Newsletter, 14 July 2023

11th amendment to the German competition law passed by the Parliament

The German Parliament approved the 11th amendment to the Act against Restraints of Competition – granting far-reaching powers to the Federal Cartel Office

Last Thursday, 6 July 2023, the German Parliament passed the 11th amendment to the Act against Restraints of Competition ("ARC").[1] As long as the Bundesrat does not raise any objections to the bill, it can be expected that it will enter into force this fall. After the original proposal of the Federal Ministry of Economics and Climate Protection ("BMWK") of 20 September 2022[2] had caused an outcry and much criticism, readjustments were made to the original draft bill. However, the core elements of the proposal were retained: At the heart of the reform is the more effective design of the instrument of sector inquiry, in particular the granting of far-reaching powers to the Federal Cartel Office ("FCO") to intervene in markets, even if there is no competition law infringement. In addition, the new law facilitates the disgorgement of benefits resulting from antitrust violations by the FCO. Finally, the amendment provides for the legal basis for the enforcement of the Digital Market Act ("DMA").

Sector inquiry

One of the innovations, and probably the most controversial point, is the introduction of a new instrument which allows the FCO following a sector inquiry to take remedies in case of a disruption of competition. A violation against competition law is not a prerequisite.

Background

The instrument of sector inquiries was introduced in 2005. It allows the FCO and the state cartel authorities to conduct investigations into a specific sector of the economy if rigid prices or other circumstances suggest that competition is restricted or distorted.[3] Since its introduction, 20 reports on sector inquiries have been published. However, the procedures have been lengthy, making the outcome of sector inquiries less relevant, especially in dynamic markets where timeliness of data is important. Furthermore, the powers of the FCO after the conclusion of the sector inquiry have been so far limited to requiring from a company to notify future mergers.[4] Furthermore, the FCO was able to impose remedies only if it found a violation against antitrust law, such as the existence of an agreement restricting competition (Section 1 ARC) or an abuse of a dominant position (Section 19 ARC). The amendment aims to correct these deficits.

Streamlining the timing

In order to accelerate the procedure, the timing envisaged for sector inquiries by the FCO will be limited to 18 months.[5] The FCO will have extra 18 months to take remedies.[6]

Expansion of the FCO's remedy options following a sector inquiry

The introduction of Section 32f ARC intends to provide the FCO with means to determine a significant and lasting disruption of competition on a market following a sector inquiry and to order behavioral and structural remedies on this basis.

The starting point for intervention by the FCO is the finding of a "significant and lasting[7] disruption of competition" – a term previously unknown to the ARC. While the original draft bill did not specify the concept of disruption of competition, the bill now provides with a list of test criteria and names standard examples. A disruption of competition should regularly exist in case of unilateral market power, market access restrictions, uniform or coordinated conduct and the foreclosure of input factors or customers

[1] The parliament adopted the draft law (20/6824) as amended by the Economic Committee (20/7625).
[2] See COMMEO Newsletter of 11/2022.
[3] Section 32e (1) of the ARC.
[4] Old Section 39a ARC.
[5] New Section 32e (3) ARC.
[6] New Section 32f (7) ARC.
[7] See definition in new Section 32e (5) sentence 3 ARC.

through vertical relationships.[8] Factors relating to market structure and market behavior are to be taken into account when assessing the existence of a disruption of competition.[9]

Furthermore, the FCO must establish that the classic tools available to the antitrust authorities, such as the issuance of a cease-and-desist order due to abusive conduct, do not appear to be sufficient to effectively and permanently eliminate the disruption of competition. This underlines that the new instrument of Section 32f ARC is subsidiary.

From a procedural point of view, the novel provides that, in a first step, the FCO must determine by means of an order the existence of such a competition disruption, which cannot be eliminated with the classic tools available to competition authorities. The companies subject to the order are those which, in addition to their conduct, also contribute to the distortion of competition through their importance for the market structure.

In a second step, the FCO can order behavioral and structural remedies. The new Section 32f (3) ARC provides a list of possible types of remedies, including:

- granting access to data, interfaces, networks or other facilities;
- specifications on business relationships between companies (e.g. by ordering delivery obligations);
- the obligation to establish transparent, non-discriminatory and open norms and standards by companies;
- requirements for certain contract forms or contract designs (e.g., by specifying maximum terms), including contractual regulations on the disclosure of information;
- the prohibition of unilateral disclosure of information that favors parallel behavior by companies;
- the accounting or organizational separation of corporate and business units.

If these remedies are not sufficient, the FCO can, as a *last resort,* order companies to sell company shares or assets if this eliminates or significantly reduces the identified disruption of competition.[10] However, in contrast to the original draft bill, the law provides that such an order can only be issued against undertakings with market dominance and undertakings of paramount significance for competition across markets pursuant to Section 19a of the ARC.

The FCO's decision finding the distortion of competition and the individual remedial measures ordered are subject to judicial review. The appeal against the measures ordered has a suspensive effect. This means that the measures do not have to be implemented before it is decided on the appeal.

Irrespective of the finding of a distortion of competition, the FCO continues to have the possibility – as previously stipulated in Section 39a ARC – to oblige a company by order to notify any merger even below the criteria of Section 35 ARC if competition could be impeded by future mergers. The notification obligation will from now on apply if the acquirer achieved in the previous year domestic sales of EUR 50 million and the target company domestic sales of EUR 1 million.[11]

Facilitated disgorgement of benefits

The second element of the reform affects the instrument of disgorgement of benefits. This instrument was introduced in the 1980s in order to provide further incentives against antitrust violations. It enables the FCO to restore the economic advantage gained by a company as a result of an antitrust infringement. However, this instrument has not yet been applied by the FCO, due to the considerable difficulty in determining the amount of an economic advantage.

In order to facilitate the disgorgement of benefits, Section 34 (4) ARC introduces the double presumption that (i) in the case of a intentionally or negligently committed competition law violation, the company has gained an economic benefit, and (ii) this benefit amounts to at least 1% of the domestic sales achieved by the company with the product or service related to the proven antitrust violation. In contrast to the draft bill, Section 34 (4) ARC continues to require the existence of a culpable violation.

This presumption can only be rebutted if the obtaining of benefits is excluded due to the particular nature of the infringement or if the undertakings concerned prove that the worldwide profit of the entire group of companies was not so high in the relevant period. The amount disgorged is to be capped at 10% of the annual total worldwide group turnover.

[8] New Section 32e (5) sentence 1 ARC.
[9] New Section 32e (5) sentence 2 ARC.
[10] New Section 32f (4) GWB.
[11] New Section 32f (2) ARC.

Enforcement of the DMA

Finally, the amendment paves the way for the DMA, which is applicable since 2 May 2023 and aims to limit the power of dominant digital groups.

Investigations by the FCO

The amendment introduces the legal basis for the FCO to support the European Commission ("**Commission**") in enforcing the DMA (so-called *public enforcement*). In the future, the FCO will also be able to conduct its own investigations into possible violations of provisions of the DMA by Gatekeepers. Following the investigation, the FCO is required to report to the Commission on the results of the investigation. Still, the finding of a breach falls under the exclusive competence of the Commission. Finally, existing regulations on regulatory cooperation with the Commission are supplemented to cover DMA-related proceedings.

Private enforcement of the DMA

Moreover, the amendment ensures the judicial enforcement of the DMA (so-called *private enforcement*) by guaranteeing that the claimant-friendly provisions in the ARC facilitating private enforcement in antitrust cases extend to DMA-related actions. The amendment provides inter alia that a final Commission decision finding a breach of obligations laid down in the DMA has binding effect in follow-on damages proceedings before the German courts. Finally, the regional courts are declared to have exclusive jurisdiction for DMA-related disputes – like for antitrust damages actions.

Comment

The heart of the novel, the strengthening of the instrument of sector inquiry divides the public opinion. Whether or not the reform represents a paradigm shift, there is consensus that the amendment gives the FCO far-reaching powers to intervene in "encrusted markets" and to order remedial measures against companies without them having been guilty of violating against antitrust law.

Even though a number of adjustments have been made during the legislative process, it is still difficult for companies to determine whether there is a disruption of competition in a market. The law raises numerous legal questions. At the same time, it is welcome that the companies affected – compared to the original draft bill – will have better legal protection options.

According to the legislative process, the bill will now be forwarded to the German Federal Council (Bundesrat) for further consultation at the end of September 2023.
With the 11th amendment to the ARC, the BMWK has now implemented a first part of its competition policy agenda presented in February 2022. A 12th amendment to the ARC, which intends to address the issues of sustainability and consumer protection, is also to be launched during this legislative period.


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