The 1999 Amendments to the German Act Against Restraints of Competition

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I. Introduction

The sixth major revision of the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen or GWB) was enacted in May 1998 and entered into force in January 1999. One of the main objectives of the revision is the harmonization with EU competition law. Over the last years, the influence of EU law on Member States’ laws has grown steadily, especially in the area of competition law. It has been argued that equal opportunities for all competitors in the EU single market could not be provided as long as structural and substantive differences between German and EU antitrust law remain. German industry criticized perceived competitive disadvantages vis-à-vis foreign companies. To bring GWB into line with EU law standards, (a) prohibitions on cartels, the abuse of a market-dominating position, and recommendations were explicitly introduced; (b) a supplementing general exemption was added in § 7 GWB; (c) all covered mergers are now subject to pre-merger-notification; and (d) the definition of mergers was harmonized through the introduction of the acquisition of control in § 37 (1) No. 2 GWB. In the main investigation procedure, not only prohibitions, but also clearances of mergers, are subject to publication and explanation.

However, unlike Article 85 (1) of the EEC Treaty, German competition law will continue to distinguish between horizontal and vertical restraints. While horizontal restraints are generally prohibited by § 1 GWB and can be exempted according to §§ 2 through 8 GWB, vertical restraints in the form of...
exclusive dealing agreements are in general subject to supervision of the cartel authorities (§ 16), and only contractual restrictions on a party’s freedom to determine prices or contractual terms concluded with third parties are directly prohibited by law.

II. Horizontal Restraints

The prohibition of concerted practices, found in § 25 of the old version of the GWB (o.v.), has been incorporated in § 1 in order to follow the wording of Art. 85 (1) EEC Treaty. Like Art. 85 (1) EEC Treaty, § 1 GWB is now a real prohibition. Therefore, already the conclusion of a cartel agreement, and not only the performance of the cartel agreement, is now prohibited. Until these amendments, only the disregard of the ineffectiveness of the agreement or resolution was prohibited under § 38 (1) No. 1 GWB o.v. The amended § 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.

Substantive as well as procedural requirements continue to differ in the exemption systems of German and EU law. While EU law has a general provision in Art. 85 (3) EEC Treaty, German law relied on precise exclusive exemptions in §§ 2 through 8 GWB. The GWB as amended combines both models by keeping the revised exemptions in §§ 2 through 6 GWB and § 8 GWB and enacting a general exemption in § 7 GWB similar to Art. 85 (3) EEC Treaty. The amendments strengthen the tendency to require the Federal Cartel Office (FCO) to review every single exemption from § 1 GWB individually. In contrast, Art. 85 (3) EEC Treaty exempts special agreements from the application of Art. 85 (1) EEC Treaty by law through block exemptions.

Different categories of cartel exemptions remain largely unaltered in substance, with minor procedural changes: (a) agreements for uniform application of standards or types (Normen- und Typenkartelle, § 2 (1) GWB); (b) agreements for uniform application of general terms of business, delivery and payment (Konditionenkartelle, § 2 (2) GWB); (c) specialization cartels (Spezialisierungskartelle, § 3 GWB); (d) efficiency-promoting agreements between small and medium enterprises (Mittelstandskartelle, § 4 GWB); (e) purchasing cartels (Einkaufsgemeinschaften, § 4 (2) GWB); (f) rationalization cartels (Rationalisierungskartelle, § 5 GWB); and (g) structural crisis or recession cartels (Strukturkrisenkartelle, § 6 GWB).

The exemptions for rebate cartels (§ 3 GWB o.v.), export cartels (§ 6 GWB o.v.) and import cartels (§ 7 GWB o.v.) have been repealed. In practice, neither rebate cartels (§ 3 GWB) nor import cartels (§ 7 GWB) were important
in the last years. According to the legislative comments, the exemption for export cartels (§ 6 GWB o.v.) has been abolished due to worldwide efforts to combat cross-border restraints on competition. However, at the same time, the long-arm-statute" of § 98 (2) sentence 2 GWB (o.v.) that had widened the scope of the GWB to apply to pure" German export cartels, thereby enabling monitoring of German pure export cartels through a notification requirement, has been abolished as well. Thus, the control of German-based export cartels, as well as the opportunity to pursue pure German export cartels, has been abandoned. With regard to exports to EU Member States, which account for more than half of German exports, the exemption was meaningless due to the prevailing prohibition in Art. 85 (1) EC Treaty.

In 1999, a general cartel exemption was enacted in § 7 GWB after the model of Art. 85 (3) EEC Treaty. Agreements or decisions which contribute to improving the development, production, distribution, procurement, recycling or waste disposal of goods, while allowing consumers a fair share of the resulting benefit, can be exempted from § 1 GWB. The exemption requires that the improvement cannot be achieved by other means, the improvement is adequate in relation to the restraint of competition connected with it, and the restraint of competition does not lead to the creation or strengthening of a market-dominating position. However, according to § 2 GWB, agreements and decisions whose object is the rationalization of economic activities by specialization or by other means, or whose object is the joint purchase of goods or commercial services or which deal with the uniform application of terms of business, do not fall under § 7 GWB. They can only be exempted from § 1 GWB by application of § 2 (2) GWB and §§ 3 through 5 GWB. The requirement of promoting technical or economic progress", which is subject to Art. 85 (3) EEC Treaty, has not been incorporated in § 7 GWB; thereby the legislature expressly wanted to exclude any attempt to override competition considerations by industrial policy goals or public interest considerations. Nevertheless, § 7 GWB allows the cartel authorities as well as enterprises more flexibility to adapt to different market conditions and developments. In addition, this provision provides exemptions for areas such as banking or insurance which were formerly subject to industry exemptions.

Procedurally, German cartel exemptions can be divided into three categories. First, the cartel exemptions in §§ 2 through 4 (1) GWB are governed by § 9 GWB (Widerspruchskartelle). They require notification and become effective if the cartel authority does not object within three months, § 9 (3) GWB. Second, agreements mentioned in §§ 5 through 8 GWB require express approval from the cartel authority according to § 10 GWB (Erlaubniskartelle). The third exemption category is purchasing cartels intended to increase the competitiveness of small or medium-sized enterprises, § 4 (2) GWB. They require notification and become effective without approval of the cartel authority if a complete notification is filed, § 9 (4) GWB. Purchasing
cartels are no longer automatically defined to be outside the scope of § 1 GWB without notification.

III. Vertical Restraints

Resale price maintenance and agreements restricting a party’s freedom to set the trade terms were declared null and void under the old § 15 GWB. The new § 14 GWB, like Art. 85 (1) EEC Treaty, prohibits such agreements. The nullity of those agreements now follows from general civil law rules, § 134 of the German Civil Code.

The exemption for books and other publications remained for reasons of cultural policy mainly unaltered and is now found in § 15 GWB.

Restrictive licenses concerning intellectual property rights (§ 17 GWB) or know-how (§ 18 GWB) are increasingly subject only to prevailing EU competition law with its detailed block exemptions, and therefore had few importance for the FCO practice in recent years. These provisions have been partly adapted to EU law.

Concerning vertical restraints other than resale price maintenance, the supervisory powers of the cartel authorities in § 18 GWB o.v. have been simplified and incorporated in § 16 GWB. The cartel authority may declare agreements between enterprises for the sale of goods or commercial services to be void and forbid the implementation of new, similar agreements, insofar as the agreements impose on one of the parties (1) restrictions as to its freedom to use the supplied goods, other goods or commercial services, (2) restrictions as to the purchase of other goods or commercial services from, or their sale to, third parties, (3) restrictions as to the sale of the supplied goods to third parties, or (4) an obligation to accept goods or commercial services not related to the subject-matter of the agreements by their nature or trade customs. Furthermore, a decision of the cartel authority requires that such restrictions substantially impair competition in the market for these or other goods or commercial services. Section16 GWB is not directly enforceable by private parties but lies within the discretion of the cartel authorities. Therefore, tying arrangements and other vertical restraints are not prohibited per se. However, they may fall under § 19 or § 20 GWB if exercised by market-dominating enterprises. Also, if they have an effect on trade between Member States, they may fall under Articles 85, 86 EEC Treaty.

Section 22 (1) GWB prohibits recommendations, e.g. suggested retail prices, which, through uniform conduct, circumvent prohibitions laid down in the GWB or decisions taken by cartel authorities pursuant to the GWB. Section 22 (2)
and (3) GWB exempt several types of recommendations. Section 23 GWB exempts non-binding price recommendations issued by an enterprise for the resale of its branded goods, if the goods are in price competition with similar goods of other manufacturers. Those recommendations have to be expressly designated as non-binding, and economic, social or other pressure may not be exerted to enforce them.

The prohibition on boycotts and refusals to deal, and other prohibitions of unilateral acts irrespective of market power, were integrated into § 21 GWB. Section 21 (2) and (3) GWB prohibit different kinds of coercion of other enterprises, especially to threaten or cause harm, or to promise or grant advantages, to other enterprises for the purpose of inducing them to adopt conduct which the GWB prohibits from being the subject-matter of a contractual commitment.

IV. Market Dominating Enterprises

The GWB does not contain a provision applying to monopolization. However, the merger control rules govern the creation or strengthening of a market-dominating position, and § 19 GWB prohibits the abuse of an existing market-dominating position.

In contrast to § 22 GWB of the old version, which enabled the cartel authorities to take appropriate remedial measures, an abuse of a market-dominating position is now directly prohibited under § 19 (1) GWB, as is the case in Art. 86 EEC Treaty. Private parties can enforce this prohibition directly through damage claims and injunctive relief according to § 33 GWB. Under the old version of the GWB, they had to wait for a decision from the cartel authorities. Also, under the former law, administrative fines (Bugelder) could only be levied after an enterprise had disregarded a decision of the cartel authority.

In contrast to European competition law, German law provides an explicit definition of market domination. An enterprise is market-dominating if it has no competitor or is not exposed to any substantial competition (§ 19 (2) No. 1 GWB), or if it has a paramount market position in relation to its competitors (§ 19 (2) No. 2 GWB). For this purpose, its share of the market, its financial strength, its access to the supply or sales markets, its links with other enterprises, the existence of legal or actual barriers to the market entry of other enterprises, its ability to switch its supply or its demand to other goods or commercial services, as well as the ability of the opposite side of the market to deal with other enterprises shall in particular be taken into account. In addition, the 1999 amendment requires consideration
of the actual or potential competition by undertakings located inside or outside the area in which the GWB applies. Thus, the legislature intends to make clear that for the purpose of defining market domination, the market conditions within the relevant international market shall be considered irrespective of the question of the applicability of the GWB to markets outside its scope.

Any enterprise with a market share of at least one-third for a particular type of good or commercial service is presumed to be market-dominating. Also, if two or three enterprises have a combined market share of 50 percent or over, or five or less enterprises have a combined market share of two-thirds or over, they are presumed to be market-dominating, § 19 (3) GWB. Under the presumption for market-dominating enterprises, the turnover requirements subject to § 22 GWB o.v. were deleted.

Section 19 (4) GWB provides examples of abuses of a market-dominating position. An abuse occurs, for instance, if the enterprise demands consideration or other business terms that deviate from those which would result in all probability if effective competition existed, or if it demands less favorable consideration or other business terms than are demanded from similar buyers on comparable markets by the market-dominating enterprise, unless there is a factual justification for such differentiation (§ 19 (4) No. 2 and No. 3 GWB).

With the sixth revision the essential facilities doctrine was implemented in the GWB. After developing the doctrine in US in United States v. Terminal Railroad Association, the essential facilities doctrine was used in EC competition law. Since there are specific competition law provisions in, specially in the field of Telecommunications, § 19 (4) No. 4 GWB is only a subsidiary norm. How the relationship between the general competition law of the GWB and the specific competition law will show the practice of the FCO and the courts. According to § 19 (4) No. 4 GWB an abuse is present in particular, if a dominating the market enterprise as providers or supplier of a certain type of goods or commercial performances refuses to grant another enterprise against appropriate payment access to the own networks or other infrastructure facilities if it is not possible for the other enterprise for legal or actual reasons without the sharing, on pre or stored market than competitors of the dominating the market enterprise to become active; this does not apply, if the dominating the market enterprise prove that the sharing for conditioned or other reasons is not possible or not reasonable. The FCO and the courts will have to balance competition v. property (it should be mentioned that the essential facilities doctrine as applied in Europe is broader than the one in the US. In this respect it is somehow misleading to speak of the essential facilities doctrine; Germany will develop an own form of the essential facilities doctrine).
The problematic relationship between specific competition law and general competition law becomes specially obvious in the case of GWB and TKG. Section 2 (3) TKG states that the TKG shall not affect provisions of the GWB. On the other hand, the legislative materials of the TKG show that the TKG is meant to be the more specific law when it comes to competition questions compared with GWB. The question of subsidiary has sever consequences for institutional questions: the GWB institutional authority is the FCO, the institutional authority of the TKG is the Regulatory Authority for Telecommunications and Posts (RATP) which operates in the jurisdictional area of the Ministry of Economy.

The prohibitions of discrimination and hindrance (§ 26 GWB o.v.) remained mainly unaltered and are now in § 20 GWB. According to § 20 (1) through (3) GWB, market-dominating enterprises, cartels exempted under §§ 2 through 8 GWB, and enterprises binding their resale prices according to the exemptions in §§ 15, 28 (2), 29 (2) and 30 (1) GWB, shall not unfairly hinder, directly or indirectly, another enterprise in business activities which are usually open to similar enterprises, nor in the absence of facts justifying such differentiation, treat such enterprise directly or indirectly in a manner different from the manner of treatment accorded to similar enterprises.

Section 20 (1) GWB also applies to enterprises and associations of enterprises, insofar as small or medium-sized enterprises acting as suppliers or purchasers of certain types of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of dealing with other enterprises do not exist (§ 20 (2) sentence 1 GWB). A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser, if, in addition to the price reductions or other considerations customary in the trade, the purchaser regularly receives special benefits not granted to similar purchasers (§ 20 (2) sentence 2 GWB).

Those enterprises and associations are also prohibited from using their market position to cause other enterprises in business activities to accord them preferential terms in the absence of facts justifying such terms, § 20 (3) GWB.

According to § 20 (4) sentence 1 GWB, enterprises having superior market power in relation to small and medium-sized competitors must not use their market power to unfairly hinder those competitors either directly or indirectly. In particular, the 1999 amendments added a provision (sentence 2) naming the sale of goods or services below original cost price or purchase price (Verkauf unter Einstandspreis), if it does not occur only occasionally, and in the absence of justifying facts. This amendment constitutes a further
legislative attempt to protect small and medium-sized retailers against their large competitors in what is deemed to be a highly concentrated market. It remains to be seen if the difficulties in defining original cost price or purchase price can be overcome; also, criticisms have been raised concerning a price control effect created by this provision.

V. Exempted Areas

Following the privatization of a number of key industries such as energy, telecommunications and transport in recent years, the broad general exemptions for special industries in §§ 99 et seq. of the old GWB have been mainly repealed. For purposes of harmonization with EU law, they have been replaced by rules which in principle require single decisions of the cartel authority. For instance, § 29 (1) GWB requires from agreements in the bank and insurance sector an express application for a single exemption from the prohibition of cartels (§ 1 GWB) in accordance with §§ 2 through 8 GWB. Also, exemptions from resale price maintenance prohibitions (§ 14 GWB) and the prohibition of certain recommendations (§ 22 GWB) are, in general, subject to single decisions of the cartel authority, § 29 (1) GWB.

Also, the former broad exemptions for agreements for the supply of electricity or gas (§ 103 GWB o.v.) have been abolished, in connection with the new Energy Act of 1998.

Following a FCO decision, several judgments, and political discussions concerning the joint marketing of television rights by German professional soccer teams, another exemption from § 1 GWB was added in § 31 GWB exempting joint marketing of broadcasting rights through sports associations, provided that these sports associations, in accordance with their sociopolitical responsibility, are also obliged to promote youth and amateur sports, which has to be shown by an adequate participation in the proceeds. However, the EC Commission also initiated an investigation into the joint marketing of broadcasting rights within the German Soccer League (Bundesliga) under Art. 85 EEC Treaty. The results of this exemption might be restricted since an EC Commission decision, a German court decision in a private case or even a FCO decision finding a violation of Art. 85 (1) EEC Treaty prevails over the exemption provided in § 31 GWB.

VI. Merger Control

Merger control is the area where the revisions mainly took place. An amendment introduced a compulsory pre-merger notification for all mergers
subject to the GWB. Until 1998, with several exceptions and modifications, mergers with more than DM 500 million required notification only after completion. Pre-merger notification was compulsory if one concerned enterprise had turnover of at least DM 2 billion, or two concerned enterprises recorded individual turnovers of DM 1 billion or more (§ 24a (1) GWB o.v.).

Under current law, both groups of mergers are treated equally. A proposed merger requires advance notification, if, during the completed business year preceding the merger, the participating enterprises together recorded a turnover of at least DM 1 billion (§ 35 (1) No. 1 GWB), and if at least one enterprise concerned recorded domestic turnover of at least DM 50 million (§ 35 (1) No. 2 GWB). Merger control does not apply if an enterprise that is not a controlled enterprise and in the last completed business year recorded a turnover of less than DM 20 million, affiliates itself to another enterprise (§ 35 (2) No.1 GWB). This prerequisite has been lowered from DM 50 million to DM 20 million. The application of the merger rules is also excluded insofar as a market is affected in which goods or commercial services have been supplied for at least five years, and the market in the last calendar year had a turnover of less than DM 30 million (§ 35 (2) No.2 GWB, Bagatellmarktklausel”). This prerequisite has been increased from DM 10 million, thereby eliminating more cases deemed to be a trifle” for merger control. It is expected that approximately two thirds of merger cases will no longer be subject to the notification requirement due to the increases in turnover thresholds triggering German merger control.

Also, in many cases, the European Merger Control Regulation 14 prevails, if the combined aggregate world-wide turnover of all enterprises concerned is more than ECU 5 billion and, in addition, the aggregate Community-wide turnover of each of at least two of the enterprises concerned is more than ECU 250 million, unless each of the enterprises concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. In 1997, Art. 1 (3) of the European Merger Control Regulation was amended to extend the scope of Community merger control to concentrations with a significant impact in several Member States and to extend the one-stop shop” system to particular mergers where the aggregate world-wide turnover of the enterprises concerned is more than ECU 2.5 billion 15. Mergers which fall under the EU Merger Control Regulation are not subject to German merger control, § 35 (3) GWB.

Section 36 (2) GWB includes a now common connection provision" (Verbundklausel) for the purpose of turnover calculation as well as for the determination of a market-dominating position in terms of market shares. If one of the participating enterprises is a controlled or controlling enterprise or an affiliated company, the enterprises linked in this manner are regarded as a single enterprise for the calculation of turnovers as well as market
shares. If several enterprises, as a result of an agreement or otherwise, act together in such a way that they jointly are able to exercise a controlling influence on a participating enterprise, each of them is regarded as a controlling enterprise. Therefore, the market shares as well as the turnovers of the controlling enterprises have to be taken into account. The terms "controlled enterprise", "controlling enterprise" and "affiliated enterprise" (Konzernunternehmen) are defined in Sections 17 and 18 of the Joint Stock Companies Act. The special rules for the calculation of turnovers and market shares remain mainly unaltered and are now subject to § 38 GWB.

Section 37 GWB governs the definition of mergers. The system of different explicit definitions has been shortened and partly adapted to EU Merger Control. § 37 (1) No. 1 GWB concerns the acquisition of all or a substantial part of the assets of another enterprise and remains almost unaltered.

In No. 2, the term "acquisition of control" has been introduced. In accordance with Art. 3 EU Merger Control Regulation, control requires that one or more undertakings acquire direct or indirect control of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by ownership or the right to use all or part of the assets of an undertaking (§ 37 (1) GWB) a), or by rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking (b). According to the Commission decisions involving EU law, acquisition of control" shall include not only majority holdings, but also minority interests if the owner of the shares holds a secure majority in shareholders' meetings. Acquisition of control" shall also cover cases which were formerly subject to § 23 (2) No. 3, 4 and 5 GWB o.v. This amendment combines the flexible approach of EU merger control with the fixed merger definitions of German law.

No. 3 continues to cover the acquisition of shares in another enterprise, provided the shares alone or together with other shares already held by the acquiring enterprise amount to 50 percent (a) or 25 percent (b) of the capital or voting rights of the other enterprise. The shares held by the acquiring enterprise shall also include the shares held by another enterprise on behalf of these enterprises, and, if the owner of the enterprise is a sole proprietor, any other shares belonging to the owner. If several enterprises simultaneously or successively acquire shares in another enterprise to the extent mentioned above, this is also deemed a merger of the participating enterprises (joint venture) with regard to the markets in which the other enterprise operates.
The controversial provision of competitively significant influence", which was enacted in 1989 in order to cover attempts to circumvent merger control, e.g. acquisition of 24.9 percent of the shares, was transferred to § 37 (1) sentence 4 GWB. It concerns any other combination of enterprises insofar as the combination enables one or several enterprises to exercise directly or indirectly a competitively significant influence on another enterprise."

Note that the fulfillment of each single merger provision is regarded as a separate merger and therefore subject to the notification requirement and the corresponding administrative fines for failing to notify (§ 81 (1) No.7 GWB). Therefore, if an enterprise acquires at first 25 percent, gains a stable actual majority of voting rights in the shareholders’ meeting one year later (acquisition of control), and another year later acquires shares amounting to 51 percent, the FCO must be notified of each of these acquisitions.

If it is likely that a market-dominating position will be created or strengthened as a result of a merger, the FCO has to prohibit the merger, unless the participating enterprises prove that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of market domination (§ 36 GWB). A market-dominating position is defined in § 19 GWB. Therefore, the market share-related presumptions in § 19 (3) GWB are important.

Major changes took place in the merger control procedure, which is divided into a preliminary examination within one month, and a main examination within four months (Hauptprüfverfahren). According to § 40 (1) sentence 1 GWB, the FCO may prohibit a notified merger only if it informs the notifying enterprises within a period of one month from receipt of a complete notification that it has begun an examination of the proposed merger. The main examination procedure shall be instituted if a further examination is necessary (§ 40 (1) sentence 2 GWB). In the first examination period, a preliminary examination is undertaken in order to detect harmless cases. Complex cases shall be subject to the second stage: the main examination procedure. Clearances in the first stage are not subject to formal decisions; they are handled by informal administrative notice, or by the expiration of the four month period. In the main examination procedure, decisions of the FCO have to be formal decisions (Verfügungen). Therefore, the FCO must publish and give reasons for its decision. Until 1998, only prohibitions of mergers were subject to publication and explanation. Clearance decisions were mainly only published in the biennial report of the FCO or the general report (Hauptgutachten) of the Monopoly Commission 16. The European Merger Control has shown that clearance decisions, even more than prohibitions, require discussion in public. It is expected that these formal requirements for clearance decisions will enhance transparency and the public control of merger control decisions by the cartel authorities. In addition, the amendments
clarify that third parties are allowed to challenge clearance decisions. However, the amended GWB does not preclude clearance of mergers by letting the 4 months period lapse. According to § 40 (2) sentence 2 GWB, a merger is deemed to be cleared if the FCO does not issue a decision within four months. Therefore, although it might seem unlikely, merger cases could be cleared without a formal decision even in the main procedure through expiration of the four month period, thereby preventing third parties from their right to bring an action. Also, clearance of critical cases during the preliminary procedure through informal notice could hinder transparency and third party legal remedies.

Section 39 GWB defines the content of the notification and the persons obliged to notify, as well as the FCO’s right to demand information. A new provision was introduced in § 39 (6) GWB to require an authorized recipient in Germany to file the notification if a concerned enterprise is located outside of Germany.

VII. Enforcement

The procedural rules remain mainly unaltered. German competition law is enforced by the Federal Cartel Office, which is located in Berlin and moves to Bonn in 1999, and the cartel authorities of the sixteen German States (Länder).

The GWB provides for administrative sanctions in the form of cease and desist orders (the general rule for cease and desist orders is found in § 32 GWB) and administrative fines for administrative offenses (Ordnungswidrigkeiten) which are named in § 81 GWB. In addition, § 34 GWB provides for excess proceeds surcharge orders of the cartel authority if an enterprise willfully or negligently, as a result of conduct prohibited by a cartel authority decision pursuant to § 32 GWB, has obtained additional proceeds following service of a decision. In addition to the single excess proceeds surcharge subject to ordinary" administrative proceedings (§§ 54 through 80 GWB), a treble surcharge of illegal proceeds is possible as an administrative fine if an administrative offense (Ordnungswidrigkeit) is found under § 81(2) GWB.

The GWB does not provide for criminal sanctions. However, the 1997 amendments to the Criminal Code introduced an express provision for bid-rigging.

Private damage actions and injunctive relief are now covered by § 33 GWB. Although this provision seems very similar to the former § 35 in the old version of the GWB, its importance might change substantially given the amendments to other provisions. The abuse of a market-dominating position is now prohibited in § 19 GWB and can therefore be enforced by private parties.
without a cease and desist order from the FCO. It is unclear whether or not the newly introduced explicit prohibition of cartels (§ 1 GWB) and agreements restricting one party’s freedom to determine prices or business terms in contracts which it concludes with third parties (§ 14 GWB) will also impact the interpretation of the persons protected by those provisions and therefore authorized to claim for damages under §§ 1, 33 GWB or §§ 14, 33 GWB. A major impediment to the enforcement of the rules against abusive conduct of market-dominating enterprises and enterprises having superior market power has been the reluctance of adversely affected small firms to complain with the cartel authorities for fear of retaliatory measures taken by accused business partners. Therefore, § 54 GWB was complemented to allow the cartel authority to institute a proceeding ex officio upon the request of a complainant in order to protect the claimant’s anonymity. The cartel authorities are now allowed to redact parts of a document, especially the address of the complainant, when they submit evidence to a court concerning a judicial review of an inquiry order issued by the cartel authority (§§ 59, 70 (4) GWB).

The requirement that cartel agreements and other agreements containing restrictions must be in writing (§ 34 GWB o.v.) has been abolished.

VIII. Public Procurement

German procurement law has traditionally been part of administrative law and not competition law, and therefore focused on budgetary issues, without guaranteeing individual rights and legal remedies for applicants and bidders. Not until 1993 was a unified review of public procurement procedures and decisions for cases above the thresholds in the EU directives introduced ("budgetary solution"). The respective rules explicitly excluded bidders’ individual, enforceable rights. This has been criticized by the Commission and by the EC Court of Justice as well as by the U.S. government in trade negotiations, and led to the introduction of several actions brought by the Commission against Germany on grounds of infringement of the EEC Treaty. In order to fulfill the requirements set by several European Directives18 aimed at the opening of public procurement for Community-wide competition, the rules on government procurement have been amended and incorporated into the GWB, §§ 97 through 129. The GWB provides for definitions of public procurement and contracting authorities, and general principles governing public procurement. The procurement rules in the GWB do not only apply to governmental authorities. Contracting authorities within the meaning of § 98 GWB are also private enterprises involved in certain governmental-supported activities, e.g. the construction of hospitals and schools.

During the legislative process, strong disagreement occurred between the
federal government and the States (Länder) concerning the permitted criteria for procurement. According to § 97 (4) GWB, procurement decisions have to be based on the expert knowledge, experience, efficiency and reliability of the enterprises. Other criteria may only be considered if provided for in federal or state laws. Several States insisted on their ability to set additional criteria. Thereby, they want to be able to use government procurement to promote certain groups of employees and to exclude those firms found guilty of work on the side through black lists.

The new GWB introduced a subjective right for tenderers to guarantee compliance of government procurement proceedings with the respective rules, § 97 (6) GWB. Any enterprise having an interest in the procurement order and claiming to be injured in his or her rights has standing to bring an action, § 107 (2) GWB.

Judicial review is guaranteed by administrative authorities in the first instance (§ 104 GWB). The Vergabekammern (procurement review bodies) are independent, § 105 (1) GWB. Federal procurement orders are handled by federal Vergabekammern which are constituted within the Federal Cartel Office, and the 16 German States (Länder) have their own Vergabekammern. The final decision of a Vergabekammer constitutes an administrative act, § 114 (3) GWB. The Vergabekammer as well as the High Court on appeal have to decide within 5 weeks after receiving the complaint, § 113 (1) and § 121 (3) GWB. A review application will automatically halt the award procedure (§ 115 GWB), thus keeping open for the bidder the possibility of winning the contract. In its decision, the Vergabekammer declares whether the tenderer is affected in his or her rights, and may order necessary measures, without being bound by the application, § 114 (1) GWB. For example, the Vergabekammer can issue an order against a contracting authority to eliminate discriminatory elements from tender documents. It cannot remand the award, § 114 (2) GWB. Vergabekammer decisions can be appealed to the High Court (Oberlandesgericht), § 116 GWB. The appeal, complete with a statement of the grounds for appeal, must be filed within two weeks of the announcement of the first instance decision, § 117 GWB. The Court of Appeals can either render its own decision or remand the case to the review board to decide again with attention to the court's arguments, § 123 GWB.

In case of an infringement of procurement rules, bidders can seek an award of damages under § 123 GWB, notwithstanding further damage claims, e.g., claims under the German Civil Code. In contrast, § 125 GWB provides a damage claim for cases involving abuse of rights; if the available remedies are abused by a bidding entity, it may be liable for damages to the other parties to the proceeding.
IX. International Application of German Antitrust Law and Relation to European Antitrust Law

The GWB provides an explicit provision for the effects-principle in § 130 (2) GWB, stating that this Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area. Therefore, all prohibitions and notification requirements apply to activities which have a direct, reasonably foreseeable and significant (not necessarily substantial) effect. The FCO has regularly applied the GWB provisions to foreign enterprises.

A strong influence of EU law derives from the fact that EU law generally overrules German competition law. Therefore, if Art. 85 EEC Treaty is applicable, i.e., if an effect on trade between Member States is present, an express exemption granted under Art. 85 (3) EEC Treaty under a decision made by the Commission prevails over the prohibitions found in §§ 1 and 14 GWB. On the other hand, the prohibitions in Articles 85 and 86 EEC Treaty prevail over every kind of exemption in German law.

Many questions concerning the relationship, differences and conflicts of EU and German competition law remain open due to the fact that in many areas the EC Commission did not enforce prevailing prohibitions in EU law. Also, applications for exemptions under Art. 85 (3) EEC Treaty filed with the Commission may remain untreated for years. Due not only to the lack of resources in the EC Commission, recently, the FCO applied in several cases EU law directly, even if explicit provisions in the GWB exempted the conduct in question from the GWB prohibitions.

Therefore, for international transactions likely to have an effect on trade between Member States within the meaning of Articles 85 and 86 EEC Treaty, EU competition law rules always have to be considered in German competition law cases.

(1) The GWB was initially enacted in 1957 (BGBl. 1957 I, 1081). Since then, it has undergone six major revisions, the most important occurring in 1973 when the Merger Control was amended.

(2) Revision of August 26, 1998 (entry into force 1 January 1999), BGBl. 1998 I, 2521. For an overview of literature on German competition law in English, see <http://www.antitrust.de>.

(3) For the legislative history, see: BT-Drucks. 13/9720.

(4) In §§ 48 - 53 GWB.
(5) Block exemptions (Article 85 (3) EEC Treaty) under Council Regulations or Commission Regulations exist for exclusive dealing agreements, licensing agreements for the transfer of technology, specialization and research and development agreements, franchising agreements and insurance-sector agreements.

(6) See Federal Civil Supreme Court (Bundesgerichtshof), October 24, 1995 – BGHZ 131, 107-121 – Backofenmarkt”.

(7) 224 U.S. 383 (1912).


(9) German Telecommunications Act of 1996 (TKG), BGBl. 1996 I, 1120; An English version of the Telecommunications Act is available through the German Regulatory Authority for Telecommunications and Posts at <http://www.regtp.de/English.htm>.


(12) In addition to the EC Commission, the FCO and other Member States’ Cartel Authorities are allowed and encouraged to apply EC competition rules; see § 50 GWB explicitly empowering the FCO to apply EC Competition Rules. See also Commission Notice on Cooperation Between National Competition Authorities and the EC Commission in Handling Cases Falling within the Scope of Articles 85 or 86 EEC Treaty, published in the Official Journal: OJ C 313, 15/10/97, p. 3.

(13) The FCO has published an information leaflet relating to the German control of concentrations, available at <http://www.bundeskartellamt.de>.


(15) Art. 1 (3) of the regulation now requires that
- the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2.5 billion
- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million
- in each of at least three Member States included for the above mentioned
purpose, the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million

- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

(16) §§ 44 - 47 GWB.


(18) For the respective EU directives, see the legislative history, Bundestagsdrucksache 13/9340 of December 3, 1997
The sixth major revision of the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen or "GWB") was enacted in May 1998 and entered into force in January 1999. One of the main objectives of the revision is the harmonization with EU competition law. Over the last years, the influence of EU law on Member States’ laws has grown steadily, especially in the area of competition law. In addition, the 1999 amendment requires consideration of the actual or potential competition by undertakings located inside or outside the area in which the GWB applies. This LawFlash summarizes the key changes of the ninth amendment to the German Act against Restraints of Competition (GWB) (Amended Law), which was adopted on March 31 and presumably will enter into effect in April or early May of 2017.

**Cartel Liability.** The Amended Law significantly extends the liability for cartel infringements by introducing the concept of group liability. The aim is to harmonize German cartel liability provisions with European competition law. Also, all companies belonging to the same group will now be jointly and severally liable for the fines imposed. Furthermore, the Amended Law tightens the rules for cartel liability in cases of legal succession.