GIBSON DUNN

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DRAFT AMENDMENT TO GERMAN COMPETITION ACT ADOPTED BY GERMAN GOVERNMENT – MORE POWERS FOR THE BUNDESKARTELLAMT – PART II

To Our Clients and Friends:

The German Government adopted the draft of the 11th amendment to the Act against Restraints on Competition on 5 April 2023. The initial draft had been published by the German Ministry of Economic Affairs and Climate Action on 26 September 2022 (see our earlier client alert of 30 September 2022 here).

The ministry's initial draft of the 11th amendment to the German Act against Restraints of Competition ("**ARC**") ("**initial draft bill**") triggered a broad public debate and has been criticized by various stakeholders, including some of the largest business associations. In particular, it has been criticized that the initial draft bill provided for unbalanced and overreaching additional powers for the German Federal Cartel Office's ("**FCO**"), including an *ultima ratio* power to unbundle undertakings. These concerns have partly been addressed in the revised draft bill ("**revised draft bill**"). In particular the revised draft bill increases the threshold for the new *ultima ratio* powers compared to the initial draft bill. Still, the revised draft bill marks a substantial shift towards a new era of antitrust law enforcement, with extensive powers of the FCO to intervene in markets, even without a need to establish antitrust law infringements.

The main aspects of the revised draft bill include: (i) a revision of the sector inquiry tool and related interventional powers of the FCO; (ii) the facilitation of disgorgements of economic benefits; and (iii) the implementation of the DMA in the national framework of public and private enforcement.

1. **New intervention powers of the FCO after completion of a sector inquiry**

The FCO can conduct a sector inquiry if it suspects that competition in the market under investigation is restricted or distorted, unrelated to a specific competition law infringement. Such a sector inquiry is generally concluded with a report on the competitive conditions on the market under investigation. As of today, the FCO can only impose remedies if it finds that the restraint of competition is based on an infringement of antitrust law.

- The revised draft bill gives power to the FCO to intervene on the market on which it was found that competition has been disrupted, even when there is no infringement of antitrust law. This would be an absolute novelty to German antitrust law.

- The interventional powers of the FCO require that there is a "***substantial and continuing distortion of competition on at least one market which is at least nationwide, on several individual markets or across markets***". This is supposed to clarify that the distortion of

competition must have a certain intensity and cannot be only temporary. It marks one of the changes compared to the initial draft bill where a "*significant, persistent or repeated distortion of competition*" was required. The revised draft bill includes a non-exhaustive list of factors relevant for the assessment of a distortion of competition on the one hand, as well as the continuance of this distortion of competition (continued in the previous three years and is not expected to end in the upcoming two years) on the other hand.

- If the FCO determines that there is a substantial and continuing distortion of competition, it can impose behavioral or structural remedies against one or more undertakings, including:
    - Granting access to data, interfaces, networks or other facilities;
    - Specifications to the business relationships between companies in the markets under review;
    - Establishing transparent, non-discriminatory and open norms and standards;
    - Requirements for certain types of contracts or contractual arrangements also with regard to the disclosure of information;
    - Prohibition of unilateral disclosure of information that favors parallel behavior by companies;
    - The organizational separation of corporate or business units; and
    - **As a *ultima ration*, the FCO may impose unbundling remedies on companies with a dominant market position and companies with paramount significance for competition across markets according to (the recently introduced) Sec. 19a ARC. In contrast to the initial draft bill, the revised draft bill does not provide for these remedies if a dominant position or paramount significance for competition across markets cannot be established.** However, according to the revised draft bill, assets only have to be sold if the sales price is at least 50% of the price determined by an auditor that has been engaged by the FCO. If the actual sales price is below the price determined by the auditor, an additional payment in the amount of half of the difference between the audited value and the actual sales price has to be paid to the selling company from federal funds.

2. **Additional / extended merger control after completion of a sector inquiry**

As already provided for in the initial draft bill, the FCO can impose an obligation on specific undertakings to notify any future concentrations even if they do not meet (i.e. fall below) the regular merger control notification thresholds. This notification requirement can be imposed on companies if 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 extended.

3. **Simplified disgorgement of economic benefits**

Pursuant to the existing Sec. 34 ARC, in cases of an infringement of antitrust law, the FCO can order the disgorgement of profits achieved by a company as a result of an antitrust infringement. However, since the legal requirements for such a disgorgement are rather high, this provision has not been applied much in practice in the past.

The revised draft bill aims at facilitating the use of this instrument by the FCO. It holds that the FCO no longer has to prove an intentional or negligent infringement of antitrust law before making use of the disgorgement mechanism of Sec. 34 ARC. Further, the revised draft bills facilitates the establishment of economic benefits associated with antitrust infringements. If a violation of antitrust law is determined, the revised draft bill includes a presumption that the antitrust law infringement has resulted in an economic benefit for the concerned undertaking. The amount of the economic benefit can be estimated by the FCO, and there is even a legal presumption that at least 1% of the national turnover of the concerned company relating to the products and services affected by the antitrust law infringement are subject to disgorgement. A rebuttal of this presumption requires that neither the legal entity directly involved in the infringement nor its group generated a profit in the respective amount during 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.

Regarding the time frame in which the FCO can disgorge economic benefits, the revised draft bill retains the current legal status: The disgorgement of economic benefits may be ordered only within a period of up to seven years after the termination of the infringement and for a maximum period of five years. The initial draft bill provided a time period of ten years after the termination of the infringement with an unlimited disgorgement period.

4. **Enforcement of the EU Digital Markets Act (DMA)**

As already included in the initial draft bill, the revised draft bill is intended to establish the legal basis for enforcement of the DMA in Germany. The FCO will be able to conduct investigations with regard to violations of the DMA. However, the FCO can only conduct investigations. The results of the investigations shall be forwarded to the European Commission. The FCO has no powers of its own to sanction non-compliance with the DMA.

In addition, private enforcement of the DMA will be facilitated. The civil law enforcement mechanisms are inspired by the enforcement mechanisms of the EC's cartel damage claim directive. In particular, final decisions of the European Commission finding a violation of the DMA will have binding effect in damages proceedings before German courts.

The revised draft bill does not include any changes compared to the initial draft bill with regard to the provisions relating to the enforcement of the DMA.

Outlook

The revised draft bill has to take another step in the legislative process by passing the German Parliament [Bundestag] and the German Federal Council [Bundesrat]. There also is still no clarity yet as to when the revised draft bill will enter into force, but it is expected to come into force still this year.

As already mentioned in the previous Client Alert (***available here***), the competent Ministry is already working on a draft 12th amendment of the German Competition Act with a focus on establishing more legal certainty for sustainability cooperation between companies as well as stronger consumer protection.

The following Gibson Dunn lawyers assisted in preparing this client update: Georg Weidenbach, Kai Gesing, Jan Vollkammer, and Elisa Degner.

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