

## German Draft Bill Reflects Trend Toward New Antitrust Tools

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On Sept. 26, the German Ministry of Economic Affairs and Climate Action published the first draft of the 11th amendment to the Act against Restraints on Competition, which 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.[1]

It is the 11th amendment since the German Competition Act came into force in 1958 and the fourth amendment in the last 10 years. This underlines the increasing focus on competition law enforcement in Germany over the last decade.

The draft bill is not an immediate reaction to the current crisis on the energy markets, but is a long-planned amendment, which has already been reflected in the 2021 government coalition agreement between the Social Democratic Party, the Alliance90/The Greens and the Free Democratic Party.

The draft bill marks another step in the direction of a new era of antitrust law enforcement in Germany and this trend continues to shift competition law enforcement from a more traditional approach, where an infringement of competition law, e.g., a cartel or abuse of dominance, is required, to a more extensive market protection tool.

The intention is to address perceived distortions to competition that can already operate below the infringement threshold.

The draft bill refers to the experiences of the U.K. Competition and Markets Authority in particular, which has a similar tool and has used it, for example, concerning BAA airports — responsible for the U.K.'s main airports — in 2009.

The draft also refers to concepts of a so-called new competition tool that was considered by the European Commission in 2020. The tool also explored ways of a timely competition law enforcement below the competition law infringement threshold.

The main aspects of the draft bill are the:



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- Complete revision of the sector inquiry tool of the Federal Cartel Office;
- Implementation of the Digital Markets Act, or DMA, in the national framework of public and private enforcement; and
- Facilitation of benefits disgorgements.

### **Sector Inquiries**

The sector inquiries tool enables the cartel office 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 20 times in the fuel, food retail, waste disposal and hospitals sectors.

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 cartel office 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 yet another 18 months after the publication of the respective sector inquiry report.

#### ***Merger Control***

The cartel office can impose an obligation on specific undertakings to notify concentrations under the German merger control 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 minimus exception applies to transactions in which the buyer generated turnover with customers in Germany in its last completed financial year of less than €50 million (\$49.3 million) and/or the target of less than €500,000 (\$493,000).

This special notification obligation expires after three years, but it can be renewed.

#### ***Structural and Behavioral Remedies***

The cartel office 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***

Last, the cartel office 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 cartel office cannot impose an obligation to divest assets that have been subject to a final merger control clearance by the European Commission or by the cartel office in the past five years.

### **Digital Markets Act**

The EU DMA 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 an opportunity for EU member states to empower their national competition authorities to conduct investigations of possible noncompliance of gatekeepers with DMA rules. The draft bill paves the way for a public enforcement of the DMA by the cartel office in Germany. However, the cartel office can only conduct investigations and forward the results to the commission. It has no powers of its own to sanction noncompliance with the DMA.

### ***Private Enforcement***

The DMA is an EU regulation and therefore directly, i.e., without needing to be transposed, applies in all EU member states.

In addition, various DMA provisions have its private enforceability in national courts as a prerequisite.

The draft bill implements the relevant provisions of the DMA into the German Competition Act's provisions on private antitrust enforcement, that is, injunctive relief, damage claims.

### **Disgorgement of Economic Benefit**

The draft bill also improves the cartel office'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 shortly so that 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 that will implement topics mentioned in a white paper on competition law priorities from February this year.[2]

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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[1] Competition Act – GWB. See [https://www.gesetze-im-internet.de/englisch\\_gwb](https://www.gesetze-im-internet.de/englisch_gwb).

[2] (Wettbewerbspolitische Agenda des BMWK bis 2025).