German Ministry for Economic Affairs plans would empower authorities to require undertakings to pay 20 % of their group turnover for antitrust law infringements

Under German law, a company that intentionally or negligently violates antitrust law so far mainly risks, first, a fine of up to 10% of its group turnover and, second, often a landslide of damages claims. The proposal of a draft bill for the 11th amendment of the Act against Restraints of Competition ("ARC") of 15 September 2022 ("Proposal") of the Federal Ministry of Economics and Climate Protection ("BMWK") wants to provide "further incentives against antitrust violations" and, to this end, breathe life into a legal tool that has existed for a long time but has never been used by the German Federal Cartel Authority ("FCO"): the disgorgement of benefits. "Disgorgement of benefits" means that an undertaking that has drawn an economic advantage of any kind from violating the law, should not be entitled to keep this advantage, and the state should be entitled to withdraw this advantage. The Proposal is part of the BMWK's successive implementation of its "Competition Policy Agenda until 2025".

So far, disgorgement of benefits by antitrust authorities has only been possible in cases of intent or negligence. The BKWK wants to change that. In addition, and probably more importantly, it wants to introduce a legal presumption that the benefit amounts to at least 1% of the turnover that the undertaking achieved in Germany with products and services linked to the infringement. In the case of longer-lasting infringements, this can add up to enormous amounts. The Proposal caps the amount that the competition authority may withdraw at 10% of the undertaking's worldwide total turnover. Undertakings that so far hoped not to be confronted with significant damages claims by private parties have to face (should the Proposal become law): 10 % disgorgements are always a strong possibility; these can be topped-up by another 10 % the undertaking might need to pay in fines.

Initiative to bring the disgorgement of economic benefits to life

Provisions on disgorgement in the ARC can be traced back to 1980. Initially, it was about skimming-off surplus revenues, and the scope of application was very narrow. Since 2005, the current provision, Section 34 ARC, has been in force and has remained virtually unchanged in substance. At its core is the idea that companies that have gained economic advantages from a cartel violation should not keep these advantages. In the abstract, no one will object to this. However, to this day the FCO has never passed an order on the basis of Section 34 ARC - even in its activity reports it does not mention a single case in which it at least launched an attempt that was later abandoned. The only decision based on Section 34 ARC seems one made by the cartel authority of the Federal State of Hesse, that is directed against excessive water prices of a municipal utility, a decision that was upheld by a Regional Court on its merits (although not in the entire amount) and is currently on appeal before the Federal Supreme Court.

The Proposal wants to make the disgorgement of benefits an effective instrument of public cartel enforcement by introducing the following amendments:

- In contrast to the current situation, the cartel authority is to be allowed to order the disgorgement of the economic benefit even if the undertaking did act neither intentionally nor negligently when violating antitrust law.
- A legal presumption is to be introduced that the antitrust law violation causes an economic advantage, and another presumption that the amount of the advantage amounts to at least 1% of the turnover in Germany directly or indirectly linked to the infringement.
- The cartel authority is to be allowed to estimate the amount of the advantage like a court in civil proceedings, i.e. “rule on this issue at its discretion and conviction, based on its evaluation of all circumstances”.
- The calculation of the economic advantages will be based on the duration of the infringement and not limited, as now, to a period of five years.
- The period for a cartel authority to order disgorgement is extended from seven to ten years.
- The FCO is to receive three additional full-time employees for conducting disgorgement procedures. The BMWK assumes that the FCO will conduct two proceedings per year.

German law embodies another provision that enables consumer protection associations in particular to claim from undertakings to the surrender of benefits to the federal budget (Section 34a ARC). This provision is not to be changed. The hurdles for associations are higher than those for cartel authorities and there has never been a case of disgorgement of economic benefits by associations.

Disgorgement of benefits irrespective of an antitrust law violation being committed negligently or intentionally

The German cartel authorities may impose fines only if an antitrust law violation was committed intentionally or negligently. The same has so far applied to ordering of the disgorgement of benefits. However, if one understands disgorgement merely as withdrawing an unjustifiably obtained advantage (similar to “unjustified enrichment”), the company addressed by a disgorgement order is not accused of any culpable conduct at all. Therefore, it seems consequent not to make disgorgement orders dependent on a negligent or intentional behaviour. However, even if an undertaking assesses its behaviour constantly and thoroughly for antitrust compliance it cannot fully exclude that some conduct may amount to an antitrust law infringement (e.g. because the presence of efficiencies that justify a restriction of competition cannot be ultimately proven in front of a cartel authority or in court). It can be discussed if it is right that such conduct should fall under the threat of a disgorgement order, especially as there seems to be no need to strike out from the law that such an order requires a negligent or intentional violation. It is relatively simple to prove negligence. For example, from the time where an undertaking knows that its conduct is subject to an investigation by a competition authority, negligence is generally assumed.

Presumption that benefit amounts to at least 1 % of turnover linked to the infringement

Probably the most exciting – and for companies, troublesome – proposal is the introduction of the presumption that each infringement leads to an economic advantage amounting to at least 1% of

the turnover that the undertaking has achieved in Germany with the sale of the product or service linked to the infringement. With this amendment, the Proposal aims at removing the (perceived) reason why the FCO never used its tool: "In order to determine the amount of an economic advantage that may have been achieved, in some cases very complex econometric analysis techniques have to be used. The data basis required for this ... must be collected from the companies concerned. This requires considerable resources, both on the part of the FCO, but also on the part of the companies." The Proposal does not change this. But it reverses the burden of proof. And it gives two reasons for this. First, the infringing company caused the unjust enrichment. Second, companies should be deterred from committing infringements. Therefore, the Proposal advocates (1.) the presumption that an antitrust violation gives rise to an economic benefit and (2.) that the minimum amount of the benefit can be determined by law: the minimum amount of 1% of the sales linked to the infringement. In this regard, the Proposal refers to court cases on agreements with which contracting parties had agreed on the lump sum of damages for antitrust violations.

At this point, it should be highlighted that a benefit or an advantage does not necessarily mean the same as damage. In the legal sense, a damage is an involuntary loss of assets. The decision of the FCO to prohibit Facebook from combining user data from different sources (Facebook, WhatsApp, Instagram) as this was considered an abuse of market power may serve as an illustration of the difference between benefits and damages. Since Facebook etc. are completely ad-financed, Facebook by committing the abuse does not reduce users' assets. Users therefore do not suffer damages for which they could sue Facebook. However, Facebook is likely to gain an economic advantage from the pooling of data because it can optimise the products it sells on the advertising market. If Facebook could generate higher advertising sales as a result of the infringement, this could be an advantage that the BMWK wants the cartel authorities to be able to withdraw in the future. The Proposal does not require that the advantage must occur in the same market in which the antitrust law violation was committed. In such cases, a decisive question will therefore be whether the services for the advertising industry are "related to the infringement".

It is difficult for the undertaking to rebut the presumption: the company must prove to the authority that it did not make a profit worldwide in the amount of the presumed benefit. This is strange: why should the rebuttal be linked to profits that may have been generated with products that have no connection whatsoever with the antitrust law violation? Also: if the effect of an infringement is limited to Germany, why should the undertaking be favoured by the law (i.e. be able to rebut the presumption) if it has made no profit because of losses elsewhere in the world? Or in the opposite case: why should the undertaking be disadvantaged (not be able to rebut the presumption) by the fact that it has made profits elsewhere and has nevertheless made losses where the antitrust infringement has had an effect (Germany)? The Proposal's reference to a hardship rule - e.g. in the case of little added value typical of trading markets - seems to be a weak consolation: in order to avoid "undue hardship", the order "shall" be limited to a "reasonable" monetary amount.

Authority may estimate benefit at its discretion based on its evaluation of all circumstances

Under current German law, the authority may estimate the amount of the benefit. However, the Proposal wants to lower the standard for the estimation by referring to the provision that allows courts to make estimates in civil proceedings. Thus, if the authority decides, it may do so "at its discretion and conviction, based on its evaluation of all circumstances". According to the Proposal, the applicable standard for the authorities is to be the question: "Is it more probable than not?".

The BMWK tries to justify this amendment with the argument that any uncertainties of estimation should be at the risk of the undertakings as they are the ones responsible for the antitrust law infringement and that they are more likely to have the information that allows conclusions to be drawn about the effects of the infringement on the market. The second argument, at least, is not convincing. The German antitrust authorities have numerous and very far-reaching powers of investigation: they may "conduct all investigations and collect all evidence that is necessary" (Section 57 (1) ARC), for example, demand the provision of information as well as the surrender of documents by order (Section 59 ARC) and enforce these orders with coercive periodic penalty payments (Section 86a ARC). Even searches of companies and homes are permissible (Section 59b GWB). At least the FCO has the necessary personnel resources for conducting such procedures, and the number of staff is to be increased especially with regard to disgorgement proceedings. In our view the authority should not be allowed to make an estimate in general, but only when further investigation is no longer reasonable. It could be discussed whether this is the case, for example, if companies do not fulfil their duty to cooperate despite the threat of a periodic penalty payments.

Amount of economic benefit to be calculated for the entire infringement period, cap at 10 % of group turnover

Currently, the amount of the benefit is calculated for a period of five years at most. The Proposal wants to abolish this. Instead, the period for which the authority finds the infringement determines the basis for the calculation. The Proposal recognises that this may lead to enormous burdens. Probably in order to reduce the legal contestability of the Proposal, the BMWK declares it necessary to cap the amount that can be disgorged - even if this means that the goal of the disbursement, namely, to withdraw the unlawfully obtained advantage, is achieved only in part.

The envisaged cap is 10 % of the total turnover of the undertaking (i.e. group) generated in the business year preceding the authority's decision. In addition to a fine, which can also amount to up to 10 % of the group turnover, there would be also the threat of a disgorgement as an additional realistic consequence of an antitrust law infringement, which can cost a further 10 % of the group turnover.

Time limit for the order: 10 years

The Proposal wants to extend the time limit for the authority to order the disgorgement to ten years (currently seven) since the infringement ended This, the Proposal states, is "necessary for preventive reasons". However, it seems practically impossible that companies would behave differently today because they could still be deprived of an unlawful advantage later on in years 8, 9 and 10

(if the antitrust authority after so much time wanted to take up the case up at all). The pressure on undertakings for antitrust compliance exists for a number of reasons and will most probably not be increased by extending the time limit for disgorgement orders.

On the other hand, a reason for the extension of the time limit may arise from the legal provision that authorities cannot order an advantage skimming insofar as the advantage has been skimmed off by damages. The Proposal does not want to change this, because that would amount to an expropriation of those damaged by the antitrust law violation. The authorities must therefore wait a while until it is clear to them whether and to what extent private claimants will receive damages from the undertaking, if necessary, after multi-instance court proceedings. Such waiting should not lead to the risk that the authority might exceed the statute of limitation for passing a disgorgement order. An extension of the time limit to ten years is perhaps justified from this point of view. However, it is again questionable how realistic (and necessary) an activity of the authority still is after so many years. An even longer extension would hardly be justifiable for reasons of securing legal concord – and in other fields of law, unjustified enrichment can no longer be enforced at some point in time.

Conclusion

Of course, no undertaking should be allowed to keep what it has gained through a violation of the law. To remedy such unjust enrichment is first and foremost a matter for private individuals. The state can and must help. It has done so in particular by strengthening the claims for damages of antitrust victims (private enforcement) and by concentrating court proceedings in specialised appellate chambers at the civil courts. If, in addition, the state wishes to take the withdrawal of economic benefits into its own hands (public enforcement), it must justify this. From this point of view, an assessment of the Proposal arrives at mixed results:

- It is plausible to no longer demand that an antitrust law infringement must be committed negligently or intentionally as a prerequisite for passing a disgorgement order if one accepts that the purpose of disgorgement is to eliminate an unlawfully acquired advantage. However, the Proposal does not make it clear that culpability so far really has been in the way of cartel authorities. Nothing is known of any practical experience the FCO has had with disgorgement; the requirements for negligence are not high anyway; the first ruling of the Federal Supreme Court on a decision (by the cartel authority of Hesse) ordering the skimming of benefits pursuant to Section 43 GWB is not yet available.
- It is understandable that the authority first wants to (and should) wait and see whether and to what extent an economic advantage is withdrawn from the undertaking by private parties. Since it can take several years before private parties present claims for damages in a reasonably substantiated manner and court proceedings generally take a long time, the authority must also be allowed to wait for some time before initiating disgorgement proceedings. As damages claims are time barred after five years, the desire to extend the time limit for the authority from seven to ten years is therefore understandable. For undertakings, however, this means that they can rule out burdens that may come their way only ten years after the infringement has ended. It is also permissible to ask whether a cartel authority that

closed a case several years ago really still sees an interest in revisiting an old case more than seven years after the end of the infringement “in the interest of competition and as a preventive measure” (this is Proposal’s justification). Moreover, an authority that has already withdrawn an advantage, which is afterwards successfully claimed by private parties in court, must somehow reimburse the undertaking. A mechanism to arrange for this is not in place. And as has already been pointed out by academic writers, such situations raise a number of problems, such as a potential unconstitutional double taxation of the undertaking. Unfortunately, the Proposal does not address any of these problems.

- It seems justified to calculate the benefit on the basis of the advantage actually obtained throughout the infringement.
- The proposed presumption of an advantage that amounts to at least 1 % of the sales linked to the infringement is problematic. Since a disgorgement is only possible insofar as an advantage has not already been withdrawn from the undertaking by damages payments or a portion of the fine imposed for the infringement, the new provision on disgorgement is likely to be limited, first, to cases with dispersed damages, i.e. if the legal costs for the private party are not in reasonable proportion to the effort, and, second, to cases in which infringements are prosecuted not in criminal but merely administrative proceedings. However, the Proposal does not convincingly explain the necessity of a statutory presumption on the amount of the advantage: already today authorities can oblige undertakings to provide information by imposing periodic penalty payments and thus, at least to a large extent, eliminate the alleged "information asymmetry". Connecting the rebuttal of the presumption to a profit that is not causally linked to the infringement at all is also a not convincing feature of the Proposal.

Further amendments of the Proposal

For further amendments contained in the proposal see:

New draft German antitrust bill: will the Federal Cartel Office be vested with new powers to order unbundling on any disfunctional market without having to prove a violation of antitrust laws? New draft German antitrust bill: will the Federal Cartel Office be vested with new powers to order unbundling in any disfunctional market without having to prove a violation of antitrust laws?