11TH AMENDMENT TO THE GERMAN COMPETITION ACT (GWB): NEW POWERS OF INTERVENTION FOR THE BUNDESKARTELLAMT CREATING NEW CHALLENGES FOR COMPANIES

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A REFORM TO STRENGTHEN COMPETITION

After publication on 6 November 2023, the long awaited latest reform of German competition law has finally entered into force. Germany's Vice Chancellor and Federal Minister for Economic Affairs and Climate Protection, Robert Habeck, called the amendments the "biggest reform of competition law“ in the last 60 years. The 11th amendment to the GWB, the "Competition Enforcement Act", serves to tighten competition law and, according to Minister Habeck, is intended to represent an antitrust law with "claws and teeth".

The Competition Enforcement Act contains three main elements: the "centerpiece" of the amendment is the newly inserted Section 32f GWB, which grants the Bundeskartellamt (Federal Cartel Office) new powers following the conduct of sector inquiries. In addition, Section 34 (4) GWB facilitates the skimming of benefits obtained in violation of antitrust law and legally stipulates that the European Commission will receive the support of the Bundeskartellamt in the enforcement of the Digital Markets Act (DMA) pursuant to Section 32g GWB. The amendment additionally facilitates private enforcement of the DMA.

With regard to the Bundeskartellamt's new powers of intervention into the direct business policy and structure of companies, the amendment represents a significant shift in the further development of national antitrust law in Germany. For the first time the legislator enables proactive interventions in competition in order to prevent the emergence of undesirable market situations in advance. Where they have already arisen, they can be dissolved again. For this to happen, there is no need for companies to have engaged in specific conduct that qualifies for sanctions.

What does this mean exactly? In the future, the Bundeskartellamt will be able to intervene in the event of a mere "disruption of competition" identified in the course of a sector inquiry without a company having been found to have violated antitrust law. This is intended to cover highly concentrated markets in particular, but also smaller regional markets which are rarely subject to merger control. It is precisely these far-reaching new powers of intervention that have led to numerous controversial discussions in business, academia and politics and have been met with criticism. The frequently used term "paradigm shift in antitrust law" seems justified here.

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THE NEW PROVISIONS IN DETAIL

Increased Bundeskartellamt Powers of Intervention Following Sector Inquiries

In addition to the three classic "pillars" of German antitrust law–the prohibition of cartels, prevention of abuse of dominance and merger control–a further intervention instrument has been introduced to enforce competition: now, following the investigation of an economic sector for disturbances of competition (so-called "sector inquiry"), the Bundeskartellamt can take targeted measures to remedy identified significant and persistent disturbances without the need for unlawful conduct by a company to have taken place. This fourth "pillar" thus departs from the previous dogma of antitrust intervention powers, which always presupposed concrete anticompetitive behavior by a company in the form of a violation of the ban on cartels, the ban on abuse of market power or the ban on implementation under merger control law.

In case of a “significant and persistent disruption of competition”, the Bundeskartellamt can intervene: that means that the standard examples (e.g., consistent or coordinated behavior) must be met and that the disruption must have existed for three years and be expected to continue for the next two years (Section 32f (5) ARC).

The countermeasures provided for in this regard differ in terms of their intensity, with even the measures the legislator considers "less intrusive" being relatively extensive: these are mainly measures that are linked to the behavior of market participants and are intended to facilitate market access for third parties. For example, the Bundeskartellamt can in future prohibit very long-term commitments in supply contracts or oblige companies to make their own products technically compatible with those of other manufacturers. The Bundeskartellamt can also prohibit companies from publishing certain information that is suitable for implied coordination of prices or production volumes on a market.

The Competition Enforcement Act also allows very drastic measures of a structural nature. Insofar as competition disruptions have profound structural causes, the Bundeskartellamt will in future even be authorized to order a company concerned to sell company shares or assets. However, this instrument is only to be applied if, in extreme cases, it represents the last measure to eliminate the identified distortion of competition. It is also subject to a number of additional requirements (as e.g. no other equally effective remedies, prior consultation of the Monopolies Commission).

The Bundeskartellamt's powers are complemented in Section 32f (2) GWB by the power to subject any company in the respective sector following a sector inquiry to an obligation to notify all merger projects following a sector inquiry. This is possible if there are objectively verifiable indications that future mergers may significantly impede effective competition in Germany or in the sector under investigation. The obligation is limited to a period of three years from the date of notification of the order. It applies only to mergers in which the acquirer generated domestic turnover of more than €50 million in the last financial year and the company to be acquired generated turnover of more than €500,000 in the last financial year–i.e. already for much smaller transactions than would be caught under the previous merger control system.

Simplified Skimming of Advantages With the Introduction of a Double Presumption Rule

The Competition Enforcement Act provides for a significant expansion of the instrument of skimming of advantages. The Bundeskartellamt has already had the possibility to use this levy of benefits since 1999. The levy

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is intended to ensure that no economic advantages remain with companies that have committed a competition infringement and can be imposed in addition to a decision imposing a fine.

Due to the considerable evidentiary requirements in the GWB prior to the amendment, the skimming of advantages has hardly gained any practical relevance to date. The Competition Enforcement Act introduces a double presumption rule, which should facilitate the application of this instrument in the future.

The first presumption assumes that an identified violation of competition law has actually led to an economic advantage. The second presumption relates to the amount of this economic advantage. It is now presumed that this advantage amounts to at least 1% of the turnover generated in Germany with the goods or services related to the violation. The amount to be paid is limited to 10% of total turnover in the previous fiscal year.

Thus, the Bundeskartellamt does not have to prove the facts covered by the presumption rules when applying the benefit levy. Instead, the companies concerned must disprove them in the proceedings, whereby the corresponding hurdles for companies are heightened considerably. Thus, it cannot merely be argued that no economic advantage or only a small amount of advantage has accrued. Rather, in order to rebut the presumption, the company must prove that neither the legal entity or association of persons directly involved in the violation nor the company group as a whole generated a profit in the corresponding amount during the levy period.

New Investigative Powers for the Implementation of the DMA

The Competition Enforcement Act provides that German courts are bound by final decisions of the European Commission insofar as the determination of a violation under the DMA is concerned. In this respect, there is now a legal basis for the judicial assertion of claims for damages by aggrieved parties under the DMA, which is comparable to the one that already applies to claims for antitrust damages.

However, since this change only affects the simplified proof of the existence of a competition violation as such, the plaintiff must still provide proof of the existence of concrete damages resulting from that competition law violation in court proceedings. In contrast to the aforementioned provision in the context of the skimming of benefits, there is no statutory presumption covering both the existence of a damage and its amount. Here, as in the case of antitrust damage claims, it is to be expected that proving concrete damage will be challenging due to the high requirements. It should also be emphasized that further regulations applicable in the area of antitrust damages, which contain certain simplifications of proof such as the presumption that a damage exists, have not been extended to the DMA. In this respect, it remains to be seen whether the Competition Enforcement Act actually heralds the same paradigm shift for private enforcement of the DMA as is certainly the case in some other areas affected by the amendment.

CONCLUSION

An antitrust law with "claws and teeth"–whether this somewhat ambitious announcement applies to the Competition Enforcement Act will be seen in practice. The Bundeskartellamt has been an active enforcer of competition law already without the new powers afforded to it by the latest amendment. At the same time, the German government emphasized that "reliability under the rule of law and economic competition [...] strengthen our economy and our country together" and that a "competition authority with bite" "must therefore strictly uphold the principles of the rule of law when intervening with its given powers".

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It is true that the amendment brings with it significant new powers for the Bundeskartellamt, as well as extensive facilitations for its investigative and enforcement activities. These can indeed be described as a paradigm shift: the newly introduced fourth "pillar" of antitrust law in the form of intervention powers following sector inquiries dogmatically represents a departure from the previous system of antitrust intervention powers. In principle, the existence of an identified distortion of competition on a market without a concrete antitrust violation on the part of a company is sufficient. It is therefore an instrument that must be used with caution.

With regard to the skimming of benefits, it is to be expected that this will gain increased relevance due to the newly introduced presumptions regarding the existence of an economic advantage and its amount.

With regard to the newly introduced regulations on the enforcement of the DMA, it remains to be seen what effects these will actually have, particularly with regard to the private enforcement of the DMA. However, affected companies should know that, as in antitrust damages proceedings, they will have to provide extensive evidence in court proceedings, both as defendants and, above all, as plaintiffs. This also includes the submission of extensive expert reports.

How Can K&L Gates Help?

Contact us if you need help navigating the complex and constantly evolving landscape of antitrust law.

The members of K&L Gates' Competition and Antitrust practice group support clients in optimally adapting to the newly created challenges and are happy to assist them with all legal questions and possible opportunities that may arise from the new regulations.

This also applies looking ahead with regard to the already announced 12th amendment to the GWB. This will focus on establishing additional legal certainty for cooperation between companies for greater sustainability and stronger consumer protection.

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