

## NEW GERMAN COMPETITION ACT

### **Draft Bill Of November 2011:** **8<sup>th</sup> Amendment To The German Act On Restraints Of Competition**

In November, 2011, the German Government published a draft bill that will amend and restate the German Act on Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, “*GWB*”) (“Draft Bill”).<sup>1</sup>

The Government has not yet adopted the final version of the Bill. Once adopted, the Bill will be the basis for the parliamentary process towards amending the *GWB*. The Government expects the final version of the amendment to enter into force in January 2013.

The key changes proposed by the Draft Bill are summarized below.<sup>2, 3</sup>

#### **I. Merger Control**

##### **A. Notification Criteria**

1. The special notification thresholds for newspaper mergers will be increased. In this industry, a filing will be required if (i) the parties to the transaction generate sales of more than €62.5 million combined worldwide (up from €25 million); and (ii), in Germany, one party generates sales exceeding €3.1 million (up from €1.3 million); and (iii), in Germany, the other party generates sales exceeding €0.6 million (up from € 0.3 million). Outside the newspaper industry, the thresholds will not change.

2. The exception for *de minimis* markets (i.e. markets with a total sales volume not exceeding €15 million in Germany) will be moved from the notification criteria to the substantive test for prohibition. As a result, the FCO will be able to review, but will not be able to prohibit, transactions to the extent they relate to *de minimis* markets.

3. If the parties enter into several transactions for parts of a business within a period of two years, those transactions will be treated as one single transaction (as per the last one of those transactions).

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<sup>1</sup> *Referentenentwurf: Achstes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (8. GWB Novelle)*, November 10, 2011, available for download [here](#) (last visited November 22, 2011).

<sup>2</sup> In particular, the sector-specific rules in the Draft Bill (e.g., price control over the supply of water) are intentionally omitted.

<sup>3</sup> Additionally, the Ministry of Justice and the Ministry for the Economy are understood to be working on a revision of the rules defining the antitrust liability of corporate entities in situations where managing directors or senior employees infringe the antitrust rules and where the entity for which they were acting at the time of the infringement has been reorganized after the infringement. On November 17, 2011 (after the Draft Bill was published), the Federal Civil Court (*Bundesgerichtshof*) published a decision overturning an antitrust fine the FCO had imposed on a corporation although that corporation owned only a fraction of the assets which used to be owned by the company for which the infringers acted, following a series of reorganizations.

\* Changes that are designed to align German law with EU law.

As a result, the notification criteria will apply to the entirety of those parts of a business (rather than to the individual transactions).\*

4. For the acquisition of shares, the seller's revenues will count towards the notification thresholds (and its market shares will be considered) not only if the seller continues to own  $\geq 25\%$  shares in the target (which is the current law), but also if the seller retains a competitively significant influence over the target (which will be new). "Competitively significant influence," an oddity of German merger control, relates to the acquisition of less than 25% and is subject to pre-closing approval by the FCO.

## **B. Substantive Test**

1. The standard for prohibition will change from "dominance" to "significant impediment to efficient competition" (SIEC). "Dominance" will be retained as an example for SIEC. The supporting memorandum of the Draft Bill makes it clear that this change is intended to echo the SIEC test under the EU Merger Control Regulation. It should be noted, however, that the EU Commission's rules and practice do not bind the FCO. Equally important, the new test (SIEC) will apply only to merger control, not to unilateral conduct (where the statutory prohibitions will continue to be triggered by "dominance" only).\*

2. The market share threshold for the statutory presumption of single-firm "dominance" (not: SIEC) will be increased from 1/3 to 40%. The presumption will continue to be rebuttable.

## **C. Review Procedure**

1. In phase two, the parties' failure to provide sufficient and timely information in response to information requests by the FCO will automatically suspend the FCO's four-month review period (until such information is provided).\*

2. When the parties offer remedies for the first time, another month will automatically be added to the FCO's four-month (phase two) review period.\*

3. If the parties fail to obtain a merger control approval, and if the FCO investigates but subsequently discontinues its investigation (because the transaction does not satisfy the conditions for prohibition), the transfer of the assets or shares involved in the transaction will be legally enforceable as of termination of the FCO's investigation.

4. For tender offers and stock acquisitions on a stock exchange, the bar to closing will not apply if (i) the transaction is reported to the FCO without undue delay; and (ii) the acquirer does not exercise its newly acquired voting rights.\*

5. Behavioral remedies will be possible.\*

## **II. Unilateral Conduct**

1. The prohibition on discrimination between similar businesses without objective justification will no longer require that the scope of business subject to discrimination is typically open to similar businesses.

2. The prohibition on any and all below-cost sales in the food retail industry (currently in force until December 2012) will not be adopted in the amended GWB. However, the GWB will continue to prohibit below-cost sales, unless such sales are made only occasionally.

3. The prohibition on margin squeeze (currently in force until December 2012) will be included in the amended GWB.

### III. Enforcement Powers

1. If the FCO seizes assets in a dawn raid, and if an objection is raised, the FCO should (currently: must) ask a court to confirm the seizure within three days.

2. The Local Court (*Landgericht*) of Bonn will have jurisdiction for dawn raids, irrespective of where in Germany the dawn raid takes place.

3. The FCO may allow EU staff (and the support team the EU is using) to be “actively engaged” in dawn raids and interrogations the FCO conducts on the basis of EU law.

4. Legal entities and associations will have no right to remain silent with regard to certain types of information (and documents) such as revenues, shareholdings and the way in which shareholders’ rights have been exercised in the past. The maximum fine for non-compliance is €1 million.

### IV. Remedies

1. The FCO will have the power to impose “structural” changes on infringers, i.e. it may order that the parties to an infringement dispose of assets or shares. (Under the current GWB, it is unclear whether the FCO has this power.)\*

2. The FCO will have the power to impose an obligation on infringers to pay back any financial advantages they have gained through the infringement.

### V. Antitrust Litigation

1. Industry associations representing customers or suppliers of the infringer will have standing to bring actions requesting that the infringer cease and desist.

2. Consumer associations will have standing to request cease-and-desist orders and to request that the infringer transfer to the Federal budget any financial gains it obtained by virtue of the infringement.

3. The FCO’s power to skim off the financial advantages infringers obtained through the infringement will no longer be time-barred after five years. If the FCO, the EU or other antitrust authorities in the EU investigate, the statute of limitations will be suspended.

4. Third parties (in particular, plaintiffs in or preparing actions for damages) will no longer be able to request access to the FCO’s files as far as requests for immunity/leniency are concerned (including supporting documents and information).