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CLIENT ALERT

Germany Tightens Antitrust Law

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On November 7, 2023, the 11th amendment to the German Act against Restraints of Competition (the Act) entered into force. The amendment introduces sweeping powers of intervention for the German Federal Cartel Office (FCO) following sector inquiries. The amendment also facilitates confiscating profits gained from anticompetitive behavior and adapts some procedural rules for the enforcement of the new EU Digital Markets Act (DMA). This Client Alert highlights the three main substantive changes incorporated in the amendment.

1. Federal Cartel Office equipped with new powers following sector inquiries

Since 2005, the FCO is authorized to investigate conditions of competition in certain economic sectors by conducting so-called sector inquiries. Sector inquiries are not targeted against individual companies nor do they investigate a concrete suspicion of a cartel violation. Their purpose is to gain information about the markets concerned.

The new rules give the FCO the power to impose behavioral or structural remedies on companies if, in a sector inquiry, the authority has found a significant and continuing disruption of competition in at least one national market, several individual markets, or across markets.[1]

[1] The new rules for sector inquiries in Germany in part reflect UK Competition law. The UK *Competition and Markets Authority* also has the power to impose behavioral or structural remedies on companies, including breaking up businesses, in the context of market investigations. The European Commission (EC) had explored the initiative of introducing market investigation tools at EU level. The discussed tools would have given the EC the power to impose behavioral or structural remedies in response to a structural harm caused to competition in an investigated market, without having to identify an infringement of EU competition law. However, following a public consultation, the initiative was ultimately abandoned in June this year. Instead, a reduced scope of the initiative is included in the DMA.

Disruption of competition

The law does not define the term “disruption of competition”, however, it lists four groups of cases as examples of when a disruption may be deemed to exist. These include situations of (1) individual market power, (2) high market entry barriers, capacity restraints, restrictions of the ability to switch suppliers or customers, (3) uniform or coordinated behavior of firms, and (4) customer or input foreclosure in vertical relationships.

The disruption must be significant and continuous. A disruption of competition is continuous if it has persisted or occurred repeatedly over a period of at least three years and if there are no indications that it will likely cease within two years. The Act does not define the term “significant”. According to the legislative reasons, a disruption is significant if it has more than just minor negative effects on competition.

If the FCO concludes that competition is disrupted, it can issue a corresponding declaratory order to the companies which, through their conduct and relevance for the market, contribute significantly to that disruption. Affected companies may seek judicial review of the finding that they contributed significantly to the disruption of competition.

FCO can impose remedies

The FCO may impose remedies on the affected companies without having to find that they have violated competition law. Whether the FCO takes remedial action is at its discretion. However, any measure must be capable of eliminating or reducing the distortion of competition effectively and permanently and must be proportionate to achieve this objective. The FCO has to choose the least restrictive measure and may not impose an excessive burden on companies in relation to the objective pursued. Remedies may include the following:

- Granting of access to data, interfaces, networks or other facilities;
- Certain requirements regarding business relationships, certain types of contracts or contractual arrangements, including provisions on the disclosure of information on the affected markets;
- An obligation on companies to establish transparent, non-discriminatory and open norms and standards;
- The prohibition of unilateral disclosure of information that may facilitate parallel behavior by companies; or
- A requirement for separate accounting or organization of companies or business units.

Last resort: Breaking up businesses

The amended Act even allows for ordering the unbundling of companies, i.e., the obligation to divest shares in affiliates or assets. Such drastic measures may, however, only be imposed on companies that either have single or joint market power

or a paramount significance for competition across markets. The FCO may only order breaking up businesses if that measure will significantly reduce or completely eliminate the disruption. Unbundling may only be ordered as *ultima ratio* if there are no less onerous and equally effective remedies available.

Expansion of notification requirements in merger control

If the FCO, upon conclusion of a sector inquiry, finds that future concentrations may significantly impede effective competition in the examined sector, it may order companies with a domestic revenue of more than EUR 50 million to notify to the FCO any acquisitions of targets with a domestic revenue of more than EUR 1 million for the next three years, thereby lowering the usual merger control thresholds.

Procedural framework for sector inquiries updated

The new law also revises the procedural framework for sector inquiries. To increase the effectiveness of sector inquiries, the FCO should complete an inquiry within 18 months. The orders and remedial measures explained above shall then be issued within 18 months of publication of the final report on the sector inquiry. However, these time frames are only indicative for the FCO.

2. Amendment facilitates confiscation of illegal gains from antitrust violations

Under the new law, it will be easier for the FCO to confiscate profits gained through violations of antitrust law as the FCO no longer needs to demonstrate culpability (i.e., intent or negligence). Moreover, a proven objective violation of antitrust law will suffice. The new law further stipulates a rebuttable presumption that the economic advantage obtained as a result of an antitrust violation amounts to at least one percent of the domestic sales generated with the products or services related to the infringement. The FCO may use a period of up to five years as a basis for calculating the relevant sales.

3. Adjustment of procedural rules regarding DMA enforcement

The amendment further creates the basis for the FCO to support the enforcement of the DMA by conducting investigations into gatekeepers designated by the EC with regard to infringements of the DMA. The FCO may investigative DMA violations if they have an effect in Germany.

4. Summary and outlook

The amended rules provide the FCO with new instruments that will strengthen its powers in the long term.

Companies in sectors investigated by the FCO will need to be prepared for the possibility of administrative measures even if they have not violated antitrust law – in particular, if the FCO finds that their behavior contributes significantly to the disruption of competition. The hurdles for breaking up businesses are high and it does not seem likely that the FCO will

make frequent use of this option – if at all. The significantly lowered merger filing thresholds following sector inquiries will have an impact on the M&A business of affected companies in Germany.

Companies who have been found to have violated antitrust law will more often be confronted with confiscation of profits gained from anticompetitive practices.

The German Federal Ministry of Economics has already announced the launch of a 12th amendment to the Act, aiming to strengthen consumer protection and legal certainty for sustainability co-operations. On November 6, 2023, the Ministry launched a public consultation to give organizations, companies and associations the opportunity to submit their views and suggestions on the planned legislative initiative. The consultation ends on December 4, 2023.

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