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# Overview

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With the 8th Amendment to German competition law finally taking effect on 1 July 2013, Germany is rejoining the European canon of modern merger control: The implementation of the significant impediment of effective competition (SIEC) test places a more central role on the empirical analysis of the 'closest competitor' property, thus further limiting the role of dominance assessment or market share additions. The change in German competition law has further important implications – some of them widely accepted, others heavily contested. Here we briefly introduce these changes and discuss other important priorities for 2013 and 2014.

### 8th Amendment to German competition law

The change in German competition law came under political dispute due to its provisions on public health insurers and the question of whether they fall under competition law. Finally a compromise was found putting public health insurers under merger control scrutiny, but otherwise excluding them from competition law. However, the Amendment also has more general implications.

Regarding merger control, first and foremost the implementation of the SIEC test should be highlighted. Below, we provide some recent case examples offering insights into likely future practice. Second, the rules on minority shareholding have been extended, keeping regulatory oversight over acquisitions of a 25 per cent (or even lower) share in capital. Third, transactions taking place within a two-year time frame are considered as a single transaction; an important change for mergers in industries with local markets, such as mergers of hospitals. Fourth, revenue thresholds for mergers in the media industry have been elevated. Fifth, new rules include an automatic one-month extension when remedies are offered by the parties. Finally, the ban on closing a transaction before competition law approval has been replaced by a prohibition to exercise relevant voting rights in the case of public offerings.

With respect to unilateral conduct, the statutory presumption of market dominance has been raised to 40 per cent (from one-third), the protection of SME's through the notion of vertical dependence and specific provisions restricting predatory pricing in the food sector has been extended. Regarding private enforcement of antitrust damages, the Amendment also grants more standing to consumer associations.

### The diminishing role of market share presumptions in merger control

Several merger cases offer insights into future practice under the SIEC test. In general, they show a trend away from market-share presumptions and towards effects-based assessment.

The acquisition of Fenwal by Fresenius, which was approved in December 2012, relates to the markets for blood transfusion (technology and related products like transfusion bags). Post-merger, the two firms reach a market share above the single firm dominance presumption. A bidding analysis indicated no closeness of competitors, though; strong buyer power exercised by associations like the German Red Cross, the availability of alternative suppliers and intensive price competition led to the approval of the merger.

Likewise, the acquisition of two subsidiaries of Pernod Ricard by Ratos AB was approved in December 2012 despite market shares above the single firm dominance presumption. The merger affects the markets for aquavit and other caraway-flavoured liquor. In this case, a common market of private label and branded products has been delineated, and private labels are considered to be a significant constraint for premium branded products. As Scandinavian customers, who, for tax reasons, are also an important consumer group in Germany, have a larger set of alternative aquavits available and German customers consider other liquors to be close substitutes, the market shares overstate the market position of the merged entity. Consequently, the merger was approved.

The acquisition of the Rosen Eiskrem group by DMK Eis was approved in March 2013. This four-to-three merger in the market for private-label ice cream production and distribution in Germany led to market shares in the range of 40 to 50 per cent. The high market shares are the result of the FCO's finding that branded ice cream and private labels are distinct products. However, a bidding analysis showing that the two merging firms are not the closest competitors, together with significant free capacities and countervailing buyer power (the five leading purchasers account for 80 per cent of the buyer market) led to a positive assessment.

While these cases indicate a willingness of the competition authority to apply a more effects-based analysis, the support of the German courts for such an approach is less clear. A decision by the highest German court in *Total/OMV* stresses that in a situation where a fact-based analysis is inconclusive, the market share presumption remains valid. This decision also emphasises the importance of changes in market shares as evidence for rebutting the presumption of collective dominance. The recent public hearing at the higher regional court in *Liberty Deutschland/Kabel BW* – a case in the German cable industry – indicates the courts' scepticism in trading off a deterioration in market structure against behavioural remedies. In the subsequent decision on the proposed *KDG/Tele Columbus* merger, the FCO saw a joint market share of 65 to 75 per cent in the German-wide retail TV services market and blocked the merger.

### Cartels and unilateral conduct

Parallel to the FCO's ongoing intensive fight against cartels (a new unit focusing exclusively on cartel enforcement was established by the Federal Cartel Office in 2012), Germany has also emerged as one of the preferred jurisdictions for private litigation cases within Europe, leading to complex empirical work in the quantification of damages by economists. In addition to a judgment by the highest German court in 2012 that confirmed the standing of indirect purchasers and the validity of a pass-on defence, a judgment by the same court in 2013 on grey cement resulted in the highest cartel fine ever becoming legally enforceable in Germany. This judgment, by approving the quantification methods applied in this case, also offers a precedent for the quantification of damages and triggered new Guidelines for the setting of fines in Germany, interpreting the 10 per cent turnover threshold not as a cut-off point but as a reference for maximum fines, potentially resulting in lower fines in particular for multi-product firms.

As regards unilateral conduct, one focus was set on – besides more traditional excessive pricing cases in network industries – pricing and distribution restraints in the online and offline distribution of products. In the case against HRS, the leading hotel reservation platform, HRS' requirement of best price guarantees from hotels is under scrutiny; comparable provisions are under investigation regarding Amazon's online platform. In the cases against the sport apparel manufacturers ASICS and Adidas, the exclusion of offline distribution in general, of open internet marketplaces and, more specifically, their distribution agreements are being assessed. The assessment of most-favoured nation clauses and, accordingly, selective distribution systems will provide lasting topics for the near future. Together with the outcome of the sector inquiry in the retail grocery sector, which is expected for the beginning of the year, they will shape the discussion of competition law enforcement in Germany in 2014.

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E.CA Economics is an economics consultancy that provides case-related advice and research on key topics in the fields of competition policy and regulation. This includes economic analysis in national and European competition matters and regulatory procedures, as well as studies of competition policy issues for international organisations. E.CA, formerly known as ESMT Competition Analysis, has consistently been named in *Global Competition Review*'s 'The Economics 20' survey as one of the world's leading competition economics firms since 2008, with offices both in Berlin and Brussels.

Founded at ESMT European School of Management and Technology in 2007 under the presidency of Professor Lars-Hendrik Röller, former chief economist to the Directorate General of the European Commission, E.CA Economics has become an independent, international economics consultancy in the areas of mergers, cartels, antitrust, state aid and regulation. Based on an exclusive partnership, E.CA Economics works closely with ESMT's faculty on leading-edge research in industrial organisation and quantitative methods.

E.CA Economics cooperates with Bates White LLC, a leading US economic consulting firm with more than 150 professionals, to address clients' concerns arising in international and transnational competition matters within the purview of EU and US regulatory authorities.

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Lars Wiethaus is a principal at the Brussels office of E.CA Economics. He has extensive case experience in all areas of competition policy and regulation. His representative merger appointments include LGI's recent takeover of the German cable operator Kabel BW, *Vattenfall/Nuon* and the proposed merger of *Portugal Telecom/Sonaecom*. He joined E.CA's Berlin office as a manager in 2008. Prior to that, he worked for the competition policy practice of LECG, London. He holds a PhD in economics from the University of Hamburg.