Prof. Dr. Martin Nettesheim

University of Tübingen
Law School

The German Competition Law Autority's Power to Combat "Disturbances of Competition": Constitutional Law Classification and Criticism

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English Summary

1. Let me start with a thought experiment: Imagine the German legislator empowers a governmental administrative authority to identify "disturbances" (“Störungen”) in an important societal function system such as the system of political formation of will, of science, culture, or sports, and to react to them with potentially unlimited coercive measures. Please assume further that the legislator has no precise conception of what constitutes a disturbance and hands over the development of substantive criteria and standards to the administrative authority. It would be expected that legislation of such content would be unanimously classified as unconstitutional.

2. The German legislator now intends to implement such a competence in the course of the 11th amendment to the German Competition Law statute (“Gesetz gegen Wettbewerbsbeschränkungen”/”GWB”) with regard to the societal function system "market" and its coordination mechanism "competition". The proposition stipulated in § 32f III i.c.w. § 32f V of the draft amendment (“GWB-E”) is unprecedented in Germany’s legislative history. German law does not know of any coercive instrument which, in terms of breadth (entirety of a social function system), regulatory approach (an administrative authority combatting any disturbances) and intervention instrument (any measures of a behavioral or structural nature), is comparable with the Federal Competition Authority’s competence intended in § 32f III i.c.w. § 32f V GWB-E.

3. Current German law is characterized by the legislator's protection of the effectiveness, freedom, fairness, and stability in the societal function systems by means of rules of conduct that reflect coagulated knowledge about the harmfulness of certain actions. This also applies to the current competition law. § 32f GWB-E amounts to a paradigm shift in terms of legal theory.

4. If the competences intended in § 32f III i.c.w. § 32f V GWB-E became applicable law, Germany would be taking a deviant approach to competition law. The "Market Investigation Tool" of the British Competition Authority shows at best an ambivalent track record and cannot serve as a role model. The EU recently decided against the introduction of a "New Competition Tool". There is no other large state in the world, being active in the field of competition policy, that allows "distortions of competition" to be combatted in an undifferentiated manner. The existing competition law instruments are suitable for dealing with any deficits in the structure or intensity of competition. The planned amendment does not close any loopholes but aims for a *new approach* that is not backed up by competition theory.

5. The competence intended in § 32f GWB-E goes far beyond the competences assigned to the regulatory authority in the sectors of post, telecommunications, energy, and rail, but its content is considerably more indefinite and open.

6. The explanatory memorandum of the draft law admits that there is no attempt to define the term "disruption of competition" or to concretize the normative concept. The topoi listed in § 32f V 2 GWB-E predominantly deal with the description and analysis of market structures (nos. 1-6). They do not permit any normative statements on when functioning competition occurs and when the threshold for disruption is exceeded. The examples of rules mentioned in § 32f V 1 GWB-E are based on quite different theories of competitive harm; they are so heterogeneous that they do not permit any inductive conclusions on the general definition of "disruption". It would be a fallacy to believe that competition theory, economics or sociology would provide consensual standards for determining when competition is disrupted.

7. The legislator's decision to grant an administrative authority the competences intended in § 32f III i.c.w. § 32f V GWB-E meets with serious constitutional law concerns. The draft aims to shift decision-making competence to an administrative body to an extent that is incompatible

with the principles of liberal constitutionalism. The competition authority is enabled to formulate general rules of market conduct, which must remain the legislature's prerogative. The plan is based on socio-technocratic misconceptions about the administrative controllability of a societal function system. Liberal constitutional principles do not allow an administrative authority to define general standards of normality and disruption in a societal function system.

8. Moreover, § 32f III 1 GWB-E violates the precept of definiteness based on the principles of democracy and rule of law (see No. 6 above). Subjects of Law cannot recognize when a disruption has occurred: they cannot adjust their conduct to foreseeably avoid coercive measures. Sufficient definiteness can be achieved in particular by providing a conclusive list of potentially disruptive conduct in § 32f V 1 GWB-E. This would also correspond to the regulatory technique of the EU's Digital Market Act.

9. § 32f III GWB-E does not comply with the constitutional requirement the the legislator must determine the "material" questions insofar as the legislator neither defines the term "disruption" nor specifies the associated concept. He must also define more precisely when unilateral market power turns into a disruption (§ 32f V 1 no. 1 GWB-E). He must not grant the Federal Cartel Office arbitrary freedom to select addressees of the administrative decision who have made any causal contribution to the creation of a market structure (§ 32f III 2 GWB-E). Finally, the use of the hitherto limitless decision-making competence under § 32f III 6 GWB-E must also be normatively restricted.

10. § 32f III i.c.w. § 32f V GWB-E leads to property-relevant encroachments on the fundamental right of adequate respect for property rights under Art. 14 I of the German Basic Law ("Grundgesetz"/"GG"). The provision does not meet the requirements of Art. 14 I GG, in particular as it is not clear why the legislator intends to establish a general and unspecific competence to combat interference that would extend beyond the problematic conduct specifically identified by the legislator. Fundamental rights do not permit the haphazard establishment of administrative power. The regulation is also inappropriate because it does not allow addressees to direct their behavior. It is unreasonable because it allows claims to be made on the basis of mere market power (§ 32f V 1 no. 1 GWB-E) and because it allows claims to be made against non-responsible companies without formulating any limiting conditions (e.g. § 32f III 7 no. 1

GWB-E: granting access to data and facilities; no. 2: recourse because the state has erected barriers to market access; § 32f III 6 GWB-E: recourse for reasons of efficiency). It is inadequate because it does not foresee compensation in these cases.

11. For the reasons stated above, § 32f III i.c.w. § 32f V GWB-E also proves to be an inadmissible encroachment on entrepreneurial freedom according to Art. 12 GG (freedom to conduct a business).

12. The draft bill violates the guarantee of effective legal protection in Art. 19 IV GG because it does not foresee that appeals against orders under § 32f III 6 GWB-E have suspensive effect. Pursuant to § 66 I no. 1 GWB-E, legal remedies against unbundling regulations pursuant to § 32f IV GWB-E shall have a deferring effect. There is no objective reason not to provide this for the potentially more severe encroachments on fundamental rights under § 32f III 6 GWB-E in terms of breadth and depth.

13. The constitutionality of the provisions in § 32f III i.c.w. § 32f V GWB-E can be ensured by
- concretizing the concept of competition's disruption by a conclusive list of harmful conduct (amendment of § 32f V 1 GWB-E),
- ensuring that the discretionary authority foreseen in § 32f III 2 GWB-E may only be exercised to the detriment of companies which can be accused of harmful conduct,
- ensuring that the discretion foreseen in § 32f III 6 GWB-E may only be used to issue orders eliminating the effect of the harmful conduct.

14. If the legislator insists on the Federal Cartel Office's possibility to act against companies that have not behaved harmfully in terms of competition theory, it needs:
- to limit the definition of market power in § 32f V 1 no. 1 GWB-E and
- to establish a compensation regulation for property-relevant measures that affect normatively non-responsible companies.