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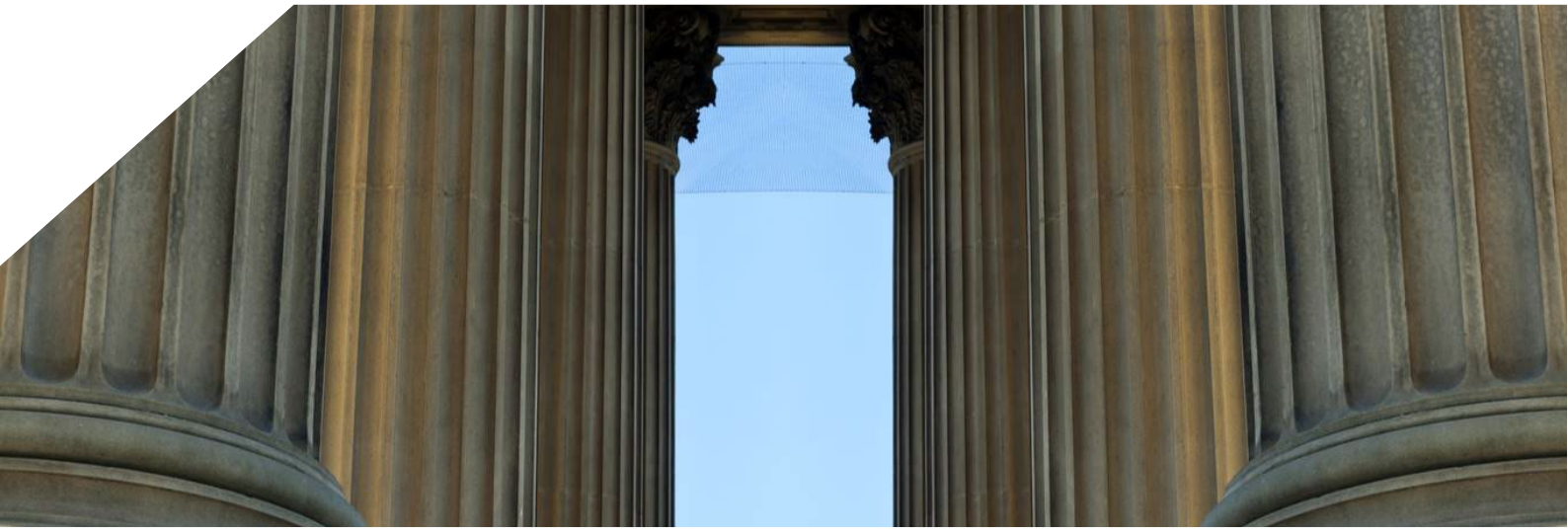

11th Amendment of German Competition Act enters into force, introducing significant reforms

18 July 2023

The 11th amendment to the German Act Against Restraints of Competition (the Amendment) has been accepted by the German parliament on 6 July 2023 and will enter into effect following the Federal Council's final adoption expected end of September 2023, and then publication in the official journal. The German government describes the reform as the most significant since the Act's creation under *Ludwig Erhard* (the Bundesrepublik's first economic minister). It introduces three key changes:

1. **A 'new competition tool'**: Following completion of a sector inquiry, the Federal Cartel Office (FCO) can now impose remedies, including (as a last resort) divestitures, to address "*significant and continuous disruptions of competition*" – irrespective of the addressee's compliance with competition law. This new '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 imperfect *market structures* (in particular narrow oligopolies).

2. **DMA enforcement**: New provisions promote 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's (EC) own enforcement. It also establishes the procedural and substantive rules for private enforcement of the DMA in Germany.

3. **Disgorgement**: The Amendment facilitates the skimming off by the FCO of profits that undertakings potentially gain from antitrust infringements, establishing a new rebuttable presumption that the anti-competitive profits amount to 1% of the undertakings' sales of goods or services affected by the infringement.

1. Sharpening the teeth of German sector inquiries

Under the previous rules, the FCO was under no time limit to complete a sector inquiry and it could not subsequently make any direct interventions based on its findings. The 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 UK Competition and Markets Authority (CMA)'s market investigation powers.

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

Previous rules: The FCO could – as a follow-up to a sector inquiry – oblige an undertaking to notify future concentrations for a period of three years, if: (i) the acquirer 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 was generated in Germany); (ii) there was a plausible concern that future concentrations could substantially impede effective competition in Germany; and (iii) in Germany, the undertakings sold or procured at least 15% of goods or services in the relevant sector(s).

Amendment: The Amendment lowers these thresholds substantially. The FCO may oblige an undertaking to notify any future concentration in the sector(s) concerned for a period of three years if: (i) the acquirer achieved a domestic turnover of more than EUR50m, while the target achieved a domestic turnover of more than EUR1m; and (ii) there is a plausible concern that future concentrations could substantially impede effective competition in Germany in the relevant sector(s). By dropping the worldwide turnover and the 'share of supply' thresholds, the Amendment intends to bring M&A in small and/or regional markets under the scrutiny of the FCO. The FCO can renew the obligation to notify transactions up to three times (for a three-year period each).

b. Behavioural and structural remedies

Previous rules: Sector inquiries did not allow for direct interventions based on the sector inquiry's findings. The FCO could only include recommendations in its final report and/or initiate proceedings into specific market conduct under the conventional antitrust rules, in particular on anti-competitive agreements and abusive conduct of dominant undertakings.

Amendment: The FCO may, by means of an order to individual undertakings: (i) declare that there is a significant and continuous "disruption of competition" in the market(s) concerned; and (ii) impose any behavioural or structural remedies that are necessary to effectively and permanently eliminate the "disruption of competition" – irrespective of the undertaking's compliance with competition law.

There are limitations on the use of orders, however, as they (i) may only be addressed to undertakings which, by virtue of their market behaviour and their importance to the market structure, contribute significantly to the "disruption of competition"; and (ii) are only permissible if it appears likely that the FCO's conventional antitrust and merger control powers are insufficient to effectively and permanently eliminate the disruption of competition.

The objective is to address poor competitive outcomes which do not result from any 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. Indeed, the event which triggered the government's initiative was a tax reduction on retail gas prices which was implemented to soften the impact of the energy crisis. While the effects of the tax reduction appeared compromised by price signalling between the major gas suppliers, a government complaint was subsequently disproven.

The revised law lists (non-exhaustively) four examples in which a "disruption of competition" could occur: (i) unilateral market power on the supply or demand side; (ii) restrictions of market entry, exit, capacities or switching to another

supplier or buyer; (iii) uniform or coordinated behaviour; and (iv) the vertical foreclosure of input factors or customers.

The assessment of "disruption of competition" should also take into account a number of structural criteria that are relevant to determine whether a firm holds a dominant position (eg number, size, turnover and financial strength of the undertakings, conglomerate structures) and/or whether there could be other factors facilitating 'tacit collusion' (eg market transparency and product homogeneity). In addition, the FCO may consider poor market results (such as higher or parallel prices, lower volumes, reduced choice, lower quality) and market behaviour (eg significantly imbalanced contractual terms) as well as countervailing efficiency gains (eg lower costs or more innovation allowing consumers a fair share of the resulting benefit). Potentially problematic scenarios are, therefore, highly concentrated markets where only a few players remain (eg 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.

Possible behavioural remedies include: (i) orders to grant access to data/interfaces/networks; (ii) requirements on business relations between companies in the markets concerned or regarding certain forms of contracts/contractual arrangements; and (iii) orders to establish transparent and open norms and standards. Structural remedies could include the functional or accounting unbundling of different business units owned by the undertaking in question. As in antitrust proceedings, the FCO may issue commitment decisions.

Before imposing remedies, the FCO must hold a public hearing. Further, 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. Appeals against behavioural or structural remedies have suspensive effect.

c. Divestitures as a last resort

The structural remedies also include – as a last resort – the possibility for the FCO to order dominant companies and companies of "paramount significance for competition across markets" within the meaning of Sec. 19a of the German Competition Act to divest certain businesses or assets if: (i) the divestiture can be expected to eliminate or substantially reduce the "disruption of competition"; and (ii) no equally effective but less burdensome remedy for the significant and continuous "disruption of competition" exists. The divested parts cannot be repurchased within five years unless market conditions have substantially changed.

However, if the acquisition of the relevant businesses or assets was subject to review under the German or EU merger control regime, the FCO cannot order their sale for a period of ten years from the merger control clearance or authorisation by the Federal Ministry of Economics and Climate Action. Before imposing a divestiture, the Federal Monopoly Commission (an advisory body) and the State competition authorities must be consulted.

Additionally, the addressee only has to sell the assets if the proceeds amount to at least 50% of the value determined by an auditor commissioned by the FCO (as per the annual financial statements preceding the unbundling order). If the actual sales proceeds are less than the value determined, the selling company receives an additional payment equal to half of the difference between the determined value and the actual sales proceeds.

2. Effective enforcement of the DMA

The second objective of the Amendment is to ensure the effective enforcement of the DMA in Germany.

a. Public enforcement

DMA: The EC is the sole enforcer of the DMA. However, the DMA encourages EU Member States to establish investigatory powers for

national antitrust authorities to support the EC's enforcement.

Amendment: Under the new rules the FCO has the power to conduct investigations into possible non-compliance by gatekeepers (designated as such by the EC) with the obligations imposed by the DMA if the potential infringement may have effects in Germany. The FCO has the same procedural powers as in other antitrust investigations, eg 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 the EC initiates under the DMA.

b. Private enforcement

DMA: The DMA anticipates private enforcement of its provisions.

Amendment: Under the new rules, the German provisions facilitating the private enforcement of antitrust law to a large extent 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 a longer limitation period (five years) applies compared to general civil law matters.

As in private enforcement of antitrust law, the German district civil courts (not the civil local courts) 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 reform aims to improve the FCO's ability to skim off profits obtained through violations of antitrust law.

Previous rules: The rules on the disgorgement of illegal profits required (apart from an intentional or negligent infringement of antitrust law) a quantification of the size of the anti-competitive gain. This quantification required the FCO to engage in complex calculations and, as a result, it did not generally seek disgorgement.

Amendment: The revised provisions establish a rebuttable presumption that the violation led to an economic benefit of at least 1% of the undertakings' domestic turnover achieved in relation to the products or services affected by the antitrust violation over the relevant time frame. As under the previous rules, the disgorgement is limited to illegal profits generated over the course of five years of the infringement. 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 seven years after the termination of the infringement and subject to compensation through private enforcement, which takes precedence.

Evaluation

The 11th amendment to the German Competition Act brings radical changes:

- After the completion of a sector inquiry, the FCO gains unprecedented powers for behavioural and structural interventions (even divestitures) irrespective of illegal market conduct (much like the UK's CMA). Absent strict legal requirements or concrete guidance as to what constitutes a "disruption of competition" (and despite refinements of the wording in the course of the legislative process), it appears that in principle *any* economic sector characterised by stable and/or oligopolistic market conditions may be subject to FCO sector inquiries and possible 'follow-on' interventions. Recommendations from the Federal Monopoly Commission could potentially act as checks and balances to this substantial strengthening of the FCO's powers.

- The thresholds to impose merger control obligations on individual undertakings as a follow-up to a sector inquiry are now significantly lower. For small and regional markets that are subject to sector inquiries, this could bring inorganic growth strategies under the FCO's merger control scrutiny.
- The Amendment also launches a DMA private enforcement regime in Germany. In light of the exclusive jurisdiction of the district courts and substantive rules favouring claimants, we expect Germany to become an attractive forum for disputes arising in connection with the DMA.
- Finally, the Amendment establishes for (and only for) the purpose of skimming off of anti-competitive gains a rebuttable presumption that any antitrust infringement causes an economic benefit of 1% of the undertakings' sales of goods or services affected. 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 disgorgement by the FCO will actually play.

Please be in touch with our German antitrust team who would be delighted to further discuss the scope and impact of these revisions.

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