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# The 11th GWB Amendment ("Competition Enforcement Act") has entered into force

Will the new Act result in "competition law with claws and teeth"?

## I. Introduction

With the entry into force of the 11th Amendment to the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*: GWB) on 7 November 2023, German competition law underwent several far-reaching changes. Two years after the GWB Digitisation Act (i.e. the 10th Amendment to the GWB) gave the *Bundeskartellamt* (Federal Cartel Office - BKartA) unprecedented investigative powers, the 11th Amendment Act seeks to further strengthen competition enforcement in Germany. These newly adopted amendments were announced by Vice-Chancellor and Federal Minister of Economics, Dr. Robert Habeck, as competition law endowed with "*claws and teeth*" and welcomed by Federal Minister of Justice, Dr. Marco Buschmann, as a necessary step for a "*competition authority with bite*". Notably, despite the Amendment Act positioning the GWB as a fourth pillar, consisting of sector inquiries and subsequent remedial actions, and equipping the BKartA with far-reaching instruments of intervention to combat antitrust infringements, the rhetoric unexpectedly creates the impression, that antitrust enforcement in Germany has thus far been 'toothless' and following a gentle approach. Nevertheless, the Amendment Act establishes practical significance for the previously ineffective provisions on disgorgement of benefits by implementing two presumptions on the existence and minimum level of economic benefits. In addition, it provides the necessary legal framework for the BKartA to support the EU Commission in enforcing the *Digital Markets Act* (DMA). Apart from the new rules on DMA implementation, the 11th Amendment Act gives the impression that, after years of focusing on digital markets, markets in analogue economies may now also be of interest to the BKartA.

By starting the consultation process for the 12th Amendment to the GWB on the same day the 11th Amendment Act was announced, the *Bundesministerium für Wirtschaft und Klimaschutz* (Federal Ministry for Economic Affairs and Climate Action- BMWK) illustrates that it does not want to waste any time developing its competition policy agenda for the remaining legislative period in a targeted manner.

### Timeline

In September 2022, the BMWK presented the 'draft bill for the improvement of competition structures and the disgorgement of benefits obtained by competition law infringements', formally referred to as the "*Wettbewerbsdurchsetzungsgesetz*" (Competition Enforcement Act, GWB-E). After the proposal was presented by Robert Habeck and Marco Buschmann, the Federal Government formally adopted it on 5 April 2023 and initiated the legislative procedure. Following several revisions to the draft bill by the Economic Committee, the German Bundestag approved the 11th GWB Amendment Act on 6 July 2023, on the basis of a recommended resolution. The Amendment Act was not referred to the Bundesrat and subsequently published in the Federal Law Gazette until after the summer break. As a result, the Act has finally come into force on 7 November 2023.

### Background

From a political standpoint, the initial motivation for the Competition Enforcement Act is primarily seen in price developments in the energy markets after Russia's attack on Ukraine in violation of international law. At that time, the debate centred around the passing on of the so-called 'fuel discount' (*Tankrabatt*) to consumers in the mineral oil sector. According to State Secretary (BMWK) Sven Giegold, these changes have generated a "*feeling of unease among the public*", highlighting existing "*gaps in competition law*", *whereby the "crisis [had] simply functioned like a magnifying glass*". In its interim report from November 2022 on the ad hoc sector inquiry into "refineries and fuel wholesalers", the BKartA established that the fuel discount had largely been passed on to consumers. Thus, it remains unclear which specific competitive issues legitimise such a far-reaching competition law reform. While representatives of the leading competition institutions have regularly confirmed that the German economy allows for unfavourable competition structures in several individual sectors, they have not specified a concrete sector or named examples.

Whether the legislator has succeeded in providing the competition authority with more effective 'biting' instruments and whether such measures were, in fact, necessary is discussed below.

## II. Sector inquiries and potential follow-up measures

The 11th GWB Amendment Act centres around improving the effectiveness of the existing sector inquiry instrument. The rather low prerequisites for the initiation of sector inquiries, initially introduced by the 7th GWB Amendment Act in 2005, have been marginally modified: if circumstances suggest that domestic competition may be restricted or distorted, the Bundeskartellamt and the higher state authorities may conduct an investigation of a particular economic sector or, more broadly, of certain types of agreements or practices across various sectors (Section 32e (1) GWB, new version). These sector inquiries help enable competition authorities to gain in-depth insights into the competitive conditions of individual economic sectors. Since their introduction in 2005, the BKartA has published 20 sector inquiry reports, including the 2021 sector inquiry into "hospitals" and the 2014 sector inquiry into "buyer power in the food retail sector".

Ultimately, inspired by the market review instrument of the British Competition and Markets Authority (CMA) and the European Commission's proposed "*New Competition Tool*," the German legislator has expanded its options for intervention.

### Expediting the present sector inquiry process

In the past, the initiation of sector inquiries often resulted in lengthy procedures. In order to expedite these, Section 32e (3) GWB (new version) aims at limiting sector inquiries to 18 months commencing from their initiation, including the investigation, and concluding with the completion of a final report. While this is a target deadline, exceeding it does not entail any immediate legal consequences. Andreas Mundt, President of the BKartA, characterises this deadline as "*ambitious*"; the duration of the procedures should not be underestimated. The BKartA has a wide repertoire of investigatory measures at its disposal for sector inquiries. These include the capacity to obtain evidence, request information, view and examine business documentation, order inspections, and - as per the 11th GWB Amendment Act - conduct seizures under Section 58 GWB (new version). Under Section 44 (4) GWB (new version) the Monopolies Commission may strengthen its role in the initiation of sector inquiries by suggesting sectors warranting investigations in its report. If the competition authority fails to initiate a sector inquiry within 12 months of receiving such a recommendation, it must issue a formal statement. In an effort to maintain procedural transparency, the final report is to be published on the official website of the BKartA after conducting a sector inquiry. Furthermore, as part of the Economic Committee's resolution, the BMWK is now obligated to report on the effects of Section 32f GWB (new version) to the Bundestag and the Bundesrat ten years after the coming into force of 11th GWB Amendment Act.

### Extension of intervention options following sector inquiries

In the past, sector inquiries concluded with a final report by the BKartA, without the possibility of sector inquiry specific follow-up actions. However, in cases where antitrust infringements were discovered, undertakings suspected of infringing competition law could potentially

face separate actions by the BKartA. With the implementation of the 11th GWB Amendment Act, the BKartA is authorised to issue far-reaching measures against undertakings, if a significant and continuous disruption of competition is identified as a result of a sector inquiry. These new legislative measures are not contingent on the existence of antitrust infringements, but rather on the mere presence of a significant and continuous disruption of competition. According to the legislator, a disruption of competition does not necessarily have to be rooted in an infringement of competition law. Hence, even if all undertakings in the respective market act in accordance with competition law, the conditions within such market alone may result in a significant and continuous disruption of competition. This could result in higher prices, worse quality, and less product variety, and at the same time stifle incentives for innovation. It is important to note, that consumer sector inquiries, as defined under Section 32e (6) GWB (new version), are explicitly excluded from the scope of these new intervention powers (Section 32f (1) sentence 2 GWB, new version).

## Extension of merger control scope under Section 32f (2) GWB (new version)

Section 32f (2) GWB (new version), initially introduced in the preceding GWB Amendment Act under Section 39a GWB, allows for the BKartA to oblige undertakings to notify mergers that fall below the notification threshold of Section 35 GWB. Specifically, if there is objective comprehensible evidence that future mergers could significantly impede domestic competition in one or more investigated economic sectors, the BKartA may order an undertaking in the concerned sector(s) to notify any merger after a sector inquiry. This obligation only applies if the acquirer achieved a domestic turnover of over 50 million Euro in the last business year and the undertaking to be acquired achieved a domestic turnover of over one million Euro (Section 32f (2) sentence 2 GWB new version). Consequently, the extension of merger control is exclusively applicable to sector inquiry cases; the BKartA may only oblige undertakings to notify all proposed mergers that fall below the regular intervention thresholds following a prior sector inquiry. From a substantive perspective, merger control investigations remain unchanged; prohibitions are solely pursued if competition is significantly impeded.

These notification orders are not subject to the de minimis market threshold of Section 36 (1) sentence 2 no.2 GWB. As indicated in the explanatory memorandum accompanying the legislation, the BKartA may order geographical (obligation pertaining to specific countries, market areas, or municipalities) or factual (obligation pertaining to specific services or products) restrictions. A notification order remains valid for three years after receipt and can be extended up to three times for an additional three years, resulting in a maximum validity of twelve years.

The transitional provision outlined in Section 187 (11) GWB (new version) allows for the inclusion of sector inquiries completed before the entry into force of the 11th GWB Amendment Act under Section 32 (2) GWB (new version). Hence, if the relevant final sector inquiry report was published no less than one year before the 11th GWB Amendment Act came into force, that sector inquiry can serve as the basis of these orders.

## Determining a significant and continuous competition disruption

Following a sector inquiry, the BKartA may identify a significant and continuous disruption of competition in at least one individual or (across) multiple nationwide markets through an independent administrative procedure. This is a stand-alone administrative procedure following the sector inquiry. An infringement of competition law is not required. The legislator has established criteria for evaluating the presence of a competition disruption, a new legal concept introduced in Section 32f (5) GWB (new version). These criteria are primarily based on rather vague standard examples, including the existence of unilateral supply or buyer strength or the isolation of input factors or customers (based on the concepts of input or customer foreclosure from EU law) through vertical relations. Other factors to determine the existence of a disruption in the market are outlined as well and include the number and size of undertakings operating in the market, as well as the price, quantity, selection, and quality of products or services offered in that market. Since the German legislator intentionally - as per the Government draft bill - does not provide for a definition through the standard examples of Section 32f (5) GWB (new version), concerns about the constitutionality of the Amendment Act have been raised by constitutional law scholars. Prof. Dr. Martin Nettesheim, holder of the chair for Constitutional, Administrative, European, and International Law at the University of Tübingen, criticises on behalf of the German Retail Federation, that the legislator has hereby infringed the principle of legal certainty. The absence of suitable well-defined criteria for what constitutes a disruption of competition and what constitutes limited functioning competition, places a significant responsibility on the BKartA for interpretation. As a result, the Competition Enforcement Act does not offer legal certainty for the undertakings subject to this amendment. They cannot predict beforehand the actions necessary to prevent accusations of disrupting competition and facing actions by the BKartA. Especially considering the BKartA's far-reaching scope of intervention measures – as discussed below – which encroach on the freedom to conduct a business under Article 12 GG and the property guarantee of

Article 14 GG, particularly high requirements are to be placed on the principles of democracy and the rule of law. In addition, the 11th GWB Amendment Act does not satisfy the requirements of the essential-matters doctrine ("Wesentlichkeitsvorbehalt"), which dictates that the legislator must decide on essential – especially fundamental rights – matters itself. Following this criticism, a refinement of the concept of competition disruption would have been necessary. Shifting the decision-making responsibility to the executive, on the other hand, is incompatible with the essential-matters doctrine.

As stated in the explanatory memorandum, a disruption is deemed significant if it has "*more than merely a minor negative effect on competition*" within the respective market(s). It is considered continuous if it persists or recurs repeatedly over a period of three years (Section 32f (5) sentence 3 GWB, new version). To determine a disruption of competition, the BKartA must first assess whether traditional antitrust measures would likely prove insufficient in effectively and permanently eliminating the disruption. The assessment standard for the respective subsidiarity was recently adjusted by the Economic Committee's resolution recommendation: the BKartA's findings on the market conditions are no longer required to be "*factually*" sufficient but must "*appear to be sufficient*" in effectively and permanently eliminating the disruption of competition.

The BKartA may issue a declaratory decision to all undertakings potentially addressed by the measures of Section 32f (3) sentence 6 or 32f (4) GWB (new version). These measures are directed only at undertakings, which substantially contribute through their conduct and, as introduced by the Bundestag's resolution, cumulatively contribute through their significance in the market structure to the disruption of competition. A substantial contribution includes any conduct perceivable in the market. The BKartA may extend the formal decision to further addressees at a later date (Section 32f (3) sentence 5 GWB new version). If the BKartA has issued a formal decision identifying a disruption, it may impose a range of behavioural and structural actions under Sections 32f (3) and 32f (4) GWB (new version).

## Behavioural remedies under Section 32f (3) GWB (new version)

The BKartA may order behavioural remedies under Section 32f (3) sentence 5 GWB (new version), if they are deemed necessary to eliminate or reduce the distortion of competition, as part of the extension of its Section 32 (2) GWB powers. The following non-exhaustive list of remedies is provided for in Section 32f (3) sentence GWB (new version):

- granting access to data, interfaces, networks, or other resources,
- specifying business relations (e.g. supply obligations) between undertakings in the investigated markets and at different market levels,
- mandating companies to implement transparent, non-discriminatory, and open standards,
- requiring certain contractual forms or arrangements, including contractual agreements for the disclosure of information,
- prohibiting unilateral disclosure of information that might encourage parallel behaviour by undertakings, and
- separating company or business divisions on an accounting or organisational level.

In its selections of addressees, measures, and degree of intervention, the BKartA should take into consideration the undertaking's position in the respective market(s) (Section 32f (3) sentence 4 GWB, new version), whereby the intensity of the remedies should be proportional to the undertaking's importance in the relevant market.

## Structural remedies (dissolution decisions) under Section 32f (4) GWB (new version)

In addition to the behavioural measures of Section 32 (3) GWB (new version), the 11th GWB Amendment Act expands the BKartA's authority to include decisions related to ownership dissolution, as a follow-up action after a sector inquiry. The compulsory divestiture of company shares or assets may only be ordered if the behavioural measures of Section 32f (3) sentence 6 GWB (new version) are (effectively) ruled out, excluded, not equally efficient, or impose a greater burden on the concerned undertaking (cf. Section 32f (4) sentence 1-2 GWB, new version). Addressees of this *ultima ratio* decision may only be dominant undertakings or undertakings of paramount significance for competition across markets under Section 19a (1) GWB.

In addition, an elimination or substantial reduction of the disruption must the expected result of the dissolution, serving as an *ultima ratio* to behavioural measures.

To address the concerns voiced about the draft bill's dissolution provision potentially undervaluing a company's shares during an ordered divestiture, a possibility to object to the divestment obligation and a compensation provision has been included by the resolution for sales below their actual value. The purpose of this is to prevent undue hardship and to provide possible compensation for affected undertakings. According to the resolution, a divestment obligation may be overturned if the sale proceeds are lower than 50 % of the undertaking's value determined by an auditor during the last annual financial statement. Whether the likelihood of a substantial value reduction, determined by the commonly applied capitalised earnings method and resulting from the implementation of structural remedies

(if not from prior proceedings), should be considered in the valuation of the undertaking remains unclear. If the sales proceeds fall below the determined value, the company shall receive compensation in addition to the sales proceeds. This compensation is equal to 50% of the deviation between the auditor's determined company value and the actual sales proceeds.

Moreover, if the dissolution proceeding concerns an undertaking that has previously acquired parts of a business by means of a merger control clearance, the new version of Section 32f (4) sentence 10 GWB allows for the protection of legitimate expectations. As such, it stipulates a minimum of ten years must pass between the final merger control clearance and the dissolution decision pertaining to the same business units. Consequently, the BKartA may only overturn unfavourable clearance decisions by means of a dissolution decision after ten years.

### Procedural amendments

The 11th GWB Amendment Act further introduces several procedural provisions that specify and/or limit the BKartA's new options for intervention:

- Pursuant to Section 32f (6) GWB (new version), the BKartA may now declare an undertaking's statement of commitments (Section 32b GWB) to be binding for decisions under Section 32f (3) and Section 32f (4) GWB (new version). This allows the BKartA to address anticompetitive concerns while ensuring a degree of flexibility in the implementation of remedies, prior to a formal decision.
- Alongside accelerating the sector inquiry procedure, the legislator intends a standard procedure duration for follow-up measures limited to 18 months after the publication of the final report. This timeline is applicable to the determination of a significant and continuous competition disruption, as well as to decisions pursuant to Sections 32f (2) to 32f (4) GWB (Section 32f (7) GWB, new version). However, exceeding this timeline does not carry any legal consequences.
- The Amendment Act introduced an additional hearing requirement after the initiation of proceedings for cases under Section 32f (3) sentence 6 and 32f (4) GWB (new version). As per Section 56 (7) sentence 3 GWB (new version), the BKartA must hold a public hearing following the initiation of proceedings, unless all parties involved, including any third parties, agree to a decision without a hearing. Considering the publicity of a public oral hearing, an agreement of all parties involved is likely to be the exception, even in future cases of Section 32f (3) sentence 6 and 32f (4) GWB (new version).
- Appeals against a formal decision of the BKartA are admissible under Section 73 (1) sentence 1 GWB. The affected undertakings may file the appeal as parties to the proceedings under Section 54 (2) no.2 GWB. Although appeals against a Section 32f (3) sentence 3 GWB (new version) decision on a significant and continuous disruption do not carry a suspensive effect, it is possible to attain such an effect by filing for interim relief under (very) stringent conditions (cf. Section 67 (3) sentence 3 GWB). It is due to the restrictive nature of the measures regulated in Section 32f (3) sentence 6 and Section 32f (4) GWB (new version), that such appeals have a suspensive effect. As a corresponding addition to the behavioural measures under Section 32f (3) sentence 6 GWB (new version), Section 66 (1) GWB (new version) was only implemented in the course of the Bundestag's resolution and provides the competition authority with the authority to impose the immediate enforcement of a decision if strict conditions are met.
- In regulated markets within the postal, telecommunication, and railway sectors, as well as the electricity and gas supply networks regulated under the Energy Industry Act (EnWG), the BKartA must obtain the consent of the *Bundesnetzagentur* (Federal Network Agency) as the regulatory authority, if it intends to issue remedies according to Section 32f (3) sentence 6 and Section 32f (4) GWB (new version) (cf. Section 32f (8) GWB, new version). In turn, the *Bundesnetzagentur* is obligated to publish a statement on this matter.
- The BKartA's rights to request information and documents from undertakings in the postal logistics sector are expanded to include information on postal services. As a result, postal secrecy, as stipulated in Article 10 GG, will be restricted under Section 59 (1) sentence 5 and (6) GWB (new version).
- Under Section 81 (2) no. 2 GWB (new version) infringements of measures prescribed by a BKartA decision under Section 32f (3) sentence 6 or Section 32f (4) GWB (new version) constitute an offence subject to a fine.

## III. A new chance for the disgorgement of benefits

Moreover, the 11th GWB Amendment Act intends to extend the application of Section 34 GWB to a more practical application. In line with the maxim "*injustice does not pay*", this instrument has historically enabled competition authorities to seize any benefits obtained by undertakings through intentional or negligent infringements of competition law. This distinct administrative procedure may be initiated by the BKartA following a prior antitrust procedure conducted either by itself or by the European Commission. Alternatively, it

may also be initiated independently without any preceding procedure. The primary objective of disgorgement is to ensure that an undertaking does not retain the economic benefits it has gained by violating a provision of the GWB, Article 101, and Article 102 TFEU or a formal decision of the competition authority. Consequently, the disgorgement of benefits requires an economic benefit gained by an undertaking through a violation of competition law to the detriment of other market participants. Disgorgement is only possible, if the economic benefit has not been disgorged by other means, e.g. payment of fines, damages, or confiscation orders of proceeds. To summarise, if the benefits obtained or presumed from an antitrust violation exceed the amount of fines and/or damages paid by the undertaking, an additional disgorgement of benefits may be ordered for the difference between the economic benefit obtained or presumed and the payments made. The above, however, only applies to fines that also serve a disgorgement purpose and, as such, are not only imposed for punitive reasons within the meaning of Section 81d (3) GWB. Since the introduction of the disgorgement of benefits in the 1980s, the BKartA has *de facto* never made use of this instrument. Reasons for this, aside from the limited resources of the BKartA and the subsidiarity clause, include above all difficulties in proving that the economic benefit was obtained through an infringement of competition law. Particularly after the abandonment of assessing fines based on additional proceeds with the 7th GWB Amendment Act, this issue persisted. Proving an economic benefit, while seemingly different, ultimately encounters the same issues.

To provide practical relevance to the disgorgement of benefits under Section 34 GWB, the draft bill proposed three amendments:

- the introduction of a presumption of benefit to determine the existence and amount of such benefits,
- the exclusion of the requirement of fault, and
- the extension of the time limit for disgorgement from seven to ten years.

However, after intense debate among the governing parties, only the introduction of the presumptions was implemented by the 11th GWB Amendment Act.

## Simplifying evidential requirements through two presumptions of benefit

To simplify the assessment of an economic benefit obtained through the intentional or negligent infringement of competition law, the Competition Enforcement Act introduces two presumptions of benefit:

- Section 34 (4) sentence 1 GWB (new version) establishes the rebuttable presumption that an infringement of competition law has led to an economic advantage.
- Section 32 (4) sentence 4 GWB (new version) establishes a presumption pertaining to the amount of the economic benefit, which is deemed to be at least 1% of the generated domestic revenue obtained with the products or services related to the infringement.

Challenging the presumption regarding the minimum amount on grounds of claiming no or a minor economic benefit is not possible. The presumption is rebuttable, but only if the undertaking proves that neither the legal person directly involved in the infringement nor the undertaking has profited from the specified amount during the relevant period (cf. Section 34 (4) sentence 6 GWB, new version). To determine this "comparative benefit", the overall profits of the (worldwide) group during the disgorgement period (maximum of five years) are to be considered.

However, the presumption does not apply when the special nature of the infringement inherently precludes the obtaining of a benefit (cf. Section 34 (4) sentence 9 GWB, new version). To limit its scope of application, cases in which only third parties or other participants have benefited from the infringement are excluded. An example cited in the explanatory memorandum is one, where neither the concerned nor the involved undertaking is awarded a contract; in such cases, logic does not allow for causality between the competition infringement and the attainment of benefits.

Beyond this, the amount of the economic benefit may still be estimated. The Amendment Act clarifies that a preponderance of probability - and not a strict standard, as partially claimed for the interpretation of Section 287 ZPO - shall be sufficient for the estimate (cf. Section 34 (4) sentence 2 and 34 (4) sentence 3 GWB, new version). Regardless, the competition authority must specify the basis of estimation applied in its decision. The total disgorgement amount may not exceed 10% of the previous business year's worldwide group turnover, as is custom for antitrust fines (cf. Section 34 (4) sentence 1 GWB, new version).

The presumption of benefits regarding the amount may further be applicable to infringements committed prior to the entry into force of Section 34 (4) GWB (new version).

In addition, concerns about the constitutionality of future tax assessments on isolated benefit disgorgements under Section 34 GWB (new version) are being expressed. In the absence of a provision equivalent to Section 4 (5) sentence 1 no. 8 sentence 4 EStG for benefit disgorgement, some literature suspects, that the application of Section 34 GWB (new version) may effectively lead to a double taxation of the concerned undertakings, as taxation of the benefits may have already occurred when the BKartA orders a gross disgorgement.

### No amendments to fault and time limit provisions

Whereas the draft bill aimed to remove the requirement of fault under Section 34 GWB for an infringement of competition law, the government parties were unable to reach consensus on this matter. As such the adopted disgorgement of benefits remains applicable only to intentional or negligent infringements of competition law, much to the dismay of the BKartA; establishing the necessary fault is often considered "*challenging and demanding*". Additionally, the benefit disgorgement period of ten years after termination of the infringement was, while still intended in the draft bill, not included in the resolution. As a result, the authority may only order the disgorgement of benefits within seven years after suspension of the infringement. Nevertheless, it is possible to hinder the limitation period under § 34 (5) sentence 2 in conjunction with Section 33h (6) GWB (new version), if the competition authority orders a measure in response to an antitrust infringement. The five-year period, relevant for the disgorgement of benefits, is referred to as the "disgorgement period" in Section 34 (5) sentence 1 GWB (new version).

### Assessment and outlook

Where an economic benefit obtained by an antitrust infringement has not already been (fully) offset in another way, the disgorgement of benefits represents an additional financial risk for undertakings. Especially with the newly implemented presumption rules, this risk has become more tangible for infringing undertakings.

Furthermore, the introduction of the two presumptions of benefit should provide practical significance to the previously rather insignificant provision. Even so, the systematic standing of disgorgement alongside fines, compensation for damages, and confiscation of proceeds remains unchanged. As such, the provision serves a catch-all function, whereby it does not apply if the benefits have been offset by other means. Generally, it would be advisable for the competition authority to order the disgorgement of an economic benefit only after damages proceedings have taken place to avoid potential reimbursements under Section 34 (2) sentence 2 GWB. However, if the BKartA deems the retention of economic benefits by the infringing party unjust, such as in cases of dispersed damages where no or few injured parties claim damages, there is a significant risk of disgorgement. Likewise, when the competition authority refrains from imposing a fine, disgorgement still poses a serious financial risk. In future, perhaps the competition authority will opt for the less burdensome disgorgement of the presumed benefits. As always, it remains to be seen for practical application whether and to what extent the BKartA will order the disgorgement of benefits instead of or in addition to fines or other measures in the future. Nonetheless, the first court decisions on the requirements for counterevidence will be of great importance.

## IV. Effective enforcement of the EU DMA

Finally, the Competition Enforcement Act is also intended to ensure the enforcement of the DMA by the national competition authority. While the DMA entered into force in 2022 and has been applicable since 2 May 2023, certain "gatekeepers", designated by the European Commission in early September, will be subject to the stringent requirements and prohibitions of the DMA from spring 2024 onwards. Although the primary competence to enforce the DMA lies with the European Commission, Article 38 (7) DMA allows the national competition authorities of the Member States to support the European Commission by providing them with investigative powers within their territory for certain infringements of the DMA.

Hence, the newly incorporated Section 32g GWB (new version) authorises the BKartA to conduct its own investigations on possible infringements of Articles 5, 6, and 7 DMA (public enforcement). To further ensure private enforcement, Section 33 (1) GWB has been extended to include violations of Articles 5, 6, and 7 DMA.

This extension will prove beneficial to future litigants in proceedings involving a DMA infringement, as national courts are bound by the European Commission's decisions on the existence of a DMA infringement. To safeguard private enforcement, Sections 87, 89 GWB (new version) and Section 95 (2) no. 1 GVG (new version) concentrate legal proceedings by assigning exclusive jurisdiction over DMA related actions to the regional cartel courts. Due to the similarities between the DMA and (national) competition law, the synchronisation of antitrust competences and thus the bundling of expertise appears to be appropriate. Especially when considering the future possibility of parallel actions based on (national) competition law and the DMA.

## V. Conclusion: A fourth pillar with "claws" and "bite"

In summary, the 11th GWB Amendment Act significantly expands the BKartA's options of intervention and introduces a new dimension - a fourth pillar- to German competition law through sector inquiries and subsequent remedies. Alongside the traditional antitrust measures, such as prohibition of restrictive agreements, abuse control, and merger control, these new amendments provide the BKartA with additional behavioural and structural powers of intervention that do not require an infringement of competition law.

The extent to which the BKartA will exercise these powers remains uncertain and may hinge on its available resources. Given the substantial (investigative) effort required for follow-up measures, it is anticipated that only a single case per year will be pursued. Affiliated with this, is the tension between the inherent goal of a comprehensive and in-depth economic sector inquiry and the legislative intention to expedite the sector inquiry and follow-up measure processes.

Moreover, the fourth pillar of the GWB will be evaluated based on constitutional standards: whether the recent introduction of the "*disruption of competition*" satisfies the principle of legal certainty is increasingly being questioned. Although the provision provides examples, they encompass almost all market behaviour and thus do not adequately serve a limiting function. Furthermore, critics object that the new intervention possibilities disproportionately infringe fundamental rights, including the freedom to pursue an occupation and the freedom of property, potentially rendering them unconstitutional.

Another apprehension is the potential impact on Germany's attractiveness as a business location due to the introduction of these intervention options. Undertakings operating in markets within the scope of serious sector inquiries may be less willing to invest due to the threat of remedial actions. Whether these concerns are valid remains to be determined.

From a more substantive standpoint, the debate and legislative process surrounding the introduction of the new intervention measures has suffered from a lack of explanation by the political institutions and the BKartA. It remains unclear which specific serious infringements and affected sectors the legislature aims to address with these new measures. The provided negative delimitations create the overall impression, that the BKartA has been granted 'blanket' authority, perhaps, to resolve any potential future disruptions of competition.

The practical effectiveness and precision of these new "claws" are yet to be determined. President Andreas Mundt has declared that these new intervention powers will be exercised judiciously and assured, that the BKartA will act with "*sense of proportion*" As noted by Mundt, there is "*no reason to worry that the Bundeskartellamt will design entire industries*" – in fact, the German competition authority likely lacks the resources to do so. Furthermore, it remains to be seen, whether other national legislators will introduce similarly far-reaching intervention instruments to address structural issues in their markets. Recent revelations indicate that the Swedish government is considering comparable solutions.

As extensive as the intervention powers introduced by the 11th GWB Amendment Act may be, there are still two critical issues left unaddressed by the Competition Enforcement Act. Firstly, it does not grant leniency witnesses the widely demanded privileges in subsequent administrative and damages proceedings. Secondly, it does not approach a majority of the issues laid out by the BMWK's ten-point agenda, such as ensuring legal certainty for cooperation between undertakings in pursuit of sustainability. Nonetheless, early indications suggest that these matters will be the subject of the 12th GWB Amendment Act, anticipated within this legislative period. With the "claws of competition law" now honed by the 11th GWB Amendment Act, it is expected that the forthcoming 12th GWB Amendment Act will focus on promoting legal certainty for matters of great practical importance.