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Germany's New Competition Tool: Sector Inquiry With Remedies

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Germany's New Competition Tool: Sector Inquiry with Remedies[*]

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Abstract

This paper explains the novelties for sector inquiries as a result of the 11th amendment to the German Competition Act. The Bundeskartellamt is now authorized to impose measures ranging from behavioural requirements to the unbundling of a company in order to remedy identified competition problems. The new regulatory instrument supplements antitrust law in an appropriate manner.

Keywords: Competition law, sector inquiry, market investigation, New Competition Tool, Bundeskartellamt, divestiture

JEL classification: K2, L41

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I. Introduction

Germany has a new competition tool. With the 11th amendment to the Competition Act (the ‘Act against Restraints of Competition’ – ‘ARC’), which came into force on 7 November 2023, the German competition authority (Bundeskartellamt) is authorized to order remedial measures following a sector inquiry. Previously, its powers had been limited to initiating proceedings for suspected breaches of competition law and making recommendations to the Federal Government as to how it could legislate to promote competition in the sector that was deemed to be lacking.

The new tool is inspired by the UK’s market investigation instrument,[1] which was introduced there in 2002.[2] Until recently, in Europe the only other jurisdictions with similar regulatory mechanisms were Iceland[3] and Greece.[4] But the German reform could signal a European trend: in Italy, the competition authority was granted market investigation powers by a law adopted in August 2023;[5] in November 2023, the authority launched a sector inquiry into pricing algorithms for air passengers, highlighting its powers to impose remedies on investigated companies to address potential distortions of competition.[6] However, it was only in January 2024, when the Italian Council of State published an opinion,[7] that it was clarified that the instrument was not limited to passenger air transport but could indeed be applied across the board.[8] In Denmark, a market investigation tool with the power to order behavioural remedies has been in force since 1 July 2024.[9] On 2 April 2024, the Hungarian Ministry of Justice sent a draft law to the Hungarian Parliament,[10] which, among other things, provides for the introduction of an instrument that corresponds to section 32f ARC.[11] On 6 September 2024, the Norwegian government published a draft law to be

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[1] See Deutscher Bundestag, Drucksache 20/6824, 16 May 2023, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze (‘Regierungsbegründung’), 18–19, 32 and 36.

[2] For an overview of the UK’s market investigation tool, see Richard Whish, ‘Market Investigations in the UK and Beyond’, in Massimo Motta, Martin Peitz, and Heike Schweitzer (eds), *Market Investigations: A New Competition Tool in Europe?* (Cambridge University Press 2022) 216, 219–59.

[3] Article 16 of the Icelandic Competition Act (as amended by Act No.14/2011) provides for a market investigation tool similar to that in the UK.

[4] Greek Competition Act, art 11.

[5] Decree Law no 104 of 10 August 2023 (converted with amendments by Italian Law 136/2023), art 1, paras 4 and 6 <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2023-08-10;104>.

[6] Autorità Guarante della Concorrenza e del Mercato (AGCM), Press Release of 16 November 2023 <https://en.agcm.it/en/media/press-releases/2023/11/IC56>.

[7] Consiglio de Stato (Council of State), 20 December 2023, no. 01388/2023. <https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=consul&nrg=202301388&nomeFile=202400061_27.html&subDir=Provvedimenti>.

[8] See Gian Luca Zampa and others, ‘The Italian Council of State publishes its unexpected views on the scope of application of the new market investigation powers recently granted to the Competition Authority’, Concurrences, Antitrust Case Laws e-Bulletin, January 2024.

[9] The Danish Parliament passed the respective legislative package on 21 May 2024. The relevant provision is section 15f of the Competition Act <https://www.ft.dk/samling/20231/lovforslag/L121/som_vedtaget.htm>. See Christian Bergqvist and Mark Gall, ‘Significant Amendments to the Danish Competition Act’, Kluwer Competition Law Blog, 5 June 2024.

[10] See <https://www.parlament.hu/irom42/08004/08004.pdf>.

[11] See Eszter Ritter and Iván Sólyom, ‘New Competition Tools Proposed in Hungary’, 5 April 2024 <https://www.lakatoskoves.hu/storage/1565/lkt-newsletter-new-competition-tools-proposed-in-hungary-05-04-2024.pdf>.

sent to the Norwegian Parliament.[12] In Sweden,[13] the government is considering introducing a market investigation instrument that includes remedial powers and started a consultation that is to be finished by the end of February 2025. In the Netherlands, a similar tool is being publicly debated[14] and has been supported by the chairperson and the chief economist of the competition authority.[15] The Czech competition authority has also expressed support for an instrument that would allow it to impose remedies following a sector inquiry.[16] Legislation to this effect is apparently being considered by the government.[17]

To legitimize the new powers for the Bundeskartellamt, the German Federal Government also referred to the new competition tool envisaged by the European Commission in 2020, alongside the underlying inception impact assessment[18] and the expert reports prepared.[19] At the time, the concept was shelved and, instead, political capital was invested in the Digital Markets Act.[20] Now, one might wonder whether the introduction of a 'new competition tool' in several EU Member States could lead to the relaunch of a debate at the EU level; we will come back to this question at the end of this article.

The concept of a market investigation instrument (with remedial powers) derives its legitimacy from the fact that competition law enforcement and complementary pro-competitive legislative interventions leave significant gaps in the protection of competition. Effective competition law enforcement is limited by various facets. There are substantive limitations, but the procedural and remedial limitations must not be overlooked; these are partly a matter of law but also partly a consequence of the institutional framework for competition enforcement.[21] The limitations of competition enforcement are particularly obvious when market-opening remedies are called for, but they also arise in other situations. For example, gaps in

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[12] The draft bill Prop. 118 L is available in Norwegian at <https://www.regjeringen.no/contentassets/6fa533bcc39b4ef2810f648e2508b36f/no/pdfs/prp202320240118000dddpdfs.pdf>.

[13] The Swedish government has commissioned a special investigator to submit a report by 28 February 2025 analysing and assessing the need for a market investigation tool. See <https://www.regeringen.se/rattsliga-dokument/kommittedirektiv/2023/10/dir.-2023136>.

[14] See Jasper van den Boom and others, 'Towards Market Investigation Tools in Competition Law: The Case of the Netherlands' (2023) 14 JECLAP 553–64.

[15] See Martijn Snoep, 'More tools to combat market power, please', 29 August 2023 <https://www.acm.nl/en/publications/blog-martijn-snoep-more-tools-combat-market-power-please> and Paul de Bijl, 'A new phase in competition oversight', 25 May 2023 <https://www.acm.nl/en/publications/blog-new-phase-competition-oversight>.

[16] Czech Office for the Protection of Competition, 'The Office Presented a Number of Legislative Proposals to Support Efficient Competition', 16 January 2024 <https://uohs.gov.cz/en/information-centre/press-releases/competition/3809-the-office-presented-a-number-of-possibble-legislative-proposals-to-support-efficient-competition.html>. See Jan Kupčik, 'New competition tool and call-in power for mergers in Czechia?' Kluwer Competition Law Blog, 26 January 2024.

[17] See Robert Neruda, Petra Joanna Pipková, Dušan Valent, and Martin Vejtasa, 'New competition tool à la tchèque?', 13 May 2024, <https://en.havelpartners.blog/new-competition-tool-a-la-tcheque>.

[18] European Commission, Inception Impact Assessment (New Competition Tool) – Ares(2020)2877634 – 04/06/2020.

[19] Regierungsbegründung (n 1), 16 and 19.

[20] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). OJ L 265, 12.10.2022, pp. 1–66.

[21] See Jens-Uwe Franck, 'Competition Enforcement versus Regulation as Market-Opening Tools: An Application to Banking and Payment Systems' (2024) 12 Journal of Antitrust Enforcement 148, 150–57 and 171–75.

the unilateral promotion of tacit collusion, a challenge of particular importance in the era of algorithmic pricing,[22] have been extensively researched and discussed.[23]

In principle, selective legislative intervention – be it EU or national – could be expected to fill the remaining gaps. The comparative advantage of such legislative regulation lies in a high degree of democratic legitimacy and accountability and, in the case of EU law, in the possibility of avoiding regulatory fragmentation in the internal market. In addition, legislatures may react rapidly to regulatory challenges.

Experience shows that it is not realistic to rely on dedicated legislative intervention alone. The opportunity costs appear to be too high. It is true that pro-competitive regulatory interventions can occasionally be observed.[24] However, it seems that lawmakers tend to be reluctant to invest their limited resources in considering and debating possible distortions of competition in markets that receive less of the political spotlight, and in adopting the often small but detailed rules that are needed to respond to barriers to entry or other competition problems that cannot be effectively addressed by competition enforcement. It can therefore be argued that market investigation (with remedial powers) can play a useful complementary role to both competition law enforcement and legislative rulemaking.

The remainder of this article is structured as follows. Section II provides an overview of the new tool. Section III briefly explains that the Bundeskartellamt's power to impose extended merger notification obligations on undertakings has been modified and integrated into section 32f ARC. Sections IV and V set out in more detail the two stages of the new remedies phase following a sector inquiry: the declaration of a 'significant and continuing malfunctioning of competition' and the actual imposition of remedies. Sections VI and VII focus on some modifications to the procedure and judicial redress. In section VIII we illustrate how the new tool could work in practice. We look at past scenarios of competition enforcement and/or pro-competitive legislative intervention and consider whether and how the market investigation tool could have been used and possibly led to better results. We also speculate on scenarios where ownership unbundling could be used to good effect. In Section IX, we take a look back at some of the political debates that have surrounded the new German competition instrument, and we offer some assessment of them. Section X concludes by considering, in particular, whether the idea of a new EU competition instrument might be revived.

II. The new tool in a nutshell

The competence to launch sector inquiries[25] has existed in Germany since 2005.[26] The Bundeskartellamt is supposed to complete a sector inquiry within 18 months[27]

[22] See, for example, Emilio Calvano and others, 'Protecting Consumers from Collusive Prices due to AI' (2020) 370 Science 1040–43.
[23] See, for example, Patrick Andreoli-Versbach and Jens-Uwe Franck, 'Econometric Evidence to Target Tacit Collusion in Oligopolistic Markets' (2015) 11 Journal of Competition Law and Economics 463–92.
[24] See the examples mentioned below, section VIII.A.
[25] ARC, s 32e.

and is required to publish its findings in a report.[28] As a recent example, it published a report on its 'collection of municipal waste' sector inquiry.[29] Ongoing investigations concern the infrastructure of charging stations for electric vehicles as well as refineries and fuel wholesalers. Such sector inquiries can now function as the first phase (the 'investigatory phase') of the new competition tool. If, through a sector inquiry, the authority identifies competition deficits, it has three options available to react: it can go ahead and investigate whether a competition law infringement can be substantiated;[30] it can recommend legislative intervention;[31] or it can issue pro-competitive remedies based on its new powers.[32]

The competence under the third option includes, first of all, the possibility to impose extended notification obligations on individual undertakings for acquisitions that, although they do not meet the thresholds, will then be reviewed under 'normal' merger control procedures. This option was introduced in 2021.[33] It has now been modified[34] and integrated into the new system of sector inquiries with remedies.[35]

The main innovation is the Bundeskartellamt's option to initiate a second phase (the 'remedial phase'), which may lead to the imposition of competition-enhancing measures. This remedial phase consists of two stages. In a first stage, the authority may determine the existence of a significant and continuing malfunctioning of competition.[36] This decision can be addressed to one or more undertakings. On this basis, the authority can, in a second stage, impose behavioural or structural remedies necessary to eliminate or reduce these competitive deficits.[37]

The new instrument may only be used in a subsidiary manner.[38] On the basis of the results of the sector inquiry, the Bundeskartellamt must predict that its competition enforcement powers appear to be 'unlikely to be sufficient to eliminate the malfunctioning of competition effectively and permanently'.[39]

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[26] Since then, the Bundeskartellamt has investigated at least 17 sectors based on its powers under section 32e(1) to (5) ARC, according to information available on the authority's website. In addition, there are at least six sector inquiries based on suspicions of 'substantial, permanent or repeated infringements of provision under consumer protection law which, due to their nature or scale, harm the interests of a large number of consumers' (section 32e(6) ARC). These latter sector inquiries cannot form a basis for measures under the new competition tool pursuant to section 32f ARC.

[27] ARC, s 32e(3).

[28] ARC, s 32e(4), 1st sentence. Although the law has not been clarified in this respect, if the Bundeskartellamt considers initiating a remedial phase following the results of a sector inquiry, it should publish an interim report in order to give firms in the sector under investigation the opportunity to comment at an early stage of the proceedings, which may lead to remedial measures under section 32f(3) and (4) ARC.

[29] Bundeskartellamt, Sektoruntersuchung, Erfassung von Siedlungsabfällen/Aufbereitung von Hohlglas (B5-60/22), Abschlussbericht (December 2023).

[30] See ARC, s 32f(1), 1st sentence ('without prejudice to its other powers').

[31] ARC, s 32e(4), 3rd sentence.

[32] ARC, s 32f(1), 1st sentence, (2), (3), and (4).

[33] See ex-section 39a ARC.

[34] See section III.

[35] ARC, s 32f(2).

[36] See section IV.

[37] ARC, s 32f(3), sentences 6 and 7.

[38] See section B.

[39] ARC, s 32f(3), 1st sentence.

Remedies can only be imposed on companies whose behaviour or importance in the market structure contributes significantly to the alleged distortion of competition.[40] The law contains a non-exhaustive catalogue of possible remedies. This is based on the range of possible competitive deficits that, in the legislature's view, are not sufficiently addressed by competition law. It lists, for example, access to data, interfaces, or networks, as well as obligations to create transparent, non-discriminatory, and open norms and standards that facilitate market access.[41] Forced divestiture is available under enhanced requirements.[42]

Several elements are meant to promote a more collaborative and participatory style of procedure.[43] The authority must organize an oral hearing.[44] In addition to the potential addressees of the remedies, representatives of the industries concerned must generally be given the opportunity to express their views.[45] The use of external expertise is not specifically addressed.

The undertakings addressed enjoy judicial protection.[46] The 'malfunctioning of competition' finding and the remedies imposed can be challenged separately.

III. Extended merger control

If a sector inquiry, possibly with the help of subsequent investigations, finds 'objectively plausible indications' that a future concentration in a sector under investigation for which a report has been prepared[47] could significantly impede 'effective competition in Germany', the Bundeskartellamt can require companies to notify any merger in one or more of the relevant sectors. This obligation may be imposed for a period of three years; this can be extended three times for three years each time.[48] Any further extension would require a new sector inquiry.

This extension of the notification obligations is intended to capture repeated takeovers below the turnover thresholds of section 35 ARC (so-called 'stealth consolidations'). It is primarily designed to protect competition in regional markets.[49] In order to better achieve this, the integration of this tool into section 32f ARC has en passant also significantly lowered the requirements: the requirement that the obligated company must have a strong market position nationwide[50] was abandoned. Moreover, the turnover thresholds were lowered from EUR 500 million (worldwide turnover) to EUR 50 million for the acquirer and from EUR 2 million to EUR 1 million

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[40] See section C.
[41] See section A.
[42] See section B.
[43] See section VI.
[44] ARC, s 56(7), 3rd sentence.
[45] ARC, s 56(2).
[46] See section VII.
[47] See ARC, s 32e(4).
[48] ARC, s 32f(2), 5th sentence.
[49] Regierungsbegründung (n 1), 17 and 28. Under German law, large-scale acquisitions of targets with no or low turnover (as may be typical in the pharmaceutical or digital sectors) can be captured by the transaction value-based threshold under section 35(1a) ARC.
[50] Pursuant to ex-section 39a (1) no. 3 ARC, the undertaking to be obliged had to have a share of at least 15 per cent in the supply of or demand for the products or services in the specified sector in Germany.

for the target. In each case, the domestic turnover of the last financial year will apply.[51] Finally, the exemption for so-called de minimis markets, i.e. markets with a domestic turnover of less than EUR 20 million,[52] does not apply in cases that need to be notified under this provision.[53]

It can be assumed that, given these relaxed requirements, this provision could gain considerable practical significance. However, the Bundeskartellamt has not yet used this instrument. In December 2023, following an updated sector inquiry into domestic waste collecting and hollow glass processing, the authority announced that it considered initiating a proceeding under section 32f(2) ARC to impose an obligation to notify all concentrations upon the Rethmann Group, the leader in the investigated markets.[54]

IV. First stage of the remedial phase: establishing a 'significant and continuing malfunctioning of competition' and subsidiarity

The first step in the new remedial phase is for the Bundeskartellamt to decide that there is a 'significant and continuing malfunctioning of competition'. In addition, the authority must assess whether the subsidiarity requirement is met.

A. Declaring the existence of 'significant and continuing malfunctioning of competition'

A 'malfunctioning of competition' is said to be characterized by a low intensity of competition, which is reflected in corresponding 'market outcomes' such as high prices, limited product choice or quality, low levels of innovation, and inefficient use of resources.[55] This reference to preventing losses of allocative, dynamic, and productive efficiency[56] illustrates the complementary alignment of the new instrument with traditional competition law.

Section 32f(5) ARC contains a catalogue of scenarios in which competition may be distorted but which the German legislature did not consider to be adequately addressed by competition law enforcement. These include unilateral supply or buyer power; restrictions on entry, exit, or capacity of companies or on switching to another supplier or buyer; uniform or coordinated behaviour; and the foreclosure of inputs or customers through vertical restrictions.[57]

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[51] ARC, s 32f(2), 2nd sentence.
[52] ARC, s 36(1), 2nd sentence, no 2.
[53] ARC, s 32f(2), 2nd sentence. This means that not only can the thresholds effectively be lowered but that the substantive rules governing mergers can also be tightened.
[54] Bundeskartellamt, Press Release of 28 December 2023, 'Rethmann Group is clear market leader – Results of sector inquiry "Domestic waste collection / hollow glass processing" published' <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_12_2023_SU_Abfaelle.html?nn=55030>.
[55] Regierungsbegründung (n 1), 15.
[56] Cf. Article 101(3) TFEU.
[57] These scenarios are detailed in Regierungsbegründung (n 1), 32–34.

In addition, section 32f(5) ARC lists various factors to be taken into account in this assessment, relating to market structure, the market position of the undertakings in the sector, links with upstream and downstream markets, and product characteristics.

The distortion of competition to be proved by the Bundeskartellamt must be 'significant' and thus have 'more than merely minor negative effects on competition'.[58] According to the definition given in the law, the fact that it must also be characterized as 'continuing' presupposes that it existed 'over a period of three years … permanently or occurred repeatedly'. In addition, at the time of the decision, there must be 'no indications that the malfunctioning is more likely than not to cease to exist within two years'.[59]

Finally, the malfunctioning of competition must be determined 'in at least one market which is at least national in scope, in several individual markets or across markets'.[60] This limitation essentially excludes intervention in cases where the distortion of competition is confined to one regional market.

B. Subsidiarity

The Bundeskartellamt must only use the new power to impose remedial measures 'insofar as, based on the information available to [it] at the time of its decisions, the application of the authority's other powers under Part 1 of [the Competition Act][61] appears unlikely to be sufficient to eliminate the malfunctioning of competition effectively and permanently'.[62] On the one hand, there is a good reason for this subsidiarity clause, namely to avoid substitution effects. It can ensure that the sanctioning effect of competition law enforcement (possibly in the form of fines) will not be lightly foregone by the authority. Ongoing case practice is also indispensable for the further development of competition law in the light of changing circumstances and new challenges to functioning competition.

On the other hand, the legal enshrinement of the subsidiarity carries with it the risk that the application of the new remedies will be made excessively burdensome. The wording of the provision quoted above makes it clear that the legislature has recognized that a low degree of certainty on the part of the authority as to the remedies available under traditional competition law must suffice to satisfy the condition of subsidiarity. This must also be acknowledged in case of judicial review.[63] In particular, it should be borne in mind that competition law enforcement may not only appear to be inadequate or insufficient to remedy an identified distortion of competition due to substantive limitations. As mentioned before, attention should also

[58] Regierungsbegründung (n 1), 28.
[59] ARC, s 32f(5), 3rd sentence.
[60] ARC, s 32f(3), 1st sentence.
[61] This is a reference to ARC, ss 1–47l.
[62] ARC, s 32f(3), 1st sentence.
[63] Regierungsbegründung (n 1), 29.

be paid to the limitations of available remedies and the limiting effects of procedural or institutional frameworks.[64]

C. Addressees

The determination of significant and continuing malfunctioning of competition must be addressed to those undertakings that are potential addressees of remedial measures.[65] These can only be those undertakings 'whose conduct and … relevance for the market structure contributes significantly to the malfunctioning of competition'.[66] In particular, the market position must be taken into account.[67] The legislature has thus identified important aspects that must guide the Bundeskartellamt's discretion in deciding who is to be addressed in a finding of a qualified distortion of competition and the remedial measures to be taken. The requirement of proportionality, which must be respected in any case, is specified by these aspects. This does not rule out the possibility of targeting, for example, undertakings with only small market shares, where this appears appropriate and necessary in individual cases in order to reduce or even eliminate significant distortions of competition. The Bundeskartellamt may extend the group of addressees at a later date.[68]

V. Second stage of the remedial phase: imposing pro-competitive remedies

A. Behavioural and structural remedies

The Bundeskartellamt can order behavioural and structural remedies if these are necessary to reduce (or even eliminate) the identified malfunctioning of competition.[69] The provision lists a number of conceivable measures that, from the legislature's point of view, may be particularly appropriate to address those competition deficits that cannot be adequately addressed by competition law enforcement alone. In particular, remedies are listed that are intended to foster market entry, namely the granting of access to data, interfaces, networks, or other facilities and the obligation to establish transparent, non-discriminatory, and open norms and standards.[70] To make tacit collusion more difficult, unilateral disclosure of information may be prohibited.[71]

The Bundeskartellamt has discretion as to which remedial measures are imposed and to whom they are addressed. Any intervention must be proportionate:[72] the more a remedy interferes with fundamental rights, the more effective it must be in

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[64] See above n 21 and accompanying text.
[65] ARC, s 32f(3), 2nd sentence.
[66] ARC, s 32f(4), 3rd sentence.
[67] ARC, s 32f(4), 4th sentence.
[68] ARC, s 32f(3), 5th sentence.
[69] ARC, s 32f(3), 6th sentence.
[70] ARC, s 32f(3), 7th sentence, nos 1 and 3.
[71] ARC, s 32f(3), 7th sentence, no 5.
[72] ARC, s 32f(3), 8th sentence, in conjunction with s 32(2).

relation to the identified malfunctioning of competition. The latter in turn depends on the extent of the malfunctioning and on the extent to which it can be remedied on a scale between 'slight reduction' and 'complete elimination'. The choice of the addressees has to be determined according to the criteria mentioned above.[73]

B. Ownership unbundling: forced divestiture of shares and assets

Ownership unbundling as a possible remedy – such as the spin-off of certain business areas – was the subject of particularly heated debate in the run-up to the amendment of the Competition Act. This type of remedy is not only politically controversial but also sensitive because of its encroachment on the freedom of ownership, which is an essential fundamental right. To take this into account, specific rules are laid down in section 32f(4) ARC.

First, stricter requirements apply. Unbundling must only be ordered as a measure of last resort ('*ultima ratio*'[74]): other types of remedies must be 'not possible' or not equally effective or would be more burdensome to the undertaking.[75] Divestiture orders must only be imposed on undertakings that are either market-dominant or designated as section 19a addressees ('undertakings of paramount significance for competition across markets'[76]). The latter currently applies to Alphabet, Amazon, Apple, and Meta; designation proceedings against Microsoft are pending.[77] Moreover, unbundling must only be imposed when it is expected to at least 'significantly' reduce the determined malfunction of competition.[78]

Second, the issue of compensation is addressed. Although the explanatory memorandum to the bill stated that the protection of fundamental rights was already satisfied by the fact that the undertaking on which the remedy will be imposed (or, in fact, its shareholders) would receive the proceeds of the sale,[79] a more generous solution was ultimately adopted: it is only when 50 per cent of the value can be realized that the ordered divestiture must be completed.[80] In addition, the seller is compensated for half of the difference between the value and the sale proceeds.[81] Taken together, these ensure that the seller receives proceeds and compensation totalling at least three quarters of the value determined by an auditor to be appointed by the Bundeskartellamt. The valuation is based on the closing date of the financial statements prior to the divestiture order. The valuation is therefore essentially based on the status quo ante. However, at this point in time, the authority may have already declared the existence of a malfunctioning of competition vis-à-vis the undertaking or

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[73] See section C.
[74] Regierungsbegründung (n 1), 30.
[75] ARC, s 32f(4), 2nd sentence.
[76] See on this concept Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 JECLAP 513, 514–19.
[77] Jens-Uwe Franck, 'Abuse Proceedings Against Digital Gatekeepers under Section 19a of the German Competition Act: Taking Stock of Early Results' (4 May 2024), 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769738>.
[78] ARC, s 32f(4), 1st sentence.
[79] Regierungsbegründung (n 1), 31.
[80] ARC, s 32f(4), 8th sentence.
[81] ARC, s 32f(4), 9th sentence.

even imposed (behavioural) remedies that then proved to be insufficient. Potential or actual remedies that would have or have had an impact on the profitability of the undertaking's business could therefore have an impact on the valuation of the undertaking and hence on the calculation of the compensation.

Third, in relation to merger control, a time limit is stipulated: if an unbundling order is to apply to shares or assets that were the subject of merger control clearance, 10 years must have passed.[82] The repurchase of divested assets or shares is prohibited for a period of five years, unless the undertaking can prove that the malfunctioning of competition no longer exists.[83]

The German legislature was aware that this alone would not take sufficient account of the overriding nature of the merger decisions by the European Commission. The relationship with European merger control should therefore otherwise follow from Article 21 of the EU Merger Regulation.[84] This statement opens leeway for an interpretation of section 32f ARC in conformity with EU law and a corresponding exercise of discretion by the Bundeskartellamt. Prior clearance of a merger by the Commission must not be deprived of its practical effectiveness. A divestiture can therefore only be ordered by the Bundeskartellamt if there has been a material change in the market and the competitive situation since then.[85] After 10 years, this will often, but not always, be the case.

Furthermore, the German legislature cannot, of course, restrict the powers of the European Commission under the EU Merger Regulation. If a repurchase is subject to EU merger control law, the Bundeskartellamt must consider the possibility that a forced divestiture will ultimately come to nothing because the Commission clears the repurchase. Ideally, the authority will then refrain from a forced divestiture in the first place if it foresees that a possible buy-back could be cleared on the basis of Article 2 of the EU Merger Regulation.

VI. Procedure

Rulemaking via section 32f ARC is directed solely at the future; it does not seek to brand and sanction past conduct as unlawful. The Bundeskartellamt can use this instrument to set sector-wide standards for the market conduct of firms. This may include detailed technical rules that are intended, for example, to ensure interoperability and data access in order to lower barriers to market entry. Thus, as regards the framework conditions and objectives, the procedure differs considerably from competition law enforcement. The success of the instrument – in terms of setting appropriate pro-competitive remedies but also in terms of legitimacy – could be promoted by an enforcement style that is less adversarial and legalistic but more

[82] ARC, s 32f(4), 10th and 11th sentences.
[83] ARC, s 32f(4), 9th sentence.
[84] Regierungsbegründung (n 1), 31.
[85] Jürgen Kühling and Thiemo Engelbrecht, in Torsten Körber, Heike Schweitzer and Daniel Zimmer (eds), *Immenga/Mestmäcker, Wettbewerbsrecht, vol II, GWB* (7th edn, C.H. Beck 2024), §32f, para 57.

pragmatic and participatory than competition law enforcement.[86] However, the success of a co-operative approach ultimately depends on the willingness and ability of the companies in the industry under investigation to participate in good faith.

In some cases, remedial measures may be found by consensus with the undertakings in the sector that had been under investigation. This can ensure that competition deficits are remedied in an effective and pragmatic manner without unduly interfering with the entrepreneurial freedom of the market players. The Bundeskartellamt can declare appropriate commitments by the undertakings to be binding.[87] It can be assumed that this will normally only become relevant once the authority has formally declared the existence of a 'malfunctioning of competition' vis-à-vis an undertaking – thus making it a potential addressee of remedies. However, according to the broad wording of the provision and taking into account the way commitments are used in competition enforcement, this does not appear to be a prerequisite.[88]

The special nature of rulemaking under section 32f(3) and (4) ARC has been taken into account by making some changes to the procedure. In addition to the general right of interested parties to state their case,[89] the Bundeskartellamt must schedule a public hearing.[90] This hearing should allow an open exchange of views on whether there is a malfunctioning of competition and what measures could be taken to remedy it. The authority should formulate a reasoned (preliminary) position in advance to ensure an (informational) level playing field. It should also regularly give representatives of the business sectors affected by potential remedies the opportunity to state their case.[91] There is no specific provision on whether and under what conditions independent external experts can be invited to the hearing, for example to provide information on technical or economic issues.[92]

VII. Judicial redress

Appeals against decisions of the Bundeskartellamt under section 32f ARC may be lodged with the Düsseldorf Higher Regional Court.[93] The practical effectiveness of judicial redress is enhanced by the two-stage nature of the remedial phase. The addressees and other parties to the proceedings[94] may first bring an action against the authority's declaration of a 'malfunctioning of competition'. To avoid undue delays in the remedial phase, this appeal has no suspensive effect. However, the court may order suspensive effect upon application.[95]

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[86] See – with regard to the UK's market investigation tool – Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?' (2021) 12 JECLAP 44, 50–51.
[87] ARC, s 32f(6), in conjunction with s 32b.
[88] Kühling and Engelbrecht (n 85), §32f, para 69.
[89] ARC, s 56(1).
[90] ARC, s 56(7), 3rd sentence.
[91] ARC, s 56(2).
[92] The only mention in the legislative materials is that interested third parties may submit comments on the findings of the sector inquiry report on an ad hoc basis. Regierungsbegründung (n 1), 28.
[93] ARC, s 73(1) and (4).
[94] ARC, s 54(2) no 1, 3, and 4.
[95] The requirements are specified in ARC, s 67(3), 3rd sentence, in conjunction with 1st sentence, nos 2 and 3.

An appeal may then also be lodged against the remedial measures. This appeal does have suspensive effect.[96] However, the Bundeskartellamt may order immediate enforcement.[97] In this case, the suspensive effect can only be restored by the court in interlocutory proceedings.[98]

In practice, the level of scrutiny applied by the court will be of crucial importance. To avoid excessive intervention, it will be important that, in the first step, the court reviews whether the finding of a 'malfunctioning of competition' is based on a sound understanding of the competitive situation, the market mechanisms at work, and the business models prevalent in the sector, which must be substantiated by the results of the sector inquiry. In the second step, the Bundeskartellamt must be required to submit a well-founded and conclusive forecast demonstrating how the remedies ordered can remedy the competition deficits identified.

VIII. Illustration

In this section, we illustrate how the new tool could work in practice. We will look at past scenarios of competition enforcement and/or pro-competitive legislative intervention and consider whether and how the use of a market investigation tool might have played out. We will also speculate on scenarios where ownership unbundling could be used to good effect.

A. Behavioural – in particular, market-opening – interventions

Three examples from the Bundeskartellamt's practice are intended to illustrate scenarios in which a sector inquiry with remedies would probably have been a (more) appropriate way of rulemaking and in which the use of the new instrument should therefore be considered in future cases.[99]

1. Price parity clauses on hotel booking platforms

The first example concerns the ban on price parity clauses on hotel booking platforms.[100] In 2010, the Bundeskartellamt initiated proceedings against the then market leader, HRS, for violating the ban on coordination and abuse, which resulted in a prohibition decision in December 2013.[101] It was only when the authority adopted this decision against HRS[102] that it initiated proceedings against its competitors Booking and Expedia on the basis of essentially the same conditions applied by these platform operators. By that time, however, Booking had already caught up with

[96] ARC, s 66(1) no 1.
[97] ARC, s 67(1).
[98] ARC, s 67(3) and (4).
[99] In none of the cases mentioned were the authors involved as an expert or in other advisory capacity or are there any other financial links of interest.
[100] The Bundeskartellamt uses the term 'best price clauses'. Hotel booking platforms may impose such clauses to prevent a hotel from offering better conditions on other sales channels. This affects competing booking platforms and direct sales via the hotel's own website or telephone.
[101] BKartA 20 December 2013, B9-66/10 – HRS.
[102] BKartA 20 December 2013, B9-66/10 – HRS, Fallbericht (Case report) of 5 March 2014, 1.

HRS in Germany in terms of the number of bookings.[103] It was then not until December 2015 that Booking was also banned from using the clause.[104]

An advantage of intervention based on a sector inquiry would have been that, inter alia, the prohibition of the use of a price parity clause could have been imposed on all relevant platform operators at the same point in time. This would not only have been more effective in protecting competition (assuming that a sector inquiry would have been launched in 2010 and that remedies could have been imposed at an earlier point in time than the actual decision against Booking) but it would also have increased the legitimacy of the intervention in the market. In particular, it would have avoided the accusation that a 'German SME' was at a disadvantage compared to 'large American corporations'.[105] In other European jurisdictions (France, Belgium, Italy, and Austria) – and also to ensure symmetrical regulation – parity clauses were prohibited by law for hotel booking platforms.[106] This means that these jurisdictions used arguably scarce legislative capacity for an issue that could have been taken care of by a market investigation with remedies. At the same time, it is clear that legislative intervention remains the first choice where a truly swift and market-wide intervention is needed.[107]

The example illustrates the uncertainties with regard to the subsidiarity provided for in section 32f ARC vis-à-vis the enforcement of antitrust law: the aforementioned decisions of the Bundeskartellamt were confirmed by the courts; in the case of Booking, however, only by the Federal Court of Justice (BGH)[108] after the Düsseldorf Higher Regional Court had initially overturned the decision.[109] The antitrust treatment of parity agreements by digital platforms was still uncharted territory in 2013 and 2015. At that time, the Bundeskartellamt could not have been certain that an antitrust violation would be confirmed in the last instance.

Even after the BGH's decision, it has not been fully clarified under which market-related and, above all, company-related conditions a price parity clause violates antitrust law in individual cases. At the request of the Rechtbank Amsterdam, the ECJ confirmed the BGH's position that neither broad nor narrow price parity clauses fall outside the scope of Article 101(1) TFEU under the 'ancillary restraints' doctrine.[110] However, it was not finally clarified under which circumstances wide

[103] BKartA 20 December 2013, B9-66/10, para 24 – HRS.
[104] BKartA 22 December 2015, B9-121/13 – Booking.com.
[105] The news agency dpa quoted HRS Managing Director Tobias Rage as saying: 'For over two years, HRS has been at a clear disadvantage as a German SME compared to large American corporations.' See 'Verbot für HRS-Bestpreisklauseln bleibt bestehen' *Süddeutsche Zeitung* (9 January 2015).
[106] Jens-Uwe Franck and Nils Stock, 'What Is "Competition Law"?—Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements' (2020) 39 Yearbook of European Law 320, 362–70.
[107] See Franck (n 21) 183.
[108] BGH, 19. Mai 2021, KVR 54/20 – Booking.com.
[109] OLG Düsseldorf, 4 January 2019, Kart 2/16(V), *Juris – Booking.com* ('*Enge Bestpreisklausel II*'). In contrast, the court had confirmed the Bundeskartellamt's HRS decision, OLG Düsseldorf, 9 January 2015, VI-Kart 1/14(V), *Juris – HRS*.
[110] ECJ 19 September 2024, Case C-264/23, *Booking.com and Booking.com (Deutschland)*, ECLI:EU:C:2024:764, paras 50–75.

and/or narrow price parity clauses could be exempted in individual cases under Article 101(3) TFEU.[111]

On the one hand, if section 32f ARC had already been in force in 2010 and the Bundeskartellamt had initiated a sector inquiry, it seems quite plausible that the Bundeskartellamt could have banned price parity clauses for the entire sector in 2013, even taking into account the subsidiarity principle. On the other hand, the authority might then have missed the opportunity to initiate a judicial adaptation of competition law to the rise of digital platforms. In particular, if this clarifies the legal interpretation of EU competition law, for example by means of a preliminary reference, it can generate significant positive externalities. In view of legal uncertainty – with regard to new 'theories of harm', for instance – it can therefore be difficult for the authority to decide ex ante whether resources would be better invested in antitrust proceedings and/or a sector inquiry with remedies.

2. Interoperability of heat cost meters and allocators

Our second example relates to the sector inquiry into meter reading services for heating and water costs (submetering), which was initiated in 2015 and concluded in May 2017.[112] According to the findings of the Bundeskartellamt, this is an oligopolistic market in which the two largest providers in Germany had a combined market share of more than 50% (based on data for 2014). The Bundeskartellamt saw 'considerable indications for the existence of a non-competitive oligopoly to which at least the two market leaders, but possibly also other of the five largest providers, belong'[113] and stated that the competition problems were primarily structural in nature, but also partly due to anticompetitive behaviour on the part of the submetering providers. However, there was apparently no suspicion of antitrust infringements.

To promote the competition between the market leaders and reduce barriers to market entry, the Bundeskartellamt recommended legal measures, in particular the promotion of interoperability of meters and heat cost allocators.[114] The German government took up this recommendation and implemented it by amending the regulation on heating cost billing.[115] Under section 32f ARC, the competition authority would now have the power to impose such interoperability requirements and other measures itself in order to facilitate provider switching. The example illustrates that the new tool could substitute for legislative interventions where competition problems are the underlying cause of the malfunctioning of the market and remedies as foreseen by section 32f ARC are available to address them.

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[111] See ECJ 19 September 2024, Case C-264/23, *Booking.com and Booking.com (Deutschland)*, ECLI:EU:C:2024:764, paras 55, 58, and 73 ('Thus, the fact, assuming it were established, that price parity clauses tend to combat possible free-riding phenomena and are indispensable in guaranteeing efficiency gains or in ensuring the commercial success of the main operation does not make it possible to classify them as 'ancillary restraints' for the purposes of Article 101(1) TFEU. That fact can be taken into account only in the context of the application of Article 101(3) TFEU').

[112] See BKartA, Sektoruntersuchung Submetering, B8-51/15, Report of May 2017.

[113] BKartA, 'Sektorunterschung bei Ablesediensten von Heiz- und Wasserkosten' (4 May 2017), 2.

[114] Ibid.

[115] See Regulation on Heating Costs (Heizkostenverordnung), s 5(5) <https://www.gesetze-im-internet.de/heizkostenv/__5.html>.

3. Availability of APIs for payment initiation services

In July 2010, the Bundeskartellamt initiated proceedings against several German banking associations on suspicion of coordinated foreclosure of the entry of providers of payment initiation services. The banks had agreed to include clauses in their general terms and conditions for account holders that made the use of payment initiation services via screen scraping, the technical model used at the time, appear to be a breach of contract. In 2016, the authority did ultimately find an infringement but left it at establishing the illegality of the said coordination; it imposed neither sanctions nor remedies.[116] Statements made by the authority suggest that it had already concluded in 2011 that illegal coordination had taken place; why then did the authority tolerate the entry barriers illegally erected by the banks, which continued to be effective? It appears likely that the authority hesitated because of self-perceived remedial and institutional limitations. The authority may have assumed that it did not have a mandate – or at least not a sufficiently secure one – to force the banks to amend their terms and conditions and thus not to prohibit their customers from using payment initiation services based on the screen scraping technique, let alone to oblige banks to make application processing interfaces (APIs) available to payment initiation service providers. Apart from the legal restrictions on remedies, it can be assumed that the authority also wanted to avoid defining the common technical standards for the APIs necessary for secure communication between banks and payment initiation service providers.[117]

Market access for payment initiation service providers was ultimately secured by the EU legislature through a reform of the Payment Services Directive in 2015.[118] In particular, the directive defines conditions for secure communication between the providers of such services and account-holding banks. The latter must provide dedicated interfaces, which in fact made the use of screen scraping obsolete.[119]

Although the harmonization of market access rules for payment initiation services at EU level appears ultimately and with hindsight beneficial because it avoids regulatory fragmentation in the internal market, a national competition authority ought properly not to have to rely on a legislature to pull its chestnuts out of the fire. The considerable delay between the realization of the (illegally erected) barriers to market entry in 2011 and the regulatory solution of the problem with the transposition of the (amended) Payment Services Directive into German law in 2018[120] illustrates the gap in competition protection, even if the insight into the inadequacies of competition law enforcement leads to a targeted legislative intervention.

[116] BKartA 29 June 2016, B4-71/10, Zahlungsauslösedienste.
[117] Franck (n 21) 174–75.
[118] Directive (EU) 2015/236 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC ('Payment Services Directive II' – 'PSD II'). OJ L 337, 23.12.2015, 35–127.
[119] Franck (n 21) 168–69.
[120] See for a timeline covering the relevant events Franck (n 21) 186.

A sector inquiry with remedies, as is now available under German law, would arguably have been an appropriate tool to open the market to new competing payment initiation services and to force incumbents to remove barriers to entry and provide the necessary technical interfaces. In fact, in the UK market access of payment initiation service providers was secured through a retail banking market investigation.[121] Although more than three and a half years passed between the announcement of a market study in June 2013 and the publication of the Competition and Markets Authority's (CMA) order in February 2017,[122] this length compares favourably with the one in Germany. More importantly, the authority was able to address a competition deficit without having to rely on Parliament's (political) interest in the matter.

B. Ownership unbundling

Ownership unbundling as a remedial measure is an obvious choice when competition is disrupted in sectors in which acquisitions below the merger control thresholds have led to concentrations (so-called 'stealth consolidations'). Since the 10th amendment to the German Competition Act in 2021, the individually extendable notification obligation – now incorporated into section 32f ARC[123] can counteract this. At the time when this possibility to extend merger control was introduced, such concentrations were observed in various sectors. One such example is found in the waste disposal industry: Remondis, Germany's largest waste disposal company, has gained a dominant position in many waste disposal markets by acquiring several smaller waste disposal companies.[124]

An example of a – from a competition perspective – botched privatization followed by stealth consolidation is a provider of services for rest areas at or next to the German Autobahn. The German government privatized the state-owned servicing company in 1998 under the name 'Tank & Rast'. This either offers services itself or grants concessions to third parties and controls more than 400 of a total of 440 serviced rest areas along the Autobahn.[125] The strong market position, high prices, and low quality of certain services have been criticized in the German media[126] and even been the topic of a popular German late-night satirical television show.[127] The closest competitors are *Autohöfe*, which make similar offers in the vicinity of the Autobahn and tend to be owned by small companies. However, over the years, Tank

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[121] Franck (n 21) 180.
[122] Franck (n 21) 188.
[123] See above section III.
[124] See Björn Christian Becker, 'Neue Anmeldeverfügungen nach § 39a GWB', in Florian Bien and others (eds), *Die 10. GWB-Novelle* (C.H. Beck 2021), 409, 410–11.
[125] Tobias Piller, 'Macht und Rast' *Frankfurter Allgemeine Zeitung* (22 August 2023), no. 194, 22. There appears to be a governance issue. As Piller commented, '[a]t the head of Tank & Rast is a very well-connected former state secretary who … knew how to use his contacts, especially with the [previous] transport ministers, for whom the preservation of structures was probably much more important than principles such as the market and competition'.
[126] See Cornelius Welp, 'Tank & Rast. Abzocke auf der Autobahn – warum der unbeliebte Monopolist trotzdem strauchelt' *Die Welt* (24 July 2023).
[127] See *ZDF Magazin Royale* (26 January 2024).

& Rast has acquired more than 20 *Autohöfe* under the radar of the Bundeskartellamt,[128] arguably further cementing its market position.

Another sector with a conceivable candidate of ownership unbundling is the sector for the organization and ticketing of live events in Germany. According to the Bundeskartellamt's findings in abuse proceedings[129] and one merger case,[130] CTS Eventim has comprehensive control over this sector.[131] The company operates a ticketing system that provides brokerage services to organizers of live events on one side and to advance booking offices and online ticket shops on the other side of its platform. The authority already assumed in 2017 that CTS Eventim dominates the nationwide markets for ticketing system services vis-à-vis advance booking offices and event organizers. The company is also vertically integrated on its two sides: on one side, it operates its own online shop, with a large end customer base. On the other side, it organizes many popular live events and also operates large event venues. The Bundeskartellamt has listed 16 tour and festival organizers that CTS Eventim took over in the period before 2017 alone. In addition, CTS Eventim has further consolidated its dominant position in recent years – apparently also by de facto circumventing the Bundeskartellamt's ban on the acquisition of the Four Artists agency: both the managing director and the majority of the staff of Four Artists moved to All Artists Agency, a competitor controlled by CTS Eventim.[132]

IX. Policy discussion, conceptual blind spots, and possible weaknesses of the new tool

In this section, we take a look back at aspects of the policy debate that surrounded the adoption of the new competition tool and point to conceptual blind spots and possible weaknesses of the instrument.

A. Complaints by industry representatives: negative impact on the domestic industry?

Representatives of trade associations have largely criticized the sector inquiry with remedial measures.[133] For example, Iris Plöger, member of the executive board of the Federation of German Industries (BDI), said in response to the Federal

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[128] This number is reported on the Tank & Rast website <https://tank.rast.de/unternehmen> (accessed 9 September 2024).

[129] BKartA 4 February 2017, B6-132/14-2 – CTS Eventim. An appeal against this decision has been rejected. OLG Düsseldorf 3 April 2019, VI-Kart 2/18 (V) – *Ticketvertrieb II, Juris*.

[130] BKartA 23 November 2017, B6-35/17 – CTS Eventim/Four Artists. An appeal against this decision has been rejected. OLG Düsseldorf 5 December 2018, VI-Kart 3/18 (V) – *Ticketvertrieb I, Juris*.

[131] For an overview of relevant findings see Franck and Peitz (n 76) 518–19. While we show that CTS Eventim may also be a candidate for designation under ARC, s 19a, as being of 'paramount significance for competition across markets' and thus subject to a stricter abuse control regime, this would not entail any extended unbundling powers for the Bundeskartellamt.

[132] See Sammy Khamis and Friederike Wipfler, 'Unterhaltungskonzern Eventim. Expansion am Kartellamt vorbei', 3 June 2023 <https://www.tagesschau.de/investigativ/br-recherche/eventim-musikindustrie-100.html>.

[133] The same can be said of the Studienvereinigung Kartellrecht, as can be read in the statement of some leading antitrust lawyers in Germany on behalf of the Studienvereinigung. See <https://www.studienvereinigung.de/sites/default/files/2022-11/20221028_Stellungnahme_Wettbewerbsdurchsetzungsgesetz.PDF>.

Government's legislative proposal: 'With this national legislative solo effort, the Federal Government is further weakening the business location. Important investments in innovation and market growth will not be made at the location if companies have to fear sanctions despite complying with all competition rules.'[134]

Georg Böttcher, chief counsel competition, Siemens AG, took a similar line. In his statement as an expert for the Economic Committee of the German Parliament, he wrote: 'The current amendment to the ARC creates far-reaching powers to intervene against companies that behave in full compliance with the law, without any specific reason and only in advance. This is not only unnecessary, but also sends the wrong signal and is detrimental to Germany as a business location. It significantly increases legal uncertainty for companies and is therefore poison for an investment and innovation-friendly business climate.'[135] While it comes as little surprise that industry representatives speak out against any additional interventionist powers for the competition authority, it is fair to ask whether there is merit to this claim and whether the new instrument will be applied too often and/or erratically.

The availability of an instrument such as section 32f ARC does not in itself say anything about how far-reaching and intense pro-competitive regulation is in any given jurisdiction and certainly also nothing about the quality of such regulation. Competition can be intensified through (i) statutory ex ante regulation or a sector regulator with statutory authorization, (ii) sector inquiries with remedies imposed by the antitrust authorities, and (iii) antitrust enforcement. Anyone wishing to (comparatively) analyse and evaluate pro-competitive regulation must do so fairly, taking into account all the rules set via these mechanisms, differentiating according to the particular competitive challenges addressed.

Moreover, it seems anything but clear that effective promotion of competition will weaken a jurisdiction's attractiveness as a target location for investment: while the profits of incumbent undertakings may shrink, reduced barriers to market entry and intensified competition always create new business opportunities at the same time. What is more, experience shows that successful national regulation can serve as a model for other jurisdictions. This also applies to harmonizing rules in the EU's internal market. This is why a perceived maverick can become a pioneer, as indeed seems to be happening in the EU.[136]

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[134] BDI, 'BDI zur elften GWB-Novelle: Bundesregierung schwächt Standort weiter', 5 April 2023 <https://bdi.eu/artikel/news/bdi-zur-elften-gwb-novelle-bundesregierung-schwaecht-standort-weiter> ('Mit diesem nationalen gesetzgeberischen Alleingang schwächt die Bundesregierung den Standort weiter. Wichtige Investitionen in Innovationen und Marktwachstum werden am Standort unterbleiben, wenn Unternehmen trotz Befolgung aller Wettbewerbsregeln Sanktionen befürchten müssen').

[135] Georg Böttcher, 'Stellungnahme Öffentliche Anhörung zum Gesetz-entwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze ("11. GWB-Novelle")' Ausschussdrucksache 20(9)267, June 2023, 1–2 ('Die aktuelle GWB-Novelle schafft ohne konkreten Anlass und nur auf Vorrat einschneidende Eingriffsbefugnisse gegenüber sich völlig rechtskonform verhaltenden Unternehmen. Das ist nicht nur unnötig, sondern auch das falsche Signal und schädlich für den Wirtschaftsstandort Deutschland. Es erhöht die Rechtsunsicherheit für Unternehmen deutlich und ist damit Gift für ein investitions- und innovationsfreundliches Geschäftsklima').

[136] See the overview of recent developments in different EU Member States in the introduction (section I).

B. Ownership unbundling: ‘market design’ by the Bundeskartellamt?

In the political debate before the reform, it has been widely criticized that the new provision would give the Bundeskartellamt an instrument for engaging in ‘market design’. In fact, the latter term became almost synonymous with illegal and excessive intervention. This does, however, not do justice to the concept, at any rate not to its standard usage in the economic literature.[137]

As far as ownership unbundling is concerned, it should be noted that experience with the market investigation in the UK suggests that in practice it will only occur very rarely. Owing to the high hurdles, in particular the strict subsidiarity requirement in the German law, it seems obvious that the Bundeskartellamt will only seriously consider ordering unbundling in very few cases.

In view of the considerable number of legal points of attack, it is also foreseeable that judicial review could delay the pro-competitive effects for years. The Bundeskartellamt is therefore likely to have a great interest in companies agreeing to the unbundling necessary to protect competition. The companies could be motivated to do so in order to avert unwanted behavioural or other remedies or even more far-reaching unbundling orders that could have a lasting effect on profits.

In practice, the importance of the availability of unbundling measures also lies in the threat point this creates: the Bundeskartellamt can at least credibly hold out the prospect that it will work towards unbundling dominant undertakings that are not impressed by the other instruments for the protection of competition and which persistently behave in an anticompetitive manner.

The law foresees partial compensation for firms that are subjected to ownership unbundling when they have to sell below value.[138] However, at the time when the relevant valuation is applied, namely the closing date of the financial statements prior to the divestiture order, the authority may have already declared the existence of a malfunctioning of competition vis-à-vis the undertaking and possibly even imposed (behavioural) remedies that then proved to be insufficient but may have affected the profitability of the undertaking’s business model. This would imply that the authority’s activities before the divestiture order may affect the compensation. A forward-looking authority might therefore use such remedies as a means to reduce the compensation. Thus, the provision of partial compensation opens the door for strategies being played by the authority.

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[137] The new provision aims at addressing competition problems, which are studied by economists working in the field of industrial organization (IO). This is different from the role of market design: ‘Whereas imperfect competition is the most common cause of market failure that is studied in IO, a market designer more commonly focuses on the market mechanism itself … The remedies recommended by the two fields correspondingly address either the source of market power or the rules of the market that are the cause of failure.’ Nikhil Agarwal and Eric Budish, ‘Market Design’, in Kate Ho, Ali Hortaçsu, and Alessandro Lizzeri (eds), *Handbook of Industrial Organization, vol 5* (Elsevier 2021) 3.

[138] See above section V.B.

C. Conceptual blind spots and practical obstacles

In retrospect, it can be said that the German debate on the adequate institutional design of the new instrument did not pay sufficient attention to various aspects that, in the end, were then also not specifically addressed by the legislature.

In the UK, following a market study (which corresponds to a sector inquiry under German or EU law), the CMA board (or a sectoral regulator) may decide to refer a market for investigation. However, to avoid confirmation bias, the subsequent investigation will be conducted by a panel of at least three persons who do not belong to the CMA staff and who are selected by the CMA chair from a pool of experts including lawyers, economists, business consultants, and accountants.[139] Yet, as such a model would have been a novelty in the German context, its adoption was not seriously considered. The same seems to be true for proposals for internal safeguards against a confirmation bias, be it through a mandatory cross-check by a second chamber or through assigning the competence for conducting the remedial phase to a 'super chamber' consisting of the chairs of all chambers, chaired by the Bundeskartellamt's president.[140]

Little, perhaps too little, thought has been given to optimizing the procedure in the remedial phase. In particular, given the possibility of setting sector-wide (and thus potentially market-wide) standards of conduct, it would have seemed reasonable to adopt rules on the involvement of external experts. Moreover, the law does not specifically address whether and under what circumstances remedies could and should be time-stamped and when and under what circumstances obligations imposed could be reviewed and possibly adjusted. Furthermore, issues related to monitoring and enforcing remedies were also not heard in the political debate. In this respect, the Bundeskartellamt will have to rely on its 'normal' statutory powers, resources, and capabilities.

The Bundeskartellamt itself sees two main practical obstacles to the effective implementation of the new powers: subsidiarity vis-à-vis competition law enforcement and a lack of resources. Although we can see that the subsidiarity principle has a sound conceptual basis and is clearly not intended to impose a heavy burden on the authority to argue,[141] it should be critically examined whether the legalization of this requirement was a wise option. For this to happen, however, the Bundeskartellamt will have to apply the new instrument in the first place. It will then be vital for the courts to accept that the legislature did not have a strict standard of judicial review in mind in this respect.[142]

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[139] Fletcher (n 86) 50.

[140] Rupprecht Podszun, 'Stellungnahme Öffentliche Anhörung zum Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze ("11. GWB-Novelle")' Ausschussdrucksache 20(9)268, 21–22.

[141] See above section IV.B.

[142] See above n 63 and accompanying text.

The need for additional resources at the Bundeskartellamt and the (apparent) reluctance of the Federal Ministry for Economic Affairs to provide them[143] are ongoing issues in the wake of the introduction of the instrument. For the time being, the authority has no choice but to carefully weigh up the opportunities and risks when deciding whether it is worth the effort of proceeding with a remedial phase under section 32f ARC.

X. Conclusion

The new competition tool under section 32f ARC provides a third mechanism for setting pro-competitive rules alongside competition law enforcement and legislative intervention aimed at a specific competition deficit. Sector inquiries are resource-intensive, even more so if they are followed by a remedial phase in the future. For this reason alone, it is likely that the Bundeskartellamt will exercise its new powers with caution. However, case practice will be needed to develop routines in the process. Only then will it be possible to assess the practicability and effectiveness of the legal mechanisms.

Despite possible justified criticism in detail, it can be stated that section 32f ARC sets an appropriate framework for the Bundeskartellamt. Based on well-founded market analyses and a good understanding of the relevant market mechanisms and business models, the authority must determine whether there is a significant impediment to competition and forecast whether possible remedial measures can be expected to bring about improvements. Interventions to promote competition are always fraught with uncertainty – regardless of which regulatory mechanism is used. We do not find any specific risks in the structure of section 32f ARC that suggest that the Bundeskartellamt will use this instrument in a dysfunctional manner.

The new tool is very much in line with the ordo-liberal tradition of German antitrust law, with its focus on preventing or removing distortions that undermine the competitive process. Walter Eucken, one of the founders of German ordo-liberalism, wrote that an independent competition authority 'has the task of dissolving monopolies as far as possible and supervising those that cannot be dissolved'.[144] The new tool can also be seen as a partial safeguard against an activist legislature that may be pushed towards populist interventions. Now that the Bundeskartellamt

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[143] In December 2023, the president of the Bundeskartellamt, Andreas Mundt, reportedly complained that not a single one of the 20 new posts requested in connection with the new powers had (yet) been approved. See Johannes Weichbrodt, 'Conference Debriefing (40): Studienvereinigung Kartellrecht Arbeitssitzung 2023' (18 December 2023) <https://www.d-kart.de/blog/2023/12/18/conference-debriefing-40-studienvereinigung-kartellrecht-arbeitssitzung-2023>. See also Sven Giegold (state secretary, Federal Ministry for Economic Affairs and Climate Action), 'Competition and "Zeitenwende"', Speech at the 22nd International Conference on Competition in Berlin (29 March 2024), 4: '*Zeitenwende* is not only about competitiveness and systems competition. It also means that politics re-allocates political priorities, resources and budgets. For Germany, we will very probably not see an increase in civil service at the Federal level for a while. That is an inconvenient truth – unfortunately also for you, Mr. Mundt. Sorry about that.'

[144] Walter Eucken, *Grundsätze der Wirtschaftspolitik* (7th edn, Mohr Siebeck 2004), 295 ('Das Monopolamt hat die Aufgabe, Monopole so weit wie möglich aufzulösen und diejenigen, die sich nicht auflösen lassen, zu beaufsichtigen').

has the new pro-competitive rulemaking tool at its disposal, the government and the legislature have good reason to wait and, in the public debate, refer to the Bundeskartellamt's remedial powers following a sector inquiry before initiating a legislative procedure to address a perceived competition problem. Thus, while the market investigation tool does not rule out legislative initiatives, it arguably raises the threshold and could prevent a problematic politicization of individual issues.

From a European perspective, a crucial question may be: could the establishment of sector inquiries with remedial powers in Germany and other Member States revive the idea of an EU new competition tool? In this vein, in its recent annual report on competition policy, the European Parliament noted that it:

> [w]elcomes competition authorities' initiatives across several Member States to introduce new market investigation powers as long as they do not lead to the fragmentation of the internal market; calls on the Commission to introduce a similar market investigation tool to avoid enforcement gaps where the practices occur across national borders within the EU and to adopt sector-wide remedies when necessary to effectively address anticompetitive behaviours.[145]

Similarly, the Draghi Report sees a role for the new competition tool to address structural competition problems in the EU:

> A possible approach would involve defining four areas of potential intervention where current competition tools are known to be insufficient. These four areas are: i) tacit collusion; ii) markets where the need for consumer protection is more likely to be needed, for instance due to consumers belonging to sensitive categories or having behavioural biases; iii) markets where economic resilience is weak, one cause of which could be market structure (e.g. reliance on a single source of raw material) leading to frequent shortages or other harmful outcomes; iv) past enforcement actions where the information/data received by the authority indicate that the commitments or remedies adopted are not delivering competition.[146]

On the one hand, it can be expected that the acceptance of the instrument as such will increase if it is shown in practice that it can be used successfully to fill gaps in the existing system of competition protection. On the other hand, the idea of the new competition tool was put forward by the Commission at the time as a possible alternative to ex ante regulation of digital gatekeepers. As we know, the Commission has gone the other way with the Digital Markets Act. The latter's implementation requires considerable resources. For this reason alone, the Commission may be reluctant to commit political and administrative resources to the adoption and implementation of a new (complementary) regulatory instrument. Moreover, the Commission, while it had initially noted Articles 103 and 114 TFEU as a legal

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[145] European Parliament, P9_TA(2024)0011, Competition policy – annual report 2023, para 7. This is supported by the German government. See Giegold (n 143) 6 ('A [new] competition tool for the European Commission would be high on our wish list').

[146] Mario Draghi, The Future of European Competitiveness, Part B, September 2024, 303–04, point 9; see also 302, point 6.

basis,[147] seems to have ultimately concluded at the time that a new competition tool could only be adopted based on Article 352 TFEU.[148] Then, investing political capital in a project that ultimately depends on unanimity in the Council seemed too risky.

If Member States use their new instruments to adopt ex ante pro-competitive rules, there is a risk of increasing regulatory fragmentation in the internal market. It is worth discussing whether, against this background, an EU new competition tool would be an appropriate instrument to counteract such fragmentation, and thus the availability of various national new competition tools, will strengthen the case for its adoption based on Articles 103 and 114 TFEU. In any case, the EU legislature would be free to harmonize the Member States' pro-competitive rules on the basis of Article 114 TFEU, including those enacted through instruments such as the German section 32f ARC. The market access rules for payment initiation services in the Payment Services Directive II[149] or the Digital Markets Act are examples of such harmonizing pro-competitive measures.

This also applies to open questions of institutional balance at EU level. In the architecture of the EU institutions as sketched by the Treaties, the Commission has a much stronger position than national competition authorities vis-à-vis national legislatures. In particular, it has a monopoly on initiating legislative proposals.[150] If the Commission were to be given such a powerful instrument for rulemaking such as a new competition tool, institutional safeguards should therefore also be considered. It would be conceivable, for example, to grant the European Parliament and the Council a right to object to the setting of sector-wide remedies within a set period[151] or a right to limit the effect of such remedies to a fixed period of, for instance, five years.[152] These and other questions seem to be academic for now. What seems certain, however, is that the Commission and the European Parliament will at any rate keep a very close eye on the introduction, design, and application of new competition tools in the Member States.

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[147] European Commission, Inception Impact Assessment (New Competition Tool) – Ares(2020)2877634 – 04/06/2020, 2. See Bo Vesterdorf and Kyriakos Fountoukakos, 'A New Competition Tool in Old Bottles? Considerations on the Legal Design of the European Commission's Proposed NCT' (2021) 12 JECLAP 284, 288–89.

[148] See Massimo Motta, Martin Peitz, and Heike Schweitzer, 'Market Investigations in the EU: A Road Map', in Massimo Motta, Martin Peitz, and Heike Schweitzer (eds), *Market Investigations: A New Competition Tool for Europe?* (Cambridge University Press 2022) 1, 5.

[149] See above section VIII.A.3.

[150] TEU, art 17(2).

[151] Franck (n 21) 148, 150, 182, note 208.

[152] Heike Schweitzer, 'A European Market Investigation: Institutional Setup and Procedural Design', in Massimo Motta, Martin Peitz, and Heike Schweitzer (eds), *Market Investigations: A New Competition Tool for Europe?* (Cambridge University Press 2022) 90, 145.