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German Draft Competition Law Amendment Includes Far-Reaching Remedial Powers Absent Actual Infringements

Under the draft law, the FCO could impose behavioural and structural remedies following a sector inquiry without finding an infringement of German or EU competition law.

The German Federal Ministry for Economic Affairs and Climate Action (Bundeswirtschaftsministerium (BMWK)) has published a draft law that would grant the Federal Cartel Office (FCO) broad and unprecedented powers to remedy perceived "disruptions" of competition (including divestiture orders). Separately, the proposal would substantially facilitate the disgorgement of revenues affected by a competition infringement and private actions for violations of the EU Digital Markets Act (DMA).

The 10th amendment of the Act Against Restraints of Competition (ARC) has been enacted in January 2021. Less than two years later, the BMWK presents its plans for the next update of the ARC: The draft law, titled the Competition Enforcement Act, would constitute the 11th amendment of the ARC and marks the beginning of the legislative process; the law is not expected to enter into force before mid-2023. The most important changes are:

1. New powers to impose behavioural or structural remedies (including divestments) following a sector inquiry if there is a significant, continuous or repeated "disruption of competition". The draft law also lowers the merger control thresholds for companies that were placed under a reporting duty following a sector inquiry.

2. Lowering the requirements for the FCO to order disgorgement of the economic benefits from competition law infringements. The FCO can estimate the economic benefit based on a (simple) preponderance of probability. Further, the FCO can rely on a presumption that the minimum economic benefit constitutes 1% of the revenues of the affected product per year.

3. Introducing investigative powers of the FCO and facilitating private actions for violations of the DMA.

This Client Alert provides an overview of the proposed changes.

Remedial powers in sector inquiries

The most significant change would be the introduction of remedial powers following sector inquiries modelled after the UK market study tool. Sector inquiries are broad investigations into the functioning of competition in a market or industry. Under existing laws, the FCO does not have the power to remedy any structural issues identified in the sector inquiry; it can merely adopt a final report. If the FCO identifies a competition concern, it is required to open a formal investigation under traditional competition rules and establish an infringement, which it has done following only two of 15 completed sector inquiries.

Turning the sector inquiry into a powerful enforcement tool

The draft law dispenses with the legal requirements of traditional competition rules, opening the door to the imposition of incisive remedies without a finding of an infringement of German or EU competition law. Under the draft law:

- The FCO can impose remedies if it has found over the course of a sector inquiry that there is a significant, continuous or repeated "**disruption of competition**". The concept of "disruption of competition" as well as the power to impose remedies absent an actual infringement are unprecedented and far-reaching. The draft law lists factors that leave the FCO with substantial discretion, such as the degree of market concentration and financial resources, cross-ownership or interlocking directorships among competitors, high-entry barriers, and market outcomes (such as prices or the level of innovation) that would imply the existence of market power.

- The FCO can impose **any effective behavioural or structural remedy**, subject to the principle of proportionality. The draft law mentions, for instance, access to data, interfaces, networks, or other facilities; supplying and licensing to other companies, including on upstream/downstream markets; and changes to industry standards. If other remedies are less effective, the FCO can even require a divestment (unless the FCO or the European Commission (EC) granted merger clearance in the last five years for the acquisition of the concerned assets). Companies can voluntarily offer remedies.

- Procedurally, the FCO shall conclude the process within **36 months**: 18 months for the sector inquiry, and another 18 months for the imposition of remedies even though there is no legal redress if the FCO takes longer. Affected companies can appeal the final decision imposing remedies.

- Following a sector inquiry, the FCO can impose **stricter merger reporting requirements** if there are indications that future market concentration could impede competition (including in regional markets). A notification would then be required if the acquirer has revenues in Germany above €50 million and the target above €0.5 million; the latter threshold is substantially lower than the usual threshold (€17.5 million), which was increased just last year. The reporting requirement applies for three years and can be extended.

Likely impact and targeted industries

The reasoning of the draft law as well as the FCO's approach to sector inquiries, and the UK experience with a similar tool indicate that the likely impact will be limited to highly concentrated markets/industries that are perceived as having substantial relevance for the overall economy or consumers. From today's

perspective, we expect to see a limited number of sector inquiries to lead to remedies under the new enforcement tool for the following reasons:

- The reasoning of the draft law indicates that the new powers would be used against positions of **lasting and deeply entrenched** market power in **highly concentrated** markets, and only in "well-founded **exceptional cases**".

- The government expects **two remedial cases per year** under the new tool (the FCO concludes a similar number of investigations based on traditional competition rules per year). In the UK, the Competition and Markets Authority (CMA) imposes remedies based on a similar tool on average in one case per year.

- The FCO will likely focus on markets/industries that are **highly relevant for the overall economy or consumers**. Previous sector inquiries have focused on utilities (energy, gas, waste disposal), basic industries (asphalt concrete, cement), important consumer goods (milk, buyer power of large grocery chains, fuel retailing), and, more recently, healthcare (hospitals). The two ongoing sector inquiries focus on "new economy" business models: online advertisement (critical online market) and battery charging points (important infrastructure). The new enforcement powers would apply to all sector inquiries not yet concluded when the amendment enters into force.

- The draft law mentions **tacit coordination** in highly concentrated (oligopolistic) markets as one example of a disruption of competition not covered by traditional antitrust rules, and the government explicitly refers to parallel pricing in the fuel retail market. Markets exhibiting high profits on a lasting basis or characterised by substantial cross-shareholdings and interlocking directorates would similarly attract the FCO's attention.

- The FCO is **unlikely to intervene** in markets with one or many of the following characteristics: inessential products/services, small total market size, high level of innovation, recent entry, dynamic competitive behaviour, and volatility in profits and other key performance indicators.

- The FCO may follow the UK approach of imposing mostly **market-opening, quasi-regulatory remedies**. The CMA, for instance, required banks to use a system that allows customers to safely share their transaction history with third parties and FTSE 350 companies to put their statutory audit engagement out to tender at least every 10 years.

- **Divestment remedies** are meant to be a measure of last resort. Under existing laws, the FCO required the dissolution of joint ventures among competitors pursuant to the prohibition of anti-competitive agreements following sector inquiries into rolled asphalt (2012) and cement and ready-mixed concrete (2017).The CMA only twice ordered a divestment (with regard to airports in 2009 and three cement plants in 2015).

Facilitation of disgorgement of infringement-related economic benefits

The government seeks to substantially strengthen the FCO's ability to disgorge the economic benefits from competition law infringements. Government-ordered disgorgement would thus gain in prominence in addition to private actions for compensation. In detail:

- The FCO would be able to estimate the economic benefit based on a (simple) **preponderance of probability**. In principle, the FCO can estimate, and order the disgorgement of, the entire economic benefit from the (multi-year) infringement.

- The economic benefit subject to an FCO disgorgement decision is **capped at 10% of total revenues** of the company (and its economic entity) in the preceding financial year.

- The draft law **presumes** a minimum **economic benefit of 1%** of annual revenues from the products affected by the infringement in Germany over the entire period of the infringement. This presumption is only rebutted if the company proves that it had not generated a profit in that amount worldwide (from a group-wide perspective).

- The FCO will **no longer have to show intention or negligence** when ordering disgorgement.

- Under existing laws, disgorgement is time-barred after seven years from the cessation of the infringement and limited to a period of five years of the infringement. The draft law extends the **time limit to 10 years** and allows the disgorgement of benefits over the entire period of the infringement.

To the extent that a company has over-compensated the economic benefit (due to payment of private damages or the payment of an administrative fine), the government has to reimburse the over-compensated economic benefit. The existing laws remain unchanged in this respect.

The practical effect remains to be seen. The government expects two disgorgement proceedings per year going forward, normally as part of the infringement decision.

Private and public DMA enforcement in Germany

The draft law also facilitates private enforcement and creates the requirements for public enforcement of the DMA in Germany.

- **Private enforcement:** The draft law extends the full scope of private competition law claims under German law to DMA infringements by gatekeepers that the Commission has designated as such. On this basis, plaintiffs will be able to seek damages and injunctions, on a standalone basis or as a follow-on to an EC decision, before centralised German regional courts. Further, plaintiffs can bring representative actions and have access to information rights. As a first-mover with respect to legislating private DMA claims, Germany is poised to become an (even more) important venue of private litigation.

- **Public enforcement:** The draft law grants the FCO the same investigatory powers as in traditional antitrust or abuse of dominance cases for DMA investigations, including dawn raids, requests for information, and seizures. Under the DMA (Article 38), a national authority may investigate possible infringements provided it has the competence and investigative powers under national law; the FCO cannot avail itself of the EC's investigatory powers under the DMA. However, the final decision must be adopted by the EC. The FCO may nevertheless have an incentive to investigate alleged DMA infringements, especially when it is investigating the same conduct already under the quasi-regulatory platform provisions (Section 19a ARC) or as an abuse of dominance. The BMWK's proposal comes at a time when the relationship of the three regimes is still far from settled.

Outlook

The draft law not only expands the FCO's enforcement tool box, but also marks a further departure from traditional evidence-based competition law enforcement in favour of presumptions, novel concepts, and even remedial powers absent a finding of an actual infringement. The power to impose any conceivable remedy in order to address a "disruption of competition" is liable to undermine traditional competition law enforcement and reduce legal certainty, and may create disincentives for companies to compete and

succeed on the merits. Similarly, the presumptions facilitating disgorgement replace existing evidential standards.

Previous attempts to codify such far-reaching divestiture powers for the FCO have failed. The draft *Entflechtungsgesetz* published in 2010 did not see the light of day after broad political and industry opposition. But now it seems that the political winds have shifted in favour of a more interventionist approach.

Latham & Watkins will provide further updates as the draft law passes through the legislative process.

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