



New draft 11th Amendment to the German Competition Act

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The German Federal Ministry of Economics and Climate Action (BMWK) has proposed a small, but almost revolutionary 11th amendment of the German Act Against Restraints of Competition. It is expected to come into effect in early 2023. The proposed reform would bring about three key changes:

- First, it empowers the Federal Cartel Office (FCO) to impose remedies, including (as a last resort) divestitures, to address “significant persistent or repeated disruptions to competition” following the completion of a sector inquiry. This “fourth pillar” of German antitrust law (alongside conventional rules on anti-competitive agreements, abuse of market dominance and merger control) seeks to fill a perceived enforcement gap in situations where harm to competition is not attributable to anti-competitive *conduct* but to non-competitive *market structure*.
- Second, it promotes the effective enforcement of the Digital Markets Act (DMA) by providing a legal basis for the FCO to conduct investigations and to support the European Commission (EC) in enforcing the DMA. It also establishes the procedural and substantive rules for private enforcement of the DMA in Germany.
- Third, it facilitates the skimming off of undertakings’ profits derived from infringements of antitrust laws by the FCO, proposing a new rebuttable presumption that the anti-competitive gains amount to 1% of the undertakings’ sales of goods or services affected by the antitrust infringement.

1. Sharpening the teeth of German sector inquiries

Under the current rules, there is no time frame for the completion of sector inquiries and they do not allow for subsequent direct interventions based on the inquiry's findings. The draft amendment reduces the standard duration of a sector inquiry to 18 months and empowers the FCO to directly intervene following its conclusion. This rule was fashioned along the lines of, for example, the CMA's market investigation powers.

a. Lowering the thresholds to impose merger control obligations on individual undertakings

Current position: Under the current rules (since the last amendment), the FCO can – as a follow-up to a sector inquiry – oblige an undertaking to notify future concentrations for a period of three years, if: (i) the acquiring undertaking generated a worldwide turnover of more than EUR500 million and the target/joint venture undertaking generated a turnover of more than EUR2m (of which more than two thirds in Germany); (ii) there is a plausible concern that future concentrations could substantially impede effective competition in Germany; and (iii) in Germany, the undertaking sells or procures at least 15% of goods or services in the respective sector(s).

Proposal: The draft amendment lowers these thresholds substantially. The FCO may oblige an undertaking to notify any future concentrations in the sector(s) concerned if: (i) the acquiring undertaking achieved a domestic turnover of more than EUR50m, while the target company achieved a domestic turnover of more than EUR0.5m; and (ii) there is a plausible concern that future concentrations could substantially impede effective competition in Germany in the respective sector(s). By dropping the worldwide turnover and the 'share of supply' thresholds, the proposal intends to bring M&A on small and/or

regional markets under the scrutiny of the FCO.

b. Behavioural and structural remedies

Current position: Sector investigations currently do not allow for direct interventions based on the sector inquiry's findings. The FCO may only include recommendations in its final report and initiate proceedings into specific market conduct under the conventional antitrust rules, in particular, on anti-competitive agreements and abusive conduct of dominant undertakings.

Proposal: Under the draft, the FCO can order any behavioural or structural remedies necessary and proportionate to reduce or eliminate a (i) significant and (ii) persistent or repeated "disruption to competition" in the sector(s) concerned – irrespective of the undertaking's compliance with German antitrust law. The objective is to address poor competitive outcomes which do not result from an illegal market conduct (such as collusion or abuse of market dominance) but are caused by a non-competitive market structure, with a particular focus on narrow oligopolies.

The assessment of "disruption to competition" takes into account a number of (structural) criteria that are also considered when assessing whether a firm holds a dominant position (e.g. number, size, turnover and financial strength of the undertakings, conglomerate structures, barriers to entry, network effects, information asymmetries). However, in addition to these factors, poor market results can be considered (such as high or parallel prices, lower volumes, less choice, low quality, no innovation) as well as market behaviour (e.g. significantly imbalanced contractual terms). Potentially problematic are highly concentrated markets where only a few players remain (e.g. due to organic growth, market exits or acquisitions below the merger control thresholds) and/or where there is a concern of 'tacit collusion' among

these players (which could be the case due to the frequency of transactions, market transparency and the possibility to penalise competitive actions).

Possible behavioural remedies include orders to grant access to data/interfaces/networks, delivery obligations, or orders to license out IP rights or establish open norms and standards. Structural remedies could include the functional unbundling of different business units owned by the undertaking in question. As in antitrust proceedings, the FCO may issue commitment decisions.

The FCO should complete ‘follow-on’ interventions within 18 months from the publication of a sector inquiry report, but is not legally bound by this time frame.

c. Divestiture

The structural remedies also include – as a last resort – the possibility that the FCO may order the divestment of parts of undertakings or certain assets if: (i) the divestiture can be expected to eliminate or substantially reduce the “disruption to competition”; and (ii) no equally effective but less burdensome remedy for the significant persistent or repeated “disruption to competition” exists. The divested parts cannot be re-purchased for a period of five years.

However, if the acquisition of the relevant businesses or assets was subject to merger control, the FCO cannot order their sale for a period of five years from the merger control clearance or ministerial authorisation by the BMWK. Before imposing a divestiture, the Federal Monopoly Commission (and advisory body) and the State authorities must be consulted.

2. Effective enforcement of the DMA

The second objective of the draft 11th amendment is to ensure the effective enforcement of the DMA in Germany.

a. Public enforcement

Current position: The EC will be the sole enforcer of the DMA, once in force. However, the DMA provides for the introduction of investigatory powers by national antitrust authorities in support of the EC.

Proposal: Under the new rules the FCO will be able to conduct investigations into possible non-compliance by gatekeepers (designated as such by the EC) with the obligations that will be imposed by the DMA if the potential infringement may have effects in Germany. The FCO will have the same procedural powers as in other antitrust investigations, e.g. requests for information and dawn raids. The FCO must report its findings to the EC and may publish a case report. Prior to the publication of the report, the gatekeeper in question must be heard. The FCO must also cooperate with the EC in any proceedings initiated by the latter under the DMA.

b. Private enforcement

Current position: The DMA anticipates the private enforcement of its provisions. There are currently no specific rules in Germany.

Proposal: Under the draft amendment, the German provisions facilitating the private enforcement of antitrust law will also apply to the private enforcement of the DMA. Claimants may therefore bring claims for damages or injunctive relief, final decisions by the EC and by national courts determining a violation of the obligations under the DMA are binding on German courts, and there will be a longer limitation period than applies in general civil law matters (five years).

As in private enforcement of antitrust law, the German district civil courts (not the civil local

courts) will have jurisdiction for disputes between private parties based on the DMA. The courts must inform the FCO about proceedings which relate to provisions of the DMA, enabling the FCO to intervene in the proceedings as an interested party (*amicus curiae*).

3. Skimming off profits from antitrust violations

Finally, the draft reform aims at better enabling the FCO to skim off of profits obtained through violations of antitrust law.

Current position: The current rules on the disgorgement of illegal profits require an intentional or negligent infringement of antitrust law as well as a quantification of the size of the anti-competitive gain. This requires the FCO to engage in complex calculations. For this reason, it does not generally apply the rules.

Proposal: Under the draft, the disgorgement of illegal profits will no longer require intention or negligence on the part of the infringing undertaking. Instead it will be deemed sufficient that the economic benefit was gained through a violation of antitrust law. In addition, the revised provisions establish a rebuttable presumption that the violation led to an economic benefit of 1% of the undertakings' domestic turnover achieved in relation to the products or services affected by the antitrust violation over the relevant time frame. The disgorgement is no longer limited to illegal profits generated over the course of five years of the infringement. However, the maximum amount is capped at 10% of the undertakings' worldwide turnover in the business year preceding the FCO's decision.

The FCO may issue the disgorgement decision up to 10 years after the termination of the infringement and subject to compensation through private enforcement, which takes precedence.

Evaluation and Timeline

The draft 11th amendment of the German Competition Act promises to bring radical changes.

- After the completion of a sector inquiry, the FCO would gain unprecedented powers for behavioural and structural interventions (even divestitures) irrespective of illegal market conduct (much like the CMA in the UK). Absent strict legal requirements or concrete guidance as to what constitutes a “disruption to competition”, it appears that in principle *any* economic sector characterised by stable and/or oligopolistic market conditions may be subject to an FCO sector inquiries and possible ‘follow-on’ interventions. Recommendations from the Federal Monopoly Commission could potentially act as checks and balances to this substantial growth in the FCO's power.
- The thresholds to impose merger control obligations on individual undertakings as a follow-up to a sector inquiry would be substantially lower. This could bring inorganic growth strategies on small and regional markets (which are subject to sector inquiries) under the merger control scrutiny of the FCO.
- The proposal also launches the regime for private enforcement of the DMA in Germany. In light of exclusive jurisdiction of the district courts and substantive rules favouring claimants, it can be expected that Germany will become an attractive forum for disputes arising in connection with the DMA.
- Finally, the draft amendment establishes an unprecedented rebuttable presumption, for the purpose of skimming off anti-competitive gains, that any antitrust infringement causes a price overcharge of 1% (this runs counter to economic evidence cited by the Federal Court of Justice in its first *Trucks* judgment, cf. *Coppik/Heimeshoff*, 2020). Since follow-on damages claims will take precedence – and private enforcement in Germany has been vigorous for a number of years – it

remains to be seen what role public disengagement by the FCO will actually play.

The draft is now subject to inter-ministerial coordination and will then be presented to the German parliament (*Bundestag*), its commissions and the Federal Council (*Bundesrat*).

The BMWK is eager to pass it into law by the beginning of 2023, which appears ambitious, at least

compared to the 10th amendment which took two years. But we understand that there is little political resistance (although consultations with trade associations have already demonstrated that there is fierce opposition from the future potential addressees of these rules).

Our German antitrust team will keep you updated and is eager to engage in case of any questions.

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