

Germany Proposes Break-Up Provision for Dominant Companies Even Absent an Abuse of Their Market Position

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The German Ministry of Economics has proposed changes to the German Act Against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, or GWB) that would grant the German Federal Cartel Office (FCO) the power to force dominant companies to divest assets, even absent an abuse of their market position. Earlier versions of the draft bill have generated significant controversy, which will likely be increased by the new proposal.

Under the proposed bill, the FCO could seek divestiture where:

- The firm is dominant in a market “of macro-economic importance”
- Dominance is anticipated to persist
- Competition in the market would be technically and economically possible
- The acquisition of the relevant assets has not been subject to a final merger clearance decision under the GWB or the European Merger Control Regulation during the last five years
- The assets in question are not subject to sector-specific regulation
- The company meets the German merger turnover thresholds of Sec. 35 (1) GWB

The proposed procedure envisages that before a divestiture order could be issued, the FCO would be required:

- To have recently conducted a sector inquiry into the industry at issue
- To consult with the German Monopoly Commission as well as the State Cartel Offices
- To allow the company to make proposals concerning the assets to be divested
- To obtain an economic expert opinion on their value
- To provide for a reasonable divestiture period

It would then be in the FCO’s discretion to order a divestiture (or structural separation) if this might foreseeably lead to an improvement of the market conditions. In addition, the FCO would have the right to approve the divestiture agreement and could appoint a divestiture trustee or prohibit the exercise of voting rights. The subject of a divestiture order would be able to apply for an exemption from the German Ministry of Economics. Divestiture decisions would in any event be appealable in court.

The FCO has not yet publicly commented on the proposed break-up provision. As the proposal faces

strong opposition from German energy providers (the presumed targets of the amendment) and other interest groups from different industries, as well as the anticipated lengthy and controversial parliamentary legislative process, it is unclear at this point if, when, and in what form it will be enacted.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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