A paper tiger finds its claws: New intervention powers for German competition watchdog

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"We want a competition law with claws and teeth", Minister for Economic Affairs and Vice-Chancellor Robert Habeck promised last summer. Yesterday, the German Bundestag took a major step towards fulfilling that promise by passing a new reform bill – the so-called *Competition Enforcement Act* (*CEA*). At the heart of the new provisions stand significantly increased powers of intervention for the German Federal Cartel Office (*FCO*) to remedy distortions of competition following a sector inquiry. Previously, such inquiries only served as a means for the FCO to form the empirical basis for its future case practice. It did not, however, permit the authority to directly intervene against individual companies or anti-competitive conditions. Will the greatly bolstered instrument of the sector inquiry – long dismissed by many as a paper tiger – live up to Mr. Habeck's bold promise?

Background

Sector inquiries are a tool for the FCO to investigate specific economic sectors and gain comprehensive knowledge of the underlying market structure and competitive landscape. Since their introduction in 2005, the FCO has carried out eighteen inquiries, including into the food retail, district heating, milk, fuel, electricity, gas transmission and online advertising sectors; the latter just closed in May. Currently, further inquiries into charging infrastructure for electric vehicles as well as messenger and video services are ongoing. Historically, the immediate effects of such exercises were minor (apart from comprehensive reports), even in cases where significant competition deficits were found. The FCO could only take action against clear violations by individual companies – such as abusive practices or anti-competitive agreements – but only after opening a separate investigation. Addressing broader structural issues identified in an inquiry was generally outside of the FCO's powers.

Copy thy neighbour? The FCO's new intervention powers

To address this perceived shortcoming, the German legislator took major inspiration from the powers granted to the UK Competition and Markets Authority (*CMA*) for conducting market inquiries. Similar to its British equivalent, the new Section 32f ARC grants the FCO plenty of additional powers, and moreover, the threshold for the FCO to act at all was lowered significantly: It may make use of its new powers not only against abuses of dominance but even in the absence of illegal behaviour provided the sector inquiry has shown a "*significant and continuing impairment of competition*". Section 32f para.

5 provides presumptive examples and specifies that factors to be taken into account for this assessment are the number, size and financial strength of the companies operating in the affected markets as well as the interrelationships of the companies. A *continuing* impairment requires a duration of at least three years and a lack of evidence that the situation will improve over the following two years.

After finalising its report, the FCO has an array of new powers at its disposal: Where it has found objective indications for a significant and continuing impairment, the authority may require companies with at least EUR 50 million in revenues to notify any acquisitions of targets with at least EUR 1 million turnover . If the FCO has conclusively determined that competition is, in fact, impaired, it can force the companies concerned to – inter alia –

- grant access to data, interfaces, networks, or other facilities;
- follow certain specifications for business relationships between companies in the markets under review and at different market levels;
- restrict themselves to certain forms of contracts or contractual arrangements;
- prohibit unilateral disclosure of information that favors parallel behavior by companies;
- As a last resort, the FCO can force dominant companies to divest assets or company divisions to remedy impairments of competition.

The new Section 32f ACR is a true game changer. While the FCO focussed on the conduct of specific market players and their potential abuse of dominance in the past, it can now address inherent structural issues of entire markets without the need of proving abusive conduct. This strengthens the tools in the FCO's arsenal to fight market imbalances significantly.

As a result, even companies that have not violated antitrust law could be subjected to structural remedies. The FCO could in principle break up companies or force them to divest assets even though they are fully compliant with competition law. There is concern that this could lead to successful companies being punished for outperforming their competitors. Critics also point to the low bar for determination of finding a "significant" impairment, which is only slightly – defined merely as more than a *de-minimis*-effect. The considerable opposition to the new instruments could very well trigger challenges in front of the German Constitutional Court.

Last minute changes – but no U-Turn

Probably in response to such criticism, some last-minute changes were adopted in the Economic Affairs Committee of the government factions. For one, any appeal against the FCO's decisions will have a suspensory effect, preventing decisions to take effect in

the interim. Additionally, the criteria for finding significant and continuing impairment of competition were strengthened. Now, the FCO has to determine that applying its existing "ordinary" powers) are likely insufficient to effectively and permanently *eliminate* the interference with competition.

Lessons from across the channel and a look ahead

In the UK, the CMA has used its powers following a market inquiry, albeit sparingly. The most noteworthy instances include the forced divestiture of the London Gatwick and Stansted airports by the Heathrow Airport Holding (formerly BAA plc) and the forced divestment of several hospitals following a private healthcare market investigation. Most inquiries have, however, not resulted in any measures by the competition authority but have rather been resolved by voluntary changes or policy recommendations to the government.

In Germany, it remains to be seen to what extent the FCO will take measures against companies under the new rules. On the one hand, as could be seen with the Section 19a ARC, introduced in 2021, the FCO has a clear tendency to make use of its "shiny new toys" when given the opportunity (see our client briefing on Section 19a ARC). On the other hand, the new instrument comes with certain pitfalls: For one, sector inquiries require significant resources, which will limit the number of investigations that the FCO will be able to carry out within an average year. While the number of inquiries has increased in recent years, the overall ratio of eighteen completed inquiries in 18 years shows that only a limited number of companies will be confronted with the instrument. In addition, both the new Section 32f ACR and established constitutional principles clearly restrict the most intrusive of interventions as a measure of last resort. The mere existence of the Section itself could serve as a threatening gesture for companies. As the former minister of finance, Peer Steinbrück, once put it: The threat is like "the seventh cavalry before Yuma," which "you can ride out, but you don't necessarily have to ride them out. The Indians just need to know they exist."

This does not mean that companies eventually facing a sector inquiry don't have to take it seriously. Even if the worst-case scenario of forced disentanglement generally remains unlikely, the "milder" instruments may also severely restrict a company's freedom to operate. In addition, significant resources need to be deployed from an early stage solely to respond to the information requests from the FCO, while putting the company in the best possible position from the very beginning. After all, one thing is certain: The paper-tiger is teething and, in the future, it will be of even greater importance for companies to confront the challenge of sector inquiries well prepared.

BLOMSTEIN will continue to monitor developments with regard to the new law and its enforcement. If you have any questions on the topic, Anna Huttenlauch, Max Klasse and the entire competition law team will be happy to advise you.