Competition News Bulletin

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Inside...

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Commission of India (CCI) re-imposes penalty on 11 cement companies for cartelisation

CCI by its order dated August 31, 2016 has re-imposed penalties on 11 cement manufacturers and Cement Manufacturers Association(CMA) for violation of Section 3(3)(a) and 3(3)(b) of the Act. The CCI had earlier imposed a penalty under Section 27 of the Act in the same case through its order dated 20 June 2012. However, the COMPAT set aside the CCI order on December 11, 2015 with the direction that the CCI shall hear the parties afresh and pass fresh order in accordance with law.

The Information, filed by the Builder Association of India alleged cartelization by cement manufacturers on account of increased prices of cement bags despite fall in production costs, reduction in capacity utilization, non-passing of reduced costs to customers by cement manufacturers.

Along the lines of the earlier order, the CCI has again concluded that the cement manufacturers violated Section 3(3)(a) and 3(3()(b) of the Act by acting in concert and fixing cement prices and limiting and controlling the production and supply in the market. The CCI imposed a penalty of 0.5 times the net profits for 2009-10 and 2010-11 in case of cement manufacturers and 10% of the total receipts for two years on CMA.

The earlier cement order was covered as a special feature in our Competition Law Bulletin Vol. IV No. 1 covering April- June 2012 and can be read at http://competitionlawyer.in/wp-content/uploads/2015/10/CLB-15.pdf.

(Source: CCI Order dated August31, 2016. For full text see CCI website)

INTERNATIONAL

EU: European Commission (EC) welcomes General Court judgments upholding its Lundbeck decision in first Pharma pay-for-delay case

The General Court upheld the EC's Lundbeck decision and ruled for the first time that Pharma pay-for-delay agreements breach EU antitrust rules. In such agreements an original pharmaceutical manufacturer pays generics producers to stay out of the market. The EC's decision found that the Danish pharmaceutical company Lundbeck and four generics competitors had concluded agreements that harmed patients and health care systems. This allowed Lundbeck to keep the price of its blockbuster drug citalopram artificially high, in breach of Article

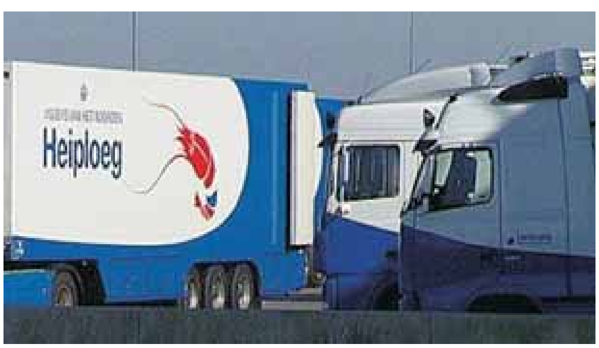
101 of the Treaty on the Functioning of the European Union. The decision imposed a fine of €93.8 million on Lundbeck and fines totaling €52.2 million on the four generics competitors, Generics UK, Arrow, Alpharma and Ranbaxy. Before the agreements were concluded, Lundbeck's basic patent for the blockbuster antidepressant medicine citalopram had expired. Lundbeck still held a number of process patents that provided limited protection. Generics producers were preparing for market entry with much cheaper generic versions of citalopram. Lundbeck paid the generics competitors for their promise to stay out of the citalopram market. As a result, Lundbeck was certain to avoid competition from the four companies for the entire duration of the agreements. Lundbeck and the generics companies appealed the decision to the General Court. However, The General Court fully confirmed the EC's findings. It is the first time that it has ruled on pay-for-delay agreements in the pharmaceutical sector.

In particular, it found that:

- The EC was correct in finding that, irrespective of any patent dispute, generics competitors agreed with Lundbeck to stay out of the market in return for value transfers and other inducements, which constituted "a buying-off of competition";
- The EC had correctly established that the agreements eliminated the competitive pressure from the generic companies and are "a restriction of competition by object". Furthermore, Lundbeck was not able to justify why these particular agreements would have been needed to protect its intellectual property rights.

(Source: EC Press Release dated September 8, 2016)

General Court dismisses appeal by Goldfish and Heiploeg against the EC regarding North Sea shrimps traders cartel



On September 8, 2016, the General Court dismissed the appeal by Goldfish BV, Heiploeg BV, HeiploegBeheer BV and Heiploeg Holding BV against the EC in relation to the North Sea shrimps trader price-fixing cartel. The General Court found that recordings obtained by the EC during the course of an unannounced investigation were legally acquired and that the EC had not breached Article 101 of the TFEU by relying on the recordings as evidence for its cartel decision, this being the case even if the recordings were made illegally by a competitor. The General Court also dismissed the appellants' argument that the EC failed to take into account their inability to pay the fine imposed by the EC.

(Source: General Court Judgment dated September 8, 2016)

EU: European Court of Justice (ECJ) confirms Pilkington Group's fine of EUR 357 million for its participation in car glass cartel

The European Court of Justice ("ECJ") confirmed the fine of EUR 357 million imposed by the EC on Pilkington Group ("Pilkington") for its participation in the car glass cartel. In November 2008, the EC concluded that a number of companies, including Pilkington, had infringed EU competition law by participating in a set of agreements and concerted practices in the automotive glass sector. The infringement consisted of an allocation of the supply of car glass, designed to maintain an overall stability of the parties' positions in the market concerned. The EC initially fined Pilkington EUR 370 million. However, in February 2013, the EC reduced the fine to EUR 357 million, in order to correct errors made in the initial calculation. Pilkington then asked the General Court to annul that decision and to substantially reduce the amount of the fine. In December 2014, the General Court dismissed Pilkington's appeal and confirmed the EC's decision and the amount of the fine. After that, Pilkington appealed the GC's judgment to the ECJ. In its ruling, the ECJ firstly concluded that, for the purpose of calculating the fine, the EC was entitled to take into account the sales made during the infringement period on the basis of contracts concluded prior to that period. The overall plan of the cartel was to allocate all supplies of automotive glass between the cartel participants, with respect to both existing supply contracts and new contracts. According to the ECJ, it follows that the sales made pursuant to contracts that pre-dated the infringement period and had not been renegotiated during that period had to be regarded as coming within the scope of the cartel and could be taken into account for purposes of determining the fine. Secondly, concerning the applicable exchange rate and the conversion of Pilkington's turnover from pounds to euros, the ECJ confirmed that the EC was entitled to use the exchange rate applicable in the business year preceding the adoption of the decision at issue. Thus, ECJ dismissed Pilkington's argument that the EC should have used the exchange rate applicable at the time of the decision's adoption. In addition, the ECJ concluded that it is not contrary to the principles of proportionality and equal treatment that an undertaking, whose activities are more focused than others on the sale of goods or services connected directly or indirectly to the infringement, may receive a fine which represents a proportion of its overall turnover that is greater than that imposed on the other undertakings. Accordingly, the ECJ dismissed Pilkington's appeal and confirmed the fine of EUR 357 million.

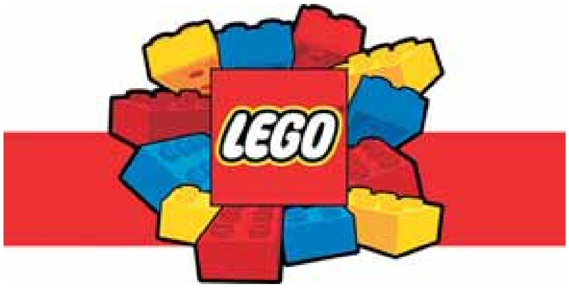
(Source: ECJ Press Release September 7, 2016)

EU: EC fines Altstoff Recycling Austria €6 million for hindering competition on Austrian waste management market

The EC has fined Altstoff Recycling Austria (ARA) €6 million for blocking competitors from entering the Austrian market for management of household packaging waste from 2008 to 2012, in breach of EU antitrust rules. The fine was reduced by 30% due to ARA's cooperation with the EC. In Austria, producers of goods are obliged to take back packaging waste that results from the use of their products. They may transfer this task to a company that takes care of the collection and recycling for them against a licence fee paid by goods' producers. ARA has been the dominant provider of these services for household packaging waste in Austria since at least 2008, the beginning of the infringement. The EC found that the nationwide collection infrastructure, partly controlled and partly owned by ARA, could not be duplicated. Competitors who wanted to enter or expand in the market were dependent on receiving access to this existing infrastructure. The investigation also found that between March 2008 and April 2012 ARA refused to give access to this infrastructure, so that competitors were excluded from the market and competition eliminated. Such behaviour is in breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU) which prohibits the abuse of a dominant market position. As well as finding an infringement and fining ARA, the EC has imposed a structural remedy to address the issue of foreclosure of the Austrian market for the management of household packaging waste. This structural remedy was suggested by ARA, which cooperated with the EC.

(Source: EC Press Release dated September 20, 2016)

Germany: Federal Cartel Office forces LEGO to change discount-system for online-sales



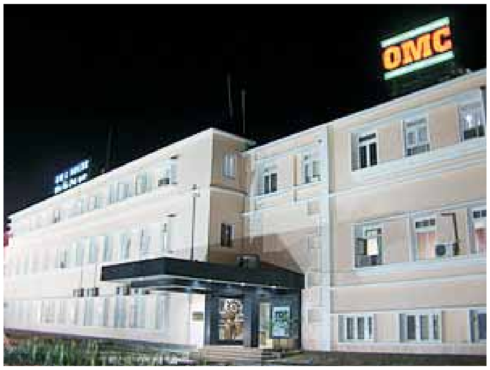
LEGO, the Danish toy manufacturer, has agreed to adjust its discount system for online sales, after the German Federal Cartel Office Federal Cartel Office (FCO – Bundeskartellamt) initiated official antitrust proceedings after receiving complaints from online retailers. The complaints alleged that the existing LEGO discount-system rewarded certain functions carried out by retailers, and at least de facto differentiated significantly between online and offline sales. Offline retailers with physical stores were able to receive discount levels based on criteria that only they could fulfill (for example, receiving a discount based on the number of meters of available shelf space in the stores reserved for Lego products), offline retailers were offered favourable prices in comparison to the online retailers. Such conduct constitutes an infringement of Article 101 TFEU. During the antitrust proceedings, the FCO found the LEGO-discount-system to be structurally disadvantageous towards online retailers, for even ideal online-retailers were not able to reach a discount level that put them in a position to compete on an equal footing with the prices of their physical store counterparts. Whereas, it is the right of a manufacturer to set certain quality standards for the distribution of its goods and grant its retailers different levels of discount for different services, the FCO held that this does not entitle the manufacturer to put a specific distribution channel at a disadvantage. Such rebate systems may qualify as dual pricing system if online sales are not privy to the same amount of discounts as offline sales.As a result of the FCO's findings, LEGO agreed to adapt its discount-systems by introducing additional criteria for online sales tailored specifically to of this distribution channel, thereby enabling actual competition between online and offline sales for the benefit of the consumer.

(Source: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html)

II. ABUSE OF DOMINANCE/ MARKET POWER

INDIA

Competition Appellate Tribunal (COMPAT) upholds CCI order dismissing abuse of dominance allegation against Orissa Mining Corporation (OMC)



COMPAT by its order dated August 30, 2016 has upheld order of CCI which had dismissed allegations of abuse of dominance by OMC has been indulging in abusing its dominant position in fixing an arbitrary and highly unreasonable price for sale of chrome ore.

The Information, filed in CCI by All Odisha Steel Federation, alleged that the method of deriving the price of the chrome ore by resorting to a Price Setting Tender (PST) was unfair and resulted in an excessive price being determined for the sale of chrome ore.By this method a very small quantity is tendered for sale by OMC. As a result, a few unknown companies, whose lifting of Chrome Ore is less than 2% of OMC's total sales, quote abnormally high price and become H-1 in the tender and such price becomes the benchmark for all plants including the members of the Informant's Association. It was also alleged that in some instances, OMC did not even accept the highest bid price (H-1) and fixed an even higher price without regard to the prevailing market conditions.

During the investigation, the DG concluded that while the OMC was in a dominant position in the relevant market, there was no abuse of dominance. The CCI agreed with the DG Report and held that despite the dominant position in the relevant market of friable chrome ore in the State of Madhya Pradesh, OMC did not abuse its position and that it was entitled to protect its business interest by adopting any methodology of price setting depending on market conditions. Since chrome ore is a non-renewable natural resource, its pricing and supply cannot be determined by market forces; that chrome ore is not like any other commodity which can be supplied to any extent and price thereof cannot be determined on the free market economy principal.

COMPAT noted that the price setting tenders were floated by OMC primarily with the objective of discovering price and in accordance with clauses of the tender scheme, the offered price could be modified to capture market realities.

Further it also needs to be appropriated that chrome ore is a scarce natural resource its availability needs to be sustained for long term use. Mineral exploitation also requires ecological mitigation. These factors make calculation of economic value extremely difficult for calculation by a competition regulator. Therefore, willingness/ability to pay is a fair method for price discovery.

The COMPAT noted that even though the OMC has made good profits out of the sale of chrome ore, this alone cannot be read against OMC. There is no conclusive determination that OMC has tried to manipulate the market in order to draw excessive pricing advantage.

The COMPAT agreed with the opinion of DG which has been approved by the CCI that the allegation of abuse of dominance by OMC has not been established and the price charged by it is not unfair. The appeal has been dismissed accordingly

(Source: Order dated August 30, 2016. For full text see COMPAT website-www.compat.nic.in)

CCI dismisses allegation of predatory pricing against ANI Technologies Ltd. in New Delhi and NCR

The CCI has dismissed allegation of abuse of dominant position through predatory by Ola Cabs and Taxi For Sure operator ANI Technologies Pvt. Ltd.

The Information was filed by three individuals plying auto-rickshawin NCR region.It was alleged that ANI is driving out competitors in the market for para-transit services- i.e., market for auto-rickshaw and taxi services-in NCR by paying more money to drivers than it collects from passengers.

The CCI noted that in the two relevant markets for that of radio taxis and auto rickshaws in New Delhi, ANI was not a dominant enterprise as there exists stiff competition between Ola and Uber in providing radio taxi services in New Delhi. Similarly, in provision of auto-rickshaw services, ANI's market share is less than 20% in New Delhi.

The CCI concluded that the ANI is not dominant in either of the relevant markets and hence no allegation of abuse of dominance can be made against them.

(Source: Order dated August 31, 2016. For full text see CCI website-www.cci.gov.in)

III. COMBINATION

COMPAT upholds penalty imposed on SCM Soilfert for "gun-jumping"

COMPAT by its order dated August30, 2016 has upheld the penalty imposed by the CCI on SCM Soilfert for failure to file a notice under Section 6(2) of the Competition Act, 2002 (the Act) for a combination.

Deepak Fertilizers and Petrochemicals Corporation Ltd. (DFPCL) is a company engaged in manufacturing and trading of industrial chemicals and fertilizers and is a listed company and SCM is DFPCL's wholly owned subsidiary.

On July 3, 2013, SCM purchased shares of Mangalore Chemicals and Fertilizers Limited (MCFL) on Bombay Stock Exchange amounting to 24.46% of the paid up capital of MCFL. DFPCL issued a press-release stating that the purchase was a "very strategic and good fit with the company's business". The acquisition was not notified to the CCI under Section 6(2) of the Act.

Further, SCM acquired additional equity shares representing 0.8% of MCFL, thus entitling SCM to hold more than 25% of the voting rights in MCFL. SCM filed a notice under Section 6(2) of the Act within 29 days of the acquisition of shares beyond 25% of the shares of MCFL.

The CCI issued a notice under Section 43A of the Act to the Appellants on the ground that they had failed to give notice in accordance with Section 6(2) of the Act in regard to the market purchase consummated on 23.4.2014 as well as the acquisition made in 2013.

SCM contended that the acquisition was "solely for investment" purpose as understood under Item 1 of Schedule 1 of the Combination Regulations and hence did not require notification to the CCI. The CCI considered that the phrase "solely as an investment" indicated "passive investment" as against "strategic investment". The CCI took note of the press release issued on the day of acquisition as indicative of the fact that the said acquisition was neither made solely as an investment nor in ordinary course of business. Further, as per media reports, SCM and Zuari Group had been in a takeover bid for MCFL since April 2013 and Zuari Group had also purchased shares amounting to 16.43% of MCFL's share capital just before the SCM made the first acquisition.

SCM also contended that the second acquisition amounting to 0.8% of the equity shares of MCFL was not consummated as the shares were kept in an escrow account and they were not entitled to exercise any legal or beneficial rights over them till approvals of regulatory bodies (including the "CCI") were obtained. CCI rejected the contention that where a buyer acquires shares but decides not to exercise legal/beneficial rights in them, notice is not required to be filed within Section 6(2) of the Act. The CCI, consequently, imposed a penalty on INR 2,00,00,000 (Two Crores only) under Section 43A of the Act for violation of Section 6(2) of the Act.

The COMPAT held that the press release is a good evidence to support the view that the objective was not solely to make an investment in a competitor company. The press release noticeably referred to the acquisition as a "very strategic and a good fit with the company's business". There is also a significant pointer in the press release of the intent when it states that DFPCL looked forward to working closely with MCFL to "enhance long term value for the shareholders of both companies". A mere investment through the stock market, where holders of the shares of MCFL i.e sellers are substituted by the buyer ,in this case SCM, cannot increase the value for shareholders of MCFL, unless the buyer planned to play a strategic role beyond a passive investment.

Regarding the consummation of 0.8% of the equity shareholding of MCFL by SCM, it was contended that the business of hostile purchase is affected by day to day rates and the same having been undertaken by SCM without any agreement, notice under Section 6(2) was to be made within 30 day period of the purchase, which had been done. The COMPAT held that the Section 6(2A) of the Act validates the prior notification requirement by stipulating that no combination shall come into effect until 210 days have passed from the date on which notice was given to the CCI or passing of the order under Section 31 by the CCI, whichever is earlier. Creation of the escrow account did not eliminate the statutory requirement of prior notice.

Lastly, the COMPAT held that usage of the word "shall impose" in Section 43A of the Act means that the failure to notify a combination under Section 6(2) of the Act shall carry a penalty under Section 43A, even if there is no mensrea or malafide intention. The CCI only has a discretion regarding the quantum. The CCI has taken the facts and circumstances of the case in consideration while imposing penalty of INR two Crores and COMPAT see no reason to interfere. The appeal has been dismissed.

(Source: Order dated August 30, 2016. For full text see COMPAT website-www.compat.nic.in)

CCI approves acquisition and amalgamation between HDFC Ergo and L&T

The proposed combination relates to acquisition of 100% shareholding in L&T General Insurance Company Limited ("LTGI") by HDFC Ergo General Insurance Company Limited ("HDFC Ergo") from Larsen and Toubro (L&T). Subsequently, HDFC Ergo shall be merged with its then 100% subsidiary LTGI.

HDFC Ergo is engaged in providing housing finance, finance for commercial real estate, general insurance services, etc. LTGI is engaged in providing general insurance services. It offers a range of general insurance products, with product offerings spanning across auto, business, home and health insurance.

CCI noted that HDFC Ergo and LTGI have a combined market share of less than 5% in the market for general insurance services and less than 10% each in market segments of fire, marine, motor, health and other insurance. Further, it was noted that LTGI has limited presence in all segments and the incremental market share resulting from the proposed combination is insignificant (between 0 to 5 percent).

CCI accepted the modification proposed by the parties to reduce the non-compete period from for L&T from 5 years to 3 years. The proposed combination has been approved under Section 31 of the Act.

(Source: Order dated August 01, 2016. For full text see CCI website-www.cci.gov.in)

INTERNATIONAL

EU: EC conditionally approves Hutchinson/VimpelCom joint venture in Italy

The EC has conditionally approved a joint venture between the telecommunications activities of VimpelCom and Hutchinson in Italy. The transaction combines VimpelCom's subsidiary WIND with Hutchinson's subsidiary H3G, the third and fourth largest mobile network operators in Italy, respectively. As a result, the number of mobile network operators in Italy would fall from four to three. The EC's investigation revealed that the transaction, as initially notified, would reduce competition in the market and impede the ability of mobile virtual operators to compete. In particular, the EC was concerned that the proposed transaction would eliminate competition between two large undertakings in the market, leaving only two mobile network operators, TIM and Vodafone, to challenge the joint venture. The EC was also concerned that the consolidated market would made it easier and more likely for the remaining mobile network operators to coordinate competitive behavior. Finally, the EC argued that the transaction would reduce the number of mobile network operators willing to host virtual network operators, which rely on access to the physical network of mobile network operators to provide their services to customers. According to the EC, the proposed transaction could have led to higher retail mobile prices and less consumer choice; the transaction would also, the EC feared, decrease the quality of services. In order to address the EC's competition concerns, the parties have offered to divest assets to allow a French telecommunications operator, Iliad, to enter the Italian retail mobile market as a fourth mobile network operator. The proposed remedies include selling mobile base station sites and capacity in the mobile radio spectrum to Iliad as well as a transitional agreement that allows the new entrant to use the joint venture's mobile network until the end of the transitional period. According to the EC, the proposed remedies fully address the competition concerns, because they allow Iliad to enter the Italian market and replace the competition that would have been lost as a result of the transaction. The EC is confident that Iliad has sufficient expertise and resources to effectively operate and compete with the existing mobile network operators in Italy. Consequently, the EC conditionally approved the proposed transaction.

(Source: EC Press Release September 1, 2016)

IV. MISCELLANEOUS

INDIA

CCI to appoint 24 Competition Resource Persons to promote competition awareness and advocacy

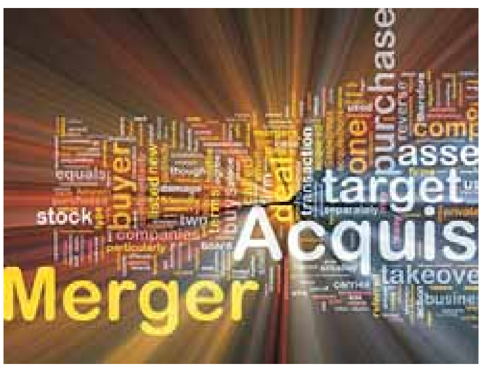
The CCI seeks to appoint 24 persons as Competition Resource Persons (CRP) to raise awareness and impart training in competition law. The CCI shall select individuals and non-government organization(NGO) as designated CRP for each State/Union Territory.

Each CRP shall be tasked with conducting 3 hour sessions on competition law and competitive culture to promote awareness. The CRP shall organize a minimum of 30 and a maximum of 100 programmes every year.

(Source: CCI Notice on Resource Person Guidelines, 2016.For full text see CCI website-www.cci.gov.in.)

INTERNATIONAL

New provision on German antitrust law enters the legislative process



On July 1, 2016, the German Ministry for Economic Affairs published a draft bill for a 9th amendment of the German Act against Restraints of Competition (GesetzgegenWettbewerbsbeschränkungen – "GWB"). The draft bill addresses numerous topics which have been subject to intense discussions in German competition policy which will bring material changes to German antitrust law. One of the main pillars of the 9th amendment is the elaboration of the present system on sanctions and penalties for antitrust violations. Under current German antitrust law, several major cases took place in which companies successfully underwent restructuring measures in order to evade the fines imposed on them. In the most popular case, this led to a penalty breakdown of the German Federal Cartel Office (Bundeskartellamt - FCO) amounting to EUR 120m in one single case. To avoid similar cases in the future, the new provisions shall empower the FCO to impose fines also on companies' legal successors, with that limiting the design possibilities for the limitations of liability. Furthermore, under the new provision the FCO shall be entitled to impose fines on a parent company, in case its subsidiary has been a member of a cartel and the parent company and subsidiary form one economic entity. The respective parent company will be additionally subjected to fines imposed by the FCO as under the future provisions the fines will be sized according to the revenue of the overall group. Significantly higher fines for antitrust violations should be expected. Another central issue of the 9th amendment of the GWB is to adapt German competition law to accommodate the latest developments in the area of digital economics. For this reason, the new provisions significantly widen the scope of fusion control by implementing an additional threshold, stating that a merger is also subject to notification when the consideration exceeds EUR 350m.Under the current antirust-rules, takeovers of small high profitable companies by big entities have not been subject to notification obligations when the smaller company did not reach the relevant turnover threshold of EUR 5m – a constellation relatively often found in the digital market. An example in this context is the takeover of WhatsApp by Facebook in 2014, when Facebook was willing to pay EUR 14bn for WhatsApp, which at that time did meet the turnover threshold of German merger control law. In the future, the additional consideration based threshold will empower the FCO to perform merger controls in such cases. This provision is accompanied by the new Sec. 18 (3a) GWB, which clarifies that a market is also constituted in cases in which the specific service is performed free of charge. The third substantial section of the 9th amendment of the GWB deals with Implementation of Directive 2014/104/EU on Actions for Damages.

(Source: http://www.antitrust.de/)

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