Germany's New Tool to Strengthen Competition: A Comparison with the UK's Markets Regime

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Introduction

On 7 November 2023, the "*Competition Enforcement Act*", which constitutes the 11th amendment of Germany's Act Against Restraints of Competition ("ARC"), took effect. The amendment facilitates the disgorgement of benefits and enables the Federal Cartel Office (Bundeskartellamt; "FCO") to assist the European Commission ("Commission") in enforcing the Digital Markets Act ("DMA"). The amendment also gives the FCO new intervention powers following sector inquiries: it may now, for up to three years, impose merger filing requirements on undertakings in a given sector considerably below the usual turnover thresholds.[1] And, most notably, it gives the FCO broad new powers to remedy a perceived "malfunctioning" of competition. This includes the ability to impose behavioural and/or structural remedies (including divestments) following a sector inquiry if there is a significant, continuing or repeatedly occurring malfunctioning of competition.[2]

Granting such far-reaching enforcement powers over market participants without proven or even alleged wrongdoing by those parties is novel and represents a fundamental change in German competition law. In fact, the German Federal Ministry for Economic Affairs and Climate Action called the new amendment the most significant reform to this area of the country's law in decades.[3] Perhaps not surprisingly, the amendment is controversial and has engendered extensive political and academic discussion.[4]

The question most pressing for businesses is how these new rules will play out in practice. The FCO, which is entering new territory, has not yet specified how it intends to use its new powers. That said, the FCO appears to have certain areas of application in mind: it has referred to "unassailable positions of power" that certain market players appear to have and where its current powers do not suffice to open up markets.[5]

More than 20 years before the FCO, the UK's Competition and Markets Authority ("CMA") (via its predecessor bodies the Office of Fair Trading and the Competition Commission) was vested with similar powers to those that Germany recently enacted in the context of "market investigations" under the Enterprise Act 2002 ("EA02"). It has made considerable use of these powers and continues to do so. Indeed, the UK market investigation tool ("Markets Regime") served as an important guide for the new German law. The FCO will thus likely closely observe the UK's experience before using its new powers. It may be equally instructive for businesses to take account of the UK precedents when analysing the scope and potential implications of the FCO's new tool.

We provide below an overview of the UK CMA's market investigation powers and practice. Subsequently, we explain the new German competition tool. In doing so, we compare, step by step and element by element, the UK CMA's market investigation powers and use this

[1] ARC s.32f(2); for details see p.140 on Measures under ARC s.32f(2)–(4) below.
[2] ARC s.32f(3) and (4); for details see p.140 on Measures under ARC s.32f(2)–(4) below.
[3] Federal Ministry for Economic Affairs and Climate Action (5 April 2023), "Bundeskabinett beschließt Verschärfung des Gesetzes gegen Wettbewerbsbeschränkungen", available at: *https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2023/04/20230405-bundeskabinett-beschliesst-verschaerfung-des-gesetzes-gegen-wettbewerbsbeschraenkungen.html#:~:text=Die%20heute%20im%20Kabinett%20verabschiedete,f%C3%B6rdert%20Wohlstand%20und%20sichert%20Freiheit*; Börsen-Zeitung (6 April 2023), "Wettbewerbsrecht—Industrie warnt vor Kartellrechtsreform", available at: *https://www.boersen-zeitung.de/konjunktur-politik/wf-90-120z-kabinett-beschliesst-kartellrechtsnovelle*.
[4] Deutscher Bundestag, (14 June 2023): "Konträre Meinungen zu neuen Befugnissen für das Bundeskartellamt", available at: *https://www.bundestag.de/dokumente/textarchiv/2023/kw24-pa-wirtschaft-11-gwb-novelle-951258*; Handelsverband Deutschland (HDE) (5 July 2023), "11. GWB-Novelle: Wettbewerbsrecht: HDE warnt vor Verfassungsbeschwerden", available at: *https://einzelhandel.de/presse/aktuellemeldungen/14219-11-gwb-novelle-wettbewerbsrecht-hde-warnt-vor-verfassungsbeschwerden*; Legal Tribune Online (7 July 2023), "Starke Wettbewerbshüter, schwacher Wirtschaftsstandort?", available at: *https://www.lto.de/recht/nachrichten/n/bundestag-bundeskartellamt-kartellamt-reform-wettbewerb-aufsicht-eingriff-beschraenkung/*; Euractiv (6 July 2023), "Germany brings market investigation tool back on EU competition policy agenda", available at: *https://www.euractiv.com/section/competition/news/germany-brings-market-investigation-tool-back-on-eu-competition-policy-agenda/*. In addition, serious doubts have been expressed as to the compatibility notably of the divestiture provision with EU law—see Johannes Kruse and Simón Maturana, EuZW 2022, 798—and with the German constitution—see Thomas Ackermann, ZWeR 2023, 1, 16–18.
[5] See FCO's submission on the Government Bill for the 11th amendment to the ARC ("Stellungnahme des Bundeskartellamtes zum Regierungsentwurf zur 11. GWB Novelle") (9 June 2023), p.4 ("Lücken bestehen […] dort, wo Machtstellungen praktisch unangreifbar geworden sind und die vorhandenen Instrumente […] zur Offenhaltung oder Öffnung der betreffenden Märkte nicht mehr ausreichen"), available at: *https://www.bundestag.de/resource/blob/952440/c3a821fe074cead4a72a2d2c2e24e82b/Stellungnahme-Mundt.pdf*.

comparison to interpret the new German rules. We then summarise key similarities and differences between the two regimes, provide an outlook as to how the new German competition tool is likely to be used and offer several conclusions.

The UK Markets Regime

The UK Markets Regime was part of a wider package of measures designed to equip the independent competition authorities with tools to increase the level of competition in the economy; the aim was to improve the UK's productivity performance and make markets work well for consumers. For this purpose, the Markets Regime is designed to enable the CMA to proactively address competition concerns especially if whole markets are not working well for reasons other than just the conduct of undertakings, such as structural aspects of the market or the conduct of customers. The UK Markets Regime is aimed at competition issues which may arise irrespective of specific anti-competitive, and thus illegal, behaviour of market participants. The process is designed to be investigative and inquisitorial, not accusatorial.[6]

The Markets Regime permits the CMA and other sectoral regulators[7] to examine whether any feature or features of a market or markets in the UK prevent, restrict or distort competition (referred to as an adverse effect on competition ("AEC")). Broadly speaking, it operates in three phases: (i) an initial review of markets pursuant to the CMA's general function to obtain, compile and keep under review information about matters relating to UK markets;[8] (ii) a "phase one" *market study*, and/or (iii) a more detailed "phase two" *market investigation*. These phases may happen consecutively or in isolation.

Initial review

Section 5 of the EA02 gives the CMA a general function to obtain, compile and keep under review information about matters relating to UK markets. The CMA carries out this function in various ways, ranging from desktop research to engaging with market participants and other interested persons. This work allows the CMA to decide whether further consideration of a potential issue on a market is both appropriate and an effective use of the CMA's resources. Unless or until the CMA opens a market study or market investigation (see below), it is not bound by statutory time limits when carrying out this initial assessment. At the same time, it does not have formal information gathering powers.[9]

"Phase one": market study

A market study process commences when the CMA publishes a "market study notice." Such notices specify the matter the CMA aims to investigate, the period during which representations may be made to the CMA in relation to the matter and the timeline of the proceeding in accordance with the statutory time limits.[10] Within six months of a market study notice's publication, the CMA must publish notice of whether it intends to make a market investigation reference; it must also begin consulting relevant persons (as applicable).[11] In addition, the CMA must publish, within 12 months of issuing a market study notice, a market study report setting out its findings, the action (if any) it proposes to take and the reasoning behind its decision.[12] These time limits are generally considered to constitute "hard edged jurisdictional limits" that cannot be extended or waived.[13]

The CMA can employ all investigative powers vested in it under EA02 s.174 following the market study notice, i.e. require attendance of parties to give evidence, require a person to produce documents, and require a person to provide estimates, forecasts, returns or other information.[14] The CMA can enforce these information requests by imposing penalties for non-compliance.[15]

The purpose of a market study is to allow the CMA to: (i) consider the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the UK *has or may have* effects adverse to the interests of consumers; and (ii) assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.[16] Market studies are intended to identify and address all different aspects of market failure and are, accordingly, not limited to particular economic markets; instead, they analyse practices across a range of goods and services ("of one

[6] R. Whish, "New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems with a particular focus on the UK's market investigation tool", Expert study for the European Commission, para.3.11: "Part 4 of the Enterprise Act takes a holistic view of markets and is intended to identify forward-looking remedies that will deliver better outcomes for consumers". See also CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies (April 2013), paras 20 and 21.

[7] The following sector regulators may, in the respective sectors for which they have responsibility, undertake market studies, and make market investigation references to the Chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets: Civil Aviation Authority (CAA), Financial Conduct Authority (FCA), NHS Improvement (NHSI), Northern Ireland Authority for Utility Regulation (NIAUR), Office of Communications (Ofcom), Office of Rail and Road (ORR), Gas and Electricity Markets Authority (Ofgem), Water Services Regulation Authority (Ofwat), Payment Systems Regulator (PSR). In addition, the Secretary of State has the power to intervene in certain markets cases which raise defined public interest concerns.

[8] EA02 s.5.

[9] Under the s.5 initial review powers (i.e. before commencing a market study or market investigation), the CMA can issue information requests but does not have a statutory power to actually enforce them.

[10] EA02 s.130A(3).

[11] EA02 s.131B(1). This requirement is expected to be removed by the DMCC, due to come into force in 2024.

[12] EA02 s.131B(4).

[13] *Apple Inc. v Competition and Markets Authority* [2023] CAT 21, Case No. 1576/6/12/23, para.44. The judgment has been quashed by the Court of Appeals. The CoA has, however, merely held that the CMA is—upon expiry of these time-limits—not barred from commencing a subsequent "standalone" market investigation, *CMA v Apple Inc.* [2023] EWCA Civ 1445, paras 45–51.

[14] See Market investigation references, Guidance about making of references under Pt 4 of the Enterprise Act, OFT511, paras 3.1–3.5.

[15] EA02 s.174A.

[16] EA02 s.130A.

or more than one description").[17] Accordingly, the CMA does not need to define a relevant market for its assessment but typically examines the functioning of competition within a product and geographic frame of reference.

Market studies may lead to a number of outcomes, ranging from a "clean bill of health"—i.e. a finding that there is no substantiated consumer detriment or that intervention would not be proportionate to the detriment—to recommendations to businesses or the government, and to (cross-) market investigation references. The CMA may also accept undertakings from the companies concerned in lieu of a reference to a (cross-) market investigation.[18]

"Phase two": market investigation

The CMA can commence a market investigation either following a market study or in relation to matters which have not been the subject of a market study (i.e. a "standalone" market investigation), provided the same statutory threshold is met. Specifically, the CMA must have reasonable grounds for suspecting that any feature, or combination of features, of a market or markets in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.[19]

The CMA then carries out an in-depth investigation to decide whether such feature(s) do prevent, restrict or distort competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK. If any of these prove to be the case, the CMA finds that there has been an adverse effect on competition (AEC). A cross-market investigation requires the CMA to apply the same substantive test, but with respect to each feature and each combination of the features specified in the reference as it relates to goods or services of one or more of the descriptions so specified.[20]

As part of its market investigation, the CMA may make an order imposing remedies or accept undertakings offered to it by the parties. Alternatively, it may recommend that remedial action be taken by others, such as government entities, regulators and/or public authorities.[21] The CMA can also combine its own actions and recommendations, in what is often referred to as a "package" of measures. The CMA can accept/order both structural and behavioural remedies, i.e. those that alter the competitive structure of the market, such as divestitures or ongoing measures that are designed to regulate or constrain the behaviour of parties in a market and/or empower customers to make effective choices.[22] Since the Markets Regime was implemented, the authority has imposed a wide range of remedies on undertakings active in the markets concerned.

To date, divestitures were imposed in two cases in the UK. In the first case—*BAA Airports market investigation*—the CMA's predecessor, the Competition Commission, put forward a package of measures to remedy the AEC from BAA's common ownership of airports in England and Scotland. Structural measures included the divestment of certain airports. These were supported by behavioural measures requiring the strengthening of consultation procedures and provisions on quality of service at Heathrow until a new regulatory system would be introduced; the reporting of relevant information and consultation with stakeholders on capital expenditure for Aberdeen Airport; and recommendations to the Department for Transport in relation to economic regulation of airports.[23] In the second case—*Aggregates, Cement and Ready-mix Concrete Market Investigation*—the Competition Commission required the divestiture of certain plants as well as measures aimed at reducing transparency in the British cement markets, by: (i) ordering restrictions on the publication of British cement market data; and (ii) prohibiting the practice of issuing generic price announcement letters.[24]

The CMA has also required behavioural remedies in other cases. For example, in the *Investment Consultants Market Investigation*, it required: (i) the introduction of mandatory tendering when pension trustees first purchase fiduciary management services, and a requirement to run a competitive tender within five years if a fiduciary management mandate was awarded without one; (ii) that investment consultants separate the marketing of their fiduciary management service from their investment advice, and inform customers of their duty to tender in most cases before buying fiduciary management; (iii) that fiduciary management firms provide better and more comparable information on fees and performance for prospective customers, and on fees for existing customers; (iv) that pension trustees set objectives for their investment consultant, to assess the quality of investment advice they receive; and (v) that investment consultancy and fiduciary management providers report performance of any recommended asset management products or funds using basic minimum standards. In addition, the CMA asked The Pensions Regulator (TPR) to give greater support for pension trustees when running tenders for investment consultancy and fiduciary management services and guidance for pension trustees to support the CMA's other remedies. The CMA also recommended to

[17] Howard Cartlidge and Nick Root, "The UK Market Investigations Regime: A Review" (2009) 8 Competition LJ 312, 313.
[18] See Market studies, Guidance on the OFT approach, Office of Fair Trading (2010), p.12; and Market Studies and Market Investigations: Supplemental guidance on the CMA's approach (January 2014—revised July 2017), CMA 3.
[19] EA02 s.131(1) with respect to a market investigation reference, and EA02 s.131(2A) and (6) with respect to a cross-market reference.
[20] EA02 s.134.
[21] CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies (April 2013), para.327; EA02 s.134(4).
[22] See EA02 ss.138(2), 161 and Sch.8 regarding the wide-ranging list of potential measures.
[23] BAA airports market investigation, Final Report (19 March 2009), available at: *https://webarchive.nationalarchives.gov.uk/ukgwa/20140402170709/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/baa-airports/final-report-and-appendices-glossary*.
[24] Aggregates, cement and ready-mix concrete market investigation, Final Report (14 January 2012), available at: *https://assets.publishing.service.gov.uk/media/552ce1d5ed915d15db000001/Aggregates_final_report.pdf*.

the government that it: (i) enable TPR to oversee its remedies on pension scheme trustees; and (ii) extend the Financial Conduct Authority's regulatory perimeter to include all the main activities of investment consultants.[25]

Legal remedies

Despite the broad powers of the CMA to require remedies, market participants have limited scope for redress once the CMA has issued a decision. Persons aggrieved by a CMA market investigation decision can appeal to the Competition Appeals Tribunal (CAT) on any point of law, following judicial review principles. Further appeal of a judgment by the CAT can be made to the Court of Appeal—or, in Scotland, the Court of Session—and, ultimately, to the Supreme Court.[26] Judicial review principles limit the CAT to finding that a decision by the CMA was either illegal, procedurally unfair, irrational or incompatible with the Human Rights Act 1998; they also set the bar very high for succeeding on any of these grounds under English law. The CAT can then: (i) dismiss the application or quash the whole or part of the decision to which it relates; and (ii) if it quashes the whole or part of that decision, refer the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the CAT.[27]

Comparing Germany's "new competition tool" under ARC s.32f with the UK Markets Regime

Background, genesis and purpose

To date, public enforcement under German competition law consists of employing merger control mechanisms to preventively address anti-competitive concentrations, prohibiting anti-competitive behaviour which may be enforced by initiation, and conclusion of administrative or fine proceedings against the undertakings concerned.

The new tools under ARC s.32f aim to address alleged enforcement gaps. They address a malfunctioning of competition that results in major damage for the economy as a whole—damage which may exist or arise without abusive behaviour or conclusion of anti-competitive agreements. The legislative materials explain that, in narrow markets with few market participants, even non-explicitly coordinated behaviour among market participants can lead to high price levels if the few remaining competitors observe and anticipate each other's competitive behaviour and have little interest in competitive advances. Further, the government maintains that the consequences would not only directly affect consumers; such a malfunctioning to competition would also prevent natural resources, labour and investments from being channelled to their best uses and necessary economic transformation processes being disrupted.[28] The legislative materials refer to cases in which competition is weakened due to a high concentration (which may, for example, result from internal company growth or market exits by competitors), in particular in digital markets with significant network and scale effects. With this in mind, the FCO's new powers are designed to counter resulting low or declining incentives for the efficient use of resources or the development and improvement of products. The ultimate goal is to counteract higher prices for consumers.[29]

The new ARC s.32f is inspired by both the considerations for a European "New Competition Tool" (NCT) and the UK's Markets Regime.[30] The Commission had initiated consultations on the NCT in 2020. Its aim was to strengthen competition enforcement and ensure that "competition policy and rules are fit for the modern economy" by establishing a tool to impose behavioural and structural remedies without any prior finding of an infringement of EU competition rules.[31] The German government agreed upon an amendment of the ARC only shortly thereafter, including, *inter alia*, to strengthen the FCO's powers to intervene in cases of significant, continuous and repeated infringements of consumer law; they also decided to promote an unbundling and divestment instrument which does not require any abuse at EU level.[32]

Whilst the Commission's initiative was ultimately abandoned, the German legislature continued considerations regarding a corresponding tool to more effectively ensure "fair competition". The adopted amendment to the ARC resembles the third option considered by the Commission in its impact assessment,[33] providing for a market-structure-based competition tool to impose behavioural and structural remedies without finding an infringement or imposition of fines.[34] The

[25] Investment consultants market investigation, Final Report (12 December 2018), available at: *https://www.gov.uk/cma-cases/investment-consultants-market-investigation*.
[26] CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies (April 2013), para.87.
[27] EA02 s.179.
[28] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.27, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.
[29] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.27, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf* .
[30] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, pp.16 and 18, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*; Florian Wagner-von Papp, WuW 2022, 642, and 643.
[31] See European Commission, Inception Impact Assessment, Ares (2020) 2877634–02/06/2020, p.1, available at: *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM%3AAres%282020%292877634*.
[32] Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP, p.31, available at: *https://www.fdp.de/sites/default/files/2021-11/Koalitionsvertrag%202021-2025_0.pdf*.
[33] See European Commission, Inception Impact Assessment, p.3, available at: *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM%3AAres%282020%292877634*.
[34] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.19, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf* .

legislator explicitly referred to the European "New Competition Tool" and took into account several of the expert studies that had been issued in that context.[35]

In addition, the legislative materials refer to the UK Markets Regime as one important role model, stressing that the UK tool was able to improve competition in multiple sectors.[36] For possible divestitures, the German legislator explicitly referred to the CMA's BAA airports market investigation.[37]

New Powers of the FCO and the Corresponding Procedure

The new powers under ARC11 s.32f (New German Competition Tool) will be executed in three steps. The FCO will first complete a sector inquiry (ARC s.32e). Second, it will determine whether there has been a "significant and continuing malfunctioning of competition" (ARC s.32f(3)). Third, the FCO will be able to implement behavioural (ARC s.32f(3)) or structural (ARC s.32f(4)) measures to remedy the malfunctioning of competition, provided one has been identified.

Sector inquiry (ARC s.32e)

To ensure that the measures under ARC ss.32f(2)-(4) are based on a sufficiently robust and up-to-date factual basis, ARC s.32f(1) requires the prior conclusion of a sector inquiry pursuant to ARC s.32e.[38] The FCO's power to conduct sector inquiries—i.e. investigations into a specific sector of the economy or across sectors into particular types of agreements or practices under ARC s.32e—had already been established through the 7th amendment of the ARC in 2005, following the example of art.17(1) VO 1/2003 at EU-level.[39]

The most recent amendments to the ARC and the introduction of ARC s.32f have not brought about significant substantive changes regarding the initiation and conduct of sector inquiries. As hitherto, the FCO was able to initiate a sector inquiry if circumstances suggest that domestic competition may be restricted or distorted (ARC s.32e(1)). The "rigidity of prices" is no longer singled out in the current amendment as a specific circumstance indicating a malfunctioning of competition. The legislator no longer saw the need to emphasise this factor vis-à-vis other, equally important, circumstances. The wording of the provision is so broad that the FCO will continue to be able to initiate a sector inquiry if the rigidity of prices or any other circumstances suggest that domestic competition may potentially be restricted or distorted (ARC s.32e(1)). Similar to the CMA, the FCO can adopt the same investigative measures as in other antitrust investigations, ranging from requests for information to searches to seize relevant pieces of evidence (ARC s.32e(5)).

Two procedural changes enshrined in the current reform are worth noting: First, the new ARC s.32e specifies that sector inquiries should be concluded within 18 months of their initiation (ARC s.32e(3)). This target timeframe aims to streamline and speed up the lengthy proceedings of sector inquiries observed in the past. According to the legislative materials, deviations from this timeframe should only occur in "exceptional cases".[40] The FCO's president has noted that this timeframe is "highly ambitious" considering the complex investigations and legal matters potentially involved.[41] However, there are no legal consequences for exceeding the statutory timeframe.

Second, the German Monopolies Commission[42] may—based on the 11th amendment enacted in 2023—make a recommendation for the initiation of a sector inquiry in its reports to the FCO. The FCO will then be able to examine the recommendation and initiate a sector inquiry within 12 months from publication of the report (ARC s.44(4) sentence 1). Otherwise, the FCO must issue a statement as to why it refrained from doing so (ARC s.44(4) sentence 2). As a result, the Monopolies Commission will, going forward, have more influence on the initiation of sector inquiries than it did before. This

[35] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.19, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.

[36] Examples include investment consultancy and fiduciary management services sector, retail banking, private healthcare, energy, aggregates, cement and ready-mix concrete, airports, and groceries, see R. Whish, "New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems with a particular focus on the UK's market investigation tool", Expert study for the European Commission Annex V. The CMA estimates the consumer savings from its markets interventions to be much higher than those derived from competition law enforcement and merger control. In its 2022–2023 report, the CMA states that direct consumer savings could be valued at £5,231.2 million in total during the financial years from 2020/21 to 2022/23, giving an average saving of £1,743.7 million per year. The savings derived from competition law enforcement were assessed at £132.3 million (annual average) and for merger control at £652.2 million (annual average); see CMA Impact Assessment 2022–2023 (17 July 2023), available at: *https://www.gov.uk/government/publications/cma-impact-assessment-2022-to-2023/impact-assessment-2022-to-2023#:~:text=Competition%20enforcement,-The%20CMA%20engages&text=We%20estimate%20that%20the%20CMA%27s,savings%20of%20%C2%A3132.3%20million*.

[37] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.19, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.; see fn.73 below.

[38] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.27, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*. Note that the FCO can also initiate a sector inquiry if it has reasonable grounds to suspect significant, persistent or repeated infringements of consumer protection provisions which, by their nature or scope, adversely affect the interests of many consumers. In that case, the FCO does not have the investigative powers to search premises, seize evidence or enforce information requests (GWB s.32e(6)).

[39] See Government Bill on the 7th amendment to the ARC ("Gesetzentwurf der Bundesregierung-Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen"), BT-Drs. 15/3640, p.52, available at: *https://dserver.bundestag.de/btd/15/036/1503640.pdf*.

[40] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.25, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.

[41] Andreas Mundt, NZKart 2023, 1, 3 regarding both the sector inquiries under s.32e ARC and the investigations under s.32f ARC. See also Andreas Mundt, WuW 2023, 521, 522 and FCO's submission on the government bill for the 11th amendment to the ARC ("Stellungnahme des Bundeskartellamtes zum Regierungsentwurf zur 11. GWB Novelle"), p.3 and 9, available at: *https://www.bundestag.de/resource/blob/952440/c3a821fe074cead4a72a2d2c2e24e82b/Stellungnahme-Mundt.pdf*.

[42] The German Monopolies Commission is a permanent, independent expert committee which advises the German government and legislature in the areas of competition policy-making, competition law, and regulation. Its reports are published. For more information see ARC ss.44–47 and *https://www.monopolkommission.de/en/monopolies-commission/mission.html*.

amendment shall ensure that sector inquiries and the newly introduced powers under s.32f ARC reach their full potential by identifying at an early stage those markets and economic sectors eligible for sector inquiries.[43]

While ARC s.32e requires the FCO to publish a final report, it does not specify which content or outcomes it should cover. In contrast to the UK market study, the FCO therefore does not have to come to a specific conclusion regarding the subsequent procedure. Notably, it does not have to decide whether a subsequent investigation as to a significant and continuing malfunctioning of competition is intended.[44] However, the FCO has in the past used the final reports of sector inquiries to explain identified anticompetitive conduct in the sector under investigation and how it could be remedied.[45] It has subsequently informed individual undertakings concerned about conduct that the FCO deemed anticompetitive and set specific timelines to remedy such conduct and prove this to the FCO. In case the addressees of such individual prompts would not have taken action as suggested in the final report, the FCO would have initiated an administrative procedure and, potentially, imposed mandatory measures and fines.[46]

Determination of a "significant and continuing malfunctioning of competition" (ARC s.32f(3))

A "significant and continuing malfunctioning of competition"[47] is necessary for the FCO to take any measures under ARC s.32f(3) or (4). Under ARC s.32f(3), the FCO determines the necessary malfunctioning of competition in a separate decision, addressed at specific undertakings, which may be considered addressees of measures under ARC s.32f(3) or (4). This determination is comparable to the UK market investigation, in which the CMA carries out an in-depth investigation to decide whether features of a market prevent, restrict or distort competition. The FCO may determine a malfunctioning of competition under ARC s.32f(3) without imposing remedies at the same time. Rather, ARC s.32f provides for a two-step procedure in which the FCO first determines a malfunctioning of competition and then issues a second order with specific remedies. Both orders are directed towards one or more specific undertaking(s) that contribute substantially to the malfunctioning of competition (ARC s.32f(3) sentence 3). The FCO may also combine both orders.

Throughout the legislative procedure in Germany, there has been intense debate over the scope and extent of the new term "malfunctioning of competition". Notably, the draft bill[48] was criticised as being too broad and vague.[49] In the subsequent government bill, the legislator added several examples constituting a "malfunctioning of competition" as well as a long list of criteria that need to be considered when assessing whether a malfunctioning of competition exists (ARC s.32f(5)).[50] However, the new law still leaves significant leeway and discretion to the FCO. The exact extent and scope of the required malfunctioning of competition, therefore, must be clarified by the FCO in practice and—ultimately—the courts.

Malfunctioning of competition

As indicated above, the term "malfunctioning" of competition is new to the ARC. Given its function to justify intervention without any direct link with individual conduct on any market, it will probably need to be substantially more impactful than a mere restriction or distortion of competition under ARC s.1 or TFEU art.101. In other words, whilst restrictions or distortions of competition may well constitute a malfunctioning in the sense of ARC s.32f(3) and (5), the purpose of the law suggests that not all restrictions and distortions will suffice to constitute a malfunctioning of competition.

As indicated above, ARC s.32f(5) offers guidance by providing, first, a list of examples in which a malfunctioning of competition may be assumed and, second, criteria for the determination of a malfunctioning.[51] The examples provided in ARC s.32f(5) encompass unilateral power to supply or demand (No. 1), restrictions on market entry, market exit or capacity of undertakings or on switching to another supplier or

[43] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.42, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.

[44] See in contrast EA02 s.131B(4) and (5) EA02: "(4) Where the CMA has published a market study notice it shall, within the period of 12 months beginning with the date on which it publishes the notice, prepare and publish a report (referred to in this Part as a "market study report") which sets out—[…]
(b) the action (if any) which the CMA proposes to take in relation to the matter.
(5) […] the market study report shall, in particular, contain—
(a) the decision of the CMA to make a reference under s.131 in relation to the matter specified in the market study notice, the decision to accept an undertaking under s.154 instead of making such a reference or (as the case may be) the decision otherwise not to make such a reference; […]"

[45] See for instance FCO, sector inquiry "online advertising", final summary report, paras 120–138, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Online_Werbung_Abschlussbericht.pdf?__blob=publicationFile&v=5*; FCO, sector inquiry "cement and ready-mixed concrete", final report, paras 17, 586–87, 634–37, 730–32 and 743–45, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Zement%20und%20Transportbeton.pdf?__blob=publicationFile&v=4#page=236&zoom=100,91,665*; FCO, sector inquiry "food retailing", B2—15/11, final report, p. 411–414, summary available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/SectorInquiries/Summary_Sector_Inquiry_food_retail_sector.pdf?__blob=publicationFile&v=2*.

[46] FCO, sector inquiry "rolled asphalt", B1-33/10, final report, paras 249–253, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Walzasphalt%20-%20Abschlussbericht.pdf?__blob=publicationFile&v=3*.

[47] German original: "*erhebliche und fortwährende Störung des Wettbewerbs*".

[48] Draft bill of the Federal Ministry for Economic Affairs and Climate Action ("Wettbewerbsdurchsetzungsgesetz") (15 September 2022), available at: *https://www.bmwk.de/Redaktion/DE/Downloads/Wettbewerbspolitik/wettbewerbsdurchsetzungsgesetz-referentenentwurf-bmwk.pdf?__blob=publicationFile&v=1*.

[49] See for instance Florian Wagner-von Papp, WuW, 2022, 642, 646, 650: Thomas Ackermann, GRUR International (Cambridge 2022), 1705 and 1706; Ulrike Suchsland and Peter Schröder, NZKart 2023, 300.

[50] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.9–10, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.

[51] See the English convenience translation, available at: *https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0256*.

demander (No. 2), parallel or coordinated behaviour (No. 3) and foreclosure of input factors or customers through vertical relationships (No. 4). These examples have in common that they may accrue absent any illegal conduct. At least examples No. 1 and No. 4 also imply a certain gravity of impact. As indicated above, the purpose of the law requires that such gravity be read into the other examples—as well as the general term "malfunctioning of competition".

This is confirmed by the criteria that are to be taken into account for the assessment. According to ARC s.32f(5), these include the number, size, financial strength and revenues of the market participants; their interrelations in the affected and related markets; prices, quantities, choice and quality of the offered products or services; transparency and homogeneity of goods, contracts and agreements between companies in the affected markets; and the dynamic on the affected market and efficiencies.

The substantive threshold for intervention for UK market investigations is the existence or presumed existence of an AEC. The CMA explains in its Guidelines for market investigations[52] that, in assessing whether or not an AEC has arisen, it will look at three issues: "(a) the main characteristics of the market and the outcomes of the competitive process; (b) the composition of the relevant market within which competition may be harmed (market definition); and (c) the features, if any, which are harming competition in the relevant market (the competitive assessment—which the CMA frames using 'theories of harm'), considering also possible countervailing factors, such as efficiencies, which may remove or mitigate the competitive harm of the features. The CMA further explains that it will not conduct analyses of these issues "as distinct chronological stages of the investigation but as overlapping and continuous pieces of work, which often feed into each other."[53]

The CMA has identified five main sources of potential competitive harm, including unilateral market power, barriers to entry and expansion, coordinated conduct, vertical relationships and weak customer response.[54] It also takes into account countervailing factors which "may benefit competition and operate to the benefit of consumers" such as positive effects of efficiencies, the prospect of entry or expansion or countervailing buyer power.[55]

The exemplary cases listed in ARC s.32f(5) closely resemble the sources of potential harm laid out in the CMA's guidelines: Except for the competitive issue of "weak customer response", ARC s.32f(5) Nos. 1 through 4 refer to the same sources of competitive harm listed in the CMA's guidelines. Those guidelines may therefore provide insights for the interpretation of the exemplary cases listed in ARC s.32f(5)—even more so, as the legislative materials explicitly refer to the CMA's guidelines.[56]

In relation to an appeal concerning the CMA's private healthcare market investigation, the CAT confirmed the CMA's conclusion not to continue its investigation, as "it was not established that an AEC existed."[57] It also confirmed that "the presence or absence of evidence of detriments for consumers may be a very weighty consideration to be taken into account in such an assessment".[58] The CAT further confirmed that the AEC was not necessarily analogous with a restriction of competition under TFEU art.101 or Chapter I of the UK Competition Act. It held that the relevance of these provisions to the concept of collective pricing "needs to be considered with proper reference to the factual context."[59] In addition, the CAT determined that the mere fact that a professional partnership which sets prices collectively in a similar way while possessing a dominant share of a particular market was not sufficient to amount to *prima facie* evidence for an AEC.[60]

This practice also suggests that a malfunctioning of competition requires more than a mere "appreciable restriction of competition" in terms of market impact—and, importantly, that the malfunctioning must be real and current. A mere finding that conduct would be "capable of disrupting competition", as is the case for the restrictions of competition under TFEU art.101 / ARC s.1 or abuses under TFEU art.102 and ARC ss.19 onwards, does not suffice.

Significant and continuing malfunctioning

The application of ARC s.32f(3) and (4) is explicitly limited to a malfunctioning of competition which is "significant and continuing".

According to ARC s.32f(5) sentence 3 a malfunctioning of competition is considered "continuing" if it has existed permanently or has repeatedly occurred over a period of three years and there are no indications that it will likely

[52] CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013, available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf*.
[53] CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013, paras 94–96, available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf*.
[54] See CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013, para.170 and paras 177–318, available at: *https://assets.publishing.service.gov.uk./government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf*.
[55] CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013, paras 173–176, available at: *https://assets.publishing.service.gov.uk./government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf*.
[56] See the explanatory notes to ARC s.32f(5), Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.32, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.
[57] *AXA PPP Healthcare Limited v CMA* [2015] CAT 5, para.53.
[58] *AXA PPP Healthcare Limited v CMA* [2015] CAT 5, para.32.
[59] *AXA PPP Healthcare Limited v CMA* [2015] CAT 5, para.34.
[60] *AXA PPP Healthcare Limited v CMA* [2015] CAT 5, para.36.

cease within the next two years. There is, however, no statutory definition of when the malfunctioning of competition is to be considered "substantial".

As a result, the FCO not only must determine a current malfunctioning of competition; it must also take the market developments over the past three years into account and make a prediction of the market developments for the next two years. The FCO can issue an order under ARC s.32f(3) only if the identified malfunctioning of competition has continuously or repeatedly occurred over that period and is expected to continue for at least two more years. A recurring malfunctioning of competition, however, does not necessarily have to occur at the date of the FCO's decision. It is sufficient for the FCO to determine that the malfunctioning of competition has repeatedly occurred over the past three years and is expected to reoccur within the next two years.

Regarding the substantiality of the malfunctioning of competition, the government bill provides further guidance: the malfunctioning shall be considered significant if it has "*more than a minor negative effect on competition*". This effect must occur on *"at least one nation-wide market, several single markets or across markets*".[61] As discussed above, the purpose of the law already suggests that the malfunctioning of competition must have a certain impact. It is therefore unclear what additional qualification, if any, is added by the substantiality requirement. If one were to adopt the substantiality threshold applied to the restriction of competition in TFEU art.101[62] and in ARC s.1,[63] a malfunctioning of competition would not be substantial if it could be attributed to specific companies, and if their combined share on the market in question would not exceed 10%.[64] Such a threshold appears far too low in relation to the intervention in question. Neither does it appear appropriate in relation to the examples provided in ARC s.32f(5) sentence 1. Unilateral power to supply or demand (No. 1), restrictions on market entry, market exit or capacity of undertakings or on switching to another supplier or demander (No. 2), parallel or coordinated behaviour (No. 3) and foreclosure of input factors or customers through vertical relationships (No. 4) all require substantially higher shares of the undertakings in question than 10 or even 15%.

For the substantiality provision to have any meaning in the overall context of ARC s.32f, the threshold could, for example, be interpreted in line with ARC s.18(4) and (6). For example, unilateral power to supply or demand (No. 1 of s.32f(5) ARC) could be regarded as a *significant* malfunctioning of competition if the undertaking in question had a share of 40% or more on a market that encompasses the whole of Germany or on several affected markets. Equally, parallel or coordinated behaviour (No.3 of s.32f(5) ARC) could be regarded as a *substantial* malfunctioning of competition if the undertakings in question have a combined share of 50% or more on a market that encompasses the whole of Germany or on several affected markets. Where the number of the undertakings concerned would be higher than three, the threshold would increase to 67%.

Measures under ARC s.32f(2)–(4)

If the FCO has found a malfunctioning of competition, the new law provides the FCO with the power to take potentially far-reaching measures against the company concerned, ranging from additional notification obligations to divestitures.

With the previously enacted 10th amendment of the ARC, the FCO was already vested with the power to require companies active in sectors which have been the subject of a sector inquiry to file all future concentrations following the conclusion of the relevant sector inquiry, even if those fall short of the usual thresholds set out in ARC s.35. The previous provision stipulating this power is now being "moved" to the new s.32f ARC and slightly amended to render it more effective. For example, the thresholds for notifying have, been adjusted to focus on national rather than worldwide turnovers.[65]

In addition to this obligation to notify future transactions, and similar to the powers of the CMA, the new 11th amendment allows the FCO to take measures to end an identified malfunctioning of competition—namely, by ordering behavioural and/or structural remedies (see below.) as well as divestitures when appropriate (see below). Given the novelty of the latter powers compared to the pre-existing power to require notifications, we focus in the remainder of this paper on the FCO's new competence to order remedial measures against a malfunctioning of competition.

[61] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.28, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf* .

[62] Notice on agreements of minor importance which do not appreciably restrict competition under art.101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ 2014 C 291, p.1.

[63] Notice No. 18/2007 of the FCO on the non-prosecution of cooperation agreements with minor restrictive effects on competition ("Bagatellbekanntmachung") (13 March 2007), available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Bekanntmachungen/Bekanntmachung%20-%20Bagatellbekanntmachung.pdf?__blob=publicationFile&v=6*.

[64] Notice on agreements of minor importance which do not appreciably restrict competition under art.101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ 2014 C 291, para.9 and Notice No. 18/2007 of the FCO on the non-prosecution of cooperation agreements with minor restrictive effects on competition ("Bagatellbekanntmachung") (13 March 2007), para.10, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Bekanntmachungen/Bekanntmachung%20-%20Bagatellbekanntmachung.pdf?__blob=publicationFile&v=6*.

[65] In particular, the threshold for the concerned undertaking's worldwide turnover has been changed from €500 million worldwide to €50 million in Germany and the target's turnover threshold has been changed from €2 million worldwide to €1 million in German. At the same time, the previous limitation to undertakings supplying or procuring at least 15% of the goods or services in the affected sectors of the economy has been eliminated. The government bill had stipulated an even lower threshold of €500,000 for the respective target. This was only mitigated by the Bundestag's Committee on Economic Affairs in their last consultations; see Recommended resolution and report by the Committee on Economic Affairs (9th Committee) on the government bill ("Beschlussempfehlung und Bericht des Wirtschaftsausschusses (9. Ausschuss) zu dem Gesetzentwurf der Bundesregierung"), BT-Drs. 20/7625, p.6, available at: *https://dserver.bundestag.de/btd/20/076/2007625.pdf*.

Remedial Measures (ARC s.32f(3))

For the FCO to order remedial measures, the company concerned must have contributed "considerably" to the malfunctioning of competition, either through its conduct on the relevant market or by way of its importance for the market structure. For this purpose, however, all conduct that affects the market to an appreciable extent appears sufficient. The requirement of a considerable contribution serves to exclude those undertakings that evidently have not contributed to the malfunctioning of competition at all or only to a negligible, very remote or very minor extent.[66] Even undertakings holding shares of 10% or slightly above on the affected market may therefore be subject to remedial measures on the basis of ARC s.32f(3).

With regard to possible remedies, ARC s.32f(3) provides a non-exhaustive list of far-reaching measures. They include, for example, obligations to grant access to data, requirements for business relationships and organisational separation of business units concerning organisation or accounting. A number of remedies focus on removing market access barriers. The FCO enjoys discretion as to which specific measure it imposes. That said, the remedy chosen must be reasonable and proportionate. It must be suitable and necessary to remove, or at least reduce, the identified malfunctioning of competition. Moreover, it must be proportionate *inter alia* to the pursued objective and the company's market position.[67] In particular, the FCO must take the company's market position into account when choosing the addressees as well as the type and the intensity of the measures to be taken when issuing an order based on ARC s.32f(3). As a general rule, the stronger the market position of the company concerned, the more severe a given measure may be.[68]

Similarly, the CMA may impose remedial measures

> "for the purpose of remedying, mitigating or preventing [an] adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition."[69]

In addition to identifying an AEC, the CMA must therefore consider whether the AEC causes detrimental effects on customers. A detrimental effect is defined as one taking the form of higher prices, lower quality or less choice of goods or services, or less innovation.[70] In principle, the CMA can then take any effective and proportionate measure to remedy the detrimental effect on customers and provides "as comprehensive a solution as is reasonable and practicable".[71] For this purpose, the CMA is able to order both remedies that alter the competitive structure of the market, i.e. structural remedies including divestitures (see in detail below), or behavioural remedies, i.e. ongoing measures that are designed to regulate or constrain the behaviour of parties in a market and/or empower customers to make effective choices. This may, for example, also include remedies such as the licensing or assignment of intellectual property rights.

Divestitures (ARC s.32f(4))

Finally, the FCO can order undertakings with a dominant position (ARC ss.18 and 19) or which are of paramount significance for competition across markets (ARC s.19a) to divest shares in companies or assets under ARC s.32f(4). The measure is intended to serve as an ultima ratio only.[72] Alternative measures under ARC s.32f(3) must therefore not be possible or not be as effective as a divestiture under ARC s.32f(4).

The provision does not provide for specifics involving the scope of a possible divestment order. However, for purposes of proportionality, the undertaking concerned is only obliged to sell the assets or shares in question if the offered consideration amounts to at least 50% of the value, as determined by an accountant mandated by the FCO. In addition, the undertaking concerned is entitled to compensation if the actual sale proceeds are less than the determined value. The compensation will amount to half of the difference between actual sale proceeds and the determined value.

Procedurally, the FCO must consult both the Monopolies Commission and the competent state authorities before it issues an order under ARC s.32f(4). However, the FCO is not bound by any issued statements. Separately, to ensure legal certainty regarding merger control, the FCO is not entitled to order divestment of shares or assets which have been the subject of a clearance decision by the FCO, the European Commission or a Ministerial Authorisation (ARC s.42) within a timeframe of ten years after the respective decision was issued.

[66] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.19, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.
[67] See also p.142 below on Subsidiarity and Proportionality.
[68] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.28, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.
[69] EA02 s.134(4).
[70] EA02 s.134(5); CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013 para.326, available at: *https://assets.publishing.service.gov.uk./government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf*.
[71] EA02 s.134(4); CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013 para.329, available at: *https://assets.publishing.service.gov.uk./government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf*.
[72] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.19, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.

As noted above, the CMA can also impose divestitures, as it did in the *BAA Airports market investigation* and the *Aggregates, cement and ready-mix concrete market investigation* cases.[73]

Timeline and temporal scope of application

According to ARC s.32f(7), the FCO should issue both the determination of the malfunctioning of competition and any order of remedial measures or divestitures within 18 months after the publication of the relevant sector inquiry's final report. As with the preceding German sector inquiry, this timeframe is non-mandatory; there are no legal consequences should the FCO exceed this timeframe. The timeframe expressly refers to the UK timeframe of 18 months for market investigations under EA02 s.137(1). The statutory timeframe set by EA02 s.137(1) is mandatory and can only be extended once, by a maximum of six months, if there are "special reasons" to do so (EA02 s.137(2A)).

ARC s.187(11) further provides that orders under ARC s.32f(2)–(4) may be based on sector inquiries concluded before the new section's entry into force on 7 November 2023 if the corresponding final report was published no longer than one year before said date. In that case, the timeframe of 18 months under ARC s.32f(7) will begin on 7 November 2023. This means that the FCO will be able to both determine a significant malfunctioning of competition and order remedial measures or divestitures under ARC s.32f(3) and (4) following its recent sector inquiry on online advertising published in May 2023. As the FCO considered both behavioural and even structural measures in its discussion paper and final report,[74] this could constitute the first case of application of the FCO's new powers.

Subsidiarity and Proportionality

Unlike the UK Markets Regime, ARC s.32f(3) sentence 1 contains a subsidiarity clause which bars the FCO from issuing an order determining a significant and continuing malfunctioning of competition to the extent the FCO's competences under Pt 1 of the ARC (i.e. in particular, enforcement of the prohibitions under ARC ss.1–19) suffice in eliminating the malfunctioning of competition "*efficiently and permanently*". This requires the FCO to (preliminarily) assess whether the malfunctioning of competition is due to a specific infringement of competition law provisions which could be remedied by a respective order of the FCO. To reach this decision, the FCO may rely on the existing facts and findings without having to conduct further investigations. To the extent there is an infringement of TFEU arts 101 or 102 or the respective national law, the FCO is therefore precluded from applying ARC s.32f.

In addition, any order of the FCO under ARC s.32f(3) or (4) must be proportionate according to the general principles of German administrative law. The measure taken by the FCO must therefore be suitable and the most effective measure to remedy the malfunctioning of competition in question. In particular, there must not be an equally or better-suited alternative which is less severe for the company concerned. Further, the measure taken must not be disproportionate regarding the outcome it aims to achieve. This applies particularly to divestiture orders based on ARC s.32f(4). Such orders thus explicitly presuppose that remedial measures under ARC s.32f(3) are not at least equally effective to remedy the identified malfunctioning of competition.[75] However, beyond the provision's wording, a thorough assessment of the order's proportionality is necessary in every single case. Divestitures under ARC s.32f(4) are only possible, in general, if there is a severe malfunctioning of competition which cannot otherwise be effectively addressed. Moreover, the measure must at least significantly reduce, or completely eliminate, the malfunctioning of competition in question.[76]

In principle, this resembles the CMA's assessment of proportionality, which requires the CMA to assess whether the envisaged remedy: (i) is effective in achieving its legitimate aim; (ii) is no more onerous than needed to achieve this aim; (iii) is the least onerous amongst several effective measures; and (iv) does not produce disadvantages which are disproportionate to the aim.[77]

In contrast, there is no provision in the Enterprise Act or the Competition Act that conduct which infringes or might infringe the Chapter I or II prohibitions in the Competition Act cannot be the subject of a market investigation.[78] The decision of whether the CMA remedies a particular situation under the Competition Act or by a market investigation is ultimately in the CMA's discretion.[79] However, as noted in its guidance on market investigation references, the CMA usually first considers whether a suspected competition problem involves an infringement of the Competition Act and can equally

[73] BAA airports market investigation, Final Report (19 March 2009), available at: *https://webarchive.nationalarchives.gov.uk/ukgwa/20140402170709/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/baa-airports/final-report-and-appendices-glossary* and Aggregates, cement and ready-mix concrete market investigation, Final Report (14 January 2014), available at: *https://assets.publishing.service.gov.uk/media/552ce1d5ed915d15db000001/Aggregates_final_report.pdf*.

[74] FCO, sector inquiry "online advertising" final summary report, paras 132–138, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Online_Werbung_Abschlussbericht.pdf?__blob=publicationFile&v=5*; FCO, sector inquiry "online advertising" discussion paper, paras 415–426, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Online_Werbung_Diskussionsbericht_lang.pdf?__blob=publicationFile&v=4*.

[75] See p.141 above under Divestitures.

[76] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.29, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.

[77] See CC3 (Revised)—Guidelines for market investigations: Their role, procedures, assessment and remedies (April 2013), para.344, available at: *https://assets.publishing.service.gov.uk./government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf*. Note, however, that in practice, the CMA typically first assesses the effective remedy options and only then considers proportionality, rather than making its assessment in the round.

[78] Sections 3(1) and 19(1) of the Competition Act do exclude the application of Chs I and II to mergers and concentrations.

[79] R. Whish, "New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems with a particular focus on the UK's market investigation tool", Expert study for the European Commission para3.11.

effectively be remedied by actions under the same.[80] The CMA therefore similarly focuses on cases which go beyond the reach of the Competition Act or in which there are particular industry-wide market features or multi-firm conduct which can be better remedied by way of a market investigation.[81] Nevertheless, the CMA (or its predecessors) have on occasion initiated investigations under the Markets Regime which could have been addressed under TFEU arts 101 or 102 as well.[82] As will be explained in more detail below, by conducting its investigation under the Markets Regime, CMA decisions are subject only to a limited standard of review under judicial review principles, whereas decisions reached pursuant to a Competition Act investigation are subject to a full appeal on the merits. This standard of redress is likely also to be a factor in determining which enforcement tool to apply.

Legal remedies

Orders issued by the FCO under ARC s.32f are subject to appeal (ARC s.73), and the general principles and provisions laid down for appeals of the FCO's decisions (particularly ARC ss.73–76) apply. However, appeals against both the behavioural measures under ARC s.32f(3) and against orders to divest under ARC s.32f(4) have suspensory effect (ARC s.66(1) (No. 1)). While this was already envisaged for appeals against divestiture orders in the initial draft bill, as a result of the final consultations of the Committee on Economic Affairs, the suspensory effect was extended to also cover appeals against measures under ARC s.32f(3):

> "due to the formative character and the possible severity of the interventions, which in individual cases may force the addressees to irreversibly change their business model".[83]

As the determination of a relevant malfunctioning of competition is already addressed to a specific company, addressees will be able to appeal both the determination itself as well as a subsequent order of behavioural or structural measures under ARC s.32f(3) and (4). In contrast, findings laid out in the final report on a preceding sector inquiry cannot themselves be appealed. This is largely because the FCO's sector inquiry reports are generally confined to a general description of the competitive conditions, without being addressed at specific companies or their specific conduct.[84] As a consequence, the reports themselves do not have direct legal consequences. Nevertheless, the sector inquiry's findings can be challenged in the context of appeals against decisions determining a malfunctioning of competition or ordering measures under ARC s.32f(3) and (4) to the extent the decisions are based on these findings.

The scope of legal remedies available against decisions of the CMA is much larger in comparison: all decisions issued by the CMA under the Markets Regime are subject to appeal to the CAT by "any person aggrieved by a decision of the CMA … in connection with a reference or possible reference".[85] To the extent that a company is aggrieved by the findings and decision associated with the market study and/or the market investigation reference, these can be appealed—in principle. In practice, appeals against the market study itself are rare. Most recently the CMA's market investigation reference "*Mobile browsers and cloud gaming*" was successfully appealed by Apple to the Competition Appeals Tribunal for being *ultra vires* due to exceeding the statutory time limits set for the market study.[86] However, the CAT's judgment was subsequently set aside by the Court of Appeal, which determined that the CMA's decision to make a market investigation reference in relation to the market for mobile browsers and cloud gaming was lawful.[87] Otherwise, legal review has been focussed on market investigation ("phase 2") decisions.

Most notably, the level of review involved in appeals against the FCO's and the CMA's decisions differ substantially. While judicial review against ARC s.32f decisions covers both questions of facts and of law, appeals against decisions of the CMA under the Enterprise Act are limited to points of law only, according to judicial review principles. The judicial review standard means that the CAT is, therefore, limited to finding that a decision by the CMA was either illegal, procedurally unfair, irrational or incompatible with the Human Rights Act 1998. Aggrieved market participants are not able to challenge the merits of CMA decisions—irrespective of whether these have a substantial effect on their businesses. Accordingly, market participants have only been able to make limited gains when appealing the decisions of the CMA or its predecessors. For example, an appeal to the CAT in the private healthcare market investigation led to a partial remittal of the decision by the Competition Commission (a predecessor body of the CMA) for reconsideration due to certain errors in its statistical analysis. This was followed by the CMA confirming the Competition Commission's original view that there was

[80] See Market investigation references, Guidance about making of references under Part 4 of the Enterprise Act, OFT511, para.2.3.
[81] See Market investigation references, Guidance about making of references under Part 4 of the Enterprise Act, OFT511, paras 2.4–2.8.
[82] In particular in *Private Motor Insurance* concerning most-favoured-nation clauses (final order available at: *https://assets.publishing.service.gov.uk/media/5509879f40f0b613e6000029/Order.pdf*) and *Movies on Pay-TV* concerning an abuse. See Florian Wagner-von Papp, WuW 2022, 642, 644.
[83] See Deutscher Bundestag, Drucksache 20/7625 (5 July 2023), p. 28, available at: *https://dserver.bundestag.de/btd/20/076/2007625.pdf*.
[84] See for instance FCO, sector inquiry "hospitals", Case B3–29/15, final report, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Krankenhaeuser.pdf?__blob=publicationFile&v=3*; FCO, sector inquiry "cement and ready-mixed concrete", Case B1–73-13 final report, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Zement%20und%20Transportbeton.pdf?__blob=publicationFile&v=1*.
[85] EA02 s.179(1). Further appeal of a judgment of the CAT can then be made to the Court of Appeal (or Court of Session in Scotland) and, ultimately, to the Supreme Court.
[86] *Apple Inc. v Competition and Markets Authority* (2023) CAT 21, Case No. 1576/6/12/23.
[87] *Competition and Markets Authority v Apple Inc.* [2023] EWCA Civ 1445.

an AEC in the market but ultimately abandoning one of the original remedies that it had identified on the basis that it would be disproportionate.[88]

The new German competition tool and the UK Markets Regime—observations

The UK market investigation and the new powers of the German FCO under ARC s.32f target similar competitive concerns. The idea behind both tools is to address competitive issues which concern entire markets irrespective of specific conduct by individual companies. In contrast to the "traditional" prohibitions of anti-competitive behaviour under TFEU arts 101 and 102, ARC ss.1, 19 and 20 and Ch.I of the UK Competition Act 1998, measures taken under the respective regime do not necessarily take up or remedy specific, let alone illegal, conduct of market participants. The rationale of both regimes is to address concerns of a more fundamental and general nature.

Procedural aspects

Seemingly the Markets Regime provides the CMA with broader discretion as to how to organise the procedure. Whilst a market study generally precedes a market investigation, in order to provide the necessary basis for a market investigation, this step may be omitted if the required statutory threshold is met.[89] Measures under ARC s.32f strictly require the prior conclusion of a sector inquiry by any of the German antitrust authorities.[90]

Under German law, a future sector inquiry "should" be concluded within 18 months. Depending on the subject matter, such timeframe would constitute a substantial acceleration of the procedure compared to past sector inquiries of the FCO.[91] Even though the 18 months are not a hard deadline, the new timeframe will exert time pressure on the FCO.[92] Unlike the requirements on the CMA when conducting a 12-month market study, the FCO does not have to specify in its final report whether a subsequent investigation as to a significant and continuing malfunctioning of competition is intended.[93] ARC s.32f(7) stipulates, however, that all decisions to be taken under ARC s.32f(2–4) "shall" be issued within 18 months of publishing the final report under ARC s.32e(4). This timeframe is aligned with the UK timeframe for market investigations, which can be extended once by a maximum of six months if there are "special reasons" to do so.[94]

On balance, the timeframe of the new German competition tool and the UK Market Regime are comparable. Whilst there is slightly more time pressure on the CMA, notably in the market study phase, the CMA has the option to conduct a stand-alone market investigation based on other information at hand. The FCO is bound to initiate a sector inquiry or act upon one that has been conducted by a state antitrust authority. This has two consequences: first, the new German competition tool is not apt for countering market failures quickly; second, the final report of the preceding sector inquiry will cater for transparency, as it usually contains a robust and current description of the markets in question. Potential remedial measures of the FCO will necessarily be regarded in the context of such a market description.

Substantive aspects and legal remedies

The differences between both regimes stand out more clearly on the substantive side. Perhaps the most important difference is the existence of the subsidiarity clause in the German regime (ARC s.32f(3)) that has been discussed in detail above.[95] The FCO will have to prove that a malfunctioning of competition cannot be remedied by any of its other competition tools which will at the very least add to the time pressure. Much less difference arguably exists between the concept of "malfunctioning of competition" in the new competition tool and the "adverse effect on competition/AEC" in the UK Market Regime. We have shown above that the criteria applied by the CMA to determine an AEC and those listed in ARC s.32f(5) to determine a malfunctioning of competition are rather similar, with "the presence or absence of evidence of detriments for consumers" playing an important role.[96] We have also concluded that both phenomena require gravity that goes beyond a mere "appreciable restriction of competition" in terms of market impact.[97] In both regimes the impact needs to be significant and continuing. This is expressly mentioned in ARC s.32f(3) sentence 1.

Specific requirements apply in the German regime for divestiture remedies under the new competition tool. Those can only be imposed on undertakings with a

[88] CMA, Private healthcare remittal, Final Report, 5 September 2016.
[89] See p.135 above on the "Phase two": market investigation for details.
[90] Given the wording of ARC s.32f(1) sentence 1 and ARC s.32e(4), the FCO can also act upon sector inquiries undertaken by German Federal State antitrust authorities ("*Landeskartellbehörden*"). In contrast, Kühling/Engelbracht, in: Immenga/Mestmäcker, § 32f GWB, para.9, argue that ARC s.32f presupposes that the FCO relies on findings in its own sector inquiry. The Federal State antitrust authorities have conducted numerous sector inquiries in the energy (gas, district heating, electricity) and water supply fields often concerning allegedly excessive pricing vis-à-vis end customers.
[91] The duration of two more recent sector inquiries (online advertising, concluded in May 2023, and hospitals, concluded in September 2021) was approximately five years.
[92] See pp.137–138 above under Sector inquiry (ARC s.32e).
[93] See in contrast EA02 s.131B(4) and (5) EA02: "(4) Where the CMA has published a market study notice it shall, within the period of 12 months beginning with the date on which it publishes the notice, prepare and publish a report (referred to in this Part as a "market study report") which sets out—[…]
(b)the action (if any) which the CMA proposes to take in relation to the matter.
(5) […] the market study report shall, in particular, contain—
(a) the decision of the CMA to make a reference under s.131 in relation to the matter specified in the market study notice, the decision to accept an undertaking under s.154 instead of making such a reference or (as the case may be) the decision otherwise not to make such a reference; […]".
[94] See p.142 above under Timeline and temporal scope of application for details.
[95] See pp.142–143 above on Subsidiarity and Proportionality.
[96] See p.138 above under Determination of a "significant and continuing malfunctioning of competition" (ARC s.32f(3)).
[97] See p.139 above under Malfunctioning of competition.

dominant position (ARC ss.18, 19) or those which are of paramount significance for competition across markets (ARC s.19a). Further, alternative measures under ARC s.32f(3) must not be possible or not be as effective as a divestiture under ARC s.32f(4).[98] Whilst this may not constitute a substantial difference in outcome (if and to the extent the CMA targets primarily dominant companies as "ultima ratio") it certainly requires a thorough and current examination of all of the aforementioned criteria from the FCO. This renders the 18-month deadline ambitious.

Legal remedies

We have discussed the legal remedies against AEC and malfunctioning of competition in detail above.[99] Whilst legal remedies are available to a larger group of interested parties against decisions of the CMA, the level of review is confined to finding that a CMA decision is illegal, procedurally unfair, irrational or incompatible with the Human Rights Act 1998. The review under German law is much deeper. The appellate court shall, acting *ex officio*, investigate the facts (ARC s.75(1)) and decide on the basis of its conclusions freely reached from the overall results of the proceedings (ARC s.76(1) sentence 1). The court will also review the discretion exercised by the FCO (ARC s.76(5) sentence 1).

Outlook on the use of the new competition tool

Practical considerations

Since the FCO was vested with the power to conduct sector inquires back in 2005, it has concluded 17 of them, with ongoing investigations concerning the provision and marketing of charging infrastructure for electric vehicles ("charging poles") and refineries and fuel wholesalers.[100] Given that the first sector inquiry was concluded in 2007, this amounts to about one sector inquiry per year. In light of the shorter timeframe for sector inquiries stipulated in ARC s.32e(3), the legislator expects a duplication of the number of sector inquiries to approximately two per year.[101] The government bill increases the personnel foreseen for the execution of the new powers under ARC s.32f, providing for seven additional posts (five "higher service" and two "higher intermediate service" posts).[102] As both the sector inquiry and the subsequent determination of a malfunctioning of competition as well as potential remedies will require complex investigations including access to the file for the companies that are addressees of a decision on malfunctioning of competition or remedies, the extent to which the FCO will be able to make use of its new powers appears somewhat limited by the available resources. This is exacerbated by the fact that the FCO has so far not been provided with the seven full-time equivalents foreseen in the government bill for purposes of executing the new powers under ARC s.32f.[103] In contrast, the CMA has significant headcount in its Markets and Mergers division many multiples in excess of the resources available to the FCO.

In practice, orders under ARC s.32f will therefore likely be limited to a comparably small number. Given the new powers under ARC and the reduced thresholds under ARC s.32f(2), the practical importance of sector inquiries will nevertheless increase. Moreover, the implications deriving from each sector inquiry will grow significantly. The FCO can take measures under ARC s.32f(3) and (4) not only on the basis of its own sector inquiries, but also based on those of the respective Federal State antitrust authorities ("*Landeskartellbehörden*"). That may lead to closer cooperation between the authorities in the context of sector inquiries.[104]

We expect both the potential increase in the number of sector inquiries and the possibility of subsequent remedial measures to affect the scope and manner in which the FCO conducts its investigations during a sector inquiry. An increase in the number of requests for information as well as the associated expenditures is likely. The FCO's president anticipates that the investigations triggered by ARC s.32f will not only present a challenge to the FCO but also to the affected companies.[105] In addition, companies subject to sector inquiries will have to consider carefully whether they could be potential addressees of measures under ARC s.32f(2)–(4) following the conclusion of a sector inquiry. This will certainly further increase the attention devoted by undertakings subject to sector inquiries to the investigative measures in question. And the FCO will do the utmost to establish a sufficient factual basis for potential measures under ARC s.32f(3) and (4) during the sector inquiry.

Conversely, the new measures also provide companies which compete or aim to compete with companies in question with additional opportunities. For example, competitors will be able to stipulate the initiation of ARC s.32f proceedings under ARC s.54(1). The complainant(s)

[98] See p.141 above under Divestitures (ARC s.32f(4)) for details.
[99] See pp.143–144 .
[100] See, *https://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Expertensuche_Formular.html?nn=49718&cl2Categories_Arbeitsbereich=sektoruntersuchungen&sortOrder=dateOfIssue_dt+desc&pageLocale=de*, with an overview of all sector inquiries undertaken by the FCO.
[101] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.22, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.
[102] Government Bill on the 11th amendment to the ARC ("Gesetzentwurf der Bundesregierung—Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze"), BT-Drs. 20/6824, p.3, available at: *https://dserver.bundestag.de/btd/20/068/2006824.pdf*.
[103] See, Andreas Mundt, WuW 2023, 521, 522 who also stresses that the FCO, which has been "blessed" with numerous new competences as of late, needs to cope with its core responsibilities as well.
[104] The FCO can also act upon sector inquiries undertaken by German Federal State antitrust authorities ("*Landeskartellbehörden*"). The Federal State antitrust authorities have conducted numerous sector inquiries in the energy (gas, district heating, electricity) and water supply fields often concerning allegedly excessive pricing vis-à-vis end customers.
[105] Andreas Mundt, WuW 2023, 521.

will be parties to the proceedings and thus have the right to take an active role in and benefit from the subsequent investigations. Third parties can, for example, submit statements (ARC s.56(1)) or access the FCO's files (ARC s.56(3)). Affected companies will also be able to privately enforce the FCO's order under ARC s.32f(3) pursuant to s.33, 33a ARC. In particular, claims for an injunction or damages will be possible against a company that infringes an order under ARC s.32f(3).

Potential areas of application

In a recent editorial the FCO's president Andreas Mundt indicated as to where the FCO is likely (*not*) to apply its new powers:[106] First, in light of the expected duration of the proceedings and the required longevity of the impact, measures under ARC s.32f would not be suited to address short-term crisis situations such as, for instance, recent issues regarding energy or fuel prices. Second, considering the recent introductions of ARC s.19a and the DMA, he deems it unlikely that the application of ARC s.32f will focus on digital markets as issues might be easier and more efficiently addressed under the special provisions.[107] Moreover, given the general precedence of EU law on the European internal market, the FCO will focus on cases with effects only or primarily in Germany. Finally, with regard to regulated markets, such as telecommunications, trains and postage services, application of ARC s.32f will likely be limited to complementing the existing regulatory framework as the necessity of consultation with the regulatory agencies (see ARC s.32f(6)) indicates that the powers under ARC s.32f may complement but not counteract or amend any regulatory requirements.[108]

While both the Ministry for Economic Affairs and Climate Action and the FCO have been cautious not to speak about envisaged application cases, Mundt particularly mentioned in the recent editorial (in line with the legislative materials) constellations of considerable market power, vertical integrations or cases of parallel behaviour without confirmed collusion as potential use cases of the new powers under ARC s.32f. He also stressed the importance of constellations referred to by ARC s.32f(5) (No. 2), i.e. markets that are no longer contestable for competitors and where consumers do not have sufficient alternatives to the established market player. Mundt further explicitly refers to the CMA's cases as potential precedents for application of ARC s.32f as well as the FCO's previous sector inquiries.[109]

Against this background, two recent sector inquiries may provide first cases of application for the new competition tool, i.e. online advertising[110] and the ad hoc sector inquiry refineries and fuel wholesalers.[111] Although Mundt has excluded the application of the new tool to address "short term crisis situations"[112] and even though the *ad hoc* sector inquiry had been triggered by the fuel price developments following Russia's attack on Ukraine in February 2022 and the associated sanctioning measures, the fuel prices have been a long-standing issue in Germany.[113] In particular, the identified "decoupling of prices" charged by refineries and wholesalers from the crude oil prices has been and potentially will be further relevant in those markets. As the final report has not been published yet, the FCO would be able to make use of its powers under ARC s.32f(3) and (4). Given the issues that have so far been identified in the published interim report, the FCO might consider further measures. A conceivable measure to counteract the identified decoupling of prices could, for instance, include an obligatory coupling of crude oil and refined oil and fuel prices to some extent.

With regard to online advertising, the FCO has in its final report identified several concerns which might also be addressed by measures under ARC s.32f. This, in particular includes competitive issues caused by advantages with regard to the collection and combination of data. These may be addressed by limiting the collection, combination and use of data or ordering access to these data for competitors and standardisation and interoperability requirements.[114] Moreover, structural remedies under ARC s.32f could be applied to remedy conflicts of interests caused by vertical integrations and activities in different parts of the advertising markets.[115]

In contrast, the recently initiated sector inquiry regarding scoring in the online retail sector will, as of now, not enable the FCO to make use of it powers under ARC s.32f(3) and (4) as ARC s.32f(1) explicitly excludes

[106] Andreas Mundt, WuW 2023, 521,522.
[107] In this regard, it could also be argued that the DMA takes precedent over s.32f ARC at least insofar as conduct under arts 5–7 DMA by gatekeepers is concerned, see Thomas Weck, NZKart (2023), 392 and 395; Thomas Ackermann, ZweR 2023, 1, 15.
[108] Andreas Mundt, WuW 2023, 521, 522.
[109] Andreas Mundt, WuW 2023, 521, 522. For previous sector inquiries see *supra*, fn. 100.
[110] FCO, sector inquiry "online advertising", Case B6-25/18, executive summary, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Sector_inquiry_online-adverstising_final_summary.pdf?__blob=publicationFile&v=3*.
[111] Ad hoc sector inquiry "refineries and fuel wholesalers", Case B8-47/22, executive summary of the interim report in English, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Sektoruntersuchung_Raffinerien_Zwischenbericht.pdf?__blob=publicationFile&v=2*. In contrast, with regard to the most recent sector inquiry "Domestic waste collection / hollow glass processing" from December 2023 the FCO will most likely limit implications to ordering notification of all future concentrations under Sec. 32f(2) ARC, see FCO, sector inquiry "Domestic waste collection / hollow glass processing", Case B5-60/22, final report para. 224, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Siedlungsabfaelle.pdf?__blob=publicationFile&v=2)*,
[112] See p.146 above after fn.106.
[113] See for instance Andreas Mundt, "Nachtrag: steigende Benzinpreise: Fehlende Transparenz auf dem Öl- und Kraftstoffmarkt?", ifo Schnelldienst 11/2012, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Fachartikel/Andreas%20Mundt%20-%20Fehlende%20Transparenz%20auf%20dem%20Kraftstoffmarkt.pdf?__blob=publicationFile&v=2*; Silvia Liebrich and Jan Willmroth, "Frust an der Zapfsäule", Süddeutsche Zeitung (24 August 2015), available at: *https://www.sueddeutsche.de/auto/oelkonzerne-und-der-wettbewerb-frust-an-der-zapfsaeule-1.2618047*.
[114] cf. FCO, sector inquiry "online advertising", Case B6-25/18, paras 96–105 and 120–131, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Online_Werbung_Abschlussbericht.pdf?__blob=publicationFile&v=5*.
[115] cf. FCO, sector inquiry "online advertising", Case B6-25/18, paras 132–138, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Online_Werbung_Abschlussbericht.pdf?__blob=publicationFile&v=5*.

sector inquiries concerning infringements of consumer protection law under ARC s.32e(6) from its area of application. It should be noted, however, that the German legislator is considering to expand the FCO's powers to enforce infringements of consumer law in the course of the coming 12th amendment of the ARC.[116] This may well be implemented by expanding the application of ARC s.32f to sector inquiries under ARC s.32e(6). Assuming that the previous transitional provision, according to which sector inquiries that have been concluded no longer than one year before the provision's entry into force will be adopted to future amendments of ARC s.32f as well, it can therefore not be precluded that in the future measures under ARC s.32f may be taken based on these most recent sector inquiries.

Conclusion

The new German competition tool is complementary and subsidiary to all the other instruments of intervention for the protection of competition and consumer welfare which the FCO has at its disposal. The procedural and substantive safeguards and requirements to be observed by the FCO when using the tool are multi-fold and exclude short-term interventions. It remains to be seen whether the subsidiarity requirement will hold-back or delay the FCO from bringing cases under the new regime, or whether its application can be readily justified outside of the application of the FCO's pre-existing antitrust enforcement tools. Experience with the UK Markets Regime suggests that an investigation into the functioning of competition of markets can readily fall outside of the ambit of antitrust concerns, which relate to unlawful agreements or concerted practices, or unilateral conduct by dominant entities, and that the focal areas of potential intervention are likely to be those which deliver the biggest benefits for the economy and German consumers. Markets of focus are therefore likely to be confined to national boundaries, e.g., infrastructure services (such as transport, energy, water and other regulated services), motor fuel, groceries markets, banking and financial services, and healthcare. In its XXIV. Biennial Report "Competition 2022", the Monopolies Commission identified the steepest mark-up increase in the manufacture of coke and refined petroleum products[117]. From a remedies perspective, conduct-based requirements are likely to affect market participants at large (e.g., imposition of new quasi-regulatory or transparency requirements), whereas structural remedies (e.g., divestments) are likely to target companies with market power who have significantly contributed to the malfunctioning of competition, notwithstanding that they have not engaged in any unlawful conduct under antitrust laws—these companies will know whether this is a material risk once market malfunctioning has been officially determined by the FCO. They may, however, see this coming even earlier when the FCO or any State competition authority conducts a sector inquiry in their business field. What is clear from the UK Markets Regime experience is that the risk of the most onerous structural remedies being imposed appears particularly high if the companies are acting on markets that are not contestable for smaller competitors and where consumers do not have sufficient alternatives to the established market player(s).

[116] See questionnaire for the 12th ARC amendment "Öffentliche Konsultation zur Modernisierung des Wettbewerbsrechts", pp.10–11, available at: *https://www.bmwk.de/Redaktion/DE/Downloads/J-L/anlage-konsultation-zur-modernisierung-des-wettbewerbsrechts.html*; FCO, 2021/2022, p.XIII, available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Jahresbericht/Jahresbericht_2021_22.pdf?__blob=publicationFile&v=5*; Andreas Mundt, WuW 2023, 521, 522.

[117] Monopolies Commission, XXIV. Biennial Report "Competition 2022", para.111; see English summary K.3, available at: *https://www.monopolkommission.de/images/HG24/HGXXIV_Summary.pdf*