸

22. Almost concurrently with the 8th Amendment, the FCO obtained new monitoring competencies in the markets for fuels, electricity and natural gas. Based on the German Act on the Establishment of a Market Transparency Unit for Electricity and Gas Wholesale Trading¹⁹ respective market transparency units have been established at the FCO and the *Bundesnetzagentur* (Federal Network Agency). These units will observe pricing behavior and collect market data to detect market abuses and the use of insider information. The transparency unit for fuels will also enable consumers to gain comprehensive and reliable information on current fuel prices at petrol stations in their vicinity. This will allow for a better comparison of prices and, in the end, lead to stronger competition. To be able to provide the relevant information to consumers, oil companies and petrol stations are obliged to report any change in price to the transparency unit. The transparency unit will then immediately pass on this information to authorized consumer information service providers, such as the ADAC, Germany's largest automobile club.

IV. Antitrust enforcement

1. Remedies

23. Sec. 32 ARC, which lays down the competences of the FCO in antitrust procedures, has essentially been modeled after Art. 7 EC Regulation No. 1/2003. According to Sec. 32 ARC the FCO is entitled to impose every remedy, which is necessary to bring antitrust infringements effectively to an end and which is proportionate to the infringement committed. Contrary to Art. 7 (2) EC Regulation No. 1/2003, structural remedies were not expressly mentioned in sec. 32 ARC, causing a debate of whether measures can only be behavioral or also of structural nature. In 2005 the *Bundesgerichtshof* (Federal Court of Justice) decided that the power to impose “all necessary” remedies (cf. sec. 32 para. 2 ARC) could also include structural relief.²⁰ This is now—for clarification purposes—affirmed by the new amendment. According to sec. 32 para. 2 ARC the FCO may impose structural remedies where this is necessary and proportionate. Such structural remedies may include the sale of certain assets or even the breaking up of a vertically integrated business. An earlier idea of granting the FCO an unbundling competence for markets with structural competition deficits irrespective of the occurrence of any abusive behavior has been abandoned.²¹

18 For further details cf. Nothhelfer, *Einrichtung von Markttransparenzstellen für den Großhandel mit Strom und Gas sowie für Kraftstoffe*, p. 283 et seq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

19 Gesetz zur Einrichtung einer Markttransparenzstelle für den Großhandel mit Strom und Gas, BGBl. 2012, Part I, p. 2043 et seq.

20 BGH, 4 March 2008, KVZ 55/07, WuW/E DE-R 2361, 2363 – *Nord-KS/Xella*.

21 See concept paper of the Federal Ministry of Economics and Technology of 1 August 2011, available in German under <http://www.bmwi.de/BMWi/Redaktion/PDF/E/eckpunkte-8-gwb-novelle,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

24. The amendment also clarifies that the FCO is empowered to order restitution of unlawful gains; in other words it can request undertakings to repay any financial advantages resulting from the breach of competition law. In 2008 the *Bundesgerichtshof* had already confirmed this practice in a disputed obiter dictum.²²

2. Administrative fine proceedings

25. In order to accelerate the final phase of cartel fine proceedings extended duties of disclosure for legal entities have been implemented in sec. 81a ARC. Prior the amendment the FCO—unlike the European Commission—lacked competences in the monetary fine proceedings to issue information requests obliging undertakings to disclose relevant information. The lack of competence, which was justified with the fundamental right against self-incrimination in such proceedings, led to an extensive use of (sometimes recurrent) dawn raids to gather sufficient data. Although, the new disclosure duty only concerns company and market data, which is relevant for the calculation of the fine (e.g. turnover for the last five years), it will facilitate the fine proceedings immensely. A violation of the duty of disclosure can be fined with an amount of up to EUR 1 million.

26. The 8th Amendment has also implemented important changes in the Regulatory Offences Act (*Gesetz über Ordnungswidrigkeiten, OWiG*) closing an enforcement gap in cases of legal succession.²³ Prior the amendment sec. 30 OWiG stated that a fine could only be imposed on a legal entity, if one of its organs or a senior manager committed a regulatory offence as a result of which duties incumbent on the legal person have been violated. In a landmark decision in 2011 the German Federal Court of Justice held that the provision's requirements were not fulfilled in cases where an undertaking has infringed antitrust law, but is subsequently restructured in such a way that the resulting entity is not economically identical to the undertaking that committed the infringement.²⁴ In other words, the extension of liability to the legal successor would only be possible in the exceptional case that both entities were virtually identical from an economic point of view (e.g. mere change of name or legal form). With regard to corporate groups, this also meant that there is no automatic liability of the ultimate parent entity or other group companies that were not involved in the infringement. The enforcement gap has now largely been closed by the newly amended sec. 30 para. 2a OWiG. Henceforth, in most cases universal and partial legal successors can be held liable. However, the fine cannot exceed the value of the amount of the fine that would have been appropriate to be imposed on the predecessor and the value of the assets that the predecessor transferred to the successor. Unlike its European counterpart, German competition law still does not provide for an automatism according to which parent entities can be held liable for the conduct of their subsidiaries.

22 BGH, 10 December 2008, KVR 2/08, WuW/E DE-R 2538, 2540 para. 16 – *Stadtwerke Uelzen*.

23 For further details cf. Ost, *Die Regelung der Rechtsnachfolge und weitere Neuerungen im Kartellordnungswidrigkeitenrecht durch die 8. GWB-Novelle*, p. 306 et seq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

24 BGH, 10 August 2011, KRB 55/10, WuW/E DE-R 3455 – *Versicherungsfusion*.

3. Private Enforcement²⁵

27. In the field of private enforcement the amendment will broaden the standing of consumer protection and industry associations to bring actions for injunctive relief and restitution against undertakings that are in breach of competition law (cf. sec. 32 para. 2 ARC). It has to be emphasized that the new scope of representative actions brought by consumer and other associations does still not include action for damages. However, in cases of mass and dispersed damage associations may, at least theoretically, skim off any economic benefit the infringing undertaking had gained (cf. sec. 34a ARC; *Vorteilsabschöpfung*). As a tool for private antitrust enforcement sec. 34a ARC will remain of little practical importance, particularly because consumer associations will not obtain any financial benefits from antitrust infringers. In fact, any financial benefit must be passed on to the Federal Budget (*Bundeshaushalt*).

28. Furthermore, at district court level the responsibility for dealing with private damages actions will move from the chamber for commercial matters (*Kammer für Handelssachen*), made up of one professional judge and two lay judges, to an ordinary civil chamber composed of three professional judges. By doing this, the legislator takes account of the very complex legal and economic questions that are typically associated with private damages actions.

V. Conclusion

29. All in all, the 8th Amendment is not a milestone in the history of German competition law. However it has introduced a number of useful and important changes to the existing regime, most noteworthy the implementation of the SIEC test into the substantive merger control assessment. Many of these modifications reveal the legislator's desire to further align domestic competition law with its European counterpart. But identical rules do not necessarily lead to identical decisions. Hence, it remains to be seen how the competition authorities and courts will apply the newly amended ARC. ■

²⁵ For further details cf. Bien, *Der Anspruch der Verbraucherverbände und Verbände der Marktgegenseite auf Unterlassung, Beseitigung und Vorteilsabschöpfung*, p. 329 et seqq., in: Bien (ed.), *Das deutsche Kartellrecht nach der 8. GWB-Novelle* (2013).

Concurrences est une revue trimestrielle couvrant l'ensemble des questions de droits de l'Union européenne et interne de la concurrence. Les analyses de fond sont effectuées sous forme d'articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L'actualité jurisprudentielle et législative est couverte par onze chroniques thématiques.

CONCURRENCES

Editorial

Jacques Attali, Elie Cohen,
Laurent Cohen-Tanugi,
Claus-Dieter Ehlermann, Ian Forrester,
Thierry Fossier, Eleanor Fox, Laurence Idot,
Frédéric Jenny, Jean-Pierre Jouyet,
Hubert Legal, Claude Lucas de Leyssac,
Mario Monti, Christine Varney, Bo
Vesterdorf, Louis Vogel, Denis Waelbroeck...

Interview

Sir Christopher Bellamy, Dr. Ulf Böge,
Nadia Calvino, Thierry Dahan,
John Fingleton, Frédéric Jenny,
William Kovacic, Neelie Kroes,
Christine Lagarde, Doug Melamed,
Mario Monti, Viviane Reding,
Robert Saint-Esteben, Sheridan Scott,
Christine Varney...

Tendances

Jacques Barrot, Jean-François Bellis,
Murielle Chagny, Claire Chambolle,
Luc Chatel, John Connor,
Dominique de Gramont, Damien Gérardin,
Christophe Lemaire, Ioannis Lianos,
Pierre Moscovici, Jorge Padilla, Emil Paulis,
Joëlle Simon, Richard Whish...

Doctrines

Guy Canivet, Emmanuel Combe,
Thierry Dahan, Luc Gyselen,
Daniel Fasquelle, Barry Hawk,
Laurence Idot, Frédéric Jenny,
Bruno Lasserre, Anne Perrot, Nicolas Petit,
Catherine Prieto, Patrick Rey,
Didier Théophile, Joseph Vogel...

Pratiques

Tableaux jurisprudentiels : Bilan de la
pratique des engagements, Droit pénal et
concurrence, Legal privilege, Cartel Profiles
in the EU...

Horizons

Allemagne, Belgique, Canada, Chine,
Hong-Kong, India, Japon, Luxembourg,
Suisse, Sweden, USA...

Droit et économie

Emmanuel Combe, Philippe Choné,
Laurent Flochel, Frédéric Jenny,
François Lévêque Penelope Papandropoulos,
Anne Perrot, Etienne Pfister,
Francesco Rosati, David Sevy,
David Spector...

Chroniques

ENTENTES

Michel Debroux
Nathalie Jalabert-Doury
Cyril Sarrazin

PRATIQUES UNILATÉRALES

Frédéric Marty
Anne-Lise Sibony
Anne Wachsmann

PRATIQUES RESTRICTIVES ET CONCURRENCE DÉLOYALE

Muriel Chagny, Mireille Dany,
Jean-Louis Fourgoux, Rodolphe Mesa,
Marie-Claude Mitchell

DISTRIBUTION

Nicolas Ereseo, Dominique Ferré,
Didier Ferrié, Anne-Cécile Martin

CONCENTRATIONS

Dominique Berlin, Jean-Mathieu Cot,
Ianis Girgenson, Jacques Gunther,
David Hull, David Tayar

AIDES D'ÉTAT

Jacques Derenne
Bruno Stromsky
Jérôme Gstalter

PROCÉDURES

Pascal Cardonnel
Alexandre Lacresse
Christophe Lemaire

RÉGULATIONS

Hubert Delzangles
Emmanuel Guillaume
Jean-Paul Tran Thiet

SECTEUR PUBLIC

Centre de Recherche en Droit Public
Jean-Philippe Kovar
Francesco Martucci
Stéphane Rodrigues

JURISPRUDENCES EUROPÉENNES ET ÉTRANGÈRES

Florian Bien, Karounga Diawara,
Pierre Kobel, Silvia Pietrini,
Jean-Christophe Roda, Julia Xoudis

POLITIQUE INTERNATIONALE

Frédérique Daudret John, Sophie-Anne
Descoubes, Marianne Faessel-Kahn,
François Souty, Stéphanie Yon

Revue des revues

Christelle Adjémian, Emmanuel Frot
Alain Ronzano, Bastien Thomas

Bibliographie

Institut de recherche en droit international
et européen de la Sorbonne (IREDIES)

Revue Concurrences | *Review Concurrences*

	HT Without tax	TTC Tax included (France only)
<input type="checkbox"/> Abonnement annuel - 4 n° (version électronique + e-archives) <i>1 year subscription (4 issues) (electronic version + e-archives)</i>	465 €	556,14 €
<input type="checkbox"/> Abonnement annuel - 4 n° (version papier) <i>1 year subscription (4 issues) (print version)</i>	485 €	495,19 €
<input type="checkbox"/> Abonnement annuel - 4 n° (versions papier & électronique + e-archives) <i>1 year subscription (4 issues) (print & electronic versions + e-archives)</i>	715 €	855,14 €
<input type="checkbox"/> 1 numéro (version papier) <i>1 issue (print version)</i>	155 €	158,25 €

Bulletin électronique e-Competitions | *e-bulletin e-Competitions*

<input type="checkbox"/> Abonnement annuel + e-archives <i>1 year subscription + e-archives</i>	635 €	759,46 €
--	-------	----------

Revue Concurrences + bulletin e-Competitions | *Review Concurrences + e-bulletin e-Competitions*

<input type="checkbox"/> Abonnement annuel revue (version électronique + e-bulletin + e-archives) <i>1 year subscription to the review (online version + e-bulletin + e-archives)</i>	815 €	974,74 €
<input type="checkbox"/> Abonnement annuel revue (versions papier & électronique + e-bulletin + e-archives) <i>1 year subscription to the review (print & electronic versions + e-bulletin + e-archives)</i>	915 €	1094,34 €

Renseignements | *Subscriber details*

Nom-Prénom | *Name-First name*

e-mail

Institution | *Institution*

Rue | *Street*

Ville | *City*

Code postal | *Zip Code* Pays | *Country*

N° TVA intracommunautaire | *VAT number (EU)*

Formulaire à retourner à | *Send your order to*

Institut de droit de la concurrence

21 rue de l'Essonne - 45 390 Orville - France | contact: webmaster@concurrences.com

Conditions générales (extrait) | *Subscription information*

Les commandes sont fermes. L'envoi de la revue ou des articles de Concurrences et l'accès électronique aux bulletins ou articles de *e-Competitions* ont lieu dès réception du paiement complet. Tarifs pour licences monopostes; nous consulter pour les tarifs multipostes. Consultez les conditions d'utilisation du site sur www.concurrences.com ("Notice légale").

Orders are firm and payments are not refundable. Reception of Concurrences and on-line access to e-Competitions and/or Concurrences require full prepayment. Tarifs for 1 user only. Consult us for multi-users licence. For "Terms of use", see www.concurrences.com.

Frais d'expédition Concurrences hors France 30 € | 30 € extra charge for shipping outside France