Kluwer Competition Law Blog

Germany Adopts Competition Enforcement Act

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On July 6, 2023, the German parliament adopted the "Competition Enforcement Act." The new law still lacks final approval by the *Bundesrat*, which will not be granted before the end of September, but this is only a formality. It marks the 11th amendment to the Act against Restraints on Competition (ARC11), Germany's national antitrust law. ARC11 has three main topics. ARC11 enhances the powers of the Federal Cartel Office (*Bundeskartellamt*, FCO) to act upon findings of its sector inquiries; it facilitates the skimming of profits generated by anti-competitive conduct; and it allows for public and private enforcement of the EU Digital Markets Act (DMA, Regulation 2022/1925) in Germany. With that, ARC11 can have an impact on a broad array of businesses that act across all industry sectors in Germany—regardless of market position, size, and even where companies act fully legal.

Background

The German government initiated the legislative process for ARC11 in June 2022. At the peak of the energy crisis, the Ministry of Economics was facing political pressure to ensure that the oil companies would not take undue advantage of rocketing fuel prices. The Minister of Economics, Robert Habeck from the Greens party, announced the establishment of competition law "*with claws and teeth*," labelled the "*Competition Enforcement Act*". The government had initially planned to rush the proposal through parliament under a very tight schedule, but the draft was facing fundamental opposition from key industry stakeholders (see below for details). This slowed down the legislative process significantly, and it ultimately took over a year for ARC11 to become final. However, while some changes were implemented along the way, the final version still contains all three core elements that the government had initially planned to introduce.

Key Elements

Sector Inquiries

Already under current German law, the FCO can conduct a sector inquiry if it has reason to believe that competition in a certain industry segment is restricted or distorted. However, the law as of yet does not provide the FCO with any particular tools to act upon its findings from the inquiry.

ARC11 will change that. It equips the FCO with new enforcement powers to remedy any "*distortion of competition*" that it identifies during a sector inquiry. This is a two-tier process:

- First, the FCO must identify the distortion of competition in a formal decision. This decision is separate from the report that the FCO prepares when concluding the prior sector inquiry and it will be directed towards individual companies that are active in the sector.
- Second, the FCO can order behavioural or structural measures, including a corporate unbundling, against companies active in the relevant sector, even where those companies did not violate competition law. In addition, the FCO can require companies active in the affected sector to notify proposed mergers subject to a significantly decreased notification threshold.

Distortion of competition

All ARC11 provisions in the context of sector inquiries revolve around a "*distortion of competition*," a legal term not otherwise used in German competition law. ARC11 does not provide a definition either. It only requires that the distortion of competition must be "*significant and perpetual*," and that it must be present in at least one nationwide market or across markets. The law provides some presumptive examples of relevant distortions of competition, such as unilateral demand or supply power, market access restrictions, uniform or collusive conduct, or market foreclosures. However, these examples are non-exhaustive, i.e., there remains a wide discretion for the FCO to find a distortion of competition for other reasons on a case-by-case basis.

Behavioural and structural remedies

Where the FCO finds a distortion of competition to continuously exist for at least three years, and where there are no indications that such distortion will vanish within the next two years, the FCO can order the necessary remedies to eliminate or lessen the distortion of competition:

- *Potential Addressees*: The FCO can generally order these remedies against any company active in the sector, regardless of whether the specific company violated competition law. During the legislative process, the scope of ARC11 was only slightly narrowed to companies that contributed significantly to the distortion of competition through their conduct and their market position— but still, all their behaviour may have been perfectly legal.
- *Presumptive examples*: ARC11 provides several presumptive examples for potential remedies, such as requiring access to data, interfaces or networks, ordering commercial terms for the companies active in the sector, or demanding separate bookkeeping. But again, these examples are non-exhaustive, leaving the FCO with broad discretionary powers.

Corporate unbundling

The FCO can even require a company to divest certain assets to remedy a distortion of competition. However, it may only take this measure as a last resort, i.e., if it would be impossible to achieve a similar result by ordering other behavioural or structural remedies. Also, the FCO cannot order a corporate unbundling against just any company active in the sector, but only against

dominant market players or against undertakings with paramount significance for competition across markets (UPSCAM). Furthermore, affected companies must be compensated for the divested assets.

Subsidiarity test

Before issuing a decision to establish a relevant distortion of competition (as a basis for then ordering remedies), the FCO must first assess whether the traditional tools of competition law enforcement would likely be sufficient to resolve the competition issue at hand effectively and sustainably. However, the FCO does not have to fully investigate such alternative enforcement options. It will be sufficient if it concludes based on the available facts that the subsidiarity test is not met. This again leaves the FCO with broad discretionary powers.

Merger control

Where there are objective indications that future mergers in a sector that was subject to a sector inquiry will significantly impede effective competition, the FCO can require a company active in that sector to notify proposed concentrations for merger control approval. To that end, adjusted (and lower) revenue thresholds apply, i.e., the buyer must have domestic revenues of at least EUR 50 million and a target of at least one million (instead of usually EUR 17.5 million). This requirement can be imposed for three years; multiple renewals are possible.

Regulated markets

ARC11 limits the FCO's ability to order post-sector-inquiry remedies in regulated markets (railways, postal services, telecommunications, or energy). Since these markets are subject to sector-specific regulation by the Federal Network Agency (*Bundesnetzagentur*, BNetzA), the FCO must obtain the BNetzA's consent before ordering any behavioural or structural remedies.

Legal recourse

Affected companies can challenge the FCO's findings of a distortion of competition, and subsequently, its remedy decisions in court. In the latter case, an appeal has a suspensive effect, i.e., the remedy decision will only take effect once judicial review is concluded, and only if the FCO's decision is upheld by the courts. This provides affected companies with more protection than proceedings under legacy competition law, where there is generally no such suspensive effect.

In essence, the new tool empowers the FCO to invoke *ex-ante* regulation for certain industry segments in reaction to the findings of a sector inquiry. This approach has been broadly opposed throughout the legislative process. Critics accuse the legislator of granting a "*carte blanche*" to the FCO by allowing it to "*design markets*" within its own discretion. This was perceived as a "*paradigm shift*" in competition law, and as unduly trusting an enforcement agency with a level of

regulatory decision-making that should rather lie with the legislator itself; Parliament, not the FCO, should decide which industry sectors require *ex-ante* regulation. In light of this criticism, it can therefore be expected that future addressees of post-sector-inquiry measures will take the FCO to court over these actions and that they will also challenge the legality of the FCO's powers under ARC11 as such.

Profit Skimming

Beyond the enhanced sector inquiry regime, ARC11 will also facilitate the FCO's ability to skim profits that companies generated with anti-competitive business practices. The FCO's toolbox contains a profit-skimming tool already today. If a company deliberately or negligently infringes competition law, and thereby, gained an economic benefit, the FCO can skim these profits and require the company to make a respective payment to the treasury. This must not be confused with penalties or cartel damage claims, although the company's relevant profit can be accounted against any such other payments.

So far, the FCO never used this provision, arguing that its requirements are too hard to meet when it comes to calculating the relevant profit. In particular, it turned out to be difficult to prove whether and to which extent a competition law violation actually led to any additional profits. ARC11 now lowers these requirements by introducing a two-fold assumption. The FCO will be able to assume that (i) any competition law violation causes additional profit and that (ii) the relevant profit amounts to at least 1% of the revenue that the company generated with the affected products or services. This will shift the burden of proof to the affected company, which will have to rebut these assumptions by providing evidence that there were no relevant profits or that these were in fact lower than the assumed amount.

DMA Enforcement

In July 2022, the European Union adopted the DMA (see our previous alert). The EU Commission is its sole (public) enforcer, but Member State authorities nevertheless have a supporting role. Also, the DMA can become subject to private enforcement in Member State civil courts, whereas it requires Member States to ensure that their courts are bound by prior DMA decisions by the EU Commission.

ARC11 responds to the DMA in both respects. It expands the FCO's investigative powers, as they currently exist for competition cases, to the DMA. Inter alia, this allows the FCO to raid company premises, claim documents, or interview company representatives also in case of alleged or suspected DMA violations. Further, there are rules governing the collaboration and exchange of information between the FCO and the EU Commission in relation to DMA investigations. And finally, ARC11 establishes a binding effect for DMA-related Commission decisions with respect to subsequent private enforcement proceedings: where a claimant seeks an injunction or damages from a company designated as a gatekeeper under the DMA for alleged DMA violations in a German court and where there already is a binding decision by the EU Commission in place that establishes the relevant DMA violation, this decision will have binding effect for the German court. The claimant must therefore no longer present evidence that the company did indeed violate the DMA. This can significantly lower the burden for claimants to bring DMA-related legal action

in Germany.

** The publication is a re-post of the contributor's original client alert, see here.*

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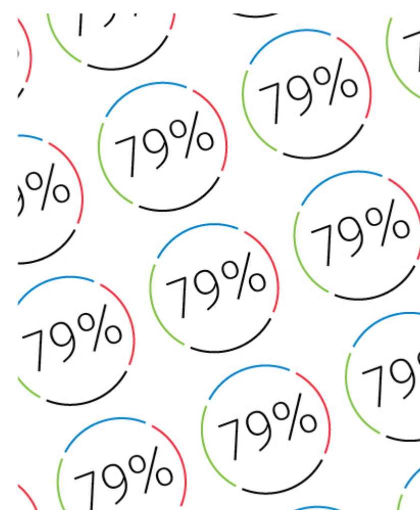

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