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A Draft Amendment to the German Competition Act Has Been Published – More Powers for the Bundeskartellamt

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The German Ministry of Economic Affairs and Climate Action published the draft of the 11th amendment to the Act against Restraints on Competition. It will further strengthen the German competition watchdog's powers to investigate market sectors and to impose remedies even in the absence of an infringement of competition law.

On 26 September 2022, the German Ministry of Economic Affairs and Climate Action ("Ministry") published the first draft of the 11th amendment of the Act against Restraints on Competition ("German Competition Act") (the "draft bill"). The draft bill is not an immediate reaction to the current crisis on the energy markets but is a longer planned amendment, which has already been reflected in the 2021 coalition agreement between the government parties SPD, Bündnis 90/Die Grünen and FDP. The draft bill marks another step in the direction of a new era of antitrust law enforcement in Germany. This trend continues to shift competition law enforcement from a more traditional approach, where an infringement of competition law (e.g., a cartel/abuse of dominance) is required, to a more extensive market protection tool intended to address perceived distortions to competition that can already operate below the "infringement threshold". The draft bill in particular refers to experiences of the UK competition authority CMA and to the European Commission's Impact Assessment for the New Competition Tool (NCT).

The main aspects of the draft bill are: (i) a complete revision of the sector inquiry tool of the Federal Cartel Office ("FCO"); (ii) the implementation of the DMA in the national framework of public and private enforcement; and (iii) the facilitation of benefits disgorgements:

(i) Sector inquiries. The sector inquiries tool enables the FCO to investigate the competitive conditions on markets unrelated to a specific competition law infringement. The tool was initially introduced in 2005 and has been used around twenty times, *inter alia* in the sectors fuels, buyer power in food retailing, cement and ready-mix concrete, waste disposal and hospitals. In 2007 the tool was also extended into the area of consumer protection – in particular in the digital space. The draft bill identifies and addresses two main weaknesses of the current tool:

- **Timing.** Sector inquiries usually take a very long time. According to the draft bill, this has a negative impact on the usability of the findings. The draft bill now sets a time limit for sector inquiries of 18 months.

- **Remedies.** The FCO currently does not have the power to impose remedial actions in response to the results of a sector inquiry. The draft bill changes this – for a time period of (another) 18 months after the publication of the respective sector inquiry report:

    - **Merger control.** The FCO can impose an obligation on specific undertakings to notify concentrations under the German merger control

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regime, even if they are below the regular notification thresholds. The prerequisite is that there are "objectively verifiable indications that future mergers could significantly impede effective competition in Germany in one or more of the economic sectors" specified in the sector inquiry report. A *de minimis* exception applies to transactions in which the buyer generated turnover with customers in Germany in its last completed financial year of less than EUR 50 million and/or the target of less than EUR 500,000. This "special notification obligation" expires after three years, but it can be renewed.

- **Structural/behavioral remedies.** The FCO can impose remedies of behavioral or structural nature, if there is a "significant, [i] continuous or [ii] repeated disturbance of competition in at least one market or across markets". The draft bill provides the following examples for potential objectives of such remedies: access to data, rights of use to intellectual property, requirements for certain types of contracts or the organizational separation of business units.
- **Unbundling.** Lastly, the FCO will also get the *ultima ratio* power to unbundle undertakings, if no other remedy of structural or behavioral nature would be equally effective or if such alternative remedy would impose an even greater burden on the undertaking. This *ultima ratio* remedy will be subject to a comprehensive proportionality assessment. Also, the FCO cannot impose an obligation to divest assets which have been subject to a final merger control clearance by the European Commission or by the FCO in the past five years.

(ii) Digital Markets Act. The Digital Markets Act (DMA) of the European Union has just been adopted by the EU Council and is expected to be published in the EU Official Journal soon. It will come into force 20 days later and then fully applies to so-called "gatekeepers" six months after it entered into force.

- **Public enforcement.** The European Commission is the sole authority empowered to enforce the DMA but the DMA left a possibility for EU Member States to empower their national competition authorities to conduct investigations of possible non-compliance of gatekeepers with DMA rules. The draft bill paves the way for a public enforcement of the DMA by the FCO in Germany. However, the FCO can only conduct investigations and forward the results to the European Commission. It has no powers of its own to sanction non-compliance with the DMA.

- **Private enforcement.** The DMA is an EU Regulation and therefore directly (*e.*, without the need for transposition) applies in all EU Member States. In addition, various DMA provisions prerequisite its private enforceability in national courts. The draft bill implements the relevant provisions of the DMA into the German Competition Act's provisions on private antitrust enforcement (injunctive relief, damage claims).

(iii) Disgorgement of economic benefit. The draft bill also improves the FCO's possibilities to order the disgorgement of economic benefits resulting from the violation of competition law. In order to do that, the draft bill removes the requirement for the authority to prove that the violation of competition law has been carried out intentionally or negligently. Furthermore, the draft bill provides for a statutory presumption that a competition law infringement caused an economic benefit of at least 1% of the turnover generated in Germany with the products or services connected to the infringement. A rebuttal of this presumption requires that neither the legal entity directly involved in the infringement nor its group (the undertaking) generated a profit in the respective amount in the relevant period. However, the amount to be paid must not exceed 10% of the total turnover of the undertaking in the fiscal year preceding the decision of the authority.

Conclusions and outlook. The draft bill follows the overall trend in Europe and overseas

to equip competition authorities with more powers beyond the “classic” competition law enforcement tools. It can be expected that the draft bill will be passed by the government’s cabinet rather soon so that the readings in the German parliament can begin. When (and whether) an 11th amendment will eventually come into force is currently hard to predict given various other political priorities and economic challenges.

The Ministry is already working on a draft for a 12th amendment of the German Competition Act (!) which shall implement topics mentioned in a White Paper on competition law priorities from February this year (*Wettbewerbspolitische Agenda des BMWK bis 2025*). Details are yet unknown but the focus could be, *inter alia*, on establishing more legal certainty for sustainability cooperation between companies as well as stronger consumer protection.

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Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders or members of the firm’s Antitrust and Competition practice group:

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