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New Provisions in German Competition Law: New Competition Tool, Provisions Accompanying the DMA and a Presumption of Benefits

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On 7 November 2023, a new amendment law to the German Competition Act ("Gesetz gegen Wettbewerbsbeschränkungen", GWB) came into force. Because it is the 11th major amendment, it is commonly referred to as the **11th GWB Amendment** (11. GWB-Novelle).

In addition to numerous small alterations, it is particularly noteworthy for three important novelties:

New Competition tool

Since 2005, the Federal Cartel Office (Bundeskartellamt)'s toolkit includes so-called **sector inquiries**. With Article 17 Regulation 1/2003 in mind, they were introduced to facilitate uncovering infringements of Articles 101 and 102 TFEU and their German equivalents. Consequently, if such an investigation uncovered problematic market conditions but could not demonstrate a competition law infringement, there was little the Bundeskartellamt could do. Informing the general public about these market conditions was the only means of action.

Similar to the UK's market investigation tool as well as the proposed, but meanwhile abandoned EU New Competition Tool, the 11th GWB amendment now introduces a **whole bouquet of new remedies**. Some of them are behavioural and shall take precedence, while others are of a structural nature.

Moreover, to ensure an efficient process, a time limit of 18 months was set.

The greatest novelty, however: These new remedies **do not require an infringement**. Instead, they rely on problematic market conditions.

In detail:

- Following a sector inquiry, the new Section 32f (2) enables the Bundeskartellamt to oblige undertakings to **notify any merger** irrespective of whether the regular merger control thresholds

are met**.** Nonetheless, the evaluation standard is the well-known **significant impediment to effective competition**.

- If, during a sector inquiry, the Bundeskartellamt discovers a **substantial and continuous disruption of competition** ("erhebliche und fortwährende Störung des Wettbewerbs"), following a public hearing, the new Section 32f (3) empowers the Bundeskartellamt to introduce further remedies. In particular, they include:
    - Obliging undertakings to grant access to data, interfaces, networks or other facilities (No. 1);
    - Prohibiting unilateral disclosure of information that encourages parallel behaviour by companies (No. 5), and;
    - Obliging undertakings to separate the accountings of business divisions (No. 6).
- If a sector inquiry does not only uncover a substantial and continuous disruption of competition but also **dominant undertakings** or undertakings of paramount significance for competition across markets at its centre, the new Section 32f (2) allows for **divestiture of assets** as a last resort.

On its website, the German Federal Ministry of Economic Affairs states that these amendments were "*a **response to the crisis-ridden (price) developments** which have become particularly apparent as a result of Russia's war of aggression on Ukraine*" (own translation). Somewhat unsurprisingly, this reasoning has led to accusations such as "*antitrust populism*" and "*theatrical thunder*" (*Haus* and *Körber*, cited by lto).

Moreover, regarding the substantial and continuous disruption of competition, Section 32f (3) introduces a completely new point of reference, the term "***paradigm shift***" has been ushered more than once (e.g. *Hahn* or *Thomas* or *Rohner*). In contrast, others (e.g. *Kühling*) point out that ordering a divestiture of assets is nothing particularly new. Although hardly ever used, it was available as a remedy for addressing an infringement of competition law in the past as well.

Similarly, the President of the Bundeskartellamt, *Andreas Mundt* ([2023] NZKart 1) highlights that Section 32f is subject to extremely strict conditions and that the divestiture of assets functions only as a last resort. He emphasizes that the **Bundeskartellamt will still focus on safeguarding competition** while being equipped with slightly better tools.

National provisions accompanying the DMA

As a majority of its stipulations address changes because of the Digital Markets Act, if not for the new behavioural and structural remedies, the 11th GWB amendment could also be referred to as the **DMA Accompanying Act**.

According to Recital 91 of the DMA, the Commission is "*the sole authority*" empowered to enforce the DMA. However, Article 38(7) grants Member States the possibility of **empowering their national competition authorities to conduct investigations** into possible non-compliance by gatekeepers. The German legislator makes use of this empowerment:

- The new Section 32g introduces **Bundeskartellamt-investigations into possible infringements of the DMA.**

Regarding the **private enforcement of the DMA**, as the draft law did not include any reference, some (e.g. *Basedow* [2021] ZEuP 217 and *Haus & Weusthof*) concluded that the DMA did not allow for injunctive relief or damage claims. Others (e.g. *Körber* [2021] NZKart 436 and *Zimmer & Göhsl*) added that admitting private enforcement would lead to an **inconsistent application** of the DMA.

Although still not actively stipulating injunctive relief or damage claims, the final version dispelled these doubts: With **Articles 39, 42 and 51**, the DMA includes provisions which only make sense if Member States can install civil law claims.

Moreover, considering the ECJ case law, not only in matters of competition law but also e.g. in the Mercedes Benz case, it is highly likely that national provisions allowing for private enforcement are not optional but mandatory (in depth: *Bauermeister*, in Becker (ed.), Wettbewerb auf digitalen Märkten, Nomos, Wirtschaftsrecht und Wirtschaftspolitik, in preparation).

German competition law is now prepared for this eventuality:

- The new Section 33 allows for **injunctive relief** and (read together with Section 33a) for **damage claims**.
- In accordance with Article 39(5) DMA, the new Section 33b binds national courts to **Commission findings** that an infringement has occurred.
- Interestingly, according to the new Sections 33g and 33h, the **disclosure rules** and **limitation periods** introduced by the Damages Directive will also apply to the private enforcement of the DMA.

Presumption of infringement benefits

In addition to imposing fines, the Bundeskartellamt also has the option of ordering the **disgorgement of the economic benefit** obtained by an infringement and requiring the undertaking to pay a corresponding amount of money. Although it is the more precise instrument, in the past, the Bundeskartellamt has hardly made use of it. Amongst others, this is because Section 34 required the Bundeskartellamt to demonstrate the benefits received. Therefore, a comprehensive fine was the simpler way.

As a third noteworthy novelty, the 11th GWB amendment aims to remedy this situation. Therefore, it introduces two presumptions:

- The new Section 34 (4) 1 stipulates the presumption that a competition law infringement will result in **financial benefits to the infringer**.
- The new Section 34 (4) 4 presumes an economic benefit of **at least 1% of an undertaking's turnover.**

Nonetheless, there are still sufficient protective mechanisms in place. In particular, both presumptions are rebuttable (further: *Pauer*).

Outlook: The 12th GWB-amendment

In German Competition law, new provisions and modernizations are introduced at regular intervals – the end of one reform is usually the start of the next. One day before the 11th amendment came into force, consultations for a 12th amendment started. Amongst others, it shall focus on improving **consumer protection**, **court proceedings on damages claims** and the consideration of **sustainability aspects.**

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Competition Tool

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