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Another Tool for the Bundeskartellamt's Box: Sections 32(f) and 32(g) of the Draft GWB on Sector Inquiries and the DMA's Implementation

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The German Federal Ministry for Economics and Climate Action published the draft for the 11th amendment of the Competition Act (GWB) on the 6th of April, following the same path towards the DMA's effective implementation under the powers conferred upon NCAs pursuant to Article 38(7). Up until now, The Netherlands has also issued the draft to confer more powers upon the ACM to perform this effective implementation (see the overview of the Dutch draft here), whereas Hungary, Luxembourg and Greece (by amending Article 83 of Law 5019/2023 with reference to the DMA, no press release issued by the HCCC) have passed several amendments to their competition law regimes.

Although the German Draft proposes to introduce Section 32(g) to the GWB to accommodate the powers conferred by the DMA to the Bundeskartellamt pursuant to Articles 37 to 36, the amendment introduces a substantive reform in terms of the remedies which the FCO will be able to impose following the findings of sector inquiries (which are currently regulated via Section 32(e) of the GWB). On top of that, the German Draft also addresses the introduction of the presumption of economic benefit in the presence of anti-competitive conduct extending the current phrasing under Section 34, i.e., the FCO's capacity to order the disgorgement of the economic benefit arising from the anti-competitive behaviour. Notwithstanding, the post addresses Sections 32(g) and (e) of the GWB sequentially, first regarding the DMA's effective implementation in German soil as proposed by the German Federal Ministry for Economics and Climate Action (Section 32(g) of the GWB) and later on the refinement of the current regulation concerning sector inquiries (Section 32(f) of the GWB).

Section 32(g) of the GWB: The German competition authority to travel in the fast lane

According to the German Draft, the introduction of Section 32(g) of the GWB will confer upon the FCO the capacity to conduct an investigation into the gatekeeper's non-compliance with Articles 5 to 7 of the DMA, under the premise set out by Article 38(7).

Nonetheless, the saliency of the amendment is twofold. First, the proposal sets out the possibility

of the FCO initiating these investigations at its own discretion. The German Draft interprets the DMA in the sense that no request for action by the European Commission is required for the NCA to intervene in an investigation concerning the non-compliance of the DMA's rules. Furthermore, the DMA's silence in this regard is equated by the German Draft to the lack of necessity to take recourse to an authorisation when ººinitiating an investigation concerning the DMA, regardless of the fact that Article 38(7) of the regulatory instrument mandates that "(…) *Before taking a first formal investigative measure, that authority shall inform the Commission in writing*".

The draft issued by the Dutch Ministry of Economic Affairs and Climate of The Netherlands mirrors this same path. The difference between both proposals in terms of the interaction of the DMA with the capacity of the NCAs to monitor the compliance of the rules imposed on the designated gatekeepers by the EC is nuanced but quite clear. The dichotomy arises around the interpretation of the first phrase under Article 38(7) of the DMA: "*Where it has the competence and investigative powers to do so under national law*, a national competent authority of the Member States enforcing the rules referred to in Article 1(6) may, on its own initiative, conduct an investigation into a case of possible non-compliance with Articles 5, 6 and 7 of this Regulation on its territory".

According to the Dutch Draft, the proposal was aimed at overcoming the procedural hurdles placed by the DMA to enable the NCA to intervene in this matter, namely by providing the ACM with the competence and powers to conduct investigations on the monitoring of the DMA via national legislation. In that case, the Dutch proposal is understood to be necessary to enable the national competition authority to exert its powers regarding the monitoring of the DMA's provisions. On the contrary, an absence of national legislation in this regard would make the ACM's monitoring actions unenforceable and unlawful, given that they would not follow the prescriptions set out by law.

Nonetheless, this is not the rationale followed by the German Draft. Even though it concedes that the European Commission remains the sole enforcer of the DMA, it recognises that the regulatory instrument opens up certain scope for the national legislator to make a complementary contribution to the effective enforcement of the Regulation in the sense of EU law's *effet utile* (that is, the interpretative principle committing Member States to realise the objectives and purposes of a provision of EU law). It seems that the German Draft interprets the DMA's *effet utile* in terms of its enforcement, both public and private. The German Draft introduces Section 32(g) GWB to confer the monitoring functions upon the Bundeskartellamt, but it also confers upon the German competition authority two additional functions, prior to reporting back its findings to the European Commission: i) inferring its own conclusions on the findings that it produces once the investigation has been terminated; and ii) to publish the findings of the investigation (with the subsequent right to be heard before the Bundeskartellamt recognised in favour of the gatekeepers designated at the EU level). As pointed out previously by Assimakis Komninos, the proposed text introduces a public pre-decision that may serve as a blueprint for the European Commission to reach its own conclusions when enforcing the DMA, even though the public publication of the German pre-decision/report may cause more harm than good. In this regard, the European Commission may be held accountable when deviating from the FCO's pre-decision conclusions. Moreover, the introduction of the reporting function may undermine one of the main objectives of the regulatory instrument: avoiding the fragmentation of the internal market in terms of the regulatory solutions related to the context of the digital arena (Recitals 6 and 9), enshrined through the DMA's Article 114 TFEU legal basis (that has been widely criticised as unfit for purpose, here, and due to its risk to cause additional overlaps in terms of regulating the main digital operators, see my own paper

and review on the topic here and here). By this token, some NCAs would directly refer the whole set of findings resulting from their investigations to the European Commission whilst others would be conferred with a prominent and decisive role once they referred their findings and not binding conclusions to the EC, with the capacity to set out the course of the DMA's sole enforcer from the national perspective.

Finally, as far as Section 32(g) of the GWB, the German Draft adjusts and amends a series of laws to accommodate the DMA's private enforcement into its judicial system through redress, by mandating that the EC's decisions (including the designation decisions) will be binding for the German national courts when assessing potential actions for damages in a similar vein to the provisions contained in the Damages Directive. In the German Draft's eyes, at least from the perspective of private enforcement, the DMA may just be more than regulation.

Section 32(f) GWB: Another drop in the bucket

The second tenet of the German Draft reviews and re-drafts the Bundeskartellamt's powers and competences when performing its sector inquiries (currently, under Section 32(e) GWB). Up until this moment, the FCO and the Länder authorities could conduct a sector inquiry into a particular type of agreement or practice, where they could request information from the undertakings concerned in each case. Following the findings of the German competition authority in the sector inquiry, the FCO would then publish a report based on the results of the investigation and invite the comments of third parties. The German provision on the capacity to investigate particular sectors of the economy and agreements substantively echoed the content of Article 17 of Regulation 1/2003.

The German Draft turns the tables on sector inquiries

The proposed amendment by the German Federal Ministry for Economics and Climate Action projects substantive and procedural changes in the current national legislation applicable to sector inquiries.

On one side, the timeframe of the sector inquiries is reduced to 18 months since their initiation and up to their conclusion. On the other side, a wide range of substantive powers is bestowed upon the FCO arising from the conclusions and findings that it will produce in this context. On top of the notions provided under the DMA regarding the gatekeepers' entrenched and durable position, in its operations (Article 3(1)(c) of the DMA) as well as by its nationally-applicable Section 19(a) GWB rules with relation to undertakings of paramount significance for competition across markets, the German Draft proposes to introduce yet another concept into the national idiosyncrasy: the determination of a significant and continuing disturbance of competition.

Once the Bundeskartellamt conducts the sector inquiry and determines that there is a significant and continuing disturbance of competition on at least one nationwide market, several individual markets or across markets as a result, the FCO is empowered to take remedial action (both behavioural and structural) against the undertakings concerned by the inquiry. The proposed Section 32(f) GWB defines the concept in a segmented way, by defining:

- The existence of a disturbance of competition in light of: i) unilateral supplier or the presence of buyer power in the market; ii) the presence of restrictions on entry, exit or the capacity of the undertakings on switching to another supplier or buyer; iii) the detection of uniform or coordinated behaviour in the market; or iv) foreclosure of inputs or customers through the undertaking's vertical relationships.
- The assessment of the disturbance's significance will determine whether it has more than a minor negative effect on competition or at least on one nationwide market, several individual markets or across markets, considering a range of elements such as: i) the number, size, financial strength and turnover of the undertakings, market share ratios and the degree of concentration in the market; ii) the prices, quantities, choice and quality of products and services in the market; iii) the transparency and homogeneity of goods; iv) the degree of dynamism in the affected markets; and vii) the undertaking's demonstrated efficiencies in the market.
- The assertion of the disturbance's continuous nature in those cases where its significance has existed permanently over a period of three years or the situation has prevailed repeatedly and there is no prompt that it will cease to exist, with an overwhelming probability, within the two next years.

In the German Draft's own terms, the undertakings subject to these procedures are those which will have substantially contributed to the specific manifestation of the structural restraints of competition via the criteria of significant and continuing disturbance of competition on at least one nationwide market, several individual markets or across markets. Additionally, the measures will not be addressed to those undertakings that have obviously not made any contribution to this result or their contribution was very remote or minor as opposed to the significance of the disturbance of competition.

Furthermore, the addressees of these sector inquiries will be imposed measures which are necessary to eliminate or reduce the interference with competition, given that the existing antitrust tools are not sufficient to adequately counteract the identified disturbance of competition. Following the current state of the proposal, Section 32(f) GWB may trigger the imposition of these measures without a prior sanctioning proceeding at the national level. In line with the German Draft, these measures may include antitrust-looking remedies such as: i) the granting of access to data, interfaces, networks or other facilities; ii) the imposition of certain requirements concerning business relations between undertakings (which may go as far as ordering the abandonment of certain supply relationships); iii) the establishment of transparent, non-discriminatory, open norms and standards upon the undertakings; iv) the imposition of requirements on certain forms of contracts or contractual arrangements; v) the prohibition of unilateral disclosure of information that favours parallel behaviour; or vi) the organisational separation of the undertaking's company or business divisions.

Moreover, the addressees resulting from the application of these procedures may be applied similar obligations to those contained in Article 14 of the DMA, insofar as they may be designated by the German competition authority due to the fact that their future concentrations could significantly impede effective competition based on objectively reasonable grounds. By this token, the FCO may designate particular undertakings to notify the mergers that they perform with regard to one or more economic sectors within a period of three years (with extensions of up to three years), and the NCA is empowered thereof to trigger the standard merger control proceedings against these undertakings.

The muse of Section 32(f) GWB: the New Competition Tool

The main source of inspiration for the introduction of Section 32(f) GWB is none other than the premises formulated in the evidence supporting the (now failed) New Competition Tool (for instance, Motta's and Peitz's expert report that is referenced in the draft, see here).

In the German Draft's mind, regardless of the DMA's implementation and the reinforced nationally idiosyncratic Section 19a designation process, some gaps in the German national competition law regime still prevail with detriment to consumers. Ironically, these gaps are attached to the distortions of competition which are unrelated to anti-competitive conduct. In other words, the gaps in the existing competition law regime relate to the structural causes or conducts which are not necessarily covered by antitrust but that are not adequately addressed and remedied either.

To some, these gaps will sound very much like market failures which should be considered through sector-specific regulation. However, the German Draft believes that sector inquiries are the answer to resolve the divide between the incapacity of the NCA to unravel the structural distortions of competition caused in the market and the Bundeskartellamt's recent do-it-yourself policy. The regulatory strategies and the competition policy brought forward by both NCAs and the European Commission in the digital arena were not the only spheres where the authority's utter failure called for quick and responsive measures on the side of regulatory and competition authorities. Rather, the vast range of services and sectors comprised by the economy are infected with the same disease now.

Moreover, the question of causality will be of the essence in this context. Sector inquiries will be triggered by the NCA with a view to imposing behavioural and structural remedies to particular undertakings. Nonetheless, the German Draft acknowledges repeatedly that a prior finding of an infringement (or even a concrete action) attributable to the undertaking must not conflate the remedies that will be imposed via the conclusions of the sector inquiries and measures imposed thereof.

Key takeaways

Unlike the previous Hungarian, Dutch, Greek and Luxembourgian amendments and proposals, the German proposal goes quite too far by introducing two additional tools to its box: the introduction of Sections 32(f) and 32(g) to its national competition law regime. Even though the monitoring of the DMA's effective implementation through Section 32(g) of the GWB is surprising in terms of the extension of the FCO's capacity to pre-empt the European Commission's findings as the regulatory instrument's sole enforcer, the introduction of Section 32(f) GWB constitutes a major blow to legal certainty and the risk of regulatory overburden while covertly addressing the structural problems set out first in the foundations of the New Competition Tool.

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