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Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by Germany

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More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

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1. Introduction/Summary

1. The German Competition Act (Act against Restraints of Competition - *Gesetz gegen Wettbewerbsbeschränkungen*, "GWB ")[1] contains safe harbour rules in antitrust matters and merger control and provides for legal presumptions where the assessment of market dominance is concerned.

2. With regard to the prohibition of anticompetitive agreements, the GWB stipulates general exemptions under certain conditions, which are consistent with Art. 101 (3) TFEU. The EU block exemptions are directly applicable, even where trade between Member States of the EU is not affected. German exemptions from the prohibition of anticompetitive agreements that go beyond those established by the EU are only applicable in cases that are not capable of affecting trade between the EU Member States. The German merger control regime contains de minimis rules for mergers where the legislator expects only a minor macroeconomic impact.

3. In merger and unilateral conduct proceedings the German competition law regime provides for rebuttable legal presumptions of market dominance, which are aimed at facilitating the decision-making practice in order to promote effective competition law enforcement. In the enforcement practice of the Bundeskartellamt legal presumptions are mainly used as an auxiliary consideration since the Bundeskartellamt is legally obliged to investigate all the facts relevant to a case on its own motion (*Amtsermittlungsgrundsatz*). The main function of legal presumptions is to provide a strong incentive for firms to submit to the Bundeskartellamt all the information that it needs for a complete assessment of the case at an early stage of the investigation. Another important function of presumptions is to provide the courts with an instrument to keep the issues raised in the proceedings manageable.

4. Section II describes safe harbours (1) from the prohibition of anticompetitive agreements and (2) in the German merger control regime. Section III explains the design of legal presumptions of market dominance in the GWB and their implications for the decisional practice of the Bundeskartellamt. Based on questions currently discussed with regard to the digital economy, the conclusion in Section IV outlines the complexity of balancing different risks of error when adopting legal rules with the aim of ensuring effective competition law enforcement.

[1] https://www.gesetze-im-internet.de/englisch_gwb/index.html. Please note, the English translation includes the amendments to the Act by Article 5 of the Act of 21.07.2014 (Federal Law Gazette I, p. 1066).

Translations may not be updated at the same time as the German legal provisions displayed on this website. To compare with the current status of the German version, see http://www.gesetze-im-internet.de/gwb/BJNR252110998.html.

2. Safe harbours in German law

2.1. Anticompetitive agreements

5. Section 1 GWB prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Section 2 (1) GWB provides for general exemptions from this prohibition under certain conditions, which are consistent with Art. 101 (3) TFEU: Agreements between undertakings, decisions by associations of undertakings or concerted practices which 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, and which do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question, shall be exempted from the prohibition of Section 1 GWB. These requirements have to be interpreted and applied in accordance with the established case law of the European Courts and the decisional practice of the European Commission on Art. 101 (3) TFEU. In addition, Section 2 (2) GWB provides for the direct applicability of the Regulations of the Council or the European Commission on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions by associations of undertakings and concerted practices (block exemption regulations), also where the agreements, decisions and practices mentioned therein are not capable of affecting trade between Member States of the European Union.

6. If the conditions for an exemption are fulfilled, Section 2 GWB has a direct legal effect so that the Bundeskartellamt does not have to issue a formal decision (prinicple of legal exemption). This also means that firms have to assess for themselves whether their conduct is eligible for an exemption (principle of self-assessment). If the Bundeskartellamt makes an assessment of potentially anticompetitive agreements, decisions or concerted practices in an administrative procedure, it has an obligation to investigate all the facts relevant to the case (*Amtsermittlungsgrundsatz*) , which include the requirements for an exemption under Section 2 GWB. Nevertheless, the undertakings concerned are obliged to cooperate with the Bundeskartellamt in order to clarify the facts of the case. In administrative proceedings the burden of proving that the conditions for an exemption are fulfilled is on the undertaking seeking to defend an agreement, decision or concerted practice. Thus, uncertainties with regard to the fulfillment of the requirements for an exemption work against the undertakings' interests. In administrative offence proceedings, which have the aim of imposing a fine, the presumption of innocence assured by German Basic Law (*Grundgesetz*, "GG") applies and thus the burden of proof that the conditions for an exemption are not fulfilled lies with the competition authority.

7. There was a significant change in German competition law in 2005 with regard to exemptions from the prohibition of anticompetitive agreements, decisions or concerted practices. With the 7th amendemt of the GWB the German legislator replaced special exemption rules (previously Section 2 to 6 GWB) with the general exemption in Section 2 GWB outlined above.[2] The rationale behind this change was the adaption of the national competition law regime to European law.

[2] There are still special exemption rules for agriculture (Section 29 GWB), the Energy Sector (Section 30 GWB), resale price maintenance agreements for newspapers and magazines (Section

8. However, the German legislator maintained a special exemption clause for small and medium-sized enterprises. According to Section 3 GWB agreements between competing undertakings and decisions by associations of undertakings whose subject matter is the rationalisation of economic activities through inter-firm cooperation fulfil the conditions of Section 2 GWB if competition on the market is not significantly affected thereby, and the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises. The German legislator considered this exemption necessary to encourage small and medium-sized enterprises to enhance their market positions through cooperation, on the basis that agreements between small and medium-sized enterprises can have positive effects even if they harm competition among these enterprises. Section 3 GWB aims only at horizontal restraints ("agreements between competing undertakings"). Due to the primacy of Community law, Section 3 GWB is only applicable to cooperations that are not capable of affecting trade between Member States of the European Union. If an agreement meets the conditions of Section 3 GWB there is no need to examine the conditions of Section 2 GWB due to the legal fiction embodied in Section 3 GWB. On the other hand, if the conditions of Section 3 GWB are not fulfilled, the general exemption of Section 2 GWB can be applicable.

3. Merger control de mimimis rules

9. The German merger control regime contains de minimis rules for mergers where the legislator expects only a minor macroeconomic impact.

3.1. Thresholds

10. The GWB stipulates a de minimis exemption from the scope of application of merger control. According to Section 35 (2) GWB the provisions on the control of concentrations shall not apply where an undertaking which is not dependent within the meaning of Section 36 (2) GWB and had a worldwide turnover of less than EUR 10 million in the business year preceeding the concentration, merges with another undertaking (de minimis threshold). A transaction that fulfils the de minimis requirements does not have to be notified to the Bundeskartellamt even if it meets the thresholds for German merger control.

3.2. Substantive merger control: "minor market clause" (Bagatellmarktklausel)

11. A special feature of German competition law is the so-called minor market (de minimis) clause (*Bagatellmarktklausel*). Section 36 (1) No. 2 GWB stipulates that the requirements for a prohibition of a merger are not fulfilled on a market on which goods or commercial services have been offered for at least five years and which had a sales volume of less than EUR 15 million in the last calendar year.[3] The minor market clause aims to prevent prohibition decisions in markets with a minor macroeconomic impact. In contrast to the de minimis threshold in Section 35 (2) GWB the minor market clause is

30 GWB), water management contracts (Sections 31, 31a and 31b GWB) and forestry (Section 46 Bundeswaldgesetz).

[3] The 9th Amendment to GWB that came into force in June 2017 introduced certain exceptions to the applicability of the minor market clause that inter alia relate to gratuitous markets and the newly introduced transaction value threshold.

no longer an exemption from the obligation to notify a transaction that meets the thresholds for German merger control. With the 8th amendment of the GWB the applicability of the minor market clause became part of the substantive merger assessment. The German legislator shiftet the clause into the substantive merger assessment to increase legal certainity. Experience had shown that the assessment of the applicability of the minor market clause is often very complex and subject to great uncertainty with regard to market definition and the determination of the market volume.

4. Legal Presumption: Market Dominance

12. In merger and unilateral conduct proceedings the German competition law regime provides for rebuttable legal presumptions of market dominance

13. According to Section 18 (1) GWB an undertaking is dominant where, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market, it has no competitors, is not exposed to any substantial competition, or has a paramount market position in relation to its competitors.

14. A single undertaking is presumed to be dominant if it has a market share of at least 40 percent (Section 18 (4) GWB). The legislator raised the threshold for the presumption of single firm dominance with the 8th amendment of the GWB in 2013. The earlier version of the GWB presumed a single undertaking to be dominant if it had a market share of one third. The rationale for the change was to adapt the GWB to the status of economic knowledge and the development of the Bundeskartellamt's decisional practice. The authority's experience/practice had shown that single firm dominance with a market share of one third is the exception rather than the rule.

15. Section 18 (6) GWB stipulates that a number of undertakings is presumed to be dominant if it consists of three or fewer undertakings reaching a combined market share of 50 percent, or consists of five or fewer undertakings reaching a combined market share of two thirds. This presumption can be refuted if the undertakings demonstrate that the conditions of competition are such that substantial competition between them can be expected, or that the number of undertakings has no paramount market position in relation to the remaining competitors.

16. Both presumptions (single firm dominance and collective dominance) are applicable in merger control proceedings as well as in abuse of dominance proceedings. The rationale for these presumptions is to promote effective competition law enforcement by facilitating merger control and unilateral conduct proceedings. The presumptions do not replace an assessment of the market situation as they do not supersede the Bundeskartellamt's obligation to investigate (*Amtsermittlungsgrundsatz*). Rather, they modify this obligation. Therefore, in its case practice the Bundeskartellamt does not apply the presumptions very often when taking a decision. Their main function is to provide the undertakings concerned with a strong incentive to submit to the Bundeskartellamt all the information that it needs for a complete assessment of the case at an early stage of the investigation. Another important function of the presumptions is to provide the courts with an instrument to keep the issues raised in the proceedings manageable.

4.1. Single firm dominance

17. Section 18 (4) GWB provides a rebuttable legal presumption that an undertaking with a market share of 40% or more is dominant. The substantive burden of proof (*materielle Beweislast*) is on the undertaking concerned. The burden of producing evidence (*Darlegungslast*) remains with the Bundeskartellamt. It is obliged to use all the evidence it has, including evidence that is favourable to the undertakings concerned. The Bundeskartellamt has to conduct investigations if the information provided by the undertaking concerned suggests that the facts of the case contradict the legal presumption of dominance. This means that the fact that the thresholds for the presumption have been reached or exceeded is not in itself sufficient proof of high market power or even dominance. The presumption only applies if, after a thorough investigation, neither the existence nor the absence of dominance can be proved (non liquet). Thus, the presumption is without prejudice to the Bundeskartellamt's obligation to investigate fully the competitive situation on the relevant market and to prove that all the requirements of dominance have been fulfilled. This is reflected in the decisional practice of the Bundeskartellamt where the legal presumption for single firm dominance is mainly used as an auxiliary consideration in addition to the results of the Bundeskartellamt's market asssessment. However, in the decisional practice of the courts the presumption often plays a more important role, especially where complex factual questions are concerned.

4.2. Collective dominance

18. The legal quality of the presumption of collective dominance set out in Section 18 (6) GWB differs from the presumption set out for single firm dominance. [4] It leads to a full shift of the burden of proof, which includes the companies having to come forward with all the necessary facts available to them and to produce evidence if needed. The interaction of the qualified legal presumption in Section 18 (6) GWB with the Bundeskartellamt's obligation to investigate (*Amtsermittlungsgrundsatz*) was clarified by the Düsseldorf Higher Regional Court in the Cargotec Case[5]. In its decision the Court found that despite the shift in the burden of proof, the Bundeskartellamt still has an obligation to investigate any facts that are substantial for the assessment of collective dominance in so far as the undertakings concerned cannot reasonably be aware of or have access to them. Moreover, the Bundeskartellamt has to conduct further investigations if they appear crucial on the basis of its special knowledge of the facts.

5. Conclusion

19. Typically, bright-line rules are associated with more clarity, speed and efficiency in decision-making but also with a higher risk of error. In contrast, more open rules that do not provide detailed guidance and make a comprehensive assessment on a case by case basis necessary are considered to be less prone to error but more resource-intensive and time consuming. When trying to establish the right balance between the advantages and

[4] This follows from the different wording in Section 18 (4) and (6) GWB and the explanatory notes from legislative procedure. The difference in the wording is not reflected in the unofficial English translation of the GWB.

[5] OLG Düsseldorf, Decision of 7 May 2008, VI-Kart 13/07 (V) BA p. 21.

disadvantages of the use of safe harbours and legal presumptions some say that false positives are more costly than false negatives. Others point out ex-post evaluations of mergers, which seem to show that enforcers may have been too lenient and too optimistic about market concentration.

20. The complexity of balancing the risks of different kinds of errors can be exemplified when looking into some of the questions that arise with regard to competition law enforcement in the digital economy. The digital economy has caused fundamental changes of competitive conditions. On the one hand it is characterized by a few large undertakings that have a strong and established market position. On the other hand, it is constantly creating new business models and providers. In connection with the market power of platforms, particularly in the internet, there are discussions about the relevance of market shares and how important they can and should be in examining market power. In these markets so-called tipping, which is potentially caused by pronounced indirect bilateral network effects (due to network effects, the platform's benefits increase with the number of users), may cause a concentration trend in a market and foster the creation of large platforms or actually result in a monopoly, even where a company's market share is yet below 40%. Once a market has tipped, it would be very difficult for a competition authority to reinstate effective competition.

21. These developments present new and challenging tasks for competition law enforcers. How to keep digital markets open for newcomers and start-ups? How to protect fair and effective competition?

22. While the open language of competition law provisions provides for the necessary flexibility to react to new technical and economic developments, clarifications might be necessary which enable competition law enforcers to keep pace with the developments of the digital economy and correct negative developments at an early stage. Due to self-strengthening effects and the high scalability of products, the developments in digital markets can lead to significant changes in very short time periods. This makes it more important for competition authorities to be able to react swiftly in order to ensure fair competition and open markets and to secure incentives for innovation.