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Section 32e Investigations into Sectors of the Economy and Types of Agreements

(1) If circumstances suggest that domestic competition may be restricted or distorted, the Bundeskartellamt and the regional authorities may conduct an investigation into a specific sector of the economy or - across sectors - a specific type of agreements or practices (sector enquiry).

(2) In the course of *the sector enquiry*, the Bundeskartellamt and the supreme Land authorities may conduct the enquiries necessary for the application of the provisions of this Part or of Articles 101 or 102 of the Treaty on the Functioning of the European Union. In this context, they may request information from the undertakings and associations concerned, in particular information on all agreements, decisions and concerted practices.

(3) The Bundeskartellamt shall conclude the sector enquiry within 18 months of its initiation.

(4) The Bundeskartellamt shall publish a report on the results of the sector enquiry; the regional authorities may publish such a report. The Bundeskartellamt and the regional authorities may ask third parties to comment. The Bundeskartellamt may make competition policy recommendations in the report pursuant to sentence 1; in this case it shall forward the report to the Federal Government.

(5) Section 49(1) as well as sections 57 to 59b and 61 shall apply mutatis mutandis.

(6) *Subsections 1 to 3, paragraph 4, sentences 1 and 2 and paragraph 5* shall apply mutatis mutandis to cases where the Bundeskartellamt has reasonable grounds to suspect substantial, permanent or repeated infringements of provisions under consumer protection law which, due to their nature or scale, harm the interests of a large number of consumers. This shall not apply if the enforcement of the provisions under sentence 1 falls within the competence of other federal authorities. *Subsection (5)* shall apply with the proviso that the provisions on entering the premises of parties concerned for the purpose of inspecting and examining business documents in accordance with Section 59a and the provisions on *seizure of assets and* on searches under Section 59b do not apply.

(7) Reimbursement of expenses incurred in the assertion of a claim to cease and desist pursuant to Section 13(3) of the German Act against Unfair Competition shall be precluded for the period of four months from the date of publication of a final report on a sector inquiry pursuant to *subsection (5)*.

Section 32f Measures following a sector enquiry

(1) Following the publication of a report under section 32e(4) on a sector enquiry under section 32e(1), the Bundeskartellamt shall, without prejudice to its other powers, have the further powers under subsections (2) to (4). This shall not apply in cases under section 32e(6).

(2) If there are objectively comprehensible indications that future concentrations could significantly impede effective competition in Germany in one or more of the economic sectors examined in the report pursuant to Section 32e(4) within the meaning of Section 36(1), the Bundeskartellamt may by order require undertakings to notify any concentration within the meaning of Section 37 in one or more of these economic sectors within a period of three years from service of the order pursuant to Section 39. The obligation to notify under the first sentence shall apply only to concentrations in which the acquirer has achieved domestic sales of more than EUR 50 million in the last financial year and the undertaking to be acquired has achieved sales of more than EUR 500 000 in the last financial year. § Section 36(1), second sentence, number 2, shall not apply to concentrations notified by the enterprise in the economic sectors under review. In all other respects, the provisions of this Act applicable to concentrations within the meaning of Chapter 7 shall apply. If the conditions pursuant to sentence 1 continue to exist after the expiry of the three-year period, the Bundeskartellamt may extend the notification obligation by three years; repeated extensions of three years each are permissible.

(3) The Bundeskartellamt may determine by means of an order that there is a significant and continuing malfunctioning of competition on at least one market which is at least nationwide, on several individual markets or across markets, to the extent that the application of the other powers under Part 1 of this Act is not likely to be sufficient, according to the information available to the Bundeskartellamt at the time of the decision, to adequately counteract the identified malfunctioning of competition. The order pursuant to sentence 1 shall be issued against one or more undertakings which may be considered as addressees of measures pursuant to sentence 6 or subsection (4). The addressees of measures may be undertakings which, through their conduct, contribute significantly to the distortion of competition. When selecting the addressees and the remedies, the market position of the undertaking shall also be taken into account. The Bundeskartellamt may extend the order under sentence 1 to further undertakings by decision at a later date. In the event of a finding pursuant to sentence 1, the Bundeskartellamt may impose on the undertakings concerned any behavioural or structural remedies which are necessary to eliminate or reduce the malfunctioning of competition. The remedies may in particular include the following measures:

1. granting access to data, interfaces, networks or other facilities,

2. *specifications on the business relationships between companies in the markets investigated and at different market levels,*
3. *a commitment to establish transparent, non-discriminatory and open norms and standards by companies,*
4. *requirements for certain forms of contracts or contractual arrangements, including contractual rules on the disclosure of information,*
5. *the prohibition of unilateral disclosure of information that favours parallel behaviour by companies,*
6. *the organisational separation of company or business divisions.*

§ Section 32(2) shall apply mutatis mutandis.

(4) Subject to the requirements of subsection (3), the Bundeskartellamt may by order require undertakings with market dominance and undertakings with paramount significance for competition across markets pursuant to section 19a(1) to dispose of shares in undertakings or assets if it is to be expected that this measure will eliminate or substantially reduce the significant and continuing malfunctioning of competition. Remedies pursuant to sentence 1 may only be ordered if remedies pursuant to subsection (3) sentence 6 are not possible, are not of equal effectiveness or would be more burdensome for the undertaking than remedies pursuant to sentence 1. Before the order is issued, the Monopolies Commission and the regional authorities responsible under section 48(1) in whose territory the undertaking has its registered office shall be given the opportunity to comment. The order under sentence 1 shall be published in the Federal Gazette. Section 43(3) shall apply mutatis mutandis with the provision that only the information pursuant to section 39(3) sentence 2 numbers 1 and 2 shall be published. The order may be combined with ancillary provisions. Section 41 subsection 3 second sentence and subs. 4 shall apply mutatis mutandis. The assets need only be sold if the proceeds amount to at least 50 per cent of the value determined by an auditor to be commissioned by the Bundeskartellamt. Insofar as the actual proceeds from the sale fall short of the value determined by the auditor to be commissioned, the undertaking disposing of the assets shall receive an additional payment amounting to half of the difference between the determined value and the actual proceeds from the sale. If the order extends to assets which were the subject of a final clearance of a merger by the Bundeskartellamt or the European Commission prior to the initiation of proceedings under this paragraph or which were acquired after the granting of a final ministerial authorisation, the order shall only be admissible if the period between its service and the service of the merger control order is greater than ten years. If no phase two proceedings have been initiated, the service of the order shall be replaced by the expiry of the period pursuant to section 40(1), first sentence. Parts of the assets which an undertaking has disposed of pursuant to an obligation under this paragraph or pursuant to an

undertaking under paragraph 6 may not be reacquired by the undertaking within five years of the disposal unless it proves that market conditions have changed in such a way that a significant and continuing malfunctioning of competition no longer exists.

(5) A malfunctioning of competition may exist in particular in the following cases:

- 1. Unilateral supply or demand power,*
- 2. restrictions on market entry, exit or capacity of undertakings or on switching to another supplier or demand side,*
- 3. uniform or coordinated behaviour, or*
- 4. foreclosure of input factors or customers through vertical relationships.*

When examining whether there is an interference with competition, particular account should be taken of consequences of the

- 1. the number, size, financial strength and turnover of the undertakings active in the markets concerned or across markets, the market share ratios and the degree of concentration of undertakings,*
- 2. interrelationships of the undertakings in the affected, upstream and downstream or otherwise related markets,*
- 3. prices, quantities, choice and quality of the products or services offered in the affected markets,*
- 4. transparency and homogeneity of goods in the markets concerned,*
- 5. contracts and agreements between companies in the affected markets,*
- 6. the degree of dynamic effects in the markets concerned, and*
- 7. demonstrated efficiency benefits, in particular cost savings or innovation, with appropriate consumer participation.*

A restraint of competition is continuous if it has existed permanently over a period of three years or has occurred repeatedly and there is no indication at the time of the order under subsection (3) that the restraint is more likely than not to cease within two years.

(6) Section 32b shall apply mutatis mutandis to proceedings under paragraphs 3 and 4

(7) Orders under subsections (2) to (4) shall be made within 18 months of the publication of the report under section 32e(4).

(8) On markets in the railway, postal and telecommunications sectors regulated by the Bundesnetzagentur, to which sector-specific competition law applies, as well as the regulated electricity and gas supply networks pursuant to the Energy Industry Act, the Bundeskartellamt shall

require the agreement of the Bundesnetzagentur in order to take remedies pursuant to subsections (3) and (4); the Bundesnetzagentur shall publish a statement in each case. Possible remedies pursuant to paragraphs 3 and 4 shall not be taken into account in the examination within the framework of the market analysis pursuant to section 11(2) number 3 of the Telecommunications Act.

Section 32g Investigation of Infringements of Regulation (EU) No 2022/1925 (Digital Markets Act)

(1) The Bundeskartellamt may conduct an investigation into possible non-compliance with Articles 5, 6 or 7 of Regulation (EU) No 2022/1925 of the European Parliament and of the Council on contestable markets in the digital sector (OJ L 265, 12.10.2022, p. 1) by an undertaking designated pursuant to Article 3 of the Regulation.

(2) The Bundeskartellamt may conduct all investigations necessary for the investigation pursuant to subsection (1). Sections 57 to 59b and 61 shall apply mutatis mutandis. Insofar as the investigations relate to a possible infringement of Article 7 of Regulation (EU) No. 2022/1925, the Bundeskartellamt shall give the Bundesnetzagentur the opportunity to comment.

(3) The Bundeskartellamt shall report to the European Commission on the results of the investigation pursuant to paragraph 1. It may publish a report on the results of the investigation.

Section 34 Disgorgement of Benefits by the Competition Authority

(1) If an undertaking has intentionally or negligently violated a provision of this Part, Article 101 or Article 102 of the Treaty on the Functioning of the European Union or a decision of the competition authority and in this way gained an economic benefit, the competition authority may order the disgorgement of the economic benefit and require the undertaking to pay a corresponding amount of money.

(2) Subsection (1) shall not apply if the economic benefit has been disgorged by

1. the payment of damages,
2. the imposition of a fine,
3. virtue of an order to confiscate the proceeds or

4. Reimbursement.

(3) If the disgorgement of benefits would result in undue hardship, the order shall be limited to a reasonable amount of money or not be issued at all. It shall also not be issued if the economic benefit is insignificant.

(4) It shall be presumed that an infringement of provisions of Chapters 1, 2 or 5, of Article 101 or 102 of the Treaty on the Functioning of the European Union or of an order of the competition authority under section 19a or under Chapter 6 has caused an economic advantage. The amount of the economic advantage may be estimated. Section 287 of the Code of Civil Procedure shall apply mutatis mutandis to the estimation of the amount of the advantage with the provision that a preponderance of probability shall suffice. It shall be presumed that the economic advantage according to sentence 1 amounts to at least 1 per cent of the turnover achieved in Germany with the products or services related to the infringement. The presumption according to sentence 4 shall be based on the disgorgement period according to paragraph 5 sentence 1. It cannot be argued against the presumption according to sentence 1 in conjunction with sentence 4 that no economic advantage or an advantage of only a small amount has accrued. It can only be rebutted if the enterprise proves that neither the legal person or association of persons directly involved in the infringement nor the enterprise made a profit in the corresponding amount in the disgorgement period. When determining the profit of the enterprise pursuant to sentence 7, the worldwide profit of all natural persons and legal entities as well as associations of persons operating as an economic unit shall be taken as a basis. The presumption according to sentence 1 in conjunction with sentence 4 shall not apply if the obtaining of an advantage is not possible due to the special nature of the violation. The amount of money to be paid shall be determined numerically and may not exceed 10 percent of the total turnover of the enterprise or association of enterprises achieved in the business year preceding the decision by the authorities.

(5) The disgorgement of benefits may be ordered only within a time limit of up to seven years from termination of the infringement, and only for a time period not exceeding five years (disgorgement period). Section 33h(6) shall apply mutatis mutandis. In the case of a final decision within the meaning of Section 33b sentence 1 or a final court judgement within the meaning of Section 33b sentence 2, the limitation period under sentence 1 shall begin to run anew.