

**Part 1**  
**Restraints of Competition**

**Chapter 1**  
**Agreements, Decisions and Concerted Practices Restricting Competition**

**Section 1 Prohibition of Agreements Restricting Competition**

Agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition are prohibited.

**Section 2 Exempted Agreements**

(1) Agreements between undertakings, decisions by associations of undertakings or concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not

1. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or
2. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

shall be exempted from the prohibition under Section 1.

(2) For the application of subsection (1), the Regulations of the Council or the European Commission on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions by associations of undertakings and concerted practices (block exemption regulations) shall apply *mutatis mutandis*. This shall also apply where the agreements, decisions and practices mentioned therein are not capable of affecting trade between the Member States of the European Union.

**Section 3 Cartels of Small or Medium-Sized Enterprises**

Agreements between competing undertakings and decisions by associations of undertakings the subject matter of which is the rationalisation of economic activities through inter-firm cooperation fulfil the conditions of Section 2(1) if

1. the agreement or the decision does not significantly affect competition on the market, and
2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises.

**Sections 4 – 17 (repealed)**

**Chapter 2**  
**Market Dominance, Other Restrictive Practices**

**Section 18 Market Dominance**

(1) An undertaking is dominant where, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market, it

1. has no competitors,
2. is not exposed to any substantial competition, or

3. has a paramount market position in relation to its competitors.
- (2) The relevant geographic market may be broader than the area of application of this Act.
- (2a) The assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge.
- (3) In assessing the market position of an undertaking in relation to its competitors, account shall be taken in particular of the following:
1. its market share,
  2. its financial strength,
  3. its access to data relevant for competition,
  4. its access to supply or sales markets,
  5. links with other undertakings,
  6. legal or factual barriers to the market entry of other undertakings,
  7. actual or potential competition from undertakings domiciled within or outside the area of application of this Act,
  8. its ability to shift its supply or demand to other goods or commercial services, and
  9. the possibility for the opposite market side to switch to other undertakings.
- (3a) In particular in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of:
1. direct and indirect network effects,
  2. the parallel use of several services and the switching costs for users,
  3. the undertaking's economies of scale arising in connection with network effects,
  4. the undertaking's access to data relevant for competition,
  5. competitive pressure driven by innovation.
- (3b) In assessing the market position of an undertaking acting as an intermediary on multi-sided markets, account shall be taken in particular of the importance of the intermediary services provided by the undertaking for accessing supply and sales markets.
- (4) An undertaking is considered to be dominant if it has a market share of at least 40 per cent.
- (5) Two or more undertakings are dominant to the extent that
1. no substantial competition exists between them with respect to a certain type of goods or commercial services and
  2. they fulfil in their entirety the requirements of subsection (1).
- (6) A body of undertakings is presumed to be dominant if it
1. consists of three or fewer undertakings reaching a combined market share of 50 per cent, or
  2. consists of five or fewer undertakings reaching a combined market share of two thirds.
- (7) The presumption under subsection (6) can be refuted if the undertakings demonstrate that
1. the conditions of competition are such that substantial competition between them can be expected, or
  2. the body of undertakings has no paramount market position in relation to the remaining competitors.
- (8) The Federal Ministry for Economic Affairs and Energy shall report to the legislative bodies on its experience with subsections (2a) and (3a) three years after the entry into force of the provisions.

## **Section 19 Prohibited Conduct of Dominant Undertakings**

(1) Any abuse of a dominant position by one or several undertakings is prohibited.

(2) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services

1. directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from similar undertakings without any objective justification;
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;
3. demands less favourable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;
4. refuses to supply another undertaking with such a good or commercial service for adequate consideration, in particular to grant it access to data, networks or other infrastructure facilities, and if the supply or the granting of access is objectively necessary in order to operate on an upstream or downstream market and the refusal threatens to eliminate effective competition on that market, unless there is an objective justification for the refusal;
5. requests other undertakings to grant it advantages without objective justification; in this regard, account shall be taken in particular of whether the other undertaking has been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request.

(3) Subsection (1) in conjunction with subsection (2) nos 1 and 5 shall also apply to associations of competing undertakings within the meaning of Sections 2, 3, and 28(1), Section 30(2a) and (2b) and Section 31(1) nos 1, 2 and 4. Subsection (1) in conjunction with subsection (2) no 1 shall also apply to undertakings which engage in resale price maintenance pursuant to Section 28(2) or Section 30(1) sentence 1 or Section 31(1) no 3.

### **Section 19a Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets**

(1) The Bundeskartellamt may issue a decision declaring that an undertaking which is active to a significant extent on markets within the meaning of Section 18(3a) is of paramount significance for competition across markets. In determining the paramount significance of an undertaking for competition across markets, account shall be taken in particular of:

1. its dominant position on one or several market(s),
2. its financial strength or its access to other resources,
3. its vertical integration and its activities on otherwise related markets,
4. its access to data relevant for competition,
5. the relevance of its activities for third party access to supply and sales markets and its related influence on the business activities of third parties.

The validity of the decision issued pursuant to sentence 1 must be limited to five years from the date on which it becomes final.

(2) In the case of a declaratory decision issued pursuant to subsection (1), the Bundeskartellamt may prohibit such undertaking from

1. favouring its own offers over the offers of its competitors when mediating access to supply and sales markets, in particular
  - a) presenting its own offers in a more favourable manner;

- b) exclusively pre-installing its own offers on devices or integrating them in any other way in offers provided by the undertaking;
- 2. taking measures that impede other undertakings in carrying out their business activities on supply or sales markets where the undertaking's activities are of relevance for accessing such markets, in particular
  - a) taking measures that result in the exclusive pre-installation or integration of offers provided by the undertaking;
  - b) preventing other undertakings from advertising their own offers or reaching their purchasers through other channels in addition to those provided or mediated by the undertaking, or making it more difficult for other undertakings to do so;
- 3. directly or indirectly impeding competitors on a market on which the undertaking can rapidly expand its position even without being dominant, in particular
  - a) linking the use of an offer provided by the undertaking to the automatic use of another offer provided by the undertaking which is not necessary for the use of the former offer, without giving the user of the offer sufficient choice as to whether and how the other offer is to be used;
  - b) making the use of an offer provided by the undertaking conditional on the use of another offer provided by the undertaking;
- 4. creating or appreciably raising barriers to market entry or otherwise impeding other undertakings by processing data relevant for competition that have been collected by the undertaking, or demanding terms and conditions that permit such processing, in particular
  - a) making the use of services conditional on the user agreeing to the processing of data from other services of the undertaking or a third-party provider without giving the user sufficient choice as to whether, how and for what purpose such data are processed;
  - b) processing data relevant for competition received from other undertakings for purposes other than those necessary for the provision of its own services to these undertakings without giving these undertakings sufficient choice as to whether, how and for what purpose such data are processed;
- 5. refusing the interoperability of products or services or data portability, or making it more difficult, and in this way impeding competition;
- 6. providing other undertakings with insufficient information about the scope, quality or success of the service rendered or commissioned, or otherwise making it more difficult for such undertakings to assess the value of this service;
- 7. demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand, in particular
  - a) demanding the transfer of data or rights that are not absolutely necessary for the purpose of presenting these offers,
  - b) making the quality in which these offers are presented conditional on the transfer of data or rights which are not reasonably required for this purpose.

This shall not apply to the extent that the respective conduct is objectively justified. In this respect, the burden of demonstration and proof shall lie with the undertaking. Section 32(2) and (3), Section 32a and Section 32b shall apply *mutatis mutandis*. The order under subsection (2) may be combined with the declaration under subsection (1).

(3) Sections 19 and 20 shall remain unaffected.

(4) The Federal Ministry for Economic Affairs and Energy shall report to the legislative bodies on its experience with this rule after a period of four years following the entry into force of the provisions under subsections (1) and (2).

## **Section 20 Prohibited Conduct of Undertakings with Relative or Superior Market Power**

(1) Section 19(1) in conjunction with subsection (2) no 1 shall also apply to undertakings and associations of undertakings to the extent that other undertakings as suppliers or purchasers of a certain type of goods or commercial services are dependent on them in such a way that sufficient and reasonable possibilities for switching to third parties do not exist and there is a significant imbalance between the power of such undertakings or associations of undertakings and the countervailing power of other undertakings (relative market power). Section 19(1) in conjunction with subsection (2) no 1 shall also apply to undertakings acting as intermediaries on multi-sided markets to the extent that other undertakings are dependent on their intermediary services for accessing supply and sales markets in such a way that sufficient and reasonable alternatives do not exist. A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other compensation, special benefits which are not granted to similar purchasers.

(1a) Dependence within the meaning of subsection (1) may also arise from the fact that an undertaking is dependent on accessing data controlled by another undertaking in order to carry out its own activities. Refusing to grant access to such data in return for adequate compensation may constitute an unfair impediment pursuant to subsection (1) in conjunction with Section 19(2) no 1. This shall also apply even if such data have not yet been commercially traded.

(2) Section 19(1) in conjunction with subsection (2) no 5 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them.

(3) Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market power to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of sentence 1 exists in particular if an undertaking

1. offers food within the meaning of Section 2(2) of the German Food and Feed Code [*Lebensmittel- und Futtermittelgesetzbuch*] below cost price, or
2. offers other goods or commercial services not just occasionally below cost price, or
3. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the delivery of such goods or services which is higher than the price it itself offers on such market,

unless there is, in each case, an objective justification. Cost price within the meaning of sentence 2 shall be the price agreed between the undertaking with superior market power and its supplier for the provision of the good or service and from which general discounts that can be expected with reasonable certainty at the time the offer is made are proportionally deducted unless otherwise expressly agreed with regard to the specific goods or services. Offering food below cost price is objectively justified if this is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises through a timely sale, or in equally severe cases. Donating food to charity organisations for use within the scope of their responsibilities shall not constitute an unfair impediment.

(3a) An unfair impediment within the meaning of subsection (3) sentence 1 shall also be deemed to exist where an undertaking with superior market power on a market within the meaning of Section 18(3a) impedes the independent attainment of network effects by competitors and in this way creates a serious risk of significantly restricting competition on the merits.

(4) If, on the basis of specific facts and in the light of general experience, it appears that an undertaking has abused its market power within the meaning of subsection (3), the undertaking shall be obliged to disprove this appearance and to clarify such circumstances in its field of business which give rise to claims and which cannot be clarified by the competitor concerned or by an association within the meaning of Section 33(4), but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which claims are made.

(5) Business and trade associations or professional organisations as well as quality mark associations may not refuse to admit an undertaking if such refusal would constitute an objectively unjustified unequal treatment and place the undertaking at an unfair competitive disadvantage.

## **Section 21 Prohibition of Boycott and Other Restrictive Practices**

(1) Undertakings and associations of undertakings may not request that another undertaking or other associations of undertakings refuse to supply to or purchase from certain undertakings, with the intention of unfairly impeding these undertakings.

(2) Undertakings and associations of undertakings may not threaten or cause disadvantages, or promise or grant advantages, to other undertakings in order to induce them to engage in conduct which, under the following rules and regulations, may not be made the subject matter of a contractual commitment:

1. under this Act,
2. under Articles 101 or 102 of the Treaty on the Functioning of the European Union, or
3. under a decision issued by the European Commission or the competition authority pursuant to this Act or pursuant to Articles 101 or 102 of the Treaty on the Functioning of the European Union.

(3) Undertakings and associations of undertakings may not compel other undertakings

1. to accede to an agreement or a decision within the meaning of Sections 2, 3, 28(1) or Section 30(2a) or (2b), or
2. to merge with other undertakings within the meaning of Section 37, or
3. to act uniformly in the market with the intention of restricting competition.

(4) It is prohibited to cause economic harm to another person because such person has requested or suggested that action be taken by the competition authority.

### **Chapter 3** **Application of European Competition Law**

#### **Section 22 Relationship Between this Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union**

(1) The provisions of this Act may also be applied to agreements between undertakings, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union which may affect trade between the Member States of the European Union within the meaning of that provision. In that case, Article 101 of the Treaty on the Functioning of the European Union shall apply besides the provisions of this Act pursuant to Article 3(1) sentence 1 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ EC 2003 No L 1, p.1).

(2) Pursuant to Article 3(2) sentence 1 of Regulation (EC) No 1/2003, the application of the provisions of this Act may not lead to the prohibition of agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States of the European Union but

1. which do not restrict competition within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union, or
2. which fulfil the conditions of Article 101(3) of the Treaty on the Functioning of the European Union, or
3. which are covered by a regulation regarding the application of Article 101(3) of the Treaty on the Functioning of the European Union.

The provisions under Chapter 2 shall remain unaffected. In other cases, the primacy of Article 101 of the Treaty on the Functioning of the European Union shall be determined by the relevant provisions under European Union law.

(3) The provisions of this Act may also be applied to practices which constitute an abuse prohibited under Article 102 of the Treaty on the Functioning of the European Union. In that case, Article 102 of the Treaty on the Functioning of the European Union shall apply besides the provisions of this Act pursuant to Article 3(1) sentence 2 of Regulation (EC) No 1/2003. The application of stricter provisions of this Act shall remain unaffected.

(4) Without prejudice to European Union law, subsections (1) to (3) do not apply to the extent that provisions concerning the control of concentrations are applied. Provisions that predominantly pursue an objective different from that pursued by Articles 101 and 102 of the Treaty on the Functioning of the European Union shall not be affected by the provisions of this Chapter.

## **Section 23 (repealed)**

### **Chapter 4** **Competition Rules**

#### **Section 24 Definition, Application for Recognition**

(1) Business and trade associations and professional organisations may establish competition rules within their area of business.

(2) Competition rules are provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct in competition which is contrary to the principles of fair competition or effective competition on the merits, and for the purpose of encouraging conduct in competition which is in line with these principles.

(3) Business and trade associations and professional organisations may submit to the competition authority an application for recognition of competition rules.

(4) Applications for recognition of competition rules shall contain:

1. the name, legal form and address of the business and trade association or professional organisation;
2. the name and address of the person representing it;
3. a description of the subject matter and the territorial scope of the competition rules;
4. the wording of the competition rules.

The application shall be accompanied by:

1. the by-laws of the business and trade association or professional organisation;
2. proof that the competition rules were established in conformity with the by-laws;
3. a list of unrelated business and trade associations or professional organisations and undertakings operating at the same level in the economic process as well as the suppliers' and purchasers' associations and the federal organisations for the relevant levels of the economic sector concerned.

The application may not contain or use incorrect or incomplete information in order to surreptitiously obtain recognition of a competition rule for the applicant or for a third party.

(5) The competition authority shall be informed of any changes and amendments to competition rules that have been recognised.

#### **Section 25 Third Party Comments**

The competition authority shall give third-party undertakings operating at the same level in the economic process, business and trade associations and professional organisations of the suppliers and purchasers affected by the competition rules, as well as the federal organisations of the levels of the economic process concerned, the opportunity to comment. This shall also apply to consumer advice centres and other consumer associations supported by public funds if consumer interests are substantially affected. The competition authority may hold a public hearing on the application for recognition where anyone shall be free to raise objections.

#### **Section 26 Recognition**

(1) Recognitions are issued by decision of the competition authority. The decision shall state that the competition authority will not exercise the powers conferred to it under Chapter 6.

(2) As far as a competition rule violates the prohibition under Section 1 and is not exempted pursuant to Sections 2 or 3, or violates other provisions of this Act, of the German Act Against Unfair Competition [*Gesetz gegen den unlauteren Wettbewerb*], or any other legal provision, the competition authority shall reject the application for recognition.

(3) Business and trade associations and professional organisations shall inform the competition authority about the repeal of recognised competition rules which have been established by them.

(4) The competition authority shall withdraw or revoke the recognition if it subsequently finds that the conditions for refusal of recognition pursuant to subsection (2) are satisfied.

### **Section 27 Information on Competition Rules, Publications**

(1) Recognised competition rules shall be published in the Federal Gazette [*Bundesanzeiger*].

(2) The following shall be published in the Federal Gazette:

1. applications submitted pursuant to Section 24(3);
2. the setting of hearing dates pursuant to Section 25 sentence 3;
3. the recognition of competition rules as well as any changes and amendments to such rules;
4. the refusal of recognition pursuant to Section 26(2), the withdrawal or revocation of the recognition of competition rules pursuant to Section 26(4).

(3) The publication of applications pursuant to subsection (2) no 1 shall include a note to the effect that the competition rules for which recognition has been requested are open to public inspection at the competition authority.

(4) Where applications pursuant to subsection (2) no 1 result in recognition, reference to the publication of the applications shall suffice for the purpose of publishing the recognition.

With respect to recognised competition rules which have not been published pursuant to subsection (1), the competition authority shall, upon request, provide information on the details provided pursuant to Section 24(4) sentence 1.

## **Chapter 5** **Special Provisions for Certain Sectors of the Economy**

### **Section 28 Agriculture**

(1) Section 1 shall not apply to agreements between agricultural producers or to agreements and decisions of associations of agricultural producers and federations of such associations which concern

1. the production or sale of agricultural products, or
2. the use of joint facilities for storing, treating or processing agricultural products,

provided that they do not maintain resale prices and do not exclude competition. Plant breeding and animal breeding undertakings as well as undertakings operating at the same level of business shall also be deemed to be agricultural producers.

(2) Section 1 shall not apply to vertical resale price maintenance concerning the sorting, labelling or packaging of agricultural products.

(3) Agricultural products shall be the products listed in Annex I to the Treaty on the Functioning of the European Union as well as the goods resulting from the treatment or processing of such products, insofar as they are commonly treated or processed by agricultural producers or their associations.

### **Section 29 Energy Sector**

An undertaking which is a supplier of electricity or pipeline gas (public utility company) on a market in which it, either alone or together with other public utility companies, has a dominant position is prohibited from abusing such position by

1. demanding fees or other business terms which are less favourable than those of other public utility companies or undertakings in comparable markets, unless the public utility company provides evidence that such deviation is objectively justified, with the reversal of the burden of demonstration and proof only applying in proceedings before the competition authorities, or



2. demanding fees which unreasonably exceed the costs.

Costs that would not arise to the same extent if competition existed must not be taken into consideration in determining whether an abuse within the meaning of sentence 1 exists. Sections 19 and 20 shall remain unaffected.

### **Section 30 Press**

(1) Section 1 shall not apply to vertical resale price maintenance by which an undertaking producing newspapers or magazines requires the purchasers of these products by legal or economic means to demand certain resale prices from or to impose the same commitment upon their own customers, down to the resale to the final consumer. Newspapers and magazines shall include products which reproduce or substitute newspapers or magazines and, upon assessment of all circumstances, must be considered as predominantly fulfilling the characteristics of a publishing product, as well as combined products the main feature of which is a newspaper or magazine.

(2) Agreements of the kind described in subsection (1) shall be made in writing as far as they concern prices and price components. It shall suffice for the parties to sign documents referring to a price list or to price information. Section 126(2) of the German Civil Code [*Bürgerliches Gesetzbuch*] shall not be applicable.

(2a) Section 1 shall not apply to industry agreements concluded between associations of undertakings that maintain resale prices for newspapers or magazines (publishers) pursuant to subsection (1), on the one hand, and associations of their purchasers, which purchase newspapers and magazines subject to resale price maintenance and with a right of return in order to sell them to retailers, also with a right of return (newspaper and magazine wholesalers), on the other hand, for the undertakings represented by such associations, to the extent that these industry agreements provide for a wide-ranging and non-discriminatory distribution of newspaper and magazine lines by newspaper and magazine wholesalers, in particular the prerequisites and compensation for such distribution and the services covered by such compensation. To this extent, the associations mentioned in sentence 1 and the publishers and newspaper and magazine wholesalers represented by them are entrusted with the operation of services of general economic interest within the meaning of Article 106(2) of the Treaty on the Functioning of the European Union in order to ensure a wide-ranging and non-discriminatory distribution of newspapers and magazines in stationary retail. Sections 19 and 20 shall remain unaffected.

(2b) Section 1 shall not apply to cooperations relating to publishing activities between newspaper or magazine publishers to the extent that such agreements enable the parties to strengthen their economic base for intermedia competition. Sentence 1 shall not apply to cooperations relating to editorial activities. Upon application, the undertakings shall be entitled to a decision issued by the competition authority pursuant to Section 32c, provided that

1. based on information available to the competition authority, the agreement under sentence 1 does not satisfy the conditions for a prohibition pursuant to Article 101(1) of the Treaty on the Functioning of the European Union and
2. the applicants have a significant legal and economic interest in such a decision.

Sections 19 and 20 shall remain unaffected.

(3) The Bundeskartellamt may, acting *ex officio* or upon the request of a purchaser bound to resale prices, declare the maintenance of resale prices invalid and prohibit the implementation of a new and equivalent price maintenance scheme if

1. resale price maintenance is applied in an abusive manner, or
2. resale price maintenance or its combination with other restraints of competition is capable of increasing the price of the goods subject to resale price maintenance, or of preventing their prices from decreasing, or of restricting their production or sales.

If an industry agreement pursuant to subsection (2a) or an agreement pursuant to subsection (2b) constitutes an abuse of the exemption, the Bundeskartellamt may declare such agreement invalid in whole or in part.

(4) The Federal Ministry for Economic Affairs and Energy shall report to the legislative bodies on its experience with subsections (2b) and (3) sentence 2 after a period of five years following the entry into force of the provisions.

## **Section 31 Water Management Contracts**

(1) The prohibition of agreements restricting competition pursuant to Section 1 does not apply to contracts entered into between companies ensuring public water supply (public water suppliers) and

1. other water suppliers or regional and local authorities, to the extent that in this agreement one of the contracting parties undertakes to refrain from operating as a public water supplier within a certain area using fixed pipelines;
2. regional or local authorities, to the extent that in this agreement a regional or local authority undertakes to permit a single supplier the exclusive installation and operation of pipelines on or under public routes for the purpose of an existing or intended direct water supply to end users in the regional or local authority's territory;
3. water suppliers at distribution level, to the extent that in this agreement a water supplier at distribution level undertakes to supply its customers with water using fixed pipelines at prices or terms and conditions that are not less favourable than the prices or terms and conditions granted by the supplying water supplier to its comparable customers;
4. other water suppliers, to the extent that they are entered into for the purpose of providing certain supply services using fixed pipelines to one or several suppliers with the exclusive purpose of ensuring public water supply.

(2) Agreements under subsection (1), including any changes and amendments, shall be made in writing.

(3) Agreements under subsection (1) or the way in which they are implemented must not constitute an abuse of the market position gained from the exemption from the provisions of this Act.

(4) An abuse shall be deemed to exist in particular if

1. a public water supplier's market conduct is in violation of the principles governing the market conduct of undertakings where effective competition exists; or
2. a public water supplier demands less favourable prices or business terms from its customers than comparable water suppliers, unless the water supplier provides evidence that such deviation is due to differing circumstances not attributable to it; or
3. a public water supplier demands fees that unreasonably exceed the costs; in this context, only costs incurred in the course of efficient business management shall be taken into account.

(5) An abuse does not exist if a public water supplier refuses, in particular for technical or hygienic reasons, to enter into agreements with another undertaking regarding the feeding-in of water to its pipe network and to permit a connected extraction of water (transmission).

## **Section 31a Water Management, Notification Requirement**

(1) Agreements under Section 31(1) nos 1, 2 and 4, including any changes and amendments, shall be fully notified to the competition authority in order to be valid. The notification shall contain the following details with respect to every undertaking concerned:

1. name or other designation;
2. place of business or registered seat;
3. legal form and address; and
4. name and address of the appointed representative or other authorised agent; in the case of legal persons, name and address of the legal representative.

(2) The competition authority shall be informed of the termination or cancellation of the agreements mentioned in Section 31(1) nos 1, 2 and 4.

## **Section 31b Water Management, Duties and Powers of the Competition Authority, Sanctions**

(1) Upon request, the competition authority shall furnish the following information on the agreements exempted pursuant to Section 31(1) nos 1, 2 and 4:

1. information pursuant to Section 31a and
  2. the material content of the agreements and decisions, in particular information on the purpose, the intended measures and the term, termination, rescission and withdrawal.
- (2) The competition authority shall issue any orders under this Act that relate to the public supply of water using fixed pipelines in consultation with the relevant industry supervisory authority.
- (3) In cases of abuse pursuant to Section 31(3), the competition authority may
1. oblige the undertakings concerned to end the abuse;
  2. oblige the undertakings concerned to modify the agreements or decisions; or
  3. declare the agreements and decisions invalid.
- (4) In deciding on a measure pursuant to subsection (3), the competition authority shall take into account the intent and purpose of the exemption and, in particular, the aim of ensuring that supply is as reliable and reasonably priced as possible.
- (5) Subsection (3) shall apply *mutatis mutandis* to the extent that a public water supplier holds a dominant position.

Section 19 shall remain unaffected.

## **Chapter 6** **Powers of the Competition Authorities, Damages and Disgorgement of Benefits**

### **Division 1** **Powers of the Competition Authorities**

#### **Section 32 Termination and Subsequent Declaration of Infringements**

- (1) The competition authority may oblige undertakings or associations of undertakings to terminate an infringement of a provision of this Part or of Articles 101 or 102 of the Treaty on the Functioning of the European Union.
- (2) For this purpose, it may require them to take all necessary behavioural or structural remedies that are proportionate to the infringement identified and necessary to bring the infringement effectively to an end. Structural remedies may be imposed only if there is no behavioural remedy which would be equally effective, or if the behavioural remedy would entail a greater burden for the undertakings concerned than the structural remedies.
- (2a) In its order to terminate the infringement, the competition authority may order reimbursement of the benefits generated through the infringement. The amount of interest that is included in these benefits may be estimated. After expiry of the time limit for reimbursement of the benefits set in the order to terminate the infringement, the benefits generated up to such date shall bear interest in accordance with Section 288(1) sentence 2 and Section 289 sentence 1 of the German Civil Code.
- (3) To the extent that a legitimate interest exists, the competition authority may also declare that an infringement has been committed after the infringement has been terminated.

#### **Section 32a Interim Measures**

- (1) The competition authority may impose interim measures *ex officio* if an infringement within the meaning of Section 32(1) is more likely than not to exist and the interim measure is necessary in order to protect competition or due to an imminent threat of serious harm to another undertaking. This shall not apply to the extent that the undertaking concerned credibly demonstrates that the order would result in unfair hardship not justified by overriding public interests.
- (2) Orders pursuant to subsection (1) shall be limited in time. The time limit may be extended. It shall not exceed one year in total.

#### **Section 32b Commitments**

(1) Where, in the course of proceedings under Section 30(3), Section 31b(3) or Section 32, undertakings offer to enter into commitments which are capable of dispelling the concerns communicated to them by the competition authority upon preliminary assessment, the competition authority may by way of a decision declare those commitments to be binding on the undertakings. The decision shall state that, subject to the provisions under subsection (2), the competition authority will not exercise its powers under Section 30(3), Section 31b(3), Section 32 and Section 32a. The decision may be limited in time.

(2) The competition authority may rescind the decision pursuant to subsection (1) and reopen the proceedings where

1. the factual circumstances have subsequently changed in an aspect that is material for the decision;
2. the undertakings concerned fail to meet their commitments; or
3. the decision was based on incomplete, incorrect or misleading information provided by the parties.

### **Section 32c No Grounds for Action**

(1) The competition authority may decide that there are no grounds for it to take any action if, based on the information available to it, the conditions for a prohibition pursuant to Sections 1, 19 to 21 and 29, Article 101(1) or Article 102 of the Treaty on the Functioning of the European Union are not satisfied. The decision shall state that, subject to new findings, the competition authority will not exercise its powers under Sections 32 and 32a. The decision does not include an exemption from a prohibition within the meaning of sentence 1.

(2) Irrespective of the conditions set out in subsection (1), the competition authority may also declare that it refrains from initiating proceedings in accordance with its discretionary powers.

(3) The Bundeskartellamt may determine general administrative guidelines concerning the exercise of its discretionary powers pursuant to subsections (1) and (2).

(4) Undertakings or associations of undertakings shall, upon application, be entitled to a decision issued by the Bundeskartellamt pursuant to subsection (1) if they have a substantial legal and economic interest in obtaining such a decision with regard to a cooperation with competitors. The Bundeskartellamt shall decide on an application pursuant to sentence 1 within six months.

### **Section 32d Withdrawal of Exemption**

If agreements, decisions by associations of undertakings or concerted practices falling under a block exemption regulation have effects in a particular case which are incompatible with Section 2(1) or with Article 101(3) of the Treaty on the Functioning of the European Union and which arise in a domestic territory bearing all the characteristics of a distinct geographic market, the competition authority may withdraw the legal benefit of the block exemption for that territory.

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

(1) If the rigidity of prices or other circumstances suggest that domestic competition may be restricted or distorted, the Bundeskartellamt and the supreme *Land* authorities may conduct an investigation into a specific sector of the economy (sector inquiry) or – across sectors – into a particular type of agreements or practices.

(2) In the course of this investigation, 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 and the supreme *Land* authorities may publish a report on the results of the investigation pursuant to subsection (1) and invite third parties to comment.

(4) Section 49(1) as well as Sections 57, 59, 59a, 59b and 61 shall apply *mutatis mutandis*.

(5) Subsections (1) to (3) 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 (4) 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 searches under Section 59b do not apply.

(6) 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).

## **Division 2** **Damages and Disgorgement of Benefits**

### **Section 33 Claim for Injunction and Rectification**

(1) Whoever violates a provision of this Part or Article 101 or Article 102 of the Treaty on the Functioning of the European Union (infringer) or whoever violates a decision issued by the competition authority shall be obliged to the person affected to rectify the harm caused by the infringement and, where there is a risk of recurrence, to desist from further infringements.

(2) A right to apply for injunction already exists if an infringement is impending.

(3) Affected persons are competitors or other market participants impaired by the infringement.

(4) Claims pursuant to subsection (1) may also be asserted by

1. associations with legal capacity for the promotion of commercial or independent professional interests, provided
  - a) they have a significant number of member undertakings that are affected persons within the meaning of subsection (3) and
  - b) are able, in particular with regard to their human, material and financial resources, to actually exercise their functions of pursuing commercial or independent professional interests as laid down in the statutes of the association;
3. entities proving that they have been entered in
  - a) the list of qualified entities under Section 4 of the German Act on Injunctive Relief [*Unterlassungsklagengesetz*] or
  - b) the European Commission's list of qualified entities pursuant to Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110 of 1 May 2009, p. 30), as amended from time to time.

### **Section 33a Liability for Damages**

(1) Whoever intentionally or negligently commits an infringement pursuant to Section 33(1) shall be liable to pay damages for any harm arising from the infringement.

(2) There is a rebuttable presumption that a cartel results in harm. A cartel within the meaning of this Section is an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition. Such agreements or concerted practices include

1. the fixing or coordination of purchase or selling prices or other trading conditions,
2. the allocation of production or sales quotas,
3. the allocation of markets and customers, including bid-rigging, restrictions on imports or exports or
4. anti-competitive actions against other competitors.

There is a rebuttable presumption that legal transactions with undertakings participating in a cartel regarding goods or services that fall within the scope of a cartel in terms of product type, time period and geographic area were covered by that cartel.

(3) Section 287 of the German Code of Civil Procedure [*Zivilprozessordnung*] shall apply to quantifying the harm caused by the infringement. In quantifying the harm, account may, in particular, be taken of the proportion of the profit which the infringer has derived from the infringement of subsection (1).

(4) The debtor shall pay interest on its pecuniary debts pursuant to subsection (1) from the time the harm occurred. Sections 288 and 289 sentence 1 of the German Civil Code shall apply *mutatis mutandis*.

### **Section 33b Binding Effect of Decisions Issued by a Competition Authority**

Where damages are claimed for an infringement of a provision of this Part or of Article 101 or Article 102 of the Treaty on the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, as made in a final decision by the competition authority, the European Commission, or the competition authority - or a court acting as such - in another Member State of the European Union. The same shall apply to such findings in final court judgements on appeals against decisions pursuant to sentence 1. This obligation shall apply without prejudice to the rights and obligations under Article 267 of the Treaty on the Functioning of the European Union.

### **Section 33c Passing-on of Overcharges**

(1) Where a good or service is purchased at an excessive price (overcharge), the fact that this good or service was resold shall not rule out the occurrence of harm. The harm incurred by the purchaser shall be deemed to be remedied to the extent that the purchaser has passed on the overcharge resulting from an infringement of Section 33a(1) to its customers (indirect purchasers). The injured party's right to claim compensation for lost profits under Section 252 of the German Civil Code shall remain unaffected to the extent that such loss of profit is the result of the passing-on of the overcharge.

(2) It shall be presumed in the indirect purchaser's favour that the overcharge has been passed on to it if

1. the infringer has violated Section 1 or Section 19 of this Act or Article 101 or Article 102 of the Treaty on the Functioning of the European Union,
2. the infringement has resulted in an overcharge for the direct purchaser of the infringer, and
3. the indirect purchaser has purchased goods or services that
  - a) were the object of the infringement,
  - b) were derived from goods or services that were the object of the infringement, or
  - c) contained goods or services that were the object of the infringement.

(3) The presumption under subsection (2) shall not apply where it is credibly demonstrated that the overcharge was not, or not entirely, passed on to the indirect purchaser. With regard to indirect

purchasers, Section 33a (2) sentence 4 shall apply *mutatis mutandis* to the goods or services specified under subsection (2) sentence 1 no 3.

(4) Subsections (1) to (3) shall apply *mutatis mutandis* to cases where the infringement of Section 1 or Section 19 of this Act or Article 101 or Article 102 of the Treaty on the Functioning of the European Union concerns supplies to the infringer.

(5) In quantifying the extent to which the overcharge has been passed on, Section 287 of the German Code of Civil Procedure shall apply *mutatis mutandis*.

### **Section 33d Joint and Several Liability**

(1) Where several infringers jointly commit an infringement pursuant to Section 33a(1), they shall be jointly and severally liable for the harm caused by the infringement. In all other respects, Sections 830 and 840(1) of the German Civil Code shall apply.

(2) The proportion to which the joint and several debtors shall be liable, in relation to one another, to pay damages and the amount that has to be paid in damages shall depend on the circumstances of the case, in particular, on the extent to which they have caused the harm. In all other respects, Sections 421 to 425 as well as Section 426(1) sentence 2 and 426(2) of the German Civil Code shall apply.

(3) Where several undertakings violate Section 1 or Section 19 of this Act or Article 101 or Article 102 of the Treaty on the Functioning of the European Union, the liability pursuant to Section 33a(1) of a small or medium-sized enterprise within the meaning of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124 of 20 May 2003, p. 36) shall be limited to the harm suffered by its direct and indirect purchasers or providers as a result of the infringement, provided that

1. its market share in the relevant market was below 5 per cent at any time during the period in which the infringement was committed and
2. the application of the liability provisions under subsection (1) would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

The small or medium-sized enterprise shall be liable only for the harm suffered by other injured parties as a result of an infringement under Section 33a(1) where these are unable to obtain full compensation from the other infringers with the exception of the immunity recipient. Section 33e(2) shall apply *mutatis mutandis*.

(4) The other infringers may recover compensation under subsection (2) from the small or medium-sized enterprise within the meaning of subsection (3) sentence 1 only up to the amount of harm the enterprise caused to its own direct or indirect purchasers or providers. Sentence 1 shall not apply to compensation of harm caused to parties other than the direct or indirect purchasers or providers of the other infringers.

(5) Liability pursuant to subsections (3) and (4) shall not be limited if

1. the small or medium-sized enterprise has led the infringement or
2. the small or medium-sized enterprise has coerced the other infringers to participate in the infringement, or
3. the small or medium-sized enterprise has previously been found by an authority or court to have violated Section 1 or Section 19 of this Act or Article 101 or Article 102 of the Treaty on the Functioning of the European Union or competition law pursuant to Section 89e(2) of this Act.

### **Section 33e Immunity Recipient**

(1) In derogation of Section 33a(1), undertakings or natural persons participating in a cartel that have received immunity from fines under a leniency programme (immunity recipient) shall be liable only for the harm caused to their own direct or indirect purchasers or providers. The immunity recipient shall be

liable only for the harm suffered by other injured parties as a result of an infringement under Section 33a(1) where these are unable to obtain full compensation from the other infringers.

(2) In cases under subsection (1) sentence 2, the immunity recipient shall not be liable for the harm caused where the limitation period for damages claims against the other infringers has already expired.

(3) The other infringers may recover compensation under Section 33d(2) from the immunity recipient only up to the amount of harm the immunity recipient caused to its own direct or indirect purchasers or providers. This limitation shall not apply to compensation of harm caused to parties other than the direct or indirect purchasers or providers of the undertakings participating in the cartel.

### **Section 33f Effect of Consensual Settlements**

(1) In the case of a consensual settlement of a damages claim under Section 33a(1), the claim of the settling injured party against the settling co-infringer shall be reduced by the latter's share of the harm that the infringement inflicted upon the settling injured party, unless agreed otherwise. The non-settling co-infringers shall be liable to pay damages only for the harm that remains after the deduction of the settling co-infringer's share. The settling injured party may claim the remaining damages from the settling co-infringers only where the non-settling co-infringers are unable to pay the remaining damages in full. Sentence 3 shall not apply if the settling parties have excluded its application under the terms of the consensual settlement.

(2) Co-infringers that have not entered into the consensual settlement under subsection (1) shall not be permitted to demand compensation under Section 33d(2) from the settling co-infringer for the remaining amount of damages payed to the settling injured party after the deduction of the settling co-infringer's share.

### **Section 33g Right to Have Evidence Surrendered and Information Provided**

(1) Whoever is in possession of evidence necessary for the assertion of a claim for damages under Section 33a(1) shall be obliged to surrender such evidence to a party that credibly demonstrates that it has such a claim if said party specifies the evidence as precisely as possible on the basis of reasonably available facts.

(2) Whoever is in possession of evidence necessary for the defence against a claim for damages under Section 33a(1) shall be obliged to surrender such evidence to the party against which a case for a claim under subsection (1) or a claim for damages under Section 33a(1) is pending if said party specifies the evidence as precisely as possible on the basis of reasonably available facts. The right under sentence 1 shall also exist where a party has applied for a declaratory decision that another party has no claim against it under Section 33a(1) and the former does not contest the infringement within the meaning of Section 33a(1) on which the claim for damages is based.

(3) The surrender of evidence under subsections (1) and (2) shall be excluded where, considering the legitimate interests of all parties concerned, this is disproportionate. In this consideration, particular account shall be taken of:

1. the extent to which the claim is based on information and evidence that is available;
2. the scope of evidence and the costs of surrendering the evidence, in particular where such evidence is requested from a third party;
3. the exclusion of a discovery of facts that are not relevant for the enforcement of the claim pursuant to Section 33a(1) or for the defence against such claim;
4. the binding effect of decisions pursuant to Section 33b;
5. the effectiveness of public competition law enforcement; and
6. the protection of trade and business secrets as well as any other confidential information and the protective measures taken for this purpose.

No account shall be taken of the interest of the party subject to a claim under Section 33a(1) in preventing the enforcement of that claim.

(4) The surrender of a document or record, also on the content of a hearing conducted during a competition authority's proceeding, shall be excluded where and to the extent that it includes a voluntary statement made by, or on behalf of, an undertaking or a natural person to a competition authority,



1. describing that undertaking's or natural person's knowledge of or role in a cartel, and to the extent that such statement was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme (leniency statement); or
2. describing the undertaking's or natural person's acknowledgement of, or renunciation to dispute, the participation in an infringement of competition law and responsibility for that infringement of competition law, and to the extent that such statement was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure (settlement submission).

Evidence that has not been specifically produced for a competition authority's proceeding shall not be considered part of the leniency statement irrespective of whether or not the information is also contained in the files of a competition authority. Where a party obliged to surrender evidence claims that a piece of evidence or parts thereof are excluded from the obligation to surrender evidence in accordance with sentence 1, the claimant may, in accordance with Section 89b(8), demand surrender to the competent court for the sole purpose of examining the validity of this claim.

(5) Until the final conclusion of the competition authority's proceedings against all parties involved, the surrender of evidence shall be excluded if and to the extent that it contains the following:

1. information that has been produced by a natural or legal person or association of persons specifically for the competition authority's proceedings;
2. communications from the competition authority to the parties to the proceedings; or
3. settlement submissions that have been withdrawn.

(6) The surrender of evidence under subsections (1) and (2) may be refused if and to the extent that the party in possession of the evidence would, in a legal dispute over a claim under Section 33a(1) of this Act, be entitled to refuse to testify in accordance with Section 383(1) nos 4 to 6 or Section 384 no 3 of the German Code of Civil Procedure. In this case, the claimant may request that the evidence be surrendered to the competent court for a decision pursuant to Section 89b(6). Sentence 2 shall not apply to

1. persons within the meaning of Section 383(1) nos 4 and 5 of the German Code of Civil Procedure, to the extent that they would be entitled to refuse to testify under this provision; and
2. persons within the meaning of Section 203(1) nos 1 to 5, subsections (2) and (3) of the German Criminal Code [*Strafgesetzbuch*], to the extent that they would be entitled to refuse to testify under Section 383(1) no 6 of the German Code of Civil Procedure.

Assistants of clerics and persons working for a cleric as part of their training for the exercise of the clerical profession shall be treated as clerics.

(7) Where the party obliged to surrender evidence in accordance with subsections (1) or (2) incurs costs which the party may reasonably consider necessary, that party shall be entitled to claim from the other party the reimbursement of these costs.

(8) Where the party obliged to surrender evidence in accordance with subsection (1) or (2) intentionally or with gross negligence provides incorrect or incomplete information, or fails to provide information, or intentionally or with gross negligence surrenders incorrect or incomplete evidence, or fails to surrender evidence, the party shall be liable for any resulting damage incurred by the claimant.

(9) The information provided or evidence surrendered by a party obliged to do so under subsections (1) and (2) may only be used in a criminal proceeding or administrative offence proceeding against that party or against that party's relatives as listed in Section 52(1) of the German Code of Criminal Procedure [*Strafprozessordnung*] on account of an offence committed prior to the provision of the information or the surrender of the evidence only if the party obliged agrees to such use. This shall also apply where the information is provided or repeated during an examination of a witness or party. Sentences 1 and 2 shall not apply in proceedings against undertakings.

(10) Subsections (1) to (9) and Sections 89b to 89d on the surrender of evidence shall apply *mutatis mutandis* to the provision of information.

### **Section 33h Limitation Periods**

(1) Claims pursuant to Section 33(1) and Section 33a(1) shall become statute-barred after five years.

- (2) The limitation period shall begin to run with the end of the calendar year in which
1. the claim arose;
  2. the claimant obtained knowledge, or should have obtained knowledge without gross negligence,
    - a) of the circumstances giving rise to the claim and of the fact that these constitute an infringement under Section 33(1), as well as
    - b) of the identity of the infringer; and
  3. the infringement pursuant to Section 33(1) giving rise to the claim has ceased.
- (3) Irrespective of any knowledge or grossly negligent ignorance of the circumstances under subsection (2) no 2, claims under Section 33(1) and Section 33a(1) shall become statute-barred ten years following the date on which
1. the claim arose and
  2. the infringement pursuant to Section 33(1) ceased.
- (4) In all other respects, claims shall become statute-barred 30 years following the date on which the infringement pursuant to Section 33(1) that caused the damage occurred.
- (5) Statutory limitation shall take effect when one of the periods under subsections (1), (3) or (4) has expired.
- (6) Limitation periods for a claim under Section 33(1) or Section 33a(1) shall be suspended if
1. a competition authority takes action for the purpose of conducting an investigation or proceedings with regard to an infringement within the meaning of Section 33(1);
  2. the European Commission or the competition authority of another Member State of the European Union – or a court acting as such – takes action for the purpose of conducting an investigation or proceedings with regard to an infringement of Article 101 or Article 102 of the Treaty on the Functioning of the European Union or an infringement of a provision of the national competition law of another Member State of the European Union within the meaning of Section 89e(2); or
  3. the claimant has brought an action against the infringer for the provision of information or surrender of evidence under Section 33g.

The suspension shall end one year after the infringement decision has become final or after the proceedings are otherwise terminated. Section 204(2) sentences 3 and 4 of the German Civil Code shall apply *mutatis mutandis*.

(7) Limitation periods for a claim to recover compensation under Section 33d(2) for the settlement of a claim for damages under Section 33a(1) shall begin with the settlement of this claim for damages.

(8) In derogation of subsection (2), the limitation period for claims for damages pursuant to Section 33a(1) held by injured parties

1. that are not direct or indirect purchasers or providers of the immunity recipient against the immunity recipient shall begin with the end of the year in which the injured party was unable to obtain full compensation from the other infringers for the harm suffered as a result of the infringement;
2. that are not direct or indirect purchasers or providers of a small or medium-sized enterprise within the meaning of Section 33d(3) sentence 1 against the enterprise shall begin with the end of the year in which the injured party pursuant to Section 33d(3) sentence 2 was unable to obtain full compensation from the other infringers with the exception of the immunity recipient for the harm suffered as a result of the infringement.

Subsection (3) shall not apply to claims for damages for which the limitation period begins to run subject to this paragraph.

### **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.

To the extent that payments pursuant to sentence 1 are made by the undertaking after the disgorgement of benefits, the undertaking shall be reimbursed for the amount of such payment.

(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) The amount of the economic benefit may be estimated. The amount of money to be paid shall be specified in numbers.

(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. 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.

### **Section 34a Disgorgement of Benefits by Associations**

(1) Whoever intentionally commits an infringement within the meaning of Section 34(1) and in this way gains an economic benefit at the expense of multiple purchasers or suppliers may be required by those entitled to an injunction under Section 33(4) to surrender the economic benefit to the federal budget unless the competition authority orders the disgorgement of the economic benefit by the imposition of a fine, by confiscation of proceeds, by reimbursement or pursuant to Section 34(1).

(2) Payments made by the undertaking because of the infringement shall be deducted from the claim. Section 34(2) sentence 2 shall apply *mutatis mutandis*.

(3) If several creditors claim the disgorgement of benefits, Sections 428 to 430 of the German Civil Code shall apply *mutatis mutandis*.

(4) The creditors shall provide the Bundeskartellamt with information about the assertion of claims pursuant to subsection (1). They may demand reimbursement from the Bundeskartellamt for the expenses necessary for asserting the claim if they are unable to receive reimbursement from the debtor. The claim for reimbursement is limited to the amount of the economic benefit paid to the federal budget.

(5) Claims pursuant to subsection (1) shall become statute-barred after five years. Sections 33b and 33h(6) shall apply *mutatis mutandis*.

## **Chapter 7** **Control of Concentrations**

### **Section 35 Scope of Application of the Control of Concentrations**

(1) The provisions on the control of concentrations shall apply if in the last business year preceding the concentration

1. the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and
2. the domestic turnover of at least one undertaking concerned was more than EUR 50 million and that of another undertaking concerned was more than EUR 17.5 million.

(1a) The provisions on the control of concentrations shall also apply if

1. the requirements under subsection (1) no 1 are fulfilled,
2. in the last business year preceding the concentration
  - a) the domestic turnover of one undertaking concerned was more than EUR 50 million and
  - b) neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than EUR 17.5 million,
3. the consideration for the acquisition exceeds EUR 400 million and
4. the target undertaking pursuant to no 2 has substantial operations in Germany.

(2) Subsection (1) shall not apply to concentrations of public entities and enterprises arising from the territorial reform of municipalities. Subsections (1) and (1a) shall not apply where all undertakings participating in the concentration

1. are members of a banking association [*kreditwirtschaftliche Verbundgruppe*] within the meaning of Section 8b(4) sentence 8 of the German Corporation Tax Act [*Körperschaftsteuergesetz*],
2. mainly provide services for the other members of that banking group, and
3. in their activities set out in no 2, do not themselves maintain any contractual relations with end consumers.

Sentence 2 shall not apply to concentrations of cooperative central banks and regional institutions of savings banks within the meaning of Section 21(2) no 2 of the German Banking Act [*Kreditwesengesetz*].

(3) The provisions of this Act shall not apply where the European Commission has exclusive jurisdiction pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, as amended from time to time.

### **Section 36 Principles for the Appraisal of Concentrations**

(1) A concentration which would significantly impede effective competition, in particular a concentration which is expected to create or strengthen a dominant position, shall be prohibited by the Bundeskartellamt. This shall not apply if

1. the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impediment to competition; or
2. the requirements for a prohibition are fulfilled exclusively on markets on which goods or commercial services have been offered for at least five years and which had a total domestic sales volume of less than EUR 20 million in the last calendar year, unless the markets are markets within the meaning of Section 18(2a), or Section 35(1a) applies; or
3. the dominant position of a newspaper or magazine publisher acquiring a small or medium-sized newspaper or magazine publisher is strengthened provided it is proven that the publisher that is acquired recorded a significant net annual deficit in the profit and loss account under Section 275 of the German Commercial Code [*Handelsgesetzbuch*] in each of the three preceding years and its existence would be jeopardised without the concentration. Furthermore, it must be proven that no other acquirer was found before the concentration that could have ensured a solution that would have been less harmful to competition.

(2) If an undertaking concerned is a dependent or dominant undertaking within the meaning of Section 17 of the German Stock Corporation Act [*Aktiengesetz*] or a group company within the meaning of Section 18 of the German Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. If several undertakings act together in such a way that they can jointly exercise a controlling influence on another undertaking, each of them shall be regarded as controlling.

(3) If a person or association of persons which is not an undertaking holds a majority interest in an undertaking, such person or association of persons shall be regarded as an undertaking.

### **Section 37 Concentration**

(1) A concentration shall be deemed to exist in the following cases:

1. acquisition of all or of a substantial part of the assets of another undertaking; this shall also apply where assets are acquired from an undertaking operating in Germany that has not yet achieved any turnover;
2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or several other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and in consideration of all factual and legal circumstances, confer the possibility of exercising decisive influence on the activity of an undertaking, in particular through:
  - a) ownership or the right to use all or part of the assets of the undertaking;
  - b) rights or contracts which confer decisive influence on the composition, deliberations or decisions of the corporate bodies of the undertaking;

this shall also apply where an undertaking operating in Germany has not yet achieved any turnover;

3. acquisition of shares in another undertaking if the shares, either separately or in combination with other shares already held by the undertaking, reach
  - a) 50 per cent or
  - b) 25 per cent

of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall also include the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking to the extent mentioned above, this shall also be deemed a concentration between the undertakings concerned with respect to those markets on which the other undertaking operates;

4. any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a material competitive influence on another undertaking.

(2) A concentration shall also be deemed to exist if the undertakings concerned had already merged previously, unless the concentration does not result in a substantial strengthening of the existing affiliation between the undertakings.

(3) If credit institutions, financial institutions or insurance undertakings acquire shares in another undertaking for the purpose of resale, this shall not be deemed a concentration as long as they do not exercise the voting rights attached to the shares and provided the resale occurs within one year. This time limit may, upon application, be extended by the Bundeskartellamt if it is credibly demonstrated that the resale was not reasonably possible within this period.

### **Section 38 Calculation of Turnover, Market Shares and Value of Consideration**

(1) Section 277(1) of the German Commercial Code shall apply to the calculation of turnover. If an undertaking exclusively uses a different internationally recognised accounting standard for its regular corporate accounting, this standard shall be decisive for calculating the turnover. Turnover from the supply of goods and services between affiliated undertakings (intra-group turnover) as well as excise taxes shall not be taken into account.

(2) For trade in goods, only three quarters of the turnover achieved shall be taken into account.

(3) For the publication, production and distribution of newspapers, magazines and parts thereof, four times the amount of the turnover achieved and for the production, distribution and broadcasting of radio and television programmes, and the sale of radio and television advertising time, eight times the amount of the turnover achieved shall be taken into account.

(4) In the case of credit institutions, financial institutions, building and loan associations and external investment management companies within the meaning of Section 17(2) no 1 of the German Investment Act [*Kapitalanlagegesetzbuch*], turnover shall be replaced by the total amount of the income referred to in Section 34(2) sentence 1 no 1 a) to e) of the Regulation on the Rendering of Accounts of Credit Institutions [*Verordnung über die Rechnungslegung der Kreditinstitute*], as amended from time to time, minus value added tax and other taxes directly levied on such income. In the case of insurance undertakings, the premium income generated in the last completed business year shall be relevant.

Premium income shall be income from insurance and reinsurance business including reinsurance cessions.

(4a) Consideration within the meaning of Section 35(1a) shall include

1. all assets and other consideration in kind which the seller receives from the acquirer in connection with the concentration pursuant to Section 37(1) (purchase price) and
2. the value of any liabilities assumed by the acquirer.

(5) If a concentration arises from the acquisition of parts of one or several undertakings, only that turnover or market share attributable to the divested parts shall be taken into account on the part of the seller, irrespective of whether or not these parts have a separate legal personality. This shall not apply if the seller maintains control within the meaning of Section 37(1) no 2 or continues to hold 25 per cent or more of the shares. Two or more acquisition transactions within the meaning of sentence 1 that are effected between the same persons or undertakings within a period of two years shall be treated as a single concentration if, as a result, the turnover thresholds under Section 35(1) are reached or the conditions under Section 35(1a) are fulfilled; the date of the concentration shall be the date of the last acquisition transaction.

### **Section 39 Notification and Information Obligation**

(1) Concentrations shall be notified to the Bundeskartellamt pursuant to subsections (2) and (3) prior to being implemented. Electronic notifications may be submitted via:

1. the central De-Mail address set up by the Bundeskartellamt within the meaning of the German De-Mail Act [*De-Mail-Gesetz*],
2. the central e-mail address set up by the Bundeskartellamt for documents with a qualified electronic signature,
3. the special electronic mailbox for German public authorities [*beBPO*], as well as
4. an online platform set up for this purpose.

(2) The obligation to notify shall be:

1. upon the undertakings participating in the concentration;
2. in the cases under Section 37(1) nos 1 and 3, also upon the seller.

(3) The notification shall indicate the form of the concentration. Furthermore, the notification shall contain the following information with respect to every undertaking concerned:

1. name or other designation and place of business or registered seat;
2. the type of business;
3. turnover in Germany, in the European Union and worldwide; instead of turnover, the total amount of income within the meaning of Section 38(4) shall be indicated in the case of credit institutions, financial institutions, building and loan associations and external investment management companies within the meaning of Section 17(2) no 1 of the German Investment Act [*Kapitalanlagegesetzbuch*], and the premium income in the case of insurance undertakings; in the case of Section 35(1a), the value of the consideration as determined in accordance with Section 38(4a), including the basis for its calculation, shall also be indicated;

3a. in the case set out in Section 35(1a), information on the nature and scale of the operations in Germany;

4. the market shares, including the basis for their calculation or estimate, if the combined shares of all undertakings concerned amount to at least 20 per cent in the area of application of this Act or in a substantial part thereof;
5. in the case of an acquisition of shares in another undertaking, the size of the interest acquired and of the total interest held;
6. a person authorised to accept service in Germany, if the registered seat of the undertaking is not located in the area of application of this Act.

In the cases under Section 37(1) nos 1 or 3, the information pursuant to sentence 2 nos 1 and 6 shall also be provided with respect to the seller. If an undertaking concerned is an affiliated undertaking, the

information required under sentence 2 nos 1 and 2 shall also be provided with respect to its affiliated undertakings, and the information required under sentence 2 nos 3 and 4 with respect to each undertaking participating in the concentration and with respect to the entirety of all undertakings affiliated with it; intra-group relationships as well as control relationships among and interests held by the affiliated undertakings shall also be indicated. The notification shall not contain or use any incorrect or incomplete information for the purpose of prompting the competition authority to refrain from issuing a prohibition pursuant to Section 36(1) or from issuing an information notice pursuant to Section 40(1).

(4) A notification shall not be required if the European Commission has referred a concentration to the Bundeskartellamt and if the information required under subsection (3) has been provided to the Bundeskartellamt in German. The Bundeskartellamt shall inform the undertakings concerned without delay of the time of receipt of the referral and shall at the same time inform them of the extent to which the necessary information pursuant to subsection (3) is available in German.

(5) The Bundeskartellamt may request from each undertaking concerned information on market shares, including the basis for their calculation or estimate, and on the turnover achieved by the undertaking in the last business year preceding the concentration with a certain type of goods or commercial services, as well as information on the operations of an undertaking in Germany, including information on the number and locations of its customers as well as the locations in which its services are offered and properly used.

(6) If, contrary to subsection (1) sentence 1, concentrations that are subject to notification were not notified prior to their implementation, the participating undertakings shall notify the Bundeskartellamt without delay. Section 41 shall remain unaffected.

### **Section 39a Request for Notification of Future Concentrations**

(1) The Bundeskartellamt may order by formal decision that an undertaking is to notify every concentration with other undertakings in one or several specific sectors of the economy if

1. the worldwide turnover of the undertaking concerned was more than EUR 500 million in the last business year,
2. there are objectively verifiable indications that future concentrations could substantially impede effective competition in Germany in the sectors of the economy specified, and
3. in Germany, the undertaking supplies or procures at least 15 per cent of the goods or services in the sectors of the economy specified.

(2) The obligation to notify the Bundeskartellamt pursuant to subsection (1) shall apply only to concentrations where the undertaking to be acquired

1. achieved a turnover of more than EUR 2 million in the last business year and
2. achieved more than two thirds of its turnover in Germany.

(3) The issuance of an order pursuant to subsection (1) is conditional on the Bundeskartellamt having conducted an investigation pursuant to Section 32e into one of the sectors of the economy concerned.

(4) The obligation to notify the Bundeskartellamt pursuant to subsection (1) shall apply for a period of three years from the date on which the formal decision is served. The relevant sectors of the economy shall be specified in the decision.

### **Section 40 Procedure of the Control of Concentrations**

(1) The Bundeskartellamt may prohibit a concentration notified to it only if it informs the notifying undertakings within a period of one month from receipt of the complete notification that it has initiated the examination of the concentration (second phase proceedings). Second phase proceedings are to be initiated if a further examination of the concentration is necessary.

(2) In the second phase proceedings, the Bundeskartellamt shall decide by way of a formal decision whether the concentration is prohibited or cleared. If the decision is not served upon the notifying undertakings within a period of five months from receipt of the complete notification, the concentration shall be deemed to have been cleared. The parties involved in the proceedings have to be informed without delay of the date on which the decision was served. This shall not apply if

1. the notifying undertakings have consented to an extension of the time limit;

2. the Bundeskartellamt has refrained from issuing the notice pursuant to subsection (1) or from prohibiting the concentration due to incorrect information or due to information pursuant to Section 39(5) or Section 59 not having been provided in time;
3. contrary to Section 39(3) sentence 2 no 6, a person authorised to accept service in Germany is no longer appointed.

The time limit under sentence 2 shall be suspended if the Bundeskartellamt has to again request information pursuant to Section 59 from an undertaking involved in the concentration because the undertaking has failed, for reasons for which the undertaking is responsible, to comply with a prior request for information pursuant to Section 59 in full or in a timely manner. The suspension shall end as soon as the undertaking has submitted all the information requested to the Bundeskartellamt. The time limit shall be extended by one month if, for the first time during the proceedings, a notifying undertaking proposes to the Bundeskartellamt conditions and obligations pursuant to subsection (3).

(3) Clearance may be granted subject to conditions and obligations in order to ensure that the undertakings concerned comply with the commitments they entered into with the Bundeskartellamt to prevent the concentration from being prohibited. These conditions and obligations must not aim at subjecting the conduct of the undertakings concerned to continued control.

(3a) Clearance may be revoked or modified if it is based on incorrect information, has been obtained by means of deceit or if the undertakings concerned do not comply with an obligation attached to the clearance. In the case of non-compliance with an obligation, Section 41(4) shall apply *mutatis mutandis*.

(4) Prior to a prohibition, the supreme *Land* authorities in whose territory the undertakings concerned have their registered seat shall be given the opportunity to submit an opinion. In proceedings conducted in accordance with Section 172a of the German Social Code, Book V [*Fünftes Buch Sozialgesetzbuch*], the competent supervisory authorities pursuant to Section 90 of the German Social Code, Book IV, must be consulted prior to a prohibition. In proceedings relating to the nationwide distribution of television programmes by private broadcasters, the Commission on Concentration in the Media Sector must be consulted prior to a prohibition in order to establish concentration levels in the media sector.

(5) In the cases under Section 39(4) sentence 1, the time limits referred to in subsections (1) and (2) sentence 2 shall begin to run when the referral decision is received by and the necessary information pursuant to Section 39(3) is available in German to the Bundeskartellamt.

(6) If clearance by the Bundeskartellamt is repealed in whole or in part by a final court ruling, the time limit referred to in subsection (2) sentence 2 shall begin to run anew at the time at which the ruling becomes final.

## **Section 41 Prohibition to Implement a Concentration, Dissolution**

(1) The undertakings may not implement a concentration not cleared by the Bundeskartellamt, nor participate in implementing such a concentration, before the expiry of the time limits referred to in Section 40(1) sentence 1 and Section 40(2) sentence 2. Legal transactions violating this prohibition shall be void. This shall not apply to

1. real estate agreements once they have become legally valid by entry into the land register;
2. agreements on the transformation, integration or formation of an undertaking and inter-company agreements within the meaning of Sections 291 and 292 of the German Stock Corporation Act, once they have become legally valid by entry into the appropriate register; and
3. other legal transactions if the non-notified concentration was notified after the concentration was implemented and the dissolution proceedings under subsection (3) were ended because the conditions for a prohibition were not met, or if the restraint of competition was removed based on a dissolution order pursuant to subsection (3) sentence 2 in conjunction with sentence 3, or if ministerial authorisation pursuant to Section 42 was granted.

(1a) Subsection (1) does not preclude the realisation of acquisition transactions where control, shares or a material competitive influence within the meaning of Section 37(1) or (2) is/are acquired from several sellers either by way of a public takeover bid or by way of a number of legal transactions in securities on a stock exchange, including securities that can be converted into other securities admitted to trading on an exchange or similar market, provided that the concentration is notified to the Bundeskartellamt pursuant to Section 39 without undue delay and that the acquirer does not exercise the voting rights



attached to the shares or only exercises them to preserve the full value of its investment based on an exemption granted by the Bundeskartellamt pursuant to subsection (2).

(2) The Bundeskartellamt may, upon application, grant exemptions from the prohibition to implement a concentration if the undertakings concerned put forward important reasons for this, in particular to prevent serious damage to an undertaking concerned or to a third party. The exemption may be granted at any time, even prior to notification, and may be made subject to conditions and obligations. Section 40(3a) shall apply *mutatis mutandis*.

(3) A concentration which has been implemented and which fulfils the conditions for prohibition pursuant to Section 36(1) shall be dissolved unless the Federal Minister for Economic Affairs and Energy authorises the concentration pursuant to Section 42. The Bundeskartellamt shall order the measures necessary to dissolve the concentration. The restraint of competition may also be removed in other ways than by restoring the *status quo ante*.

(4) To enforce its order, the Bundeskartellamt may in particular

1. (repealed)
2. prohibit or limit the exercise of voting rights attached to shares in an undertaking concerned which are owned by another undertaking concerned or are attributable to it;
3. appoint a trustee who shall effect the dissolution of the concentration.

### **Section 42 Ministerial Authorisation**

(1) The Federal Minister for Economic Affairs and Energy will, upon application, authorise a concentration prohibited by the Bundeskartellamt if, in the individual case, the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest. In this context, the competitiveness of the undertakings concerned in markets outside the area of application of this Act shall also be taken into account. Authorisation may be granted only if the scope of the restraint of competition does not jeopardize the market economy system. Where the ministerial decision deviates from the Monopolies Commission's opinion provided in accordance with subsection (5) sentence 1, the reason for the deviation shall be stated in the authorisation decision.

(2) Authorisation may be granted subject to conditions and obligations. Section 40(3) sentence 2 and (3a) shall apply *mutatis mutandis*.

(3) The application for ministerial authorisation shall be submitted in writing to the Federal Ministry for Economic Affairs and Energy within one month from service of the prohibition or, in the absence of prior prohibition, from service of a dissolution order pursuant to Section 41(3) sentence 1. If the prohibition is appealed, the period for submitting an application shall begin to run from the date on which the prohibition becomes final and non-appealable. If the dissolution order pursuant to Section 41(3) sentence 1 is appealed, the period for submitting an application shall begin to run from the date on which the dissolution order becomes final and non-appealable.

(4) The Federal Minister for Economic Affairs and Energy shall decide on the application within four months. If the decision is not made within this period, the Federal Ministry for Economic Affairs and Energy shall immediately inform the Bundestag in writing of the reasons for this delay. If the decision is not served upon the undertakings applying for ministerial authorisation within a period of six months from receipt of the complete application, the application shall be deemed rejected. Upon application by the undertakings applying for ministerial authorisation, the Federal Ministry for Economic Affairs and Energy may extend the time limit under sentence 3 by up to two months. In this case, sentence 3 shall not apply and the decision shall be served upon the undertakings applying for ministerial authorisation within the time limit set out in sentence 4.

(5) Prior to the decision pursuant to subsection (4) sentence 1, an opinion of the Monopolies Commission shall be obtained, and the supreme *Land* authorities in whose territory the participating undertakings have their registered seat shall be given an opportunity to comment. In the case of an application to authorise a prohibited concentration in the nationwide distribution of television programmes by private broadcasters, an opinion by the Commission on Concentration in the Media Sector must additionally be obtained. The Monopolies Commission shall submit its opinion within two months upon request by the Federal Ministry for Economic Affairs and Energy.

(6) The Federal Ministry for Economic Affairs and Energy shall issue guidelines on the conduct of the procedure.

### **Section 43 Publications**

(1) Notice of the initiation of second phase proceedings by the Bundeskartellamt pursuant to Section 40(1) sentence 1 and the application for ministerial authorisation shall be published in the Federal Gazette.

(2) The following shall be published in the Federal Gazette:

1. the decision issued by the Bundeskartellamt pursuant to Section 40(2);
2. the ministerial authorisation, its revocation, modification or refusal;
3. the withdrawal, revocation or modification of clearance by the Bundeskartellamt;
4. the dissolution of a concentration and any other orders issued by the Bundeskartellamt pursuant to Section 41(3) and (4).

(3) Notices under subsections (1) and (2) shall in each case contain the details pursuant to Section 39(3) sentence 1 and sentence 2 nos 1 and 2.

### **Section 43a Evaluation**

The Federal Ministry for Economic Affairs and Energy shall report to the legislative bodies on the experiences made with Section 35(1a), Section 37(1) no 1 and Section 38(4a) after three years following the entry into force of the provisions.

## **Chapter 8** **Monopolies Commission**

### **Section 44 Tasks**

(1) Every two years, the Monopolies Commission shall prepare an expert opinion assessing the level and the foreseeable development of business concentration in the Federal Republic of Germany, evaluating the application of the competition law provisions based on concluded proceedings and commenting on other topical issues of competition policy. The expert opinion shall be completed by 30 June of the year in which it is to be prepared. The Federal Government may instruct the Monopolies Commission to prepare further expert opinions. In addition, the Monopolies Commission may prepare opinions or other expert reports at its discretion. The possibility to submit comments pursuant to Section 75(5) shall remain unaffected.

(2) The Monopolies Commission shall be bound only by the mandate established by this Act, and shall be independent in pursuing its activities. If a minority holds dissenting views when an opinion is drafted, it may express them in the opinion.

(3) The Monopolies Commission shall submit its expert opinions to the Federal Government. The Federal Government shall present expert opinions pursuant to subsection (1) to the legislative bodies without delay. The Federal Government shall present its views and comments on expert opinions pursuant to subsection (1) sentence 1 within a reasonable period of time and may present its views and comments on other expert reports pursuant to subsection (1) if and to the extent that it considers this expedient. If requested, the competent federal ministries and the Monopolies Commission shall exchange views on the contents of the opinions. The expert opinions shall be published by the Monopolies Commission. In the case of opinions pursuant to subsection (1) sentence 1, this shall be done at the time at which they are submitted by the Federal Government to the legislative body.

## Section 45 Members

(1) The Monopolies Commission shall consist of five members who must have special knowledge and experience in the fields of economics, business administration, social policy, technology or commercial law. The Monopolies Commission shall elect a chairperson from among its members.

(2) The members of the Monopolies Commission shall be appointed for a term of four years by the Federal President on a proposal by the Federal Government. Re-appointments shall be permissible. The Federal Government shall hear the members of the Commission before nominating new members. The members shall be entitled to resign from office by giving notice to the Federal President. If a member leaves office prematurely, a new member shall be appointed for the former member's term of office.

(3) The members of the Monopolies Commission may not be members of the government or any legislative body of the Federation or a *Land*, or of the public service of the Federation, a *Land* or any other legal person under public law, except as university lecturers or staff members of a scientific institution. Furthermore, they may neither represent nor be bound by a permanent employment or service relationship to an industry association or an employers' or employees' organisation. Nor must they have held such a position during the year preceding their appointment to the Monopolies Commission.

## Section 46 Decisions, Organisation, Rights and Duties of the Members

(1) Decisions of the Monopolies Commission shall require the consent of at least three members.

(2) The Monopolies Commission has rules of procedure and a secretariat. The function of the latter is to scientifically, administratively and technically support the Monopolies Commission.

(2a) As far as this is required for the proper fulfilment of its functions, the Monopolies Commission shall be granted access to the files maintained by the competition authority, including access to trade and business secrets and personal data. This shall also apply to the preparation of expert opinions pursuant to Section 78 of the German Rail Regulation Act [*Eisenbahnregulierungsgesetz*], Section 62 of the German Energy Industry Act [*Energiewirtschaftsgesetz*], Section 44 of the German Postal Act [*Postgesetz*] and Section 121(2) of the German Telecommunications Act [*Telekommunikationsgesetz*].

(2b) Within the scope of access to the files, the Monopolies Commission may conduct its own assessment of the data available to the competition authority in electronic form, including trade and business secrets and personal data, to the extent required for the purpose of properly fulfilling its tasks. This shall also apply to the preparation of expert opinions pursuant to Section 78 of the German Rail Regulation Act, Section 62 of the German Energy Industry Act, Section 44 of the German Postal Act and Section 121(2) of the German Telecommunications Act.

(3) The members of the Monopolies Commission and the staff of the secretariat shall be obliged to keep secret the deliberations and the related documents designated as confidential by the Monopolies Commission. The secrecy obligation shall also apply to information and data given to the Monopolies Commission and designated as confidential, or obtained pursuant to subsections (2a) or (2b).

(4) The members of the Monopolies Commission shall receive a lump sum compensation and they shall be reimbursed for their travel expenses. These amounts shall be determined by the Federal Ministry for Economic Affairs and Energy. The costs of the Monopolies Commission shall be borne by the Federation.

## Section 47 Transfer of Statistical Data

(1) For the purpose of preparing expert opinions on the development of business concentration, the Monopolies Commission is provided by the Federal Statistical Office [*Statistisches Bundesamt*] with such summarised data from the business statistics (statistics on the manufacturing industry, crafts, foreign trade, taxes, transport, statistics on wholesale and retail trade, the hotel and restaurant business and service sector) and from the statistical register that concern the percentage shares of the largest undertakings, businesses or divisions of undertakings in the respective sector of economy in the

- a) value of goods produced for sale;
- b) turnover,
- c) number of employees,

- d) total wages and salaries paid,
- e) investments,
- f) value of fixed assets rented or leased;
- g) value added or gross proceeds,
- h) number of the respective units.

Sentence 1 shall apply *mutatis mutandis* to the provision of information about the percentage shares of the largest groups of undertakings. For the purpose of allocating the data to the groups of undertakings, the Monopolies Commission shall provide the Federal Statistical Office with the names and addresses of the undertakings, information as to their affiliation with a group of undertakings and their identification codes. The summarised data may not cover fewer than three groups of undertakings, undertakings, businesses or divisions of undertakings. The combination with or temporal proximity to other information provided or generally accessible may not allow inferences on the summarised data of fewer than three groups of undertakings, undertakings, businesses or divisions of undertakings. This shall apply *mutatis mutandis* to the calculation of summary measures of concentration, in particular Herfindahl indexes and Gini coefficients. The *Land* statistical offices shall provide the Federal Statistical Office with the necessary information.

(2) Persons who are to receive summarised data pursuant to subsection (1) shall, prior to the transfer, be put under a special obligation to maintain secrecy unless they hold a public office or have special obligations in the public service. Section 1(2), (3) and (4) no 2 of the German Act on the Formal Assignment of Responsibilities to Persons other than Civil Servants [*Verpflichtungsgesetz*] shall apply *mutatis mutandis*. Persons have been put under a special obligation to maintain secrecy pursuant to sentence 1 shall, for the purpose of the application of the provisions of the German Criminal Code [*Strafgesetzbuch*] concerning the violation of private secrets (Section 203(2), (5), and 6); Sections 204, 205) and official secrets (Section 353b(1)), be treated like persons having special obligations in the public service.

(3) The summarised data may be used only for the purposes for which they were provided. They shall be deleted as soon as the purpose referred to in subsection (1) has been achieved.

(4) The Monopolies Commission shall take organisational and technical measures to ensure that only holders of a public office, persons having special obligations in the public service or persons having been put under a special obligation to maintain secrecy pursuant to subsection (2) sentence 1 will receive summarised data.

(5) The transfer shall be recorded in accordance with Section 16(9) of the German Federal Statistics Act [*Bundesstatistikgesetz*]. The records shall be kept for at least five years.

(6) When compiling the business statistics mentioned in subsection (1), the undertakings which are surveyed shall be informed in writing or electronically that pursuant to subsection (1) the summarised data may be transferred to the Monopolies Commission.

## Chapter 9

### Market Transparency Units for Electricity and Gas Wholesale Trading and Fuels

#### Division 1

#### Market Transparency Unit for Electricity and Gas Wholesale Trading

##### **Section 47a Establishment, Competencies, Organisation**

(1) In order to ensure that the formation of wholesale prices for electricity and gas complies with competition provisions, a Market Transparency Unit shall be set up at the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway [*Bundesnetzagentur*]. It shall continuously monitor the marketing of, and trading in, electricity and natural gas at the wholesale level.

(2) The tasks of the Market Transparency Unit shall be carried out by the Bundesnetzagentur and the Bundeskartellamt by mutual consent.

(3) Details of the consensual cooperation shall be governed by a cooperation agreement between the Bundeskartellamt and the Bundesnetzagentur requiring approval by the Federal Ministry for Economic Affairs and Energy. In particular, this agreement shall contain provisions governing:

1. staffing and allocation of tasks and
2. coordination of data collection and of the exchange of data and information.

(4) The Federal Ministry for Economic Affairs and Energy shall be authorised to issue requirements regarding the terms and conditions of the cooperation agreement by means of a statutory instrument.

(5) Decisions by the Market Transparency Unit shall be taken by the person heading the unit. Section 51(5) shall apply *mutatis mutandis* to all members of staff of the Market Transparency Unit.

### **Section 47b Tasks**

(1) The Market Transparency Unit shall continuously monitor electricity and natural gas wholesale trading, irrespective of whether it is aimed at physical or financial settlement, in order to detect irregularities in pricing that might be due to abuse of market dominance, inside information or market manipulation. For this purpose, the Market Transparency Unit shall also monitor the production of natural gas and the generation of electricity, the use of power plants and the marketing of electricity and natural gas by producers, as well as the marketing of electricity and natural gas as balancing services. The Market Transparency Unit may take into account interdependencies between the wholesale markets for electricity and natural gas on the one hand and the emissions trading system on the other.

(2) As a national market monitoring body pursuant to Article 7(2) subpara. 2 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326 of 8 December 2011, p.1), the Market Transparency Unit shall monitor, together with the Bundesnetzagentur, electricity and natural gas wholesale trading. In this context, it shall cooperate with the Agency for the Cooperation of Energy Regulators pursuant to Article 7(2) and Article 10 of Regulation (EU) No 1227/2011.

(3) The Market Transparency Unit shall collect and compile the data and information it needs for the purpose of fulfilling its tasks. In this context, it shall take account of the reporting obligations of the persons required to report to the authorities and supervisory entities mentioned in Section 47i and of the reporting obligations to be laid down by the European Commission in accordance with Article 8(2) and (6) of Regulation (EU) No 1227/2011. Where possible, existing sources and reporting systems shall be used for data collection.

(4) The Bundesnetzagentur may instruct the Market Transparency Unit to collect and analyse data to the extent necessary for the purpose of fulfilling its tasks under Regulation (EU) No 1227/2011.

(5) Prior to issuing determinations pursuant to Section 47g in conjunction with the statutory instrument to be issued pursuant to Section 47f, the Market Transparency Unit shall give the authorities, stakeholders and market participants concerned the opportunity to comment within a specified period. In preparation of these consultations, the Market Transparency Unit shall, where necessary, prepare and amend a detailed list of all data and categories of data that must continuously be reported to it by the persons and undertakings subject to the reporting obligation as specified in Section 47e(1) pursuant to Sections 47e and 47g and based on the statutory instrument to be issued in accordance with Section 47f, including the point in time when the data must be transferred, the data format and the transfer channels to be used, as well as alternative reporting channels. The Market Transparency Unit shall not be bound by the comments.

(6) The Market Transparency Unit shall continuously analyse the data and information received by it, in particular to determine whether there are any indications of a violation of Sections 1, 19, 20 or 29 of this Act, Article 101 or Article 102 of the Treaty on the Functioning of the European Union, the German Securities Trading Act [*Wertpapierhandelsgesetz*], the German Stock Exchange Act [*Börsengesetz*] or the prohibitions under Articles 3 and 5 of Regulation (EU) No 1227/2011.

(7) If there is any indication that a natural or legal person is in violation of any of the legal provisions referred to in subsection (6), the Market Transparency Unit shall immediately inform the competent authorities and refer the issue to them. In the case of a suspected violation of Sections 1, 19, 20 and 29 of this Act or of Articles 101 and 102 of the Treaty on the Functioning of the European Union, the Market Transparency Unit shall inform the competent decision division of the Bundeskartellamt. If more than one authority is potentially competent to conduct investigations, the Market Transparency Unit shall inform each of these authorities of the suspected violation and of the other authorities that have been

informed. The Market Transparency Unit shall transfer all information and data required or requested by these authorities to them without undue delay in accordance with Section 47i.

(8) Subsections (1) to (3) may also apply to production and marketing abroad as well as to trading activities performed abroad, to the extent that these affect the pricing of electricity and natural gas within the area of application of this Act.

### **Section 47c Use of Data**

(1) The Market Transparency Unit shall provide the data received pursuant to Section 47b(3) also to the following entities:

1. the Bundeskartellamt for the purpose of conducting its monitoring activities pursuant to Section 48(3);
2. the Bundesnetzagentur for the purpose of conducting its monitoring activities pursuant to Section 35 of the German Energy Industry Act;
3. the competent decision division of the Bundeskartellamt for the purpose of conducting merger control proceedings pursuant to Sections 35 to 41 and for sector inquiries pursuant to Section 32e; and
4. the Bundesnetzagentur for the purpose of fulfilling its further tasks under the German Energy Industry Act, in particular for the purpose of monitoring compliance with transparency obligations in accordance with the annexes of the following regulations:
  - a) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 211 of 14 August 2009, p. 15);
  - b) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211 of 14 August 2009, p. 36);
  - c) Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ L 295 of 12 November 2010, p. 1).

(2) The Market Transparency Unit shall further provide the data to the Federal Ministry for Economic Affairs and Energy and the Bundesnetzagentur for the purpose of fulfilling their tasks under Section 54a of the German Energy Industry Act.

(3) The data may be provided to the Federal Statistical Office for the purpose of fulfilling its tasks under the German Energy Statistics Act [*Energiestatistikgesetz*] and to the Monopolies Commission for the purpose of fulfilling its tasks under this Act and under Section 62 of the German Energy Industry Act.

(4) The Market Transparency Unit may provide the data in anonymised form also to federal ministries for use in scientific studies conducted by them or on their behalf if the data are necessary to achieve these aims. Data that constitute operating or business secrets may be disclosed by the Market Transparency Unit only if it is no longer possible to link such data to any specific undertaking. The federal ministries may provide the data received from the Market Transparency Unit pursuant to sentence 1 also to third parties for the purpose of conducting scientific studies on their behalf if the third parties have proven their professional skills to the ministries and have assured confidential treatment of the data.

### **Section 47d Powers**

(1) In order to fulfil its tasks, the Market Transparency Unit shall have the powers conferred upon it pursuant to Sections 59, 59a and 59b in relation to natural and legal persons. In accordance with Section 47f, it may determine in respect of one, some or all of the persons and undertakings mentioned in Section 47e(1) the category of data and the timing and form of the data transfer for the areas set out in Section 47g. In accordance with Section 47f, the Market Transparency Unit shall have the power to amend the determination, where required, to the extent that this is necessary for the purpose of fulfilling its tasks. It may, in particular, stipulate that an online platform must be used to enter the requested information and reports. In accordance with Section 47f, the Market Transparency Unit may also stipulate that information and data be delivered to a third party assigned to collect data; however, the

data shall be analysed and used by the Market Transparency Unit only. Sections 48 and 49 of the German Administrative Procedure Act [*Verwaltungsverfahrensgesetz*] shall remain unaffected. Sections 50f, 54, 56 to 58, 61(1) and (2), Sections 63, 64, 66, 67, 70, 73 to 80, 82a, 83, 85, 91 and 92 shall apply *mutatis mutandis*. In the case of decisions made by the Market Transparency Unit by setting determinations, service pursuant to Section 61 may be replaced by publication in the Federal Gazette. Section 55 of the German Code of Criminal Procedure shall apply *mutatis mutandis* to obligations to provide information under sentence 1 and reporting obligations under Section 47e.

(2) As a national market monitoring body pursuant to Article 7(2) subpara. 2 of Regulation (EU) No 1227/2011, the Market Transparency Unit also has the rights set out in Article 7(2) subpara. 1, (3) subpara. 2 sentence 2, Article 4(2) sentence 2, Article 8(5) sentence 1 and Article 16 of Regulation (EU) No 1227/2011. Subsection (1) shall apply *mutatis mutandis*.

(3) The Market Transparency Unit may request information on the outcome of investigations from the authority to which it has referred a suspected violation under Section 47b(7) sentence 1.

### **Section 47e Reporting Obligations**

(1) The following persons and undertakings shall be subject to the reporting obligation set out in subsections (2) to (5) in addition to the reporting obligations under Section 47g:

1. wholesale customers within the meaning of Section 3 no 21 of the German Energy Industry Act;
2. energy supply companies within the meaning of Section 3 no 18 of the German Energy Industry Act;
3. operators of energy facilities within the meaning of Section 3 no 15 of the German Energy Industry Act except for operators of final consumer distribution facilities, or, in the case of gas supply, operators of ultimate shut-off devices in consumption systems;
4. customers within the meaning of Section 3 no 24 of the German Energy Industry Act except for household customers within the meaning of Section 3 no 22 of the German Energy Industry Act; and
5. trading platforms.

(2) Those subject to the reporting obligations must submit to the Market Transparency Unit the trading, transport, capacity, production/generation and consumption data, further specified in accordance with Section 47f in conjunction with Section 47g, for the markets on which they operate. This includes information

1. on transactions in wholesale markets where electricity and natural gas are traded, including orders to trade, with precise details on the wholesale energy products bought and sold, the prices and quantities agreed, the dates and times of execution and the parties to and beneficiaries of the transactions;
2. on the capacity and use of facilities and installations for the production/generation, storage, consumption or transmission of electricity or natural gas or on the capacity and use of facilities for liquefied natural gas (LNG facilities), including any planned and unplanned unavailability or any under-consumption;
3. in the field of electricity generation that enables identification of individual generation units;
4. on costs incurred in connection with the operation of the generation units that are subject to the reporting obligation, in particular on marginal costs, fuel costs, CO<sub>2</sub> costs, opportunity costs and start-up costs;
5. on technical information relevant for the operation of the generation units that are subject to the reporting obligation, in particular on minimum idle times, minimum run times and minimum production volumes;
6. on any planned decommissioning of plants or cold reserves;
7. on drawing rights agreements;
8. on planned investment projects; and
9. on import agreements and balancing services in natural gas trading.

(3) The data must be submitted to the Market Transparency Unit in accordance with Sections 47f and 47g by way of remote data transfer and, if requested, on a continuous basis. If the Market Transparency Unit provides standard forms, the data must be transferred electronically using such forms.

(4) The relevant reporting obligation shall be deemed fulfilled if

1. those subject to the reporting obligation pursuant to subsection (1) have communicated the information to be reported or requested in accordance with Article 8 of Regulation (EU) No 1227/2011 and prompt data access by the Market Transparency Unit is secured, or
2. third parties have communicated the information to be reported or requested in the name of a person or undertaking subject to reporting obligations pursuant to subsection (1) also in conjunction with Section 47g nos 3 and 4 and the Market Transparency Unit has been informed of this, or
3. those subject to the reporting obligation pursuant to subsection (1) also in conjunction with Section 47f nos 3 and 4 have communicated the information to be reported or requested to a third party appointed for this purpose pursuant to Section 47d(1) sentence 5 in conjunction with Section 47f no 2, or
4. those subject to the reporting obligation pursuant to subsection (1) no 3 in conjunction with Section 47g(6) have communicated the information to be reported or requested in accordance with the provisions of the German Renewable Energy Act [*Erneuerbare-Energien-Gesetz*] or a statutory instrument based on that Act to the grid operator, the Market Transparency Unit has been informed of this and prompt access to the data by the Market Transparency Unit is secured.

(5) The obligations set out in subsections (1) to (4) shall apply to undertakings if they are admitted to trading on a German exchange or if their activities have an effect within the area of application of this Act. Where an undertaking with a registered seat outside the area of application of this Act fails to communicate the information requested, the Market Transparency Unit may additionally request the competent authority of the country of domicile to take appropriate measures to improve access to that information.

### **Section 47f Power to Issue a Statutory Instrument**

The Federal Ministry for Economic Affairs and Energy shall be authorised to issue, by way of a statutory instrument not requiring the consent of the Bundesrat, in agreement with the Federal Ministry of Finance, taking into account the requirements imposed by implementing acts issued under Article 8(2) or (6) of Regulation (EU) No 1227/2011

1. detailed provisions on the type, content and scope of data and information that the Market Transparency Unit may request from those subject to the reporting obligation based on determinations made pursuant to Section 47d(1) sentence 2, as well as on the timing and the form of such data transfer,
2. detailed provisions on the type, content and scope of data and information that are to be delivered pursuant to Section 47d(1) sentence 5 to third parties appointed for this purpose, as well as on the timing and the form of transfer and the recipients of these data,
3. provisions stipulating that the following entities shall provide to the Market Transparency Unit records of the wholesale energy transactions on an ongoing basis:
  - a) organised markets,
  - b) systems for matching buy and sell orders or trade reporting systems,
  - c) trading surveillance offices at exchanges on which electricity and gas are traded, as well as
  - d) the authorities referred to in Section 47i,
  - e) provisions stipulating that an exchange or suitable third party may or shall provide the information pursuant to Section 47e(2) in conjunction with Section 47g at the cost of



those subject to the reporting obligation, and to specify the details in this regard or authorise the Market Transparency Unit to issue corresponding determinations,

4. reasonable *de minimis* thresholds for reporting transactions and data, as well as transitional periods for the start of the reporting obligations, as well as
5. a registration obligation for those subject to the reporting obligation and to authorise the Market Transparency Unit to require the use of a registration platform for this purpose and determine the details of registration in terms of content and technical aspects.

### **Section 47g Areas for Issuing Determinations**

(1) By making determinations for the areas referred to in subsections (2) to (12), the Market Transparency Unit shall decide in accordance with Section 47d(1) and Section 47e as well as in accordance with the statutory instrument to be issued pursuant to Section 47f which data and categories of data are to be transferred and how.

(2) The Market Transparency Unit may determine that operators of electricity generation units and of storage facilities with an installed generation or storage capacity of more than 10 megawatts must provide information on the following data and categories of data for each unit:

1. for each electricity generation unit, in particular, the name, location, control area, installed generation capacity and type of generation;
2. for each individual generation unit, on a quarterly hour basis
  - a) net generation capacity,
  - b) generation planned on the previous day,
  - c) actual generation
  - d) marginal costs of generation, including information on the cost components, in particular fuel costs, CO<sub>2</sub> costs, opportunity costs,
  - e) planned and unplanned unavailability due to technical restrictions,
  - f) unavailability due to grid restrictions,
  - g) balancing services and operating reserves held available and supplied,
  - h) unused available capacities,
3. for each individual generation unit
  - a) start-up costs (warm starts and cold starts), minimum idle times, minimum run times and minimum production volumes,
  - b) planned decommissioning of plants and cold reserves;
4. drawing rights agreements;
5. planned investment projects
6. for cross-border trading activities: volumes, trading venues used or trade partners, to be listed separately for each country in which trading took place, and
7. information enabling the Market Transparency Unit to observe and assess the supply behaviour in trading.

(3) The Market Transparency Unit may determine that operators of generation units with an installed generation capacity per unit of more than 1 megawatt and up to 10 megawatts must specify, on an annual basis, the aggregate total of the installed generation capacity of all generation units in each control area separately for each type of generation.

(4) The Market Transparency Unit may determine that operators of electricity consumption units must provide information on the following data and categories of data:

1. the planned and unplanned under-consumption of consumption units with a maximum consumption capacity of more than 25 megawatts per unit, and
2. balancing services that are held available and supplied.

(5) The Market Transparency Unit may determine that transmission systems operators within the meaning of Section 3 no 10 of the German Energy Industry Act must provide information on the following data and categories of data:

1. the transmission capacity of cross-border interconnectors on an hourly basis,
2. import and export data on an hourly basis,
3. the forecast and actual feed-in of energy from facilities for which tariffs are governed by the German Renewable Energy Sources Act on an hourly basis,
4. the sales offers made based on the German Equalisation Scheme Ordinance [*Ausgleichsmechanismusverordnung*] on an hourly basis and
5. the offers and results of auctions for balancing services.

(6) The Market Transparency Unit may determine that operators of facilities generating electricity from renewable energy sources with an installed generation capacity of more than 10 megawatts must provide information on the following data and categories of data:

1. the volumes produced by type of facility and
2. the selling method within the meaning of Section 21b(1) of the German Renewable Energy Sources Act chosen, and the volumes attributable to each selling method.

(7) The Market Transparency Unit may determine that trading platforms for trading electricity and natural gas must provide information on the following data and categories of data:

1. the offers made on the platforms,
2. trading results and
3. all off-exchange non-standardised trading activities where the counterparties individually negotiate bilateral trades (OTC transactions) that are secured by cash or commodities clearing through the trading platform.

(8) The Market Transparency Unit may determine that wholesalers within the meaning of Section 3 no 21 of the German Energy Industry Act that trade in electricity must provide information on the transactions specified in Section 47e(2) no 1, to the extent that these transactions do not fall under the scope of subsection (7). As regards the trading of electricity generated from renewable energy sources, the Market Transparency Unit may also determine that wholesalers within the meaning of sentence 1 must provide information on the form of direct selling within the meaning of Section 3 no 16 of the German Renewable Energy Sources Act and on the quantities of electricity traded in accordance with this Act.

(9) The Market Transparency Unit may determine that wholesalers within the meaning of Section 3 no 21 of the German Energy Industry Act that trade in natural gas must provide information on the following data and categories of data:

1. cross-border quantities and prices as well as data on import and export quantities,
2. quantities of gas produced in Germany and the initial sales prices for these quantities,
3. import agreements (cross-border agreements),
4. delivery volumes for each distribution level in the distribution system,
5. transactions concluded with wholesale customers, transmission systems operators and operators of storage and LNG facilities under gas supply contracts and energy derivatives within the meaning of Section 3 no 15a of the German Energy Industry Act that are based on gas, including the term, volume, date and time of execution, the stipulations on term, delivery and settlement, and transaction prices,
6. offers and results of their own natural gas auctions,
7. existing gas procurement and supply contracts and
8. any other gas trading activities concluded as OTC transactions.

(10) The Market Transparency Unit may determine that transmission systems operators within the meaning of Section 3 no 5 of the German Energy Industry Act must provide information on the following data and categories of data:

1. existing capacity contracts,
2. contractual agreements with third parties regarding flow commitments and
3. offers and results of invitations to tender for flow commitments.

(11) The Market Transparency Unit may determine that market area managers within the meaning of Section 2 no 11 of the German Gas Grid Access Ordinance [*Gasnetzzugangsverordnung*] must provide information on the following data and categories of data:

1. existing contracts on balancing services,
2. offers and results of auctions and invitations to tender for balancing services,
3. transactions carried out via trading platforms and
4. any other gas trading activities carried out as OTC transactions.

(12) The Market Transparency Unit may determine that, for balancing services and biogas, information must be provided on the procurement of third-party balancing services, on results of invitations to tender and on the feeding-in and marketing of biogas.

### **Section 47h Reporting Duties, Publications**

(1) The Market Transparency Unit shall inform the Federal Ministry for Economic Affairs and Energy of the provision of information pursuant to Section 47b(7) sentence 1.

(2) The Market Transparency Unit shall prepare a report on its activities every two years. Where wholesale trading in electricity and natural gas is concerned, it shall prepare such report in agreement with the Bundeskartellamt. Business secrets of which the Market Transparency Unit has obtained knowledge in performing its tasks shall be removed from the report. The report shall be published on the website of the Market Transparency Unit. The report may be issued at the same time as the report to be issued by the Bundeskartellamt pursuant to Section 53(3) and combined with it.

(3) The Market Transparency Unit shall publish the lists prepared pursuant to Section 47b(5), including the drafts of such lists, on its website.

(4) To increase wholesale transparency, the Market Transparency Unit may publish, in agreement with the Bundeskartellamt, the generation and consumption data currently published on the transparency platform operated by European Energy Exchange AG and the transmission system operators, as soon as that publication is discontinued. The publication requirements imposed on the market participants under the German Energy Industry Act and any statutory instruments issued under this Act as well as under European law in order to increase transparency on the electricity and gas markets shall remain unaffected.

### **Section 47i Cooperation with Other Authorities and Supervisory Entities**

(1) In carrying out the tasks of the Market Transparency Unit pursuant to Section 47b, the Bundeskartellamt and the Bundesnetzagentur shall cooperate with the following authorities:

1. the German Federal Financial Supervisory Authority [*Bundesanstalt für Finanzdienstleistungsaufsicht*]
2. the exchange supervisory authorities and trading surveillance offices of the exchanges on which electricity and gas as well as energy derivatives within the meaning of Section 3 no 15a of the German Energy Industry Act are traded,
3. the Agency for the Cooperation of Energy Regulators and the European Commission, to the extent that they perform tasks under Regulation (EU) No 1227/2011, and
4. regulatory authorities of other Member States.

Irrespective of the relevant procedure chosen in a given case, these entities may exchange information, including personal data as well as trade and business secrets, to the extent this is necessary for the purpose of fulfilling their respective tasks. They may use this information for their procedures. Prohibitions on the use of evidence shall remain unaffected. Provisions concerning legal assistance in criminal matters as well as agreements on administrative and legal assistance shall remain unaffected.

(2) Subject to the consent of the Federal Ministry for Economic Affairs and Energy, the Market Transparency Unit may enter into cooperation agreements with the Federal Financial Supervisory Authority, the exchange supervisory authorities and trading surveillance offices of the exchanges on which electricity and gas as well as energy derivatives within the meaning of Section 3 no 15a of the German Energy Industry Act are traded, and with the Agency for the Cooperation of Energy Regulators.

### **Section 47j Confidential Information, Operational Reliability, Data Protection**

(1) Information that the Market Transparency Unit has obtained or prepared in the ordinary course of business when fulfilling its duties shall be kept confidential. The Market Transparency Unit's members of staff shall be subject to a confidentiality obligation regarding the confidential information referred to in sentence 1. Other persons who are to receive confidential information shall, prior to the transfer of such information, be put under a special obligation to maintain secrecy unless they hold a public office or have special obligations in the public service. Section 1(2), (3) and (4) no 2 of the German Act on the Formal Assignment of Responsibilities to Persons other than Civil Servants [*Verpflichtungsgesetz*] shall apply *mutatis mutandis*.

(2) Together with the Bundesnetzagentur, the Market Transparency Unit shall ensure the operational reliability of the data monitoring and the confidentiality, integrity and protection of the incoming information. In this regard, the Market Transparency Unit shall be bound to the same degree of confidentiality as the entity providing the information or the entity that collected the information. The Market Transparency Unit shall take all necessary measures to prevent any abuse of, and any unauthorised access to, the information managed in its systems. The Market Transparency Unit shall identify sources of operational risks and minimise these risks by developing adequate systems, controls and procedures.

(3) Subsection (1) shall apply *mutatis mutandis* to persons who are to receive data pursuant to Section 47d(1) sentence 5 or who receive information pursuant to Section 47c(4).

(4) The Market Transparency Unit may store, edit and use personal data communicated to it for the purposes of fulfilling its tasks pursuant to Section 47b only to the extent necessary for the fulfilment of the tasks within its scope of competence and for purposes of cooperation pursuant to Article 7(2) and Article 16 of Regulation (EU) No 1227/2011.

(5) Access to files by persons whose personal rights are affected by the decisions taken by the Market Transparency Unit pursuant to Section 47b(5) and (7), Section 47d(1) and (2), Section 47e and Section 47g as well as Section 81(2) no 2(c) and (d), and nos 5a and 6 shall be restricted to documents that are exclusively attributable to the legal relationship between the affected person and the Market Transparency Unit.

## **Division 2** **Market Transparency Unit for Fuels**

### **Section 47k Fuel Market Monitoring**

(1) A Market Transparency Unit for Fuels shall be set up at the Bundeskartellamt. It shall monitor the trade in fuels in order to facilitate the detection and sanctioning by the competition authorities of infringements of Sections 1, 19 and 20 of this Act and of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). It shall perform its duties in accordance with the provisions set out in subsections (2) to (9).

(2) Operators of public petrol stations that offer fuels to end consumers at self-set prices are required, subject to the statutory instrument referred to in subsection (8), to report to the Market Transparency Unit for Fuels any changes in their fuel prices in real time and separately for each type of fuel. If the sales prices are imposed on the operator by another undertaking, the undertaking that has price setting power shall be obliged to communicate the prices.

(3) Fuels for the purposes of this provision shall mean petrol and diesel fuels. Public petrol stations shall include any service stations that are located at places accessible to the general public and that may be accessed without restrictions as to certain groups of persons.

(4) If there is any indication that an undertaking is in violation of the legal provisions referred to in subsection (1), the Market Transparency Unit for Fuels shall immediately inform the competent

competition authority and refer the issue to it. To this end, or if requested by a competition authority, it shall immediately transfer to the authority all the information and data requested or required by the competition authority for the purpose of fulfilling its tasks under this Act. The Market Transparency Unit for Fuels shall also provide the data collected pursuant to subsection (2) to the following authorities and bodies:

1. the Federal Ministry for Economic Affairs and Energy for statistical and evaluation purposes, and
2. the Monopolies Commission for the purpose of fulfilling its tasks under this Act.

The Market Transparency Unit for Fuels may provide location information, aggregated or older data also to other authorities and bodies of the directly competent federal and *Land* administration for the purpose of fulfilling their statutory duties.

(5) Subject to the statutory instrument pursuant to subsection (8), the Market Transparency Unit for Fuels shall be authorised to pass on the price data collected pursuant to subsection (2) electronically to providers of consumer information services for the purpose of informing consumers. When publishing or passing on these price data to consumers, the providers of consumer information services shall abide by the requirements specified in more detail in the statutory instrument referred to in subsection (8) no 5. If these requirements are not satisfied, the Market Transparency Unit for Fuels shall be authorised to refrain from passing on the data.

(6) The Market Transparency Unit for Fuels shall ensure the operational reliability of the data monitoring and the confidentiality, integrity and protection of the incoming information.

(7) For the purpose of fulfilling its tasks, the Market Transparency Unit for Fuels shall have the powers set out in Sections 59, 59a and 59b.

(8) The Federal Ministry for Economic Affairs and Energy shall be authorised to impose certain requirements regarding the reporting obligation provided for in subsection (2) and the passing on of the price data pursuant to subsection (5) by way of a statutory instrument not requiring the consent of the Bundesrat, in particular

1. to issue more detailed provisions on the exact timing and the type and form of reporting the price data pursuant to subsection (2);
2. to determine appropriate *de minimis* thresholds for the reporting duty under subsection (2) and to provide for more detailed provisions as regards a voluntary submission to the reporting duties under subsection (2) where the relevant thresholds are not reached;
3. to issue more detailed provisions on the requirements applicable to providers of consumer information services as referred to in subsection (5);
4. to issue more detailed provisions on the content, type, form and scope of the passing-on of price data by the Market Transparency Unit for Fuels to the providers referred to in subsection (5); as well as
5. to issue more detailed provisions on the content, type, form and scope of the publication or passing-on of price data to consumers by the providers of consumer information services as referred to in subsection (5).

The Federal Ministry for Economic Affairs and Energy must transmit the statutory instrument to the Bundestag. The statutory instrument may be amended or rejected by resolution of the Bundestag. Any amendments or a rejection shall be communicated by the Bundestag to the Federal Ministry for Economic Affairs and Energy. If the Bundestag has not dealt with the statutory instrument within three weeks of sittings following its receipt, the consent of the Bundestag shall be deemed to have been granted.

(9) Decisions by the Market Transparency Unit for Fuels shall be taken by the person heading the unit. Section 51(5) shall apply *mutatis mutandis* to all members of staff of the Market Transparency Unit for Fuels.

### **Division 3** **Evaluation**

#### **Section 471 Evaluation of the Market Transparency Units**

The Federal Ministry for Economic Affairs and Energy shall report to the legislative bodies on the results of the market transparency units' work and the experiences gained from this. The reporting regarding the wholesale trade in electricity and gas shall be carried out five years after the beginning of the reporting obligations pursuant to Section 47e(2) to (5) in conjunction with the statutory instrument referred to in Section 47f. The reporting regarding the trade in fuels shall be carried out three years after the beginning of the reporting obligation pursuant to Section 47k(2) in conjunction with the statutory instrument referred to in Section 47k(8) and should in particular include information on the development of prices and the situation of the medium-sized mineral oil industry.

## **Part 2** **Competition Authorities**

### **Chapter 1** **General Provisions**

#### **Section 48 Competencies**

(1) The competition authorities are the Bundeskartellamt, the Federal Ministry for Economic Affairs and Energy, and the supreme *Land* authorities competent according to the laws of the respective *Land*.

(2) Unless a provision of this Act assigns competence for a particular matter to a particular competition authority, the Bundeskartellamt shall exercise the functions and powers assigned to the competition authority under this Act if the effect of the restrictive or discriminatory conduct or of a competition rule extends beyond the territory of a *Land*. In all other cases, the supreme *Land* authority competent according to the laws of the *Land* shall exercise these functions and powers.

(3) The Bundeskartellamt shall monitor the degree of transparency, including that of wholesale prices, and the degree and effectiveness of liberalisation as well as the extent of competition on the wholesale and retail levels of the gas and electricity markets and on the gas and electricity exchanges. The Bundeskartellamt shall without delay make the data compiled from its monitoring activities available to the Bundesnetzagentur.

#### **Section 49 Bundeskartellamt and Supreme *Land* Authority**

(1) If the Bundeskartellamt institutes proceedings or conducts investigations, it shall simultaneously inform the supreme *Land* authority in whose district the undertakings concerned have their registered seat. If a supreme *Land* authority institutes proceedings or conducts investigations, it shall also inform the Bundeskartellamt.

(2) The supreme *Land* authority shall refer a matter to the Bundeskartellamt if the Bundeskartellamt is competent pursuant to Section 48(2) sentence 1 or Section 50(1). The Bundeskartellamt shall refer a matter to the supreme *Land* authority if the supreme *Land* authority is competent pursuant to Section 48(2) sentence 2.

(3) Upon application by the Bundeskartellamt, the supreme *Land* authority may refer to the Bundeskartellamt a matter falling under the competence of the supreme *Land* authority pursuant to Section 48(2) sentence 2, provided that this is expedient in view of the circumstances of the matter. Upon referral, the Bundeskartellamt shall become the competent competition authority.

(4) Upon application by the supreme *Land* authority, the Bundeskartellamt may refer to the supreme *Land* authority a matter falling under the Bundeskartellamt's competence pursuant to Section 48(2) sentence 1, provided this is expedient in view of the circumstances of the matter. Upon referral, the supreme *Land* authority shall become the competent competition authority. Prior to the referral, the Bundeskartellamt shall inform the other supreme *Land* authorities concerned. The referral shall not take place if a supreme *Land* authority concerned objects to this referral within a time limit to be set by the Bundeskartellamt.

#### **Section 50 Enforcement of European Law**

(1) In derogation of Section 48(2), the Bundeskartellamt shall be the competent competition authority for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union within the meaning of Article 35(1) of Council Regulation (EC) No 1/2003.

(2) The Bundeskartellamt shall be the competent competition authority for cooperation in proceedings of the European Commission or the competition authorities of other Member States of the European Union for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union. The procedural provisions that are relevant for the application of this Act shall apply.

(3) Officials of the competition authority of a Member State of the European Union, as well as other accompanying individuals authorised or appointed by this competition authority, shall be authorised to assist in searches and interviews carried out by the Bundeskartellamt on behalf and for the account of that competition authority pursuant to Article 22(1) of Regulation (EC) No 1/2003.

(4) In cases other than those specified in subsections (1) to (3), the Bundeskartellamt shall exercise the duties assigned to the authorities of the Member States of the European Union in Articles 104 and 105 of the Treaty on the Functioning of the European Union as well as in the regulations issued pursuant to Article 103 of the Treaty on the Functioning of the European Union, also in conjunction with Article 43(2), Article 100(2), Article 105(3) and Article 352(1) of the Treaty on the Functioning of the European Union. In the Advisory Committee on concentrations pursuant to Article 19 of Regulation (EC) No 139/2004, the Federal Republic of Germany shall be represented by the Federal Ministry for Economic Affairs and Energy or the Bundeskartellamt. Subsection (2) sentence 2 shall apply *mutatis mutandis*.

## Chapter 2

### Cooperation Between Authorities

#### Section 50a Investigations Within the European Competition Network

(1) The Bundeskartellamt may conduct searches and carry out other fact-finding measures on behalf and for the account of the competition authority of another Member State of the European Union and in accordance with German law in order to establish whether undertakings or associations of undertakings have failed to comply with their obligations regarding investigative measures or decisions of the applicant authority in the context of proceedings concerning the enforcement of Article 101 or Article 102 of the Treaty on the Functioning of the European Union. The Bundeskartellamt may request from the applicant authority the reimbursement of all costs reasonably incurred in connection with these investigative measures, including translation, personnel and administrative costs, unless reimbursement has been waived based on reciprocity.

(2) The Bundeskartellamt may request that the competition authority of another Member State of the European Union conduct investigative measures pursuant to subsection (1). Any additional costs reasonably incurred in connection with these investigative measures, including translation, personnel and administrative costs, shall be reimbursed by the Bundeskartellamt at the request of the applicant authority, unless reimbursement has been waived based on reciprocity.

(3) The information collected shall be exchanged and used applying Section 50d *mutatis mutandis*.

#### Section 50b Service of Documents Within the European Competition Network

(1) At the request of the competition authority of another Member State of the European Union, the Bundeskartellamt shall serve the following documents on an undertaking or an association of undertakings based in Germany on behalf of that competition authority:

1. any kind of preliminary objections to alleged infringements of Article 101 or Article 102 of the Treaty on the Functioning of the European Union;
2. decisions applying Article 101 or Article 102 of the Treaty on the Functioning of the European Union;
3. other procedural acts adopted in the context of proceedings concerning the enforcement of Article 101 or Article 102 of the Treaty on the Functioning of the European Union that are to be served pursuant to the provisions of national law; and

4. other documents relating to the application of Article 101 or Article 102 of the Treaty on the Functioning of the European Union, including the enforcement of fines or periodic penalty payments imposed.

(2) Requests to serve documents pursuant to subsection (1) on an addressee residing in the geographic scope of application of this Act shall be made by transmitting a uniform instrument in German which must be accompanied by the document to be served. The uniform instrument shall indicate the following information:

1. the name and address of the addressee, and, if applicable, any other information based on which the addressee can be identified,
2. a summary of the relevant facts and circumstances,
3. a summary of the contents of the document to be served,
4. the name, address and other contact details of the requested authority, and
5. the period within which the service should be effected, such as statutory time limits or limitation periods.

(3) The Bundeskartellamt may refuse to serve documents if the request does not meet the requirements set out in subsection (2) or if serving the documents would be manifestly contrary to public policy. If the Bundeskartellamt intends to refuse to serve documents or if additional information is needed, the Bundeskartellamt shall inform the applicant competition authority accordingly. Otherwise, the Bundeskartellamt shall serve the corresponding documents without undue delay.

(4) The documents shall be served based on the provisions of the German Act on Service in Administrative Procedure [*Verwaltungszustellungsgesetz*]. Section 5(4) of the German Act on Service in Administrative Procedure and Section 178(1) no 2 of the German Code of Civil Procedure shall apply *mutatis mutandis* to the service of documents on undertakings and associations of undertakings.

(5) The Bundeskartellamt shall be authorised to cause the competition authority of another Member State to serve the Bundeskartellamt's decisions and other documents within the meaning of subsection (1) on its behalf. The request for service shall be addressed to the competent competition authority of the requested Member State in the form of a uniform instrument in accordance with subsection (2), together with a translation of this uniform instrument into the official language, or one of the official languages, of the Member State of the requested authority, with the document to be served accompanying this instrument. A translation of the document to be served into the official language, or one of the official languages, of the Member State of the requested authority shall be necessary only if required under the national law of the requested Member State. The requested authority's testimony shall suffice as proof of delivery.

(6) At the request of the requested authority, the Bundeskartellamt shall reimburse the requested authority for any costs incurred as a result of serving documents, in particular any costs incurred due to necessary translations or personnel and administrative expenses, to the extent that these costs are reasonable. The Bundeskartellamt may file a corresponding request with an applicant authority if the Bundeskartellamt incurred such costs in the context of serving documents on behalf of the applicant authority.

(7) Any disputes concerning the lawfulness of a document prepared by the Bundeskartellamt and to be served in the territory of another competition authority, and any disputes concerning the validity of such service effected by the Bundeskartellamt on behalf of the competition authority of another Member State shall be decided by the court that is competent pursuant to this Act. The law of the Federal Republic of Germany shall apply.

### **Section 50c Enforcement Within the European Competition Network**

(1) At the request of the competition authority of another Member State of the European Union, the Bundeskartellamt shall enforce decisions imposing fines or periodic penalty payments in proceedings concerning the application of Article 101 or Article 102 of the Treaty on the Functioning of the European Union, provided that the decision to be enforced is final and the applicant authority, after having made reasonable efforts to enforce the decision in its own territory, has ascertained with certainty that the undertaking or association of undertakings does not have sufficient assets in the Member State of the applicant authority to recover the fine or periodic penalty payment.



(2) At the request of the competition authority of another Member State of the European Union, the Bundeskartellamt may also enforce final decisions imposing fines or periodic penalty payments in proceedings concerning the application of Article 101 or Article 102 of the Treaty on the Functioning of the European Union in other cases not covered by subsection (1). This shall apply, in particular, in cases where the undertaking or association of undertakings against which the decision is enforceable has no place of business in the Member State of the applicant authority.

(3) Section 50b(2) shall apply to requests pursuant to subsections (1) or (2) with the proviso that the document based on which the enforcement is requested replaces the document to be served. In addition to the information specified in Section 50b(2) sentence 2, the uniform instrument shall include the following information:

1. information about the decision permitting enforcement in the Member State of the applicant authority, unless this information was already presented in accordance with Section 50b(2) no 3,
2. the date on which the decision became final,
3. the amount of the fine or periodic penalty payment, and
4. in the case of subsection (1), information demonstrating the reasonable efforts made by the applicant authority to enforce the decision in its own territory.

The enforcement shall be based on the uniform instrument authorising enforcement in the requested Member State, without any act of recognition being required.

(4) In the case of subsection (1), the Bundeskartellamt may refuse the enforcement only if the request does not meet the requirements set out in subsection (3) or the enforcement would be manifestly contrary to public policy. If the Bundeskartellamt intends to refuse the enforcement or if it needs additional information, the Bundeskartellamt shall inform the applicant authority accordingly. Otherwise, the Bundeskartellamt shall initiate the enforcement without undue delay.

(5) Unless otherwise provided for in this Act, the enforcement of fines shall be governed by the provisions set out in Sections 89 et seqq. of the German Administrative Offences Act [*Gesetz über Ordnungswidrigkeiten*] and the enforcement of periodic penalty payments shall be governed by the provisions of the German Administrative Enforcement Act [*Verwaltungsvollstreckungsgesetz*]. Fines or periodic penalty payments imposed in a foreign currency shall be converted into Euro by the Bundeskartellamt at the exchange rate applying on the date of the foreign decision. The proceeds from the enforcement shall accrue to the Federal Cash Office [*Bundeskasse*].

(6) The Bundeskartellamt shall claim the costs incurred in connection with the enforcement pursuant to this provision together with the fine or periodic penalty payment from the undertaking or association of undertakings against which the decision is enforceable. If the enforcement proceeds are not sufficient to cover the costs incurred in connection with the enforcement, the Bundeskartellamt may request that the applicant authority bear the costs remaining after deduction of the enforcement proceeds.

(7) The Bundeskartellamt shall be authorised to request that the competition authority of another Member State of the European Union enforce decisions imposing fines or periodic penalty payments in proceedings concerning the application of Article 101 or Article 102 of the Treaty on the Functioning of the European Union. Section 50b(5) sentences 2 and 3 shall apply *mutatis mutandis*. The content of the uniform instrument shall also be subject to subsection (3) sentence 2. If the requested authority is not able to recover the costs incurred in connection with the enforcement, including translation, personnel and administrative costs, from the fines or periodic penalty payments collected, these costs shall be reimbursed by the Bundeskartellamt upon application by the requested authority.

(8) Any disputes concerning the lawfulness of a decision issued by the Bundeskartellamt to be enforced in the territory of another competition authority, and any disputes concerning the lawfulness of the uniform instrument authorising the enforcement of a decision in another Member State shall be decided by the court competent pursuant to this Act. The law of the Federal Republic of Germany shall apply. The same shall apply to disputes concerning the execution of an enforcement carried out by the Bundeskartellamt on behalf of the competition authority of another Member State.

## **Section 50d Exchange of Information Within the European Competition Network**

(1) Pursuant to Article 12(1) of Regulation (EC) No 1/2003, the Bundeskartellamt shall be authorised, for the purpose of applying Article 101 and Article 102 of the Treaty on the Functioning of the European Union and subject to subsection (2),

1. to inform the European Commission and the competition authorities of the other Member States of the European Union of any matter of fact or of law, including confidential information, in particular trade and business secrets, and to transfer to them corresponding documents and data, and
2. to request that these competition authorities transfer information pursuant to no 1 above, and to receive and use such information in evidence.

(2) Leniency statements may be transferred to the competition authority of another Member State of the European Union only if

1. the leniency applicant consents to the transfer of its leniency statement to the other competition authority, or
2. the other competition authority has received a leniency application from the same applicant relating to the same violation, provided that, at the time the leniency statement is transferred, the applicant is not free to withdraw the information submitted to the other competition authority.

(3) The Bundeskartellamt may use in evidence the information received only for the purpose of applying Article 101 or Article 102 of the Treaty on the Functioning of the European Union and with regard to the subject matter of the investigation for which it was collected by the transferring authority. Information exchanged pursuant to subsection (1) may, however, also be used for the purpose of applying this Act if provisions of this Act are applied in accordance with Article 12(2) sentence 2 of Regulation (EC) No 1/2003.

(4) Information received by the Bundeskartellamt pursuant to subsection (1) can be used in evidence for the purpose of imposing sanctions on natural persons only where the law of the transferring authority provides for sanctions of a similar kind in relation to violations of Article 101 or Article 102 of the Treaty on the Functioning of the European Union. Where the conditions set out in sentence 1 are not fulfilled, the information may be used in evidence if it has been collected in a way which ensures the same level of protection with regard to the rights of defence of natural persons as provided for under the law applicable to the Bundeskartellamt. The prohibition on the use of evidence pursuant to sentence 1 shall not exclude the use of the evidence against legal persons or associations of persons. Compliance with prohibitions on the use of evidence that are based on constitutional law shall remain unaffected.

### **Section 50e Other Cooperation with Foreign Competition Authorities**

(1) The Bundeskartellamt shall have the powers pursuant to Section 50d(1) also in other cases in which it cooperates with the European Commission or with the competition authorities of other states for the purpose of applying provisions of competition law.

(2) The Bundeskartellamt may pass on information pursuant to Section 50d(1) only with the proviso that the receiving competition authority

1. uses the information in evidence only for the purpose of applying provisions of competition law and with regard to the subject matter of the investigation for which it was collected by the Bundeskartellamt, and
2. maintains the confidentiality of the information and provides such information to third parties only if the Bundeskartellamt agrees to such provision; this shall also apply to the disclosure of confidential information in court and administrative proceedings.

Confidential information, including trade and business secrets, disclosed in merger control proceedings may be provided by the Bundeskartellamt only with the consent of the undertaking which has provided this information.

(3) The provisions concerning legal assistance in criminal matters as well as agreements on administrative and legal assistance shall remain unaffected.

### **Section 50f Cooperation with Other Authorities**

(1) The competition authorities, regulatory authorities, the Federal Commissioner for Data Protection and Freedom of Information [*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*] and the *Land* commissioners for data protection [*Landesbeauftragte für Datenschutz*] as well as the competent authorities within the meaning of Section 2 of the German EU Consumer Protection Enforcement Act [*EU-Verbraucherschutzdurchsetzungsgesetz*] may, irrespective of the type of procedure selected, exchange information, including personal data and trade and business secrets, to the extent that this is necessary for the purpose of fulfilling their respective duties, and use such information in their proceedings. Prohibitions on the use of evidence shall remain unaffected.

(2) In the performance of their respective functions the competition authorities shall cooperate with the German Federal Financial Supervisory Authority [*Bundesanstalt für Finanzdienstleistungsaufsicht*], the German Central Bank [*Bundesbank*], the competent supervisory authorities pursuant to Section 90 of the German Social Code, Book IV [*Viertes Buch Sozialgesetzbuch*], the German *Land* media authorities [*Landesmedienanstalten*] and the Commission on Concentration in the Media Sector. The competition authorities shall exchange information with the *Land* media authorities and the Commission on Concentration in the Media Sector on a mutual basis, to the extent that this is necessary for the purpose of fulfilling their respective functions; accordingly, they may, upon request, exchange information with the other authorities mentioned in sentence 1. This shall not apply to

1. confidential information, in particular trade and business secrets, as well as
2. information obtained pursuant to Section 50d or pursuant to Article 12 of Regulation (EC) No 1/2003.

Sentences 2 and 3 no1 shall not affect the provisions on the cooperation with other authorities of the German Securities Acquisition and Takeover Act [*Wertpapiererwerbs- und Übernahmegesetz*] and the German Securities Trading Act [*Gesetz über den Wertpapierhandel*].

(3) The Bundeskartellamt may communicate information relating to the undertakings participating in a concentration it has been provided with pursuant to Section 39(3) to other authorities to the extent that this is necessary for the purposes set out in Section 4(1) no 1 and Section 5(2) of the German Foreign Trade and Payments Act [*Außenwirtschaftsgesetz*]. In the case of concentrations with a Community dimension within the meaning of Article 1(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, as amended from time to time, the Bundeskartellamt shall have the power referred to in sentence 1 only with regard to information published by the European Commission in accordance with Article 4(3) of that Regulation.

## **Chapter 3** **Bundeskartellamt**

### **Section 51 Seat, Organisation**

(1) The Bundeskartellamt is an independent higher federal authority with its seat in Bonn. It is assigned to the Federal Ministry of Economic Affairs and Energy.

(2) Decisions of the Bundeskartellamt shall be made by the decision divisions established as determined by the Federal Ministry for Economic Affairs and Energy. Further to this, the President shall determine the allocation and handling of business in the Bundeskartellamt by means of rules of procedure; these rules of procedure require confirmation by the Federal Ministry for Economic Affairs and Energy.

(3) The decisions of the decision divisions shall be made by a chairperson and two associate members.

(4) The chairperson and associate members of the decision divisions must be civil servants appointed for life and must be qualified to serve as judges or senior civil servants.

(5) The members of the Bundeskartellamt may not own or manage any undertakings, nor may they be members of the management board or supervisory board of an undertaking, a cartel, or a business and trade association or professional organisation.

### **Section 52 Publication of General Instructions**

Any general instructions given by the Federal Ministry for Economic Affairs and Energy to the Bundeskartellamt with regard to the issuance or non-issuance of decisions pursuant to this Act shall be published in the Federal Gazette.

### **Section 53 Activity Report and Monitoring Reports**

(1) Every two years, the Bundeskartellamt shall publish a report on its activities and on the situation and development in its field of responsibilities. The report shall include the general instructions given by the Federal Ministry for Economic Affairs and Energy pursuant to Section 52. The Bundeskartellamt shall also regularly publish its administrative principles.

(2) The Federal Government shall without delay submit the report of the Bundeskartellamt to the Bundestag together with its opinion.

(3) The Bundeskartellamt shall prepare a report on its monitoring activities pursuant to Section 48(3) sentence 1 in agreement with the Bundesnetzagentur to the extent that aspects of regulation of the distribution networks are concerned, and shall transmit the report to the Bundesnetzagentur. At least every two years, as part of its monitoring activities pursuant to Section 48(3) sentence 1, the Bundeskartellamt shall prepare a report on the competitive conditions in the electricity generation market. The Bundeskartellamt may publish the report independently of the monitoring report prepared pursuant to sentence 1.

(4) The Bundeskartellamt may also inform the public on a continuous basis on its activities as well as on the situation and development in its field of responsibilities.

(5) The Bundeskartellamt will communicate on its website every fining decision on account of a violation of Section 1 or Sections 19-21 or Article 101 or Article 102 of the Treaty on the Functioning of the European Union no later than upon conclusion of the authority's fine proceedings. The communication should contain at least the following information:

1. Information on the facts established in the fining decision,
2. Information on the type of the infringement and the period during which the infringement occurred,
3. Information on the undertakings against which fines were imposed or which were fully exempted from fines in the context of a leniency programme.
4. Information on the goods and services affected,
5. A note pointing out that persons who suffered harm due to the infringement may claim compensation for this harm, and,
6. if the fining decision has already become final, a note pointing out the binding effect of decisions of a competition authority pursuant to Section 33b.

## **Part 3** **Proceedings**

### **Chapter 1** **Administrative Matters**

#### **Division 1** **Proceedings Before the Competition Authorities**

### **Section 54 Institution of Proceedings, Parties, Capacity to Participate in Proceedings**

(1) The competition authority shall, acting *ex officio* or upon application, institute proceedings. If so requested, the competition authority may *ex officio* institute proceedings for the protection of a complainant. Unless otherwise provided for by the specific provisions of this Act, the general provisions of the German laws relating to administrative procedures shall apply to the proceedings.

(2) Parties to the proceedings before the competition authority shall be:

1. those who have applied for the proceedings to be initiated;
2. cartels, undertakings, business and trade associations or professional organisations against which the proceedings are directed;
3. persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted to the proceedings by the competition authority; the interests of consumer advice centres and other consumer associations supported by public funds are substantially affected also in cases in which the decision affects a large number of consumers and in which therefore the interests of consumers in general are substantially affected;
4. in the cases of Section 37(1) nos 1 or 3, also the seller.

(3) The Bundeskartellamt shall also be a party to proceedings before the supreme *Land* authorities.

(4) In addition to natural and legal persons, associations of persons without legal capacity shall also have the capacity to participate in proceedings before the competition authority.

### **Section 55 Preliminary Decision on Jurisdiction**

(1) If a party pleads that the competition authority lacks territorial or subject matter jurisdiction, the competition authority may issue a preliminary decision on the issue of jurisdiction. Such decision may be challenged independently by way of appeal; the appeal shall have a suspensive effect.

(2) If a party fails to object to the competition authority's territorial or subject matter jurisdiction, an appeal cannot be based upon the contention that the competition authority erroneously assumed it had jurisdiction.

### **Section 56 Opportunity to Comment, Access to Files, Hearing**

(1) The competition authority shall give the parties an opportunity to state their case. The competition authority shall decide at its due discretion on the form in which the parties will be given the opportunity to comment. The competition authority may also require the parties to comment orally, if required by the special circumstances of the case.

(2) In appropriate cases, the competition authority may give representatives of the business sectors affected by the proceedings an opportunity to state their case.

(3) The parties have a right to access the files concerning the proceedings at the competition authority to the extent that knowledge of the information contained in the files is required for asserting or defending their legal interests. Access is provided by sending copies from the case file, printing out relevant parts of the case file or sending relevant electronic documents to the party at that party's expense.

(4) The authority shall refuse access to its files to the extent that this is expedient for important reasons, in particular in order to ensure proper fulfilment of the authority's duties, to protect classified information or trade or business secrets or other interests of the party concerned that are worthy of protection. Access shall not be granted to draft decisions, preparatory works for such decisions and any documents relating to voting.

(5) The competition authority may provide third parties with information from the files concerning the proceedings or grant access to such files to the extent that such parties can demonstrate that they have a legitimate interest. Subsection (4) shall apply *mutatis mutandis*. To the extent that accessing the files or obtaining information is intended to serve the purpose of asserting a claim for damages on account of an infringement pursuant to Section 33(1) or preparing such assertion, access shall be limited to decisions pursuant to Sections 32 to 32d and Section 60.

(6) The competition authority may request that the parties and third parties identify confidential information specified in subsection (4) when submitting, or following submission of, notifications, statements, documents or other information and to mark such confidential information accordingly in the documents. If a party fails to do so despite a request to that effect, the competition authority may assume that that party consents to the disclosure of such information in the context of granting access to the files.

(7) The competition authority may, upon application of a party or acting *ex officio*, hold a public hearing. The public shall be excluded from the hearing or from a part of the hearing if it is to be feared that this would endanger public order, in particular the welfare of the Federation or a *Land* or important trade or business secrets. In the cases specified in Section 42, the Federal Ministry for Economic Affairs and Energy shall hold a public hearing; with the consent of the parties, a decision may be issued without a hearing. In the public hearing of cases under Section 42, the Monopolies Commission shall have the right to be heard and to explain the opinion it prepared pursuant to Section 42(5).

(8) Sections 45 and 46 of the German Administrative Procedure Act shall be applied.

### **Section 57 Investigations, Evidence**

(1) The competition authority may conduct any investigations and collect any evidence required.

(2) Section 372(1), Sections 376, 377, 378, 380 to 387, 390, 395 to 397, 398(1) and Sections 401, 402, 404, 404a, 406 to 409, 411 to 414 of the German Code of Civil Procedure shall apply *mutatis mutandis* to the gathering of evidence by inspection, testimony of witnesses and experts; detention may not be imposed. The higher regional court [*Oberlandesgericht*] shall have jurisdiction over appeals.

(3) The testimony of witnesses should be recorded, and the record signed by the investigating member of the competition authority and, if a recording clerk attends, also by the clerk. The record should indicate the place and the date of the hearing as well as the names of those who conducted it and of the parties.

(4) The record shall be read to the witness or be presented to be read by the witness himself/herself for his/her approval. The approval given shall be recorded and signed by the witness. If the signature is omitted, the reason for this shall be indicated.

(5) The provisions of subsections (3) and (4) shall apply *mutatis mutandis* to the questioning of experts.

(6) The competition authority may request that the local court [*Amtsgericht*] administer the oath to witnesses if it considers such an oath to be necessary to obtain truthful testimony. The court shall decide whether the oath is required.

### **Section 58 Seizure**

(1) Officials of the competition authority may seize objects which may be of importance as evidence in the investigation. The person affected by the seizure shall be informed of this without delay.

(2) If neither the person affected nor any relative of legal age was present at the seizure or if the person affected or, in his/her absence, a relative of legal age explicitly objected to the seizure, the competition authority shall seek judicial confirmation by the local court in the district of which the competition authority has its seat within three days of the seizure.

(3) The person affected may at any time request judicial review of the seizure. He/she shall be informed of this right. The court having jurisdiction under subsection (2) shall rule on the request.

(4) The court decision may be appealed. Sections 306 to 310 and 311a of the German Code of Criminal Procedure shall apply *mutatis mutandis*.

### **Section 59 Requests for Information**

(1) To the extent necessary for the purpose of fulfilling the tasks assigned to the competition authority under this Act, the competition authority may, until its decision becomes final, request from undertakings and associations of undertakings the provision of information and the surrender of documents. The undertakings and associations of undertakings shall be obliged to provide the information or surrender the documents within a reasonable period of time. This obligation covers all of the information and documents accessible to such undertakings or associations of undertakings. This also includes general market surveys which serve the purpose of evaluating or analysing the conditions of competition or the market situation and are in the possession of the undertaking or association of undertakings. The competition authority may prescribe the form in which the information is to be provided; in particular, it may stipulate that an online platform must be used to submit the information. The competition authority may summon representatives of the undertaking or the association of undertakings to appear for questioning. Sentences 1 to 6 shall apply *mutatis mutandis* to legal persons and associations of persons that are not undertakings or associations of undertakings.

(2) The owners of the undertakings and their representatives, and in the case of legal persons and associations of persons also the persons appointed as representatives, shall be obliged to provide the information requested and to surrender the documents requested on behalf of the undertaking, the association of undertakings or the legal person or association of persons. The name of a person in a leading position responsible for providing the information shall be communicated to the competition authority.

(3) The request for information must be proportionate. It shall not compel the addressee of the request to confess to a criminal offence, an administrative offence or a violation of a provision of this Act or of Article 101 or Article 102 of the Treaty on the Functioning of the European Union. To the extent that natural persons are obliged under a request for information pursuant to subsections (1) and (2) to cooperate by providing information or surrendering documents, they shall, if obtaining information in any other way would be significantly more difficult or unlikely, also disclose facts that may result in prosecution for a criminal or administrative offence. Any information disclosed by the natural person in fulfilling the obligation under subsections (1) and (2) may, however, be used in criminal proceedings or in proceedings pursuant to this Act or the German Administrative Offences Act against that person or against a relative as defined in Section 52(1) of the German Code of Criminal Procedure only with the consent of the natural person affected.

(4) Subsection (1) sentences 1 to 6 and subsection (3) sentence 1 shall apply *mutatis mutandis* to requests for information addressed to natural persons. Section 55 of the German Code of Criminal Procedure shall be applied *mutatis mutandis*, unless the information results merely in a risk of prosecution in fine proceedings conducted by a competition authority and the competition authority has, in exercising its due discretion, given the natural person a commitment not to prosecute [*Nichtverfolgungszusage*].

(5) Requests for information made by the Federal Ministry for Economic Affairs and Energy or the supreme *Land* authority shall be made by individual order in writing and those of the Bundeskartellamt by decision. The legal basis, the subject matter and the purpose of the request for information shall be stated in the individual order or decision and an appropriate time limit for providing the information shall be stipulated.

### **Section 59a Examination of Business Documents**

(1) To the extent necessary for the purpose of performing the tasks assigned to the competition authority under this Act, the competition authority may, until its decision becomes final, inspect and examine business documents of undertakings and associations of undertakings at their premises during normal business hours.

(2) The owners of undertakings and their representatives and, in the case of legal persons and associations of persons, also the persons appointed as representatives, shall be obliged to make the business documents available for inspection and examination and to allow examination of such business documents and entry to the offices and business premises.

(3) Persons entrusted by the competition authority to carry out examinations may enter the offices of undertakings and associations of undertakings.

(4) The fundamental right of Article 13 of the German Basic Law [*Grundgesetz*] shall be restricted by subsections (2) and (3).

(5) Examinations shall be ordered by the Federal Ministry for Economic Affairs and Energy or the supreme *Land* authority by individual order in writing and by the Bundeskartellamt by decision with the consent of its President. The order or decision shall state the time, legal basis, subject matter and purpose of the examination.

### **Section 59b Searches**

(1) For the purpose of performing the tasks assigned to the competition authority under this Act, the competition authority may search business premises, homes, land and objects if it can be assumed that documents are located there that may be inspected and examined and the surrender of which may be requested by the competition authority pursuant to Sections 59 and 59a. The fundamental right under Article 13 of the German Basic Law shall be restricted to this extent. Section 104(1) and (3) of the German Code of Criminal Procedure shall apply *mutatis mutandis*.

(2) Searches may be conducted only by order of the judge of the local court in the district in which the competition authority has its seat. Sections 306 to 310 and Section 311a of the German Code of Criminal Procedure shall apply *mutatis mutandis* to appeals against such orders. If there is imminent danger, the persons entrusted with the search by the competition authority may conduct the necessary searches during business hours without judicial order.

(3) The officials of the competition authority and any accompanying individuals authorised or appointed by the competition authority shall be authorised, in particular:

1. to examine all books and business documents irrespective of the form in which they are available or the medium on which they are stored, and to obtain access to any information that is accessible to the person subject to the search,
2. to seal business premises, books and documents of any kind for the duration of and to the extent necessary for the search, and
3. during the search of undertakings or associations of undertakings, to request from all representatives or members of staff of the undertaking or association of undertakings information that might facilitate access to evidence, and explanations on facts or documents that might be connected to the subject matter and purpose of the search, and to record the answers; the request must expressly refer to the obligation to cooperate and must be included in the record.

To the extent that natural persons are obliged to cooperate by providing information pursuant to sentence 1 no 3, they shall, if obtaining information in any other way is significantly more difficult or unlikely, also disclose facts that may result in prosecution for a criminal or administrative offence. Any information disclosed by the natural person in fulfilling the obligation under sentence 1 no 3 may, however, be used in criminal proceedings or in proceedings pursuant to this Act or the German Administrative Offences Act against that person or against a relative as defined in Section 52(1) of the German Code of Criminal Procedure only with the consent of the natural person affected.

(4) A record of the search and its essential results shall be prepared *in situ*, also showing the facts which led to the assumption that danger was imminent, if no judicial order was issued.

(5) Section 108(1) and Section 110 of the German Code of Criminal Procedure shall apply *mutatis mutandis*. The parties affected shall submit to the search. If business premises and land and objects used for business purposes are searched, undertakings and associations of undertakings may be forced to submit to the search by imposing a periodic penalty payment in accordance with Section 86a.

## **Section 60 Preliminary Injunctions**

The competition authority may issue preliminary injunctions to regulate matters on a temporary basis until a final decision is issued on

1. a decision pursuant to Section 31b(3), Section 40(2), Section 41(3) or a revocation or modification of a clearance pursuant to Section 40(3a),
2. an authorisation pursuant to Section 42(1), its revocation or modification pursuant to Section 42(2) sentence 2 in conjunction with Section 40(3a),
3. a decision pursuant to Section 26(4), Section 30(3) or Section 34(1).

## **Section 61 Completion of the Proceedings, Reasons for the Decision, Service**

(1) Decisions of the competition authority shall contain a statement of reasons and be served upon the parties together with information as to the available legal remedies in accordance with the provisions of the German Act on Service in Administrative Procedure [*Verwaltungszustellungsgesetz*]. Section 5(4) of the German Act on Service in Administrative Procedure and Section 178(1) no 2 of the German Code of Civil Procedure shall apply *mutatis mutandis* to undertakings and associations of undertakings as well as to contracting entities within the meaning of Section 98. Decisions directed at undertakings with their registered seat outside the scope of application of this Act shall be served by the competition authority upon the person resident or domiciled in Germany who was named by the undertaking to the Bundeskartellamt as authorised to accept service. If the undertaking has not named a person authorised to accept service and if it is not possible to effect service pursuant to Section 50b upon undertakings or



associations of undertakings having their registered seat within the European Union or if there are doubts as to the success of the service, the competition authority shall serve the decisions by way of publication in the Federal Gazette.

(2) If proceedings are not completed by way of a decision served upon the parties pursuant to subsection (1), the parties shall be informed of the completion of the proceedings in writing or electronically.

(3) Decisions of the competition authority pursuant to Section 30(3), Section 31b(3), Sections 32 to 32b and Section 32d shall be published in the Federal Gazette. Decisions pursuant to Section 32c(1) may be published by the competition authority.

### **Section 62 Acts Subject to Fees**

(1) In proceedings before the competition authority, costs (fees and expenses) shall be imposed to cover administrative expenses. As individually attributable public services, the following acts are subject to fees (acts subject to fees):

1. notifications pursuant to Section 31a(1) and Section 39(1); with regard to concentrations referred to the Bundeskartellamt by the European Commission, the application for referral submitted to the European Commission or the notification filed with the European Commission shall be deemed equivalent to the notification pursuant to Section 39(1);
2. official acts under Sections 19a, 26, 30(3), Section 31b(1) and (3), Sections 32 to 32d, Section 34 – in each case also in conjunction with Sections 50 to 50f – and Sections 36, 39, 40, 41, 42 and 60;
3. any discontinuation of the dissolution proceedings pursuant to Section 41(3);
4. the issuance of certified copies from the files of the competition authority;
5. decisions granting access to the files of the competition authority or the provision of information from those files pursuant to Section 56(5) or pursuant to Sections 406e or 475 of the German Code of Criminal Procedure.

The cost of publications, public notices and additional executed copies, duplicates and excerpts, as well as the contributions to be paid due to the analogous application of the German Judicial Remuneration and Compensation Act [*Justizvergütungs- und -entschädigungsgesetz*] shall also be charged as expenditures. The fee for the notification of a concentration pursuant to Section 39(1) shall be credited against the fee for the clearance or prohibition of a concentration pursuant to Section 36(1).

(2) The amount of the fees shall be determined according to the personnel and material expenses of the competition authority, taking into account the economic significance of the subject matter of the act subject to fees. However, the fee rates shall not exceed

1. EUR 50,000 in the cases specified in Sections 36, 39, 40, 41(3) and (4) and Section 42;
2. EUR 25,000 in the cases specified in Section 19a, Section 31b(3), Sections 32 and 32b(1) as well as Sections 32c (1), 32d, 34 and 41(2) sentences 1 and 2;
3. EUR 5,000 in the cases where access to the files of the competition authority is granted or information from those files is provided pursuant to Section 56(5) or pursuant to Section 406e or Section 475 of the German Code of Criminal Procedure;
4. EUR 5,000 in the cases specified in Section 26(1) and (2), Section 30(3), Section 31a(1) and Section 31b(1);
5. EUR 17.50 for issuing certified copies pursuant to subsection (1) sentence 2 no 4;
6. and

- a) in the cases specified in Section 40(3a), also in conjunction with Section 41(2) sentence 3 and Section 42(2) sentence 2, the amount charged for the clearance, exemption or authorisation;
- b) EUR 250 for decisions relating to agreements or decisions of the kind described in Section 28(1);
- c) in the case specified in Section 26(4), the amount charged for the decision pursuant to Section 26(1);
- d) in the cases specified in Sections 32a and 60, one fifth of the fee in the main proceedings.

If the personnel or material expenses of the competition authority are unusually high in a particular case, taking into account the economic importance of the act subject to fees concerned, the fee may be increased by up to twice its amount. For reasons of equity, the fee determined according to sentences 1 to 3 may be reduced to a minimum of one tenth of its amount.

(3) As regards payment for several similar official acts or similar notifications by the same person liable to pay the fee, provision may be made for lump-sum fee rates which take into account the limited extent of the administrative expenses involved.

(4) Fees shall not be charged

1. for oral and written information and suggestions;
2. if they would not have arisen had the matter been handled correctly;
3. in the cases specified in Section 42 if the preceding decision of the Bundeskartellamt pursuant to Section 36(1) or Section 41(3) has been reversed.

No 1 shall not be applicable if information is provided from a file of the competition authority pursuant to Section 56(5) or Section 406e or Section 475 of the German Code of Criminal Procedure.

(5) If an application is withdrawn before a decision is made in that matter, one half of the fee shall be payable. This shall also apply if the notification of a concentration is withdrawn before second phase proceedings are initiated.

(6) The person liable to pay the costs shall be

1. in the cases specified in subsection (1) sentence 2 no 1, whoever has submitted a notification or an application for referral;
2. in the cases specified in subsection (1) sentence 2 no 2, whoever has, by making an application or submitting a notification, caused the competition authority to act, or the person against whom the competition authority has issued a decision;
3. in the cases specified in subsection (1) sentence 2 no 3, whoever was required to submit the notification pursuant to Section 39(2);
4. in the cases specified in subsection (1) sentence 2 no 4, whoever caused the copies to be made;
5. in the cases specified in subsection (1) sentence 2 no 5, whoever applied for the granting of access to the files of the competition authority or the provision of information from those files pursuant to Section 56(5) or pursuant to Section 406e or Section 475 of the German Code of Criminal Procedure.

Whoever, by declaration made before or communicated to the competition authority, assumed the obligation to pay the costs, or is liable by virtue of the law to pay the costs owed by another person, shall also be liable to pay the costs. Several debtors shall be jointly and severally liable.

(7) The claim to payment of the fees shall become statute-barred four years after the assessment of the fees. The claim to reimbursement of expenses shall become statute-barred four years after they have arisen.

(8) The Federal Government shall be authorised to regulate, by way of a statutory instrument requiring the approval of the Bundesrat, the fee rates and the collection of the fees from persons liable to pay fees under the provisions set out in subsections (1) to (6), as well as the reimbursement of expenses pursuant to subsection (1) sentence 3. For this purpose, the Federal Government may also issue

provisions which concern the exemption of legal persons under public law from costs, the limitation period, and the collection of costs.

(9) The Federal Government shall regulate, by way of a statutory instrument requiring the approval of the Bundesrat, the details regarding the reimbursement of the costs incurred in proceedings before the competition authority in accordance with the principles of Section 71.

## **Division 2** **Common Provisions on Appeal Proceedings**

### **Section 63 Parties to the Appeal Proceedings, Capacity to Participate in the Proceedings**

(1) The following parties shall participate in the appeal proceedings:

1. the appellant,
2. the competition authority whose decision is being appealed,
3. persons and associations of persons whose interests are substantially affected by the decision and who, upon their application, have been admitted to the proceedings by the competition authority.

(2) If an appeal is directed against a decision of a supreme *Land* authority or a decision issued by the appellate court concerning a decision of a supreme *Land* authority, the Bundeskartellamt shall also be a party to the proceedings.

(3) In addition to natural and legal persons, associations of persons without legal capacity shall also have the capacity to participate in appeal proceedings.

### **Section 64 Mandatory Representation by Lawyers**

The parties must be represented by a lawyer admitted to practise before a German court. The competition authority may be represented by a member of the authority.

### **Section 65 Hearing**

(1) The court shall decide on the appeal and on the appeal on points of law on the basis of a hearing; with the consent of the parties, a decision may be issued without a hearing.

(2) If the parties, despite having been summoned in time, do not appear at the hearing or are not duly represented, the case may nevertheless be heard and decided.

### **Section 66 Suspensive Effect**

(1) Legal remedies shall have a suspensive effect to the extent that the decision under appeal

1. is a decision pursuant to Section 26(4), Section 30(3), Section 31b(3), Section 32(2a) sentence 1, or Section 34(1), or
2. revokes or modifies an authorisation pursuant to Section 42(2) sentence 2 in conjunction with Section 40(3a),

or to the extent that the decision of the appellate court that is being appealed concerns such a decision.

(2) If a decision by which a preliminary injunction pursuant to Section 60 has been granted is appealed, the court may order in the appeal proceedings that the enforcement of the decision under appeal be suspended in full or in part. The court order may be repealed or amended at any time.

### **Section 67 Order of Immediate Enforcement**

(1) In the cases specified in Section 66(1), the competition authority may order the immediate enforcement of the decision if this is required by the public interest or the prevailing interest of a party.

(2) An order under subsection (1) may be issued before the appeal is filed.

(3) The court dealing with the main proceedings may, upon application, entirely or partly restore the suspensive effect of the appeal if

1. the conditions for issuing an order under subsection (1) were not satisfied or are no longer satisfied, or
2. there are serious doubts as to the lawfulness of the decision under appeal, or
3. for the party concerned, the enforcement would result in undue hardship not justified by prevailing public interests.

In cases in which the appeal has no suspensive effect, the competition authority may suspend enforcement; enforcement is to be suspended if the conditions set out in sentence 1 no 3 are satisfied. The court dealing with the main proceedings may, upon application, order the suspensive effect in full or in part if the conditions under sentence 1 no 2 or 3 are satisfied. If a third party has lodged an appeal against a decision pursuant to Section 40(2), the third party's application for an order pursuant to sentence 3 is admissible only if the third party proves that its rights are infringed by the decision.

(4) An application pursuant to subsection (3) sentences 1 or 3 shall be admissible before the appeal is lodged. The applicant shall substantiate the facts upon which the application is based. If the decision has already been enforced at the time of the court ruling, the court may also order the enforcement measures to be lifted. Orders restoring or ordering the suspensive effect of the decision may be made contingent upon the furnishing of security or upon other conditions. They may also be limited in time.

(5) Decisions on applications pursuant to subsection (3) may be amended or repealed at any time.

### **Section 68 Preliminary Injunctions in the Appeal Proceedings**

Section 60 shall apply *mutatis mutandis* to appeal proceedings. This shall not apply in the cases specified in Section 67. The court dealing with the main proceedings shall be responsible for issuing preliminary injunctions in appeal proceedings.

### **Section 69 Relief in Case of Infringement of the Right to be Heard**

(1) Upon an objection raised by a party aggrieved by a court decision, the proceedings shall be continued if

1. it is not possible to lodge an appeal or any other legal remedy against the decision, and
2. the court has infringed the party's right to be heard in a manner which is relevant to the decision of the case.

An objection is not permissible against a decision preceding the final decision.

(2) The objection shall be raised within two weeks from obtaining knowledge of the infringement of the right to be heard; the time at which knowledge was obtained shall be credibly demonstrated. An objection may no longer be raised after the expiry of one year from the announcement of the decision under appeal. Decisions which are communicated informally are deemed to have been announced on the third day after they have been posted. The objection shall be made in writing or shall be recorded by the clerk of the court which issued the decision that is appealed. The objection shall specify the decision under appeal and demonstrate that the conditions set out in subsection (1) sentence 1 no 2 are satisfied.

(3) The other parties shall, to the extent necessary, be given an opportunity to comment.

(4) If the objection is not admissible or has not been raised in accordance with the legal form or time limit, it shall be dismissed as inadmissible. If the objection is unfounded, the court shall reject it. The decision shall be taken by way of a final and non-appealable decree. The decree shall be accompanied by a brief statement of reasons.

(5) If the objection is well-founded, the court shall grant relief by continuing the proceedings as far as required by the objection. The proceedings shall be restored to the state at which they were prior to the end of the court hearing. In the case of written proceedings, the end of the hearing shall be replaced by

the point in time up to which documents may be submitted. Section 343 of the German Code of Civil Procedure shall be applicable to the judicial pronouncement.

(6) Section 149(1) sentence 2 of the German Code of Administrative Procedure shall apply *mutatis mutandis*.

### **Section 70 Access to Files**

(1) The parties referred to in Section 63(1) nos 1 and 2 and Section 63(2) may access the court files and may obtain executed copies, excerpts and transcripts at their own expense from the court clerk. Section 299(3) of the German Code of Civil Procedure shall apply *mutatis mutandis*.

(2) Access to preparatory files, supplementary files, expert opinions and other information shall be permissible only with the consent of the bodies to which the files belong or which have obtained the respective statement. The competition authority shall refuse to grant access to its records to the extent that this is necessary for important reasons, in particular to protect trade or business secrets. If access is refused or impermissible, the decision may be based on such records only to the extent that their content formed part of the pleadings. The court may, after hearing the party affected by such disclosure, order by decree the disclosure of facts or evidence the confidentiality of which is demanded for important reasons, in particular to protect trade or business secrets, to the extent that such facts or evidence are relevant for the decision, there is no other way to ascertain the facts and, after consideration of all circumstances of the particular case, the significance of the matter in protecting competition outweighs the interests of the party affected in maintaining confidentiality. The decree shall contain a statement of reasons. In proceedings pursuant to sentence 4, the party affected shall not be required to be represented by a lawyer.

(3) The court may grant the parties referred to in Section 63(1) no 3 access to the files to the same extent, after having heard those to whom the files belong.

### **Section 71 Apportionment and Taxation of Costs**

The court may order that the costs necessary for duly pursuing the matter be reimbursed, in whole or in part, by one of the parties if equity so requires. If a party has caused costs due to an unfounded appeal or by gross fault, the costs shall be imposed upon that party. In all other respects, the provisions of the Code of Civil Procedure regarding the taxation of costs and the compulsory enforcement of court decisions on the taxation of costs shall apply *mutatis mutandis*.

### **Section 72 Application of the Provisions of the German Courts Constitution Act and the German Code of Civil Procedure**

Unless otherwise stipulated, the following provisions shall apply *mutatis mutandis*:

1. the provisions under Sections 169 to 201 of the German Courts Constitution Act [*Gerichtsverfassungsgesetz*] regarding the admission of the public to proceedings, the maintaining of order in court, the official court language, judicial deliberation and voting as well as legal redress for excessive length of court proceedings;
2. the provisions of the German Code of Civil Procedure regarding the exclusion or challenge of a judge, representation and assistance in court, service of process *ex officio*, summons, dates of hearings and time limits, orders regarding the appearance in person of the parties, joining of several proceedings, taking of testimony of witnesses and experts and any other procedures for gathering evidence, restoration of the status quo ante due to non-compliance with a time limit as well as on electronic legal communication.

## **Division 3** **Appeals**

### **Section 73 Admissibility, Jurisdiction**

(1) Decisions of the competition authority may be appealed. An appeal may be based also upon new facts and evidence.

(2) The appeal may be filed by the parties to the proceedings before the competition authority within the meaning of Section 54(2) and (3). Third parties may appeal a decision by which authorisation is granted pursuant to Section 42 only if they claim that the decision infringes their rights.

(3) An appeal may also be filed if the competition authority fails to take a decision requested in an application and the applicant claims to be entitled to demand such a decision. If the competition authority has failed to rule on an application to take a decision within a reasonable period of time without sufficient reason, this shall also be deemed a failure to act. Failure to act shall in such a case be regarded as a rejection of the application.

(4) Decisions on an appeal shall be issued by the higher regional court competent for the district in which the competition authority has its seat and, in the cases under Sections 35 to 42, by the higher regional court competent for the district in which the Bundeskartellamt has its seat, also if the appeal is directed against a decision of the Federal Ministry for Economic Affairs and Energy. Section 36 of the German Code of Civil Procedure shall apply *mutatis mutandis*. Section 202 sentence 3 of the German Social Courts Act [*Sozialgerichtsgesetz*] shall apply to all disputes regarding decisions of the Bundeskartellamt relating to voluntary associations of health insurance funds under Section 158 of the German Social Code, Book V.

(5) The Federal Court of Justice [*Bundesgerichtshof*] shall decide as the court of appeal in the first and last instance on all disputes against decisions of the Bundeskartellamt

1. under Section 19a, also in conjunction with Section 32(2) and (3),

2. under Sections 32a and 32b, to the extent that these provisions are applied to matters within the meaning of Section 19a,

in each case including all independently contestable procedural steps.

### **Section 74 Time Limits and Formal Requirements**

(1) The appeal shall be filed in writing within one month with the competition authority whose decision is being appealed. This period shall begin upon service of the competition authority's decision. Receipt of the appeal by the appellate court within the time limit shall be sufficient.

(2) If no decision is taken on an application in accordance with Section 73(3) sentence 2, the appeal shall not be subject to any time limit.

(3) The appeal shall include a statement of reasons to be filed within two months from the service of the decision being appealed. In the case specified in subsection (2), the time limit is one month; it shall begin upon the filing of the appeal. The time limit may, upon application, be extended by the presiding judge of the appellate court.

(4) The statement of reasons for the appeal shall contain

1. a statement as to the extent to which the decision is being appealed and its modification or revocation is being sought,

2. details of the facts and evidence on which the appeal is based.

(5) The appeal and the statement of reasons for the appeal must be signed by a lawyer admitted to practise before a German court; this shall not apply to appeals filed by the competition authorities.

### **Section 75 Principle of Investigation**

(1) The appellate court shall, acting *ex officio*, investigate the facts.

(2) The presiding judge shall endeavour to ensure that formal defects are eliminated, unclear motions are explained, relevant motions are made, insufficient factual information is completed, and all declarations essential for ascertaining and assessing the facts are made.

(3) The appellate court may direct the parties to file statements within a specified time on issues requiring clarification, to specify evidence, and to submit documents as well as other evidence in their possession. In the event of failure to observe the time limit, a decision may be made on the basis of the established facts without consideration of evidence which has not been produced.

(4) If a request pursuant to Section 59(5) or an order pursuant to Section 59a(4) is challenged by way of appeal, the competition authority shall substantiate the factual aspects. Section 294(1) of the German Code of Civil Procedure shall be applicable. No substantiation shall be required insofar as Section 20 presupposes that undertakings are dependent on undertakings in such a way that sufficient or reasonable alternatives of switching to other undertakings do not exist.

(5) The Federal Court of Justice may obtain an opinion from the Monopolies Commission in proceedings pursuant to Section 73(5).

### **Section 76 Decision on the Appeal**

(1) The appellate court shall decide by decree on the basis of its conclusions freely reached from the overall results of the proceedings. The decree may be based only on facts and evidence on which the parties had an opportunity to comment. The appellate court may depart from this requirement insofar as, for important reasons, in particular to protect operating or business secrets, third parties admitted to the proceedings were not allowed to access the files and the content of the files was not part of the pleadings for these reasons. This shall not apply to such third parties admitted to the proceedings that are involved in the disputed legal relationship in such a way that the decision can only be made uniformly also in relation to them.

(2) If the appellate court holds the competition authority's decision to be inadmissible or unfounded, it shall reverse the decision. If, in the meantime, the decision has been withdrawn or otherwise become moot, the appellate court shall declare, upon application, that the decision of the competition authority was inadmissible or unfounded, provided that the appellant has a legitimate interest in such a declaration.

(3) If a decision pursuant to Sections 32 to 32b or Section 32d has become moot because of a subsequent change of the factual situation or for other reasons, the appellate court shall decree, upon application, whether, to what extent and up to what time the decision was well founded.

(4) If the appellate court holds the competition authority's refusal or failure to issue the decision to be inadmissible or unfounded, it shall declare the competition authority's obligation to issue the decision applied for.

(5) The decision shall also be inadmissible or unfounded if the competition authority has improperly exercised its discretionary powers, in particular if it has exceeded the statutory limits of its discretionary powers or if it has exercised its discretion in a manner violating the purpose and intent of this Act. The evaluation of the general economic situation and trends by the competition authority shall not be subject to review by the court.

(6) The decree shall contain a statement of reasons and be served upon the parties together with information as to the legal remedies available.

## **Division 4**

### **Appeal on Points of Law and Appeal Against Refusal to Grant Leave to Appeal**

#### **Section 77 Leave to Appeal, Absolute Reasons for Appeal**

(1) Appeals on points of law to the Federal Court of Justice from decrees issued by the higher regional courts shall be admissible if the higher regional court grants leave to appeal on points of law. Section 202 sentence 3 of the German Social Courts Act shall apply to all decisions of a higher social court [*Landessozialgericht*] in disputes regarding voluntary associations of health insurance funds under Section 172a of the German Social Code, Book V.

(2) Leave to appeal on points of law shall be granted if

1. a legal issue of fundamental importance is to be decided, or
2. a decision by the Federal Court of Justice is necessary to develop the law or to ensure uniform case law.

(3) The decision of the higher regional court shall state whether leave to appeal on points of law is granted or not. If leave to appeal is refused, the reasons shall be given.

(4) No leave to appeal on points of law against a decision of an appellate court shall be required if the appeal is based on, and objects to, one of the following procedural defects:

1. if the court that rendered the decision was not duly constituted,
2. if a judge participating in the decision was excluded by law from exercising judicial functions or was successfully challenged on grounds of prejudice,
3. if a party was denied its right to be heard,
4. if a party to the proceedings was not represented according to the provisions of the law, unless such party consented explicitly or implicitly to the conduct of the proceedings,
5. if the decision was made on the basis of a hearing at which the provisions regarding the admission of the public to the proceedings were violated, or
6. if the decision does not contain a statement of reasons.

### **Section 78 Appeal Against Refusal to Grant Leave to Appeal**

(1) The refusal to grant leave to appeal on points of law may be challenged by the parties participating in the appeal proceedings by way of an appeal against refusal to grant leave to appeal.

(2) The decision on the appeal against refusal to grant leave to appeal shall be made by the Federal Court of Justice by decree which shall contain a statement of reasons. The decree may be issued without a hearing.

(3) The appeal against refusal to grant leave to appeal shall be filed in writing with the higher regional court within one month. The time period shall begin upon service of the decision being appealed.

(4) The appeal against refusal to grant leave to appeal shall include a statement of reasons to be filed within two months from the service of the decision issued by the appellate court. The time limit may, upon application, be extended by the presiding judge. The statement of reasons for the appeal against refusal to grant leave to appeal shall outline the reasons for the appeal set out in Section 77(2).

(5) The appeal against the refusal to grant leave to appeal and the statement of reasons for the appeal must be signed by a lawyer admitted to practise before a German court; this shall not apply to appeals against refusal to grant leave to appeal filed by the competition authorities.

(6) If leave to appeal on points of law is refused, the decision of the higher regional court shall become final upon service of the decree issued by the Federal Court of Justice. If leave to appeal on points of law is granted, the proceedings shall be continued as appeal proceedings on points of law. In this case, the filing in due form and time of the appeal against refusal to grant leave to appeal shall be deemed to be the filing of the appeal on points of law. The time limit for providing a statement of reasons for the appeal on points of law will shall begin upon service of the decision.

### **Section 79 Right to Appeal on Points of Law, Formal Requirements and Time Limits**

(1) The parties to the appeal proceedings shall be entitled to file an appeal on points of law.

(2) The appeal on points of law may be based only on the contention that the decision rests upon a violation of the law; Sections 546 and 547 of the German Code of Civil Procedure shall apply *mutatis mutandis*. The appeal on points of law cannot be based on the contention that the competition authority erroneously and in violation of Section 48 or Section 50(1) assumed it had jurisdiction.

(3) The appeal on points of law shall be filed in writing with the higher regional court within one month. The time period shall begin upon service of the decision being appealed.

(4) The appeal on points of law shall include a statement of reasons to be filed within two months from the service of the decision issued by the appellate court. The time limit may, upon application, be extended by the presiding judge. The statement of reasons shall include an explanation as to the extent to which the decision of the appellate court is being appealed and its modification or revocation is being sought. If leave to appeal on points of law was granted based on an appeal against refusal to grant leave to appeal, the statement of reasons for the appeal on points of law may refer to the statement of reasons for the appeal against refusal to grant leave to appeal.



(5) The appeal on points of law and the statement of reasons for the appeal must be signed by a lawyer admitted to practise before a German court; this shall not apply to appeals on points of law filed by the competition authorities.

(6) The Federal Court of Justice shall be bound by the findings as to the facts in the decision being appealed unless admissible and well-founded reasons for an appeal on points of law have been put forth in respect of these findings.

## **Section 80 Decision on the Appeal on Points of Law**

(1) The Federal Court of Justice shall decide by decree on the basis of its conclusions freely reached from the overall results of the proceedings.

(2) If the appeal on points of law is inadmissible, the Federal Court of Justice shall dismiss the appeal on points of law.

(3) If the appeal on points of law is unfounded, the Federal Court of Justice shall reject the appeal on points of law.

(4) If the appeal on points of law is well-founded, the Federal Court of Justice may

1. decide itself on the merits of the case in accordance with Section 76(2) to (5),
2. repeal the decision that is being appealed and remit the case for further proceedings and a renewed decision.

The Federal Court of Justice shall remit the legal dispute if the third party admitted to the appeal proceedings on points of law in accordance with Section 142(1) sentence 2 in conjunction with Section 65(2) of the German Code of Administrative Procedure has a legitimate interest in such remittal.

(5) If the statement of reasons for the decision on the appeal establishes that rights have been violated, but the decision on the appeal itself proves to be accurate on other grounds, the appeal on points of law shall be dismissed.

(6) Following a remittal, the appellate court shall base its decision on the legal assessment of the Federal Court of Justice.

(7) The decree shall contain a statement of reasons and be served upon the parties.

## **Chapter 2** **Administrative Fines**

### **Division 1**

## **Provisions Concerning Administrative Fines**

### **Section 81 Offences Giving Rise to Administrative Fines**

(1) An administrative offence is committed by whoever violates the Treaty on the Functioning of the European Union in the version published on 9 May 2008 (OJ no C 115 of 9 May 2008, p. 47), by intentionally or negligently

1. reaching an agreement, making a decision or engaging in concerted practices contrary to Article 101(1) or
2. abusing a dominant position contrary to Article 102 sentence 1.

(2) An administrative offence is committed by whoever intentionally or negligently

1. violates a provision under Sections 1, 19, 20(1) to (3) sentence 1, Section 20(3a) or (5), Section 21(3) or (4), Section 29 sentence 1 or Section 41(1) sentence 1 concerning the prohibition of an agreement referred to in such provision, of a decision referred to in such provision, of a concerted practice, of an abuse of a dominant position, of an abuse of a market position or of superior market power, of an unfair hindrance or differential treatment, of the refusal to admit

an undertaking, of the exercise of coercion, of the infliction of an economic disadvantage or of the implementation of a concentration,

2. acts contrary to an enforceable order pursuant to
    - a) Section 19a(2), Section 30(3), Section 31b(3) nos 1 and 3, Section 32(1), Section 32a(1), Section 32b(1) sentence 1 or Section 41(4) no 2, also in conjunction with Section 40(3a) sentence 2, also in conjunction with Section 41(2) sentence 3 or Section 42(2) sentence 2, or Section 60 or
    - b) Section 39(5) or
    - c) Section 47d(1) sentence 2 in conjunction with a statutory instrument pursuant to Section 47f no 1 or
    - d) Section 47d(1) sentence 5 first half of the sentence in conjunction with a statutory instrument pursuant to Section 47f no 2,
  3. contrary to Section 39(1) fails to file a notification of a concentration correctly or completely,
  4. contrary to Section 39(6) fails to file a notification or to file a notification correctly or completely or in time,
  5. acts contrary to an enforceable obligation pursuant to Section 40(3) sentence 1 or Section 42(2) sentence 1,
  - 5a. acts contrary to a statutory instrument pursuant to Section 47f no 3(a), (b) or (c) or an enforceable order based on such a statutory instrument, to the extent that the statutory instrument refers to this fine provision for a specific offence,
  - 5b. contrary to Section 47k(2) sentence 1, also in conjunction with sentence 2 and in each case in conjunction with a statutory instrument pursuant to Section 47k(8) sentence 1 no 1 or 2, fails to communicate any of the changes or any of the information on dispensed quantities referred to in Section 47k(2) sentence 1 or communicate such change or information correctly or completely or in time, or
  6. contrary to Section 59(2) or (4), also in conjunction with Section 47d(1) sentence 1, Section 47k(7) or Section 82b(1), fails to respond to a request for information or to respond to such request correctly or completely or in time, or fails to surrender documents or to surrender documents completely or in time, or
  7. contrary to Section 59(1) sentence 6, also in conjunction with Section 82b(1), fails to appear for questioning, or
  8. contrary to Section 59a(2), also in conjunction with Section 47d(1) sentence 1 and Section 47k(7), fails to present business documents for inspection and examination or to present them completely or in time, or does not tolerate the examination of business documents or access to offices and business premises, or
  9. contrary to Section 59b(5) sentence 2, also in connection with Section 82b(1), does not tolerate a search of offices or premises or objects used for business purposes, or
  10. breaks any seal that has been affixed by officials of the competition authority or by any accompanying individual authorised or appointed by such officials pursuant to Section 59b(3) sentence 1 no 2, also in conjunction with Section 82b(1), or
  11. fails to comply with a request pursuant to Section 59b(3) sentence 1 no 3, also in conjunction with Section 82b(1), or fails to comply with such request correctly or completely or in time.
- (3) An administrative offence is committed by whoever
1. contrary to Section 21(1), requests a refusal to supply or purchase,
  2. contrary to Section 21(2), threatens or causes a disadvantage or promises or grants an advantage, or
  3. contrary to Section 24(4) sentence 3 or Section 39(3) sentence 5, provides or uses information.

## **Section 81a Administrative Fines on Undertakings**

(1) Where any person in a leading position within the meaning of Section 30(1) nos 1 to 5 of the German Administrative Offences Act committed an administrative offence pursuant to Section 81 by which the duties incumbent on the undertaking have been breached or the undertaking has gained or was to gain a profit, a fine may also be imposed on additional legal persons or associations of persons that constituted the undertaking at the time the administrative offence was committed and that directly or indirectly exercised decisive influence over the legal person or association of persons within which the person holding a leading position committed the administrative offence.

(2) In the event of a universal succession or a universal succession concerning parts of an undertaking by means of splitting up assets (Section 123(1) of the German Transformation Act [*Umwandlungsgesetz*]), the fine pursuant to subsection (1) may also be imposed on the legal successor(s). In the administrative fine proceedings, the legal successor(s) shall take up the procedural position in which the legal predecessor was at the time the legal succession became effective. Section 30(2a) sentence 2 of the German Administrative Offences Act shall not be applicable in this respect. Sentence 3 shall also be applicable to the legal succession pursuant to Section 30(2a) sentence 1 of the German Administrative Offences Act insofar as an administrative offence exists pursuant to Section 81.

(3) The fine pursuant to Section 30(1) and (2) of the German Administrative Offences Act and pursuant to subsection (1) may also be imposed on the legal persons or associations of persons which continue to operate the undertaking in economic continuity (economic succession). Subsection (2) sentence 2 shall apply *mutatis mutandis* to the proceedings.

(4) In the cases under subsections (1), (2) and (3) the maximum level of the fine and the limitation period shall be based on the law applicable to the administrative offence. The fine pursuant to subsection (1) may be set in a stand-alone proceeding.

(5) Where in the cases under subsections (1), (2) and (3) fines are imposed on several legal persons or associations of persons on account of the same administrative offence, the provisions on joint and several liability shall apply *mutatis mutandis*.

### **Section 81b Administrative Fines on Associations of Undertakings**

(1) Where a fine is imposed pursuant to Section 81c(4) on an association of undertakings as a legal person or association of persons within the meaning of Section 30 of the German Administrative Offences Act and if the association of undertakings itself is not solvent, the competition authority shall specify a reasonable time limit within which the association of undertakings shall call for contributions from its members to pay the fine.

(2) Where the contributions to paying the fine have not been rendered in full within the time limit set pursuant to subsection (1), the competition authority may demand payment of the outstanding amount of the fine directly from any of the undertakings whose representatives were members of the decision-making bodies of that association at the time the administrative offence was committed.

(3) Where necessary to ensure full payment of the fine after the competition authority has demanded payment pursuant to subsection (2), the competition authority may also demand payment of the outstanding amount of the fine from any of the members of the association of undertakings active on the market affected by the administrative offence.

(4) Payment pursuant to subsections (2) and (3) may not be demanded from undertakings which demonstrate that they

1. either were not aware of the existence of the infringing decision or actively distanced themselves from this decision before the competition authority initiated its investigations, and
2. did not implement the decision taken by the association of undertakings that gives rise to the fine pursuant to Section 81.

(5) For any one undertaking, the demand for payment of the outstanding amount of the fine shall not exceed 10 per cent of the total turnover of the respective undertaking generated in the business year preceding the authority's decision.

(6) Subsections (1) to (5) shall not apply to members of the association of undertakings

1. on which a fine has been imposed in connection with the administrative offence, or
2. which have been granted immunity from fines pursuant to Section 81k.

## **Section 81c Amount of Administrative Fines**

(1) In the cases under Section 81(1), (2) nos 1, 2a) and 5 and Section 81(3), the administrative offence may be punished by a fine of up to EUR 1 million. In all other cases under Section 81, the administrative offence may be punished by a fine of up to EUR 100,000.

(2) A fine exceeding the amount specified in sentence 1 may be imposed on an undertaking or an association of undertakings for infringements pursuant to Section 81(1), (2) nos 1, 2a) and 5 and Section 81(3). The fine shall not exceed 10 per cent of the total turnover of the undertaking or association of undertakings generated in the business year preceding the authority's decision.

(3) A fine exceeding the amount specified in subsection (1) may be imposed on an undertaking or an association of undertakings for infringements pursuant to Section 81(2) nos 2b), 3 and 6 to 11. The fine shall not exceed 1 per cent of the total turnover of the undertaking or association of undertakings generated in the business year preceding the authority's decision.

(4) Where a fine is imposed on an association of undertakings on account of an administrative offence pursuant to Section 81(1) relating to the activities of its members, such fine shall, in deviation from subsection (2) sentence 2, not exceed 10 per cent of the sum of the total turnover generated by the members active on the market affected by the administrative offence in the business year preceding the authority's decision. In this respect, the turnover of members on which a fine has already been imposed in connection with the administrative offence or which have been granted immunity from fines pursuant to Section 81k shall not be taken into account.

(5) The calculation of the total turnover shall be based on the turnover achieved worldwide by all natural and legal persons as well as associations of persons operating as a single economic entity. The amount of the total turnover may be estimated.

## **Section 81d Setting the Administrative Fine**

(1) When determining the amount of the fine, account shall be taken of both the gravity and the duration of the infringement. In the case of fines imposed on undertakings or associations of undertakings for agreements, decisions or concerted practices restricting competition pursuant to Section 1 or Article 101 of the Treaty on the Functioning of the European Union or for prohibited conduct pursuant to Sections 19, 20 or 21 or Article 102 of the Treaty on the Functioning of the European Union, the circumstances to be considered shall, in particular, include:

1. the nature and the magnitude of the infringement, in particular the amount of the turnover directly or indirectly linked to the infringement,
2. the relevance of the products and services affected by the infringement,
3. the manner in which the infringement was committed,
4. previous infringements committed by the undertaking as well as any adequate and effective precautions taken prior to the infringement to prevent and uncover infringements, and
5. the undertaking's efforts to uncover the infringement and remedy the harm as well as the precautions taken after the infringement to prevent and uncover infringements.

Estimates may be used when considering the extent, magnitude and relevance within the meaning of sentence 2 nos 1 and 2.

(2) In setting the fine, the economic situation of the undertaking or the association of undertakings shall be decisive. If, due to the acquisition by a third party, the economic situation has changed during or after the infringement, a fine that is lower than the fine which would previously have been adequate for the undertaking or the association of undertakings shall be considered.

(3) Section 17(4) of the German Administrative Offences Act shall be applied with the proviso that the economic benefit derived from the administrative offence may be disgorged by the fine pursuant to Section 81c. If the fine is imposed for reasons of punishment only, this must be taken into account in setting the amount of the fine.

(4) The Bundeskartellamt may lay down general administrative principles on the exercise of its discretionary powers in determining the fine, in particular with regard to setting the amount of the fine, and also with regard to its cooperation with foreign competition authorities.

## **Section 81e Contingent Liability in the Interim Period**

(1) If the legal person or association of persons liable pursuant to Section 30 of the German Administrative Offences Act ceases to exist after the notification of initiation of administrative fine proceedings, or if assets are transferred resulting in a situation where a fine that would be adequate for the undertaking pursuant to Section 81c and Section 81d cannot be imposed on this undertaking or its legal successor or is not likely to be enforceable, a liability amount may be determined in the amount of the fine adequate for the undertaking pursuant to Section 81c and Section 81d 5) and imposed on the legal persons or associations of persons which on the date of the notification of initiation of administrative fine proceedings constituted the undertaking and directly or indirectly exercised decisive influence over the liable legal person or association of persons or its legal successor or which will become its legal successor within the meaning of Section 81a(2) or its economic successor within the meaning of Section 81a(3) after the date of notification of the initiation of administrative fine proceedings.

(2) Section 81a(2) and (3) shall apply *mutatis mutandis* to liability pursuant to subsection (1).

(3) The rules on the setting and enforcement of a fine shall apply *mutatis mutandis* to the proceedings for determining and enforcing the liability amount. The law applicable to the administrative offence shall apply *mutatis mutandis* to the limitation period. Section 31(3) of the German Administrative Offences Act shall apply *mutatis mutandis* with the proviso that the period of limitation begins with the fulfilment of the conditions pursuant to subsection (1).

(4) Where fines and liability amounts are imposed on several legal persons or associations of persons belonging to the same undertaking on account of the same offence, only amounts up to the maximum individual amount determined may be collected from them in the enforcement proceedings.

## **Section 81f Interest Due on Administrative Fines**

Interest shall be payable on fines imposed on legal persons and associations of persons by way of a fining notice; fines shall bear interest from four weeks after service of the fining notice. Section 288(1) sentence 2 and Section 289 sentence 1 of the German Civil Code shall apply *mutatis mutandis*. The limitation period shall be three years and shall begin from the end of the calendar year in which the fine imposed was fully paid or collected.

## **Section 81g Limitation Period for Administrative Fines**

(1) Proceedings relating to administrative offences as defined in Section 81 shall become statute-barred in accordance with the provisions of the German Administrative Offences Act even if the offence is committed by disseminating printed material. Proceedings due to administrative offences as defined in Section 81(1), (2) no 1 and 81(3) shall become statute-barred after five years.

(2) The limitation period pursuant to Section 33(1) no 1 of the German Administrative Offences Act shall also be interrupted by the issuance of the first request for information addressed to the party affected pursuant to Section 82b(1) in conjunction with Section 59, provided that the request is delivered within two weeks; otherwise, the limitation period is interrupted by service of the request.

(3) The limitation period shall be suspended as long as the European Commission or the competition authority of another Member State of the European Union, acting upon a complaint or *ex officio*, is engaged in proceedings relating to an infringement of Article 101 or Article 102 of the Treaty on the Functioning of the European Union concerning the same agreement, decision or practice as the competition authority. The suspension of the limitation period shall commence when such competition authorities adopt measures within the meaning of Section 33(1) of the Administrative Offences Act and subsection (2). The limitation period shall remain suspended until the day on which the other competition authority terminates its proceedings completely by issuing a final decision or has concluded that there are no grounds for further action on its part. The suspension of the limitation period shall apply to all undertakings or associations of undertakings which have participated in the infringement.

(4) The limitation period shall expire at the latest on the day on which a period twice as long as the limitation period has elapsed. This period shall be extended, in deviation from Section 33(3) sentence 2 of the German Administrative Offences Act, by the period during which the fining decision is the subject of proceedings pending before an appellate court.

## **Division 2**

### **Leniency Programme**

#### **Section 81h Aim and Scope of Application**

(1) The competition authority may grant immunity from a fine or reduce a fine imposed on natural persons, undertakings and associations of undertakings involved in cartels (cartel participants) that contribute to uncovering a cartel through their cooperation with the competition authority (leniency).

(2) The provisions of this Division shall be applicable to administrative fine proceedings conducted by the competition authorities for the punishment of cartels under Section 81(1) no 1 in conjunction with Article 101 of the Treaty on the Functioning of the European Union and Section 81(2) no 1 in conjunction with Section 1.

(3) The Bundeskartellamt may determine general administrative principles on the exercise of its discretionary powers in applying the leniency regime and conducting the procedure. The administrative principles shall be published in the Federal Gazette [*Bundesanzeiger*].

#### **Section 81i Application for Leniency**

(1) Leniency shall be possible only upon application. Cartel participants may file an application for leniency with the competent competition authority on account of an offence subject to prosecution. The application shall include details as to all of the information specified in Section 81m(1) sentence 2 and shall be submitted together with the corresponding evidence.

(2) A leniency application submitted for an undertaking shall, unless expressly declared otherwise, apply to all legal persons or associations of persons that constitute the undertaking at the time the application is filed. It shall also apply to their current and former directors, managers and members of staff.

(3) The application may be filed in written or electronic form pursuant to Section 32a of the German Code of Criminal Procedure in German, English or in another language of the European Union bilaterally agreed between the competition authority and the applicant. If the competition authority receives an application in a language other than German, it may demand that the applicant produce a German translation without delay. In agreement with the competition authority, an application may also be submitted orally or in text form.

(4) If requested by the applicant, the competition authority shall confirm the receipt of the application, stating the date and time.

#### **Section 81j General Conditions for Leniency**

(1) Leniency may be granted only if the applicant

1. discloses its knowledge of, and its role in, the cartel to the competition authority in its leniency application or if a cartel participant, in the event of an application in its favour, fully cooperates in clarifying the facts;
2. ends its involvement in the cartel immediately after filing its leniency application, except for individual activities that, in the competition authority's view, may be necessary to preserve the integrity of its investigation;
3. meets the obligation to cooperate genuinely, continuously and expeditiously with the competition authority from the time of its leniency application until the conclusion of the competition authority's enforcement proceedings against all cartel participants; this includes in particular

- a) promptly providing all information and evidence relating to the cartel that is accessible to the applicant,
  - b) answering any request that may contribute to establishing the facts,
  - c) making directors, managers and other members of staff available for questioning; with respect to former directors, managers and other former members of staff, efforts to that effect shall be considered sufficient,
  - d) not destroying, falsifying or concealing information or evidence relating to the cartel and
  - e) not disclosing the fact of its leniency application, or any of its content, until the competition authority has released the applicant from this obligation;
4. while contemplating filing a leniency application,
- a) did not destroy, falsify or conceal information or evidence relating to the cartel and
  - b) did not disclose the fact of its contemplated leniency application, or any of its contemplated content; this does not preclude an applicant from disclosing the fact of its contemplated leniency application, or any of its contemplated content, to other competition authorities.

(2) The conditions set out in subsection (1) shall apply *mutatis mutandis* to the cartel participants in whose favour the leniency application has been filed pursuant to Section 81i(2).

### **Section 81k Immunity from Administrative Fines**

(1) The competition authority shall refrain from imposing a fine on a cartel participant if such participant

- 1. fulfils the conditions set out in Section 81j and
- 2. is the first to submit evidence that, at the time the competition authority receives the leniency application, allows the competition authority to obtain a search warrant for the first time.

(2) A fine shall generally not be imposed on a cartel participant if such participant

- 1. fulfils the conditions set out in Section 81j and
- 2. is the first to submit evidence that, if the competition authority is already able to obtain a search warrant, makes it possible to prove the offence for the first time, and if no other cartel participant has already fulfilled the conditions for immunity pursuant to subsection (1).

(3) Immunity from fines shall not be possible if a cartel participant has taken steps to coerce other cartel participants to join a cartel or to remain a member of such cartel.

### **Section 81l Reduction of Administrative Fines**

(1) The competition authority may reduce the fine imposed on a cartel participant if such cartel participant

- 1. fulfils the conditions set out in Section 81j and
- 2. submits evidence of the cartel which, relative to the information and evidence already available to the competition authority, represents significant added value for the purpose of proving the offence.

(2) The amount of the reduction is determined in particular based on the usefulness of the information and evidence and based on the point in time at which the leniency applications are filed.

(3) If an applicant is the first to submit compelling evidence which the competition authority uses to prove additional facts and to impose higher fines on other cartel participants, or if a cartel participant, in the event of an application in its favour, is extensively involved in the initial provision of such evidence, those facts shall not be taken into account when setting the fine to be imposed on the applicant or, as the case may be, on the cartel participant favoured by the application.

### **Section 81m Markers**

(1) A cartel participant may contact the competition authority to initially declare its willingness to cooperate (marker) in order to be assigned a place in the queue for leniency in the order in which the applications are received. A marker shall at least include a brief description of the following:

1. the name and address of the applicant,
2. the names of the other cartel participants,
3. the products and territories affected,
4. the duration and nature of the offence, in particular also with regard to the applicant's own involvement, and
5. information on any past or possible future leniency applications in relation to the cartel that have been made or will be made to other competition authorities, other European competition authorities or other foreign competition authorities.

(2) A marker may be placed orally or in text form. Section 81i(2), (3) sentences 1 and 2 and Section 81i(4) shall apply *mutatis mutandis*.

(3) The competition authority shall specify a reasonable period within which the applicant is to submit a leniency application including details as to all the information specified in subsection (1) sentence 2 together with the corresponding evidence. The place in the queue for leniency of the finalised leniency application pursuant to sentence 1 shall be determined based on the time of the marker pursuant to subsection (1), provided that the applicant fulfils its obligations at all times. In this case, all the information and evidence properly produced prior to the expiry of the period specified pursuant to sentence 1 are deemed to have been submitted at the time of the marker.

### **Section 81n Summary Applications**

(1) The competition authority shall accept summary applications from cartel participants applying to the European Commission for leniency in relation to the same cartel. This shall apply only if the application covers more than three Member States as the geographic areas affected by the cartel.

(2) Section 81m(1) sentence 2, Section 81m(2) and (3) sentences 3 and 4 shall apply *mutatis mutandis* to summary applications. The Member States in which the evidence of the cartel is likely to be located must also be specified.

(3) The competition authority shall request a full leniency application to be submitted once the European Commission has informed the competition authority that it is no longer pursuing the case, either in whole or in part, or if further information is necessary for delineating or allocating the case.

(4) If the applicant submits the full leniency application within the period specified by the competition authority, the full application is deemed to have been submitted at the time the summary application was received, provided that the summary application covers the same offence, the same affected products, territories and cartel participants as well as the same duration of the cartel as the leniency application filed with the European Commission.

## **Division 3**

### **Administrative Fine Proceedings**

#### **Section 82 Jurisdiction in Cartel Fine Proceedings**

(1) Administrative authorities within the meaning of Section 36(1) no 1 of the German Administrative Offences Act shall be

1. the Bundesnetzagentur as the market transparency unit for electricity and gas for administrative offences under Section 81(2) no 2c and d, no 5a and no 6 to the extent that a violation of Section 47d(1) sentence 1 in conjunction with Section 59(2) or (4) exists, and Section 81(2) no 8 to the extent that a violation of Section 47d(1) sentence 1 in conjunction with Section 59a(2) exists,
2. the Bundeskartellamt as the market transparency unit for fuels for administrative offences under Section 81(2) no 5b and no 6 to the extent that a violation of Section 47k(7) in conjunction with



Section 59(2) or (4) exists, and no 8 to the extent that a violation of Section 47k(7) in conjunction with Section 59a(2) exists, and

3. in all other cases referred to in Section 81(1), (2) and (3), the Bundeskartellamt and the supreme *Land* authority competent under the applicable laws of the respective *Land*, each for their own area of competence.

(2) The competition authority shall be exclusively competent in proceedings concerning the imposition of an administrative fine against a legal person or association of persons pursuant to Section 30 of the German Administrative Offences Act in cases arising from

1. a criminal offence which also fulfils the elements of Section 81(1), (2) no 1 and Section 81(3), or
2. an intentional or negligent administrative offence pursuant to Section 130 of the German Administrative Offences Act, where a punishable breach of duty also fulfils the elements of Section 81(1), (2) no 1 and Section 81(3).

This shall not apply if the proceedings relating to Section 30 of the German Administrative Offences Act are referred to the public prosecutor by the authority. In the cases under sentence 1, the public prosecutor and the competition authority shall inform each other at an early stage of any planned investigative steps with external effects, particularly of searches.

### **Section 82a Competences and Jurisdiction in Proceedings After an Objection has been Filed**

(1) After an objection has been filed against a fining decision, Section 69(4) and (5) sentence 1 second half of the sentence of the German Administrative Offences Act shall not apply in the proceedings. The public prosecutor shall send the files to the court competent pursuant to Section 83. In judicial proceedings concerning administrative fines, the competition authority shall have the same rights as the public prosecutor; in proceedings before the German Federal Court of Justice, the public's interest shall be represented exclusively by the Public Prosecutor General. Section 76 of the German Administrative Offences Act shall not apply.

(2) If the Bundeskartellamt has acted as the administrative authority in the preliminary proceedings, the enforcement of the administrative fine and the amount of money the confiscation of which has been ordered pursuant to Section 29a of the German Administrative Offences Act shall be carried out by the Bundeskartellamt as the law enforcement authority in accordance with the provisions relating to the enforcement of administrative fines and on the basis of a certified copy of the operative part of the judgment to be issued by the clerk of the court and endowed with the certificate of enforceability. The administrative fines and amounts of money the confiscation of which has been ordered pursuant to Section 29a of the German Administrative Offences Act shall accrue to the German Federal Cash Office, which shall also bear the costs imposed on the State Treasury.

### **Section 82b Special Investigatory Powers**

(1) In proceedings concerning the imposition of a fine pursuant to Section 81 or the imposition of a liability amount pursuant to Section 81e, Section 59(1), (2), (3) sentences 1 and 2, Section 59(4) and (5) of the German Administrative Offences Act and, in connection with searches, Section 59b(3) sentence 1 and Section 59b(5) sentences 2 and 3 shall apply *mutatis mutandis* in addition to Section 46(2). Section 59(4) sentence 2 shall apply *mutatis mutandis* to requests for information and the surrender of documents pursuant to Section 59(1) and (2), or requests pursuant to Section 59b(3) sentence 1 no 3 with regard to natural persons.

(2) Subsection (1) sentence 2 and Section 59(1), (2), (3) sentences 1 and 2, Section 59(4) and (5) shall apply *mutatis mutandis* to the provision of information or the surrender of documents to the court.

(3) Any written or recorded information provided in response to requests for information pursuant to subsection (1) in conjunction with Section 59, and any records pursuant to subsection (1) in conjunction with Section 59b(3) sentence 1 no 3 may be introduced into proceedings before a court as documents. Section 250 of the German Code of Criminal Procedure shall not apply in this regard.

## **Section 83 Jurisdiction of the Higher Regional Court in Judicial Proceedings**

(1) The higher regional court in whose district the competent competition authority has its seat shall decide in judicial proceedings concerning an administrative offence pursuant to Section 81; it shall also decide on an application for judicial review (Section 62 of the German Administrative Offences Act) in the cases under Section 52(2) sentence 3 and Section 69(1) sentence 2 of the German Administrative Offences Act and against measures taken by the competition authority in the course of the judicial proceedings concerning administrative fines. Section 140(1) no 1 of the German Code of Criminal Procedure in conjunction with Section 46(1) of the German Administrative Offences Act shall not be applicable.

(2) The decisions of the higher regional court shall be taken by three members including the presiding member.

## **Section 84 Appeal to the Federal Court of Justice on Points of Law**

The Federal Court of Justice shall decide on appeals on points of law (Section 79 of the German Administrative Offences Act). If the decision that is appealed is annulled without a decision taken on the merits of the case, the Federal Court of Justice shall refer the case back to the higher regional court whose decision is annulled.

## **Section 85 Reopening of Proceedings Against a Fining Notice**

Proceedings concerning the revision of a fining notice issued by the competition authority (Section 85(4) of the German Administrative Offences Act) shall be decided by the court competent pursuant to Section 83.

## **Section 86 Court Decisions Concerning Enforcement**

The court decisions which become necessary in connection with enforcement (Section 104 of the German Administrative Offences Act) shall be issued by the court competent pursuant to Section 83.

## **Chapter 3** **Enforcement**

### **Section 86a Enforcement**

The competition authority may enforce its orders pursuant to the provisions applying to the enforcement of administrative measures. The amount of the periodic penalty payment imposed on undertakings or associations of undertakings may be set at up to 5 per cent of the average daily worldwide turnover achieved by the undertaking or association of undertakings in the preceding business year for each day of delay calculated from the date specified in the warning notice.

## **Chapter 4** **Civil Actions**

### **Section 87 Exclusive Jurisdiction of the Regional Courts**

Regardless of the value of the matter in dispute, the regional courts [*Landgerichte*] shall have exclusive jurisdiction in civil actions concerning the application of provisions set out in Part 1, Article 101 or Article 102 of the Treaty on the Functioning of the European Union or Article 53 or Article 54 of the Agreement on the European Economic Area. Sentence 1 shall also apply even if the decision in a civil action depends, in whole or in part, on a decision to be taken pursuant to this Act, or on the applicability of Article 101 or Article 102 of the Treaty on the Functioning of the European Union or of Article 53 or Article 54 of the Agreement on the European Economic Area.

## **Section 88 Joining of Actions**

An action under Section 87 may be joined with an action based on another claim if the other claim has a legal or direct economic connection with the claim to be asserted before the court which has jurisdiction pursuant to Section 87; this shall also apply even if another court has exclusive jurisdiction over the action based on the other claim.

## **Section 89 Jurisdiction of One Regional Court Over Several Court Districts**

(1) The *Land* governments are authorised to refer, by way of a statutory instrument, civil actions for which the regional courts have exclusive jurisdiction pursuant to Section 87 to one regional court for the districts of several regional courts if such centralisation serves the administration of justice in cartel matters, in particular to ensure uniform case law. The *Land* governments may delegate their powers in this regard to their judicial administrations.

(2) The jurisdiction of one regional court over individual districts or the entire territory of several *Länder* may be established by treaties between the *Länder*.

(3) The parties may be represented before the courts referred to in subsections (1) and (2) also by lawyers admitted to practice before the court which, in the absence of the provisions set out in subsections (1) and (2), would have jurisdiction over the legal action.

## **Section 89a Adjustment of the Value in Dispute, Reimbursement of Costs**

(1) If, in the context of a legal action in which a claim pursuant to Sections 33, 33a(1) or Section 34a is asserted, a party credibly demonstrates that its economic situation would be seriously jeopardised if it had to bear the costs of litigation calculated on the basis of the full value in dispute, the court may, upon such party's application, order that the obligation of this party to pay the court fees be assessed on the basis of a part of the value in dispute adjusted to its economic situation. The court may make its order contingent on the party credibly demonstrating that the costs of litigation to be borne by it are not directly or indirectly assumed by a third party. As a consequence of the order, the benefiting party shall also pay its lawyer's fees only on the basis of the adjusted part of the value in dispute. Where costs of litigation are imposed upon or assumed by the benefiting party, this party shall reimburse the opposing party for paid court fees and the fees of its lawyer only on the basis of the adjusted value in dispute. Where the extra-judicial costs are imposed upon or assumed by the opposing party, the lawyer of the benefiting party may recover his/her fees from the opposing party based on the value in dispute applying to the opposing party.

(2) The application pursuant to subsection (1) may be declared for the record of the registry of the court. It shall be made prior to the trial of the case on its merits. The request shall subsequently be admissible only if the assumed or specified value in dispute is subsequently raised by the court. The opposing party shall be heard prior to the decision on the application.

(3) If, in the context of a legal action in which a claim pursuant to Section 33a(1) is asserted, an intervener joined the legal action of the main party, and where litigation costs are imposed upon or assumed by the opposing party, the reimbursement of costs shall cover only the intervener's costs for legal assistance on the basis of the value in dispute which the court determines at its own discretion. In the case of several interveners, the total amount of the values in dispute of all individual interventions shall not exceed the value in dispute in the main action.

## **Section 89b Procedure**

(1) Section 142 of the German Code of Civil Procedure shall apply *mutatis mutandis* to the provision of information pursuant to Section 33g.

(2) Section 142(2) of the German Code of Civil Procedure shall apply with the proviso that the reasonableness is determined pursuant to Section 33g(3) to (6).

(3) The court may issue an interlocutory judgment on the claim pursuant to Section 33g(1) or (2) if the claim is made against the other party in the legal action concerning the liability for damages pursuant to Section 33a(1). If an interlocutory judgment is issued, this shall be considered a final judgment with regard to the legal remedies.

(4) Upon application the court may suspend the legal action regarding the claim for damages pursuant to Section 33a(1)

1. until the legal action regarding the claim pursuant to Section 33g(1) or (2) is concluded or
2. for a period of up to two years, if and as long as the parties participate in a proceeding that aims at settling the legal dispute regarding the claim for damages out of court.

(5) Any party whose violation of a provision under Part 1 or of Article 101 or 102 of the Treaty on the Functioning of the European Union has been established by a decision of the competition authority that is binding pursuant to Section 33b can be ordered by way of a preliminary injunction to surrender this decision if the conditions of Section 33g are fulfilled, even without stating and substantiating the conditions laid down in Sections 935 and 940 of the German Code of Civil Procedure. An order pursuant to sentence 1 shall not require a special need for urgency. The respondent shall be heard before the order is issued.

(6) Upon application and after hearing the parties affected, the court may order by decree the disclosure of evidence or the provision of information which is required to remain confidential for important reasons or the disclosure or provision of which is denied pursuant to Section 33g (6), if

1. the court considers such evidence or information relevant for the enforcement of the claim pursuant to Section 33a (1) or for the defence against this claim and
2. after considering all circumstances of the particular case the claimant's interest in disclosure outweighs the affected party's interest in confidentiality.

The decree shall contain a statement of reasons. This decree shall be subject to immediate appeal.

(7) The court shall take the measures required in the particular case to safeguard the protection of trade and business secrets and other confidential information. In particular, the court may instruct a publicly appointed expert to produce an expert opinion on the degree of protection required in the particular case, provided that this expert is subject to a professional duty of confidentiality.

(8) Upon substantiated application submitted by a party in a legal action regarding the claim pursuant to Section 33a(1), Section 33g(1) or (2), the court shall examine the evidence submitted to it pursuant to Section 33g(4) for the sole purpose of examination to establish whether it includes leniency statements or settlement submissions that have not been withdrawn. The court shall submit the evidence to the parties, if

1. it does not include leniency statements or settlement submissions that have not been withdrawn and
2. if the other conditions for surrender pursuant to Section 33g are fulfilled.

The court shall decide on this by decree. Before issuing a decree pursuant to this subsection, the competition authority to which the leniency statement or settlement submission was submitted shall be heard. The members of the court are subject to a duty of confidentiality; the content of the evidence that is kept confidential must not be recognisable from the reasons given for the decision. Decrees pursuant to this subsection are subject to immediate appeal.

### **Section 89c Disclosure of Information from the Authority's File**

(1) In a legal action concerning a claim pursuant to Section 33a(1) or Section 33g(1) or (2), the court may request, upon application by a party, that the competition authority provide documents and items

that are included in its files on a proceeding or kept in official custody during a proceeding if the applicant credibly demonstrates that

1. it has a claim for damages against another party pursuant to 33a(1) and
2. the information expected to be included in the file cannot be obtained from another party or third party with reasonable effort.

The court shall decide on the application by decree. This decree shall be subject to immediate appeal.

(2) The court may make accessible to the applicant the documents and items submitted or provide the applicant with information included in them, to the extent that

1. the disclosure corresponds to the applicant's request,
2. the facts or evidence are necessary for the assertion of a claim pursuant to Section 33a(1) or for the defence against this claim and
3. it is not disproportionate to make the documents and items accessible or provide the information.

Before making evidence accessible or providing information, the court shall hear those affected by the disclosure and the competition authority. Facts and evidence which are required to remain confidential shall be exempted from the disclosure of evidence or provision of information. Section 89b(6) shall apply *mutatis mutandis*.

(3) The request pursuant to subsection (1) or the request for the provision of official information by the competition authority shall be excluded where this is disproportionate. In its decision on the request pursuant to subsection (1), on the request for the provision of official information by the competition authority and on making documents and items accessible or providing information pursuant to subsection (2), the court shall take into account Section 33g(3) and, in particular,

1. the precision of the application as to the type, subject and content of the evidence expected to be included in the competition authority's file,
2. the pendency of the claim under Section 33a(1),
3. the effectiveness of public competition law enforcement, in particular the influence of such disclosure on ongoing proceedings and on the functioning of leniency programmes and settlement proceedings.

(4) The competition authority may refuse to provide documents and items which are included in its files on a proceeding or kept in official custody during a proceeding, if these contain:

1. leniency statements,
2. settlement submissions that have not been withdrawn,
3. internal notes by the authorities or
4. communication between the competition authorities or between the competition authority and the general prosecutor at the higher regional court for the district in which the competition authority has its seat or the Public Prosecutor General of the Federal Court of Justice.

Section 33g(5) and Section 89b(8) shall apply *mutatis mutandis*; the latter provision shall apply with the proviso that it also applies to the examination of documents and items within the meaning of sentence 1 nos 3 and 4.

(5) Where the inspection of the competition authority's file or the provision of information serves the purpose of filing a claim for damages on account of an infringement pursuant to Section 33(1) or preparing such claim, Sections 406e and 475 of the German Code of Criminal Procedure shall not apply in addition to subsections (1) to (3). The right to request access to the fining decisions of a competition authority on the basis of these provisions shall remain unaffected. Section 33g(1) and (2) shall not apply to competition authorities that are in possession of evidence.

(6) The provisions of subsections (1) to (5) shall apply *mutatis mutandis* to authorities and courts which have files or parts or copies of files of a competition authority in their files. The competition authority that keeps or has kept the file shall be involved in accordance with subsection (2) sentence 2.

### **Section 89d Rules of Evidence**

(1) Evidence which has solely been gained through inspection of the files of a competition authority or pursuant to Section 89c can provide proof of facts in a legal action concerning a claim for damages on account of an infringement pursuant to Section 33(1) only if the party that has been granted access to the files or its legal successor is a party to the legal action.

(2) Leniency statements and settlement submissions which have solely been gained through inspection of the files of an authority or a court or pursuant to Section 89c cannot provide proof of facts in a legal action concerning a claim for damages on account of an infringement pursuant to Section 33(1).

(3) Evidence within the meaning of Section 33g(5) which has solely been gained through inspection of the files of an authority or a court or pursuant to Section 89c cannot provide proof of facts in a legal action concerning a claim for damages on account of an infringement pursuant to Section 33(1) until the competition authority has completely terminated its proceedings against each of the parties involved either by issuing a decision or otherwise.

(4) Sections 142 and 144, Section 371(2), Section 371a(1) sentence 1, Sections 421, 422, 428, 429 and 432 of the German Code of Civil Procedure shall be applicable in a legal action concerning a claim for damages on account of an infringement pursuant to Section 33(1) or concerning a claim pursuant to Section 33g(1) or (2) only to the extent that a document or item that is to be surrendered is also subject to a claim pursuant to Section 33g against the person obliged to surrender such document or item, unless a contractual claim to surrender such document or item exists against that person. Sentence 1 shall apply *mutatis mutandis* to the provision by authorities of documents and items that are included in the file of a competition authority or that are kept in official custody in the course of a proceeding, with the proviso that the conditions for the provision pursuant to Section 89c(1) to (4) and (6) have to be fulfilled with regard to the respective piece of evidence.

### **Section 89e Common Provisions for Sections 33g and 89b to 89d**

(1) Competition authorities within the meaning of Sections 33g and 89b to 89d are

1. the Bundeskartellamt,
2. the supreme *Land* authorities competent according to the laws of the respective *Land*,
3. the European Commission and
4. the competition authorities of other Member States of the European Union.

(2) Subsection (1) and Sections 33g, 89b to 89d shall be applicable *mutatis mutandis* to the enforcement of claims for damages or defence against claims for damages on account of infringements of provisions of the national law of another Member State of the European Union

1. which predominantly pursue the same objective as Articles 101 and 102 of the Treaty on the Functioning of the European Union and
2. which, pursuant to Article 3(1) of Council Regulation (EC) No 1/2003, are applied with regard to the same case and in parallel to the competition law of the European Union.

This shall not include national legal provisions imposing criminal sanctions on natural persons, unless such criminal sanctions serve the purpose of enforcing the competition law applicable to undertakings.

## Chapter 5 Common Provisions

### **Section 90 Information of and Participation by the Competition Authorities**

(1) The German courts shall inform the Bundeskartellamt about all legal actions in which the decision depends in whole or in part on the application of the provisions of this Act, on a decision issued pursuant to these provisions, or on the application of Articles 101 or 102 of the Treaty on the Functioning of the European Union, or of Articles 53 or 54 of the Agreement on the European Economic Area. This shall also apply in cases where these provisions are applied *mutatis mutandis*. Sentence 1 shall not apply to legal disputes on decisions pursuant to Section 42. The court shall, upon request, provide to the Bundeskartellamt copies of all briefs, records, orders and decisions.

(2) The President of the Bundeskartellamt may, if he considers it appropriate to protect the public interest, appoint from among the members of the Bundeskartellamt a representative authorised to submit written statements to the court, to point out facts and evidence, attend hearings, present arguments and address questions to parties, witnesses and experts in such hearings. Written statements made by the representative shall be communicated to the parties by the court.

(3) If the significance of the legal action does not extend beyond the territory of a *Land*, the supreme *Land* authority shall take the place of the Bundeskartellamt for the purposes of subsection (1) sentence 4 and subsection (2).

(4) Subsections (1) and (2) shall apply *mutatis mutandis* to legal actions which have as their subject matter the enforcement of a price set pursuant to Section 30 against a purchaser bound to such prices or against another undertaking.

(5) Upon request by a court having to decide on a claim for damages pursuant to Section 33a(1) sentence 1, the Bundeskartellamt may comment on the amount of the damage resulting from the infringement. The rights of the President of the Bundeskartellamt under subsection (2) shall remain unaffected.

(6) Subsection (1) sentence 4 and subsection (2) shall apply *mutatis mutandis* to legal actions before a court on substantial, permanent or repeated infringements of consumer protection law provisions 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.

### **Section 90a Cooperation of the Courts with the European Commission and the Competition Authorities**

(1) In all judicial proceedings where Article 101 or Article 102 of the Treaty on the Functioning of the European Union is applied the court shall, without undue delay after serving the decision on the parties, forward a duplicate of every decision to the European Commission via the Bundeskartellamt. The Bundeskartellamt may transmit to the European Commission the documents which it has obtained pursuant to Section 90(1) sentence 4.

(2) In proceedings pursuant to subsection (1), the European Commission may, acting on its own initiative, submit written observations to the court. In the case of a request pursuant to Article 15(3) sentence 5 of Council Regulation (EC) No 1/2003, the court shall provide the European Commission with all documents necessary for the assessment of the case. The court shall provide the Bundeskartellamt and the parties with a copy of the written observations of the European Commission made pursuant to Article 15(3) sentence 3 of Council Regulation (EC) No 1/2003. The European Commission may also submit oral observations in the hearing.

(3) In proceedings pursuant to subsection (1), the court may ask the European Commission to provide information in its possession or submit its observations on questions concerning the application of Article 101 or Article 102 of the Treaty on the Functioning of the European Union. The court shall inform the

parties about a request made pursuant to sentence 1, and shall provide them as well as the Bundeskartellamt with a copy of the European Commission's reply.

(4) In the cases of subsections (2) and (3), the dealings between the court and the European Commission may also be made via the Bundeskartellamt.

### **Section 91 Cartel Panel of the Higher Regional Court**

The higher regional courts shall set up cartel panels. They shall decide on legal matters assigned to them pursuant to Section 57(2) sentence 2, Section 73(4), Sections 83, 85 and 86, and on appeals against final judgments and other decisions in civil actions pursuant to Section 87.

### **Section 92 Jurisdiction of a Higher Regional Court or of the Supreme Court of a *Land* for Several Court Districts in Administrative Matters and Proceedings Concerning Administrative Fines**

(1) Where several higher regional courts exist in a *Land*, the legal matters for which the higher regional courts have exclusive jurisdiction pursuant to Section 57(2) sentence 2, Section 73(4), Sections 83, 85 and 86, may be assigned by the *Land* governments by way of a statutory instrument to one or several of the higher regional courts or to the supreme court of a *Land* if such centralisation serves the administration of justice in cartel matters, in particular to ensure uniform case law. The *Land* governments may delegate their powers in this regard to their judicial administrations.

(2) The jurisdiction of one higher regional court or of the supreme court of a *Land* for individual districts or for the entire territory of several *Länder* may be established by treaties between the *Länder*.

### **Section 93 Jurisdiction Over Appeals**

Section 92(1) and (2) shall apply *mutatis mutandis* to decisions on appeals against final judgments and from other decisions in civil actions pursuant to Section 87.

### **Section 94 Cartel Panel of the Federal Court of Justice**

(1) The Federal Court of Justice shall establish a cartel panel; it shall decide in the first and last instance on the decisions of the Bundeskartellamt specified in Section 73(5) and on the following legal remedies:

1. in administrative matters, on appeals on points of law against decisions of the higher regional courts (Sections 77, 79, 80) and on appeals against the refusal to grant leave to appeal (Section 78);
2. in proceedings concerning administrative fines, on appeals on points of law against decisions of the higher regional courts (Section 84);
3. in civil actions pursuant to Section 87
  - a) on appeals on points of law against final judgments of the higher regional courts including appeals against the refusal to grant leave to appeal,
  - b) on leap-frog appeals against final judgments of the regional courts,
  - c) on appeals on points of law against decisions of the higher regional courts in the cases under Section 574(1) of the German Code of Civil Procedure.

(2) In proceedings concerning administrative fines, the cartel panel shall constitute a criminal panel within the meaning of Section 132 of the German Courts Constitution Act, in all other matters it shall constitute a civil panel.

### **Section 95 Exclusive Jurisdiction**



The jurisdiction of the courts which may be called upon to issue a decision under this Act shall be exclusive.

## **Section 96 (repealed)**

### **Part 4** **Award of Public Contracts and Concessions**

#### **Chapter 1** **Procurement Procedure**

##### **Division 1**

### **General Principles, Definitions and Scope**

#### **Section 97 General Principles for Making Awards**

(1) Public contracts and concessions are awarded through competition and transparent procedures. The principles of cost-effectiveness and proportionality shall be upheld in the process.

(2) The participants in a procurement procedure (award procedure) shall be treated equally unless unequal treatment is expressly required or permitted under this Act.

(3) In making the award, aspects of quality and innovation as well as social and environmental aspects shall be considered in accordance with this Part.

(4) The interests of small and medium-sized undertakings shall primarily be taken into account in public procurement procedures. Contracts shall be divided into individual lots (partial lots) and awarded separately according to the type or area of specialisation (trade-specific lots). Several partial or trade-specific lots may be awarded collectively if this is required for economic or technical reasons. If an undertaking that is not a public contracting authority or sector contracting entity is entrusted with the realisation or execution of a public assignment, it shall be obliged by the public contracting authority or sector contracting entity, so far as it subcontracts to third parties, to proceed according to sentences 1 to 3.

(5) For sending, receiving, forwarding and storing data in a procurement procedure, contracting authorities and undertakings shall, in principle, use electronic means in accordance with the statutory instruments issued pursuant to Section 113.

(6) Undertakings shall have a right to have the provisions concerning the procurement procedure complied with.

#### **Section 98 Contracting Authorities**

Contracting authorities within the meaning of this Part are public contracting authorities within the meaning of Section 99, sector contracting entities within the meaning of Section 100 and concession grantors within the meaning of Section 101.

#### **Section 99 Section 99 Public Contracting Authorities**

Public contracting authorities are

1. regional and local authorities and their special funds;
2. other legal persons under public or private law that were established for the specific purpose of meeting non-commercial needs in the general interest, if

- a) they are for the most part financed through a participation or in some other way by entities within the meaning of nos 1 or 3 acting individually or jointly;
- b) their management is subject to supervision by entities under nos 1 or 3; or
- c) more than half of the members of their management or supervisory boards have been appointed by entities under nos 1 or 3;

the same shall apply if such legal person, individually or together with others, provides most of the financing to another legal person under public or private law, exercises supervision over its management or has appointed the majority of the members of a management or supervisory board;

- 3. associations whose members fall under nos 1 or 2;
- 4. natural or legal persons under private law as well as legal persons under public law, so far as they do not fall under no 2, in cases where they receive funds for civil engineering projects, for building hospitals, sports, leisure or recreational facilities, school, university or administrative buildings or for related services and design contests from entities falling under nos 1 to 3, and where these funds are used to finance more than 50 per cent of these projects.

### **Section 100 Sector Contracting Entities**

(1) Sector contracting entities are

- 1. public contracting authorities under Section 99 nos 1 to 3 that carry out a sector activity under Section 102;
- 2. natural or legal persons under private law that carry out a sector activity under Section 102, where
  - a) such activity is carried out based on special or exclusive rights that have been conferred by a competent authority; or
  - b) public contracting authorities under Section 99 nos 1 to 3 can individually or jointly exercise a controlling influence on these persons.

(2) Special or exclusive rights within the meaning of subsection (1) no 2 a) are rights which result in reserving the performance of this activity for one or more undertakings while considerably diminishing the eventuality that this activity will be performed by other undertakings. Rights are not special or exclusive rights in this sense if they have been conferred based on a procedure under the provisions of this Part or based on another procedure for which adequate notice was given and which is founded on objective criteria.

(3) The exercise of a controlling influence within the meaning of subsection (1) no 2 b) is presumed where a public contracting authority under Section 99 nos 1 to 3

- 1. directly or indirectly owns the majority of the subscribed capital of the undertaking;
- 2. holds the majority of the voting rights attached to the shares of the undertaking; or
- 3. can appoint more than half of the members of the administrative, management or supervisory board of the undertaking.

### **Section 101 Concession Grantors**

(1) Concession grantors are

- 1. public contracting authorities under Section 99 nos 1 to 3 that award a concession;
- 2. sector contracting entities under Section 100(1) no 1 that carry out a sector activity under Section 102(2) to (6) and award a concession for the purpose of carrying out this activity;
- 3. sector contracting entities under Section 100(1) no 2 that carry out a sector activity under Section 102(2) to (6) and award a concession for the purpose of carrying out this activity.

(2) Section 100(2) and (3) shall apply *mutatis mutandis*.

## Section 102 Sector Activities

(1) Sector activities in the field of water are

1. the provision or operation of fixed networks intended to provide a service to the public in connection with the collection, transport or distribution of drinking water;
2. the supply of drinking water to such networks.

Sector activities also include activities under sentence 1 that are associated with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 per cent of the total volume of water made available by such projects or irrigation or drainage installations, or are associated with the disposal or treatment of sewage. The supply of drinking water by a sector contracting entity under Section 100(1) no 2 to fixed networks which provide a service to the public shall not be considered a sector activity where the production of drinking water by the contracting entity concerned takes place because the consumption thereof is necessary for carrying out an activity that is not a sector activity under subsections (1) to (4), and the supply to the public network depends only on that contracting entity's own consumption and has not exceeded 30 per cent of that contracting entity's total production of drinking water, on the basis of the average for the preceding three years, including the current year.

(2) Sector activities in the field of electricity are

1. the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;
2. the supply of electricity to such networks, unless
  - a) the production of electricity by the sector contracting entity under Section 100(1) no 2 takes place because its consumption is necessary for carrying out an activity that is not a sector activity under subsections (1) to (4); and
  - b) the supply depends only on the sector contracting entity's own consumption and has not exceeded 30 per cent of that sector contracting entity's total production of energy, on the basis of the average for the preceding three years, including the current year.

(3) Sector activities in the field of gas and heat are

1. the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat;
2. the supply of gas or heat to such networks, unless
  - a) the production of gas or heat by the sector contracting entity under Section 100 (1) no 2 is the unavoidable consequence of carrying out an activity that is not a sector activity under subsections (1) to (4); and
  - b) the supply is aimed only at the economic exploitation of such production and amounts to not more than 20 per cent of that sector contracting entity's turnover on the basis of the average for the preceding three years, including the current year.

(4) Sector activities in the field of transport services are the provision or operation of networks intended to provide transport services to the public by railway, automated systems, tramway, trolley bus, bus or cableway; a network shall be considered to exist where the transport service is provided under operating conditions laid down by a competent authority, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

(5) Sector activities in the field of ports and airports are activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

(6) Sector activities in the field of fossil fuels are activities relating to the exploitation of a geographical area for the purpose of:

1. extracting oil or gas; or
2. exploring for, or extracting, coal or other solid fuels.

(7) For the purposes of subsections (1) to (3), the term 'supply' covers generation and production as well as wholesale and retail sale. The production of gas falls within the scope of subsection (6).

## **Section 103 Public Contracts, Framework Agreements and Design Contests**

- (1) Public contracts are contracts for pecuniary interest concluded between public contracting authorities or sector contracting entities and undertakings for the procurement of services whose subject matter is the delivery of goods, the execution of works or the provision of services.
- (2) Supply contracts are contracts for the procurement of goods involving in particular a purchase or hire purchase or leasing, or a lease with or without a purchase option. The contracts may also include ancillary services.
- (3) Works contracts are contracts either for the execution or both the design and execution
  1. of works in connection with one of the activities mentioned in Annex II of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94 of 28/3/2014, p. 65) and Annex I of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJL 94 of 28/3/2014, p. 243); or
  2. of a work for the public contracting authority or the sector contracting entity which is the result of civil engineering or building construction work and is to fulfil a commercial or technical function.A works contract also exists when a third party produces a work in accordance with the requirements specified by the public contracting authority or the sector contracting entity, the work is of direct economic benefit to the contracting authority or entity and the authority or entity has a decisive influence on the type and design of the work.
- (4) Service contracts are contracts for the performance of services which are not covered by subsections (2) and (3).
- (5) Framework agreements are agreements between one or more public contracting authorities or sector contracting entities and one or more undertakings, the purpose of which is to establish the terms governing public contracts to be awarded during a given period, in particular with regard to price. Unless otherwise specified, the same provisions as for the award of corresponding public contracts apply to the award of framework agreements.
- (6) Design contests are award procedures that are intended to enable the contracting authority to acquire a plan or design on the basis of a comparative evaluation by a jury with or without the award of prizes.

## **Section 104 Public Contracts Relating to Defence or Security**

- (1) Public contracts relating to defence or security are public contracts for at least one of the following services:
  1. the supply of military equipment, including any related parts, components or assembly kits;
  2. the supply of equipment awarded under a classified contract, including any related parts, components or assembly kits;
  3. supplies, works and services directly connected with the equipment referred to in nos 1 and 2 in all phases of the equipment's life cycle; or
  4. works and services specifically for military purposes or works and services awarded under a classified contract.
- (2) Military equipment is any equipment that is designed specifically for military purposes or adjusted to suit military purposes and destined to be used as a weapon, ammunition or war material.
- (3) A classified contract within the meaning of this provision is a contract in the special field of non-military security which has similar characteristics and needs just as much protection as a contract on the supply of military equipment within the meaning of subsection (1) no 1 or as works or services that are specifically for military purposes within the meaning of subsection (1) no 4; and
  1. in the performance of which classified information under Section 4 of the German Act on the Prerequisites and Procedures for Security Clearance Checks Undertaken by the Federal Government [*Sicherheitsüberprüfungsgesetz*] or corresponding provisions on the level of the *Länder* is used; or

2. which requires or contains classified information within the meaning of no 1.

### **Section 105 Concessions**

- (1) Concessions are contracts for pecuniary interest by means of which one or more concession grantors entrust one or more undertakings
  1. with the execution of works ('works concessions'), the consideration for which consists either solely in the right to exploit the work or in that right together with payment; or
  2. with the provision and management of services other than the execution of works referred to in no 1 ('services concessions'), the consideration for which consists either solely in the right to exploit the services or in that right together with payment.
- (2) In contrast to the award of public contracts, in the process of the award of a works or services concession, the operating risk for the use of the work or for the exploitation of the services passes to the concessionaire. This is the case when
  1. it is not guaranteed under normal operating conditions that the investments made or the costs incurred for operating the work or providing the services can be recouped; and
  2. the concessionaire is in fact exposed to the vagaries of the market, such that any potential estimated losses incurred by the concessionaire are not negligible.

The operating risk may consist in either a demand risk or a supply risk.

### **Section 106 Thresholds**

- (1) This Part applies to the award of public contracts and concessions as well as the organisation of design contests with an estimated contract value, exclusive of value-added tax, that reaches or exceeds the thresholds established in each case. Section 114(2) shall remain unaffected.
- (2) The threshold in each case is derived
  1. for public contracts and design contests awarded by public contracting authorities, from Article 4 of Directive 2014/24/EU, as amended; the threshold derived therefrom for central government authorities is to be applied by all supreme federal authorities, all higher federal authorities and comparable federal institutions;
  2. for public contracts and design contests awarded by sector contracting entities for the purpose of carrying out a sector activity, from Article 15 of Directive 2014/25/EU, as amended;
  3. for public contracts relating to defence or security, from Article 8 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216 of 20/8/2009, p. 76), as amended;
  4. for concessions from Article 8 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94 of 28/3/2014, p. 1), as amended.
- (3) The Federal Ministry for Economic Affairs and Energy shall announce the applicable thresholds without delay in the Federal Gazette after they have been published in the Official Journal of the European Union.

### **Section 107 General Exceptions**

- (1) This Part shall not apply to the award of public contracts and concessions for
  1. arbitration and conciliation services;
  2. the acquisition, rental or leasing, by whatever financial means, of land, existing buildings or other immovable property or rights thereon;
  3. employment contracts;

4. civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and that are covered by Common Procurement Vocabulary (CPV) codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services; non-profit organisations or associations within the meaning of this number are the aid agencies recognised as civil and disaster protection organisations under federal or *Land* law.

(2) Nor shall this Part apply to public contracts and concessions

1. where the application of this Part would force the contracting authority to supply information in connection with the procurement procedure or the execution of the contract the disclosure of which it considers contrary to the essential interests of the security of the Federal Republic of Germany within the meaning of Article 346(1)(a) of the Treaty on the Functioning of the European Union; or
2. that fall within the scope of Article 346(1)(b) of the Treaty on the Functioning of the European Union.

Essential interests of security within the meaning of Article 346(1) of the Treaty on the Functioning of the European Union may be affected in particular where the public contract or the concession relates to key defence industry technologies. Furthermore, in the case of sentence 1 no 1, essential interests of security within the meaning of Article 346(1)(a) of the Treaty on the Functioning of the European Union may be affected in particular where the public contract or the concession relates

1. to key security industry technologies or
2. to services that
  - a) are intended for border protection, for combating terrorism or organised crime or for covert activities of police or security forces or
  - b) relate to encryption

and to the extent that a particularly high level of confidentiality is required.

### **Section 108 Exceptions for Cooperation with Other Public Authorities**

(1) This Part shall not apply to the award of public contracts that are awarded by a public contracting authority within the meaning of Section 99 nos 1 to 3 to a legal person under public or private law where

1. the public contracting authority exercises over the legal person a control similar to that exercised by it over its own departments,
2. more than 80 per cent of the activities of the legal person are carried out in the performance of tasks entrusted to it by the public contracting authority or by other legal persons controlled by that public contracting authority; and
3. there is no direct private capital participation in the legal person with the exception of non-controlling and non-blocking forms of private capital participation that are required by national legislative provisions and that do not exert a decisive influence on the controlled legal person.

(2) The exercise of control within the meaning of subsection (1) no 1 is deemed to exist where the public contracting authority exercises a decisive influence over the strategic objectives and significant decisions of the legal person. Control may also be exercised by another legal person which is itself controlled in the same way by the public contracting authority.

(3) Subsection (1) also applies to the award of public contracts by a controlled legal person, which is at the same time a public contracting authority within the meaning of Section 99 nos 1 to 3, to the controlling public contracting authority or to another legal person controlled by that public contracting authority. It is required that there be no direct private capital participation in the legal person being awarded the public contract. Subsection (1) no 3 second half of the sentence shall apply *mutatis mutandis*.

(4) This Part shall not apply to the award of public contracts where, although the public contracting authority within the meaning of Section 99 nos 1 to 3 exercises no control within the meaning of subsection (1) no 1 over a legal person under public or private law,

1. the public contracting authority, jointly with other public contracting authorities, exercises over the legal person a control which is similar to that exercised by each of the public contracting authorities over its own departments;

2. more than 80 per cent of the activities of the legal person are carried out in the performance of tasks entrusted to it by the public contracting authorities or by another legal person controlled by those public contracting authorities; and
  3. there is no direct private capital participation in the legal person; subsection (1) no 3 second half of the sentence shall apply *mutatis mutandis*.
- (5) Joint control within the meaning of subsection (4) no 1 exists where
1. the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities; an individual representative may represent several or all of the participating public contracting authorities;
  2. the contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the legal person; and
  3. the legal person does not pursue any interests that are contrary to those of the public contracting authorities.
- (6) Nor shall this Part apply to contracts concluded between two or more public contracting authorities within the meaning of Section 99 nos 1 to 3 where
1. the contract establishes or implements a cooperation between the participating public contracting authorities to ensure that the public services they have to perform are provided with a view to achieving objectives they have in common;
  2. the implementation of the cooperation under no 1 is governed solely by considerations relating to the public interest; and
  3. the public contracting authorities perform on the open market less than 20 per cent of the activities concerned by the cooperation under no 1.
- (7) For the determination of the percentage under subsection (1) no 2, subsection (4) no 2 and subsection (6) no 3, the average total turnover or an appropriate activity-based measure for the three years preceding the public contract award shall be taken into consideration. An appropriate activity-based measure is, for example, costs incurred by the legal person or the public contracting authority in this period with respect to supplies, works and services. Where turnover, or an appropriate alternative activity-based measure such as costs, is either not available for the preceding three years or no longer meaningful, it shall be sufficient to show, particularly by means of business projections, that the measurement of activity is credible.
- (8) Subsections (1) to (7) shall apply *mutatis mutandis* to sector contracting entities within the meaning of Section 100(1) no 1 for the award of public contracts and to concession grantors within the meaning of Section 101(1) nos 1 and 2 for the award of concessions.

### **Section 109 Exceptions for Awards Based on International Procedural Rules**

- (1) This Part shall not be applied where public contracts, design contests or concessions
1. are to be awarded or executed according to procurement procedures that are laid down through
    - a) a legal instrument creating international law obligations, such as an international accord or agreement, concluded in conformity with the EU treaties, between the Federal Republic of Germany and one or more countries that are not Contracting Parties of the Agreement on the European Economic Area or their subdivisions on covering supplies, works or services intended for the joint implementation or exploitation of a project by their signatories; or
    - b) an international organisation; or
  2. are to be awarded in accordance with procurement rules provided by an international organisation or international financing institution, where the public contracts and design contests concerned are to be fully financed by that organisation or institution; in the case of public contracts and design contests co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.
- (2) Section 145 no 7 shall apply to public contracts relating to defence or security and Section 150 no 7 to concessions in the fields of defence and security.

## **Section 110 Award of Public Contracts and Concessions that Have Different Types of Procurement as Their Subject Matter**

(1) Public contracts which have different types of procurement, such as supplies, works or services, as their subject matter shall be awarded in accordance with the provisions with which the principal subject matter of the contract is associated. The same applies to the award of concessions having both works and services as their subject matter.

(2) The principal subject matter of public contracts and concessions which

1. consist in part of services that are subject to the provisions on the award of public contracts for social and other specific services within the meaning of Section 130 or concessions for social and other specific services within the meaning of Section 153, and partially of other services, or
2. consist in part of supplies and in part of services

is determined according to which of the estimated values of the respective supplies or services is the highest.

## **Section 111 Award of Public Contracts and Concessions Whose Parts Are Covered by Different Legal Regimes**

(1) If the various parts of a public contract are each covered by different legal regimes and are objectively separable, separate contracts may be awarded for each part or a whole contract may be awarded.

(2) If separate contracts are awarded, each individual contract shall be awarded according to the provisions that are applicable to its characteristics.

(3) If a whole contract is awarded,

1. the contract can be awarded without applying this Part where part of the contract satisfies the requirements of Section 107(2) nos 1 or 2 and the award of a whole contract is justified for objective reasons;
2. the contract can be awarded in accordance with the provisions on the award of contracts relating to defence or security where part of the contract is covered by those provisions and the award of a whole contract is justified for objective reasons;
3. the provisions on the award of public contracts by sector contracting entities are to be applied where part of the contract is covered by those provisions and the value of that part is equal to or exceeds the applicable threshold; this shall also apply where the other part of the contract is covered by the provisions on the award of concessions;
4. the provisions on the award of public contracts by contracting authorities are to be applied where part of the contract is covered by the provisions on the award of concessions and another part of the contract by the provisions on the award of public contracts by public contracting authorities and the value of that part is equal to or exceeds the applicable threshold;
5. the provisions of this Part are to be applied where part of the contract is covered by the provisions of this Part and another part of the contract is covered by provisions outside of this Part; this shall apply irrespective of the value of the part that would be covered by other provisions outside of this Part and irrespective of their legal regime.

(4) If the various parts of a public contract that are each covered by different legal regimes and are objectively not separable,

1. the contract shall be awarded in accordance with the provisions with which the principal subject matter is associated; if the contract contains elements of a services concession and a supply contract, the principal subject matter shall be determined according to which of the estimated values of the respective services or supplies is higher.
2. the contract may be awarded without application of the provisions of this Part or pursuant to the provisions on the award of public contracts relating to defence or security where the contract contains elements to which Section 107(2) nos 1 or 2 apply.

(5) The decision to award a whole contract or separate contracts may not be made for the purpose of excluding the contract award from the provisions on the award of public contracts and concessions.



(6) Subsections (1) and (2), subsection (3) nos 1 and 2 and subsections (4) and (5) shall apply *mutatis mutandis* to the award of concessions.

### **Section 112 Award of Public Contracts and Concessions Covering Several Activities**

(1) If a public contract covers several activities of which one activity constitutes a sector activity within the meaning of Section 102, separate contracts may be awarded for the purposes of each individual activity or a whole contract may be awarded.

(2) If separate contracts are awarded, each individual contract shall be awarded according to the provisions that are applicable to its characteristics.

(3) If a whole contract is awarded, that contract is covered by the provisions that apply to the activity for which the contract is primarily intended. If the contract is intended both for a sector activity within the meaning of Section 102 and an activity that includes defence or security aspects, Section 111(3) nos 1 and 2 shall apply *mutatis mutandis*.

(4) The decision to award a whole contract or separate contracts may not be made for the purpose of excluding the contract award from the provisions of this Part.

(5) If it is objectively impossible to determine the activity for which the contract is principally intended, the award is subject to:

1. the provisions on the award of public contracts by public contracting authorities if one of the activities for which the contract is intended falls under those provisions;
2. the provisions on the award of public contracts by sector contracting entities if the contract is intended both for a sector activity within the meaning of Section 102 and for an activity that would fall within the scope of the provisions on the award of concessions;
3. the provisions on the award of public contracts by sector contracting entities if the contract is intended both for a sector activity within the meaning of Section 102 and for an activity that would fall neither within the scope of the provisions on the award of concessions nor within the scope of the provisions on the award of public contracts by public contracting authorities.

(6) If a concession covers several activities of which one activity constitutes a sector activity within the meaning of Section 102, subsections (1) to (4) shall apply *mutatis mutandis*. If it is objectively impossible to determine the activity for which the concession is principally intended, the award is subject to:

1. the provisions on the award of concessions by their grantors within the meaning of Section 101(1) no 1 if one of the activities for which the concession is intended is covered by those provisions and the other activity by the provisions on the award of concessions by their grantors within the meaning of Section 101(1) no 1 or Section 101(1) no 3.
2. the provisions on the award of public contracts by public contracting authorities if one of the activities for which the concession is intended falls under those provisions;
3. the provisions on the award of concessions if one of the activities for which the concession is intended is covered by those provisions and the other activity is covered neither by the provisions on the award of public contracts by sector contracting entities nor by the provisions on the award of public contracts by public contracting authorities.

### **Section 113 Power to Issue a Statutory Instrument**

The Federal Government shall be authorised to regulate, by way of statutory instruments with the consent of the Bundesrat, the particulars on the award of public contracts and concessions and the organisation of design contests. This authorisation includes the power to regulate requirements for the subject matter of the contract and for the procurement procedure, particularly to regulate

1. the estimate of the order or contract value;
2. the tender specifications, the tender notice, the procurement procedures and the course of the procurement procedure, the variant tenders, the award of subcontracts as well as the award of public contracts and concessions that pertain to social and other specific services;
3. the special techniques and instruments in procurement procedures and for aggregated procurement, including central procurement;

4. the sending, receiving, forwarding and storing of data, including rules on the entry into force of the corresponding obligations;
5. the selection and review of undertakings and tenders as well as the conclusion of the contract;
6. the cancellation of the procurement procedure;
7. the defence or security-specific requirements relating to secrecy, general rules on the protection of confidentiality, the security of supply as well as specific rules on the award of subcontracts;
8. the conditions under which sector contracting entities, concession grantors or contracting authorities under the Federal Mining Act [*Bundesberggesetz*] may be exempted from the obligation to apply the provisions of this Part, and to define the procedure to be followed in this respect, including the necessary investigatory powers of the Bundeskartellamt and the particulars of the costs to be charged; measures of clemency may be provided for.

The statutory instruments must be forwarded to the Bundestag. The forwarding shall occur before the forwarding to the Bundesrat. The statutory instruments may be amended or refused by resolution of the Bundestag. The resolution of the Bundestag shall be forwarded to the Federal Government. If the Bundestag has not dealt with the statutory instrument within three sitting weeks of receipt thereof, the unchanged statutory instruments shall be forwarded to the Bundesrat.

### **Section 114 Monitoring and Procurement Statistics**

(1) By 15 February 2017 and thereafter upon request, the supreme federal authorities and the *Länder* shall make a written report in their respective area of responsibility to the Federal Ministry for Economic Affairs and Energy concerning the application of the provisions of this Part and the statutory instruments issued based on Section 113.

(2) The Federal Statistical Office shall prepare procurement statistics on behalf of the Federal Ministry for Economic Affairs and Energy. For this purpose, contracting authorities within the meaning of Section 98 shall transmit to the Federal Statistical Office data on public contracts within the meaning of Section 103(1) irrespective of their estimated contract value and on concessions within the meaning of Section 105. The Federal Ministry for Economic Affairs and Energy is authorised to define by way of a statutory instrument, in agreement with the Federal Ministry of the Interior, Building and Community and with the consent of the Bundesrat, the specifics regarding the procurement statistics and the data transmission by the reporting authority, including the technical procedure, the extent of the data to be transmitted, the thresholds for the collection and the date of entry into force, and the application of the corresponding obligations.

## **Division 2**

### **Award of Public Contracts by Public Contracting Authorities**

#### **Subdivision 1**

#### **Scope**

#### **Section 115 Scope**

This division shall be applied to the award of public contracts and the organisation of design contests by public contracting authorities.

#### **Section 116 Special Exceptions**

(1) This Part shall not apply to the award of public contracts by public contracting authorities if these contracts have the following subject matter:

1. legal services that concern one of the following activities:
  - a) representation of a client by a lawyer in

- aa) judicial or administrative proceedings before national or international courts, public authorities or institutions;
  - bb) national or international arbitration or conciliation proceedings;
  - b) legal advice given by a lawyer in preparation for a proceeding within the meaning of a) or where there are specific indications and a high probability that the matter to which the legal representation relates will become the subject of such a proceeding;
  - c) document certification and authentication services that must be provided by notaries;
  - d) activities of court-appointed conservators, guardians, caregivers, guardians ad litem, expert witnesses, administrators or other legal services, the providers of which are appointed by a court or are designated by law to carry out specific tasks under the supervision of such courts; or
  - e) activities that are at least in part concerned with the exercise of official authority;
2. research and development services, unless they involve research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 and for which
- a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
  - b) the service is fully remunerated by the contracting authority.
3. the acquisition, development, production or co-production of programme material for audiovisual media services or radio media services if those contracts are awarded by audiovisual or radio media service providers or contracts for broadcasting time or programme provision if those contracts are awarded to audiovisual or radio media service providers;
4. financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, central bank services and transactions conducted with the European Financial Stability Facility and the European Stability Mechanism;
5. loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments; or
6. services awarded to a public contracting authority under Section 99 nos 1 to 3 that has an exclusive statutory or regulatory right to render the services.

(2) Nor shall this Part apply to public contracts and design contests for the principal purpose of permitting the public contracting authority to provide or operate public communications networks or to provide to the public one or more electronic communications services.

### **Section 117 Special Exceptions for Awards that Include Defence or Security Aspects**

This Part shall not apply to public contracts and design contests with defence or security aspects that are not public contracts relating to defence or security

- 1. to the extent that the protection of the essential interests of security of the Federal Republic of Germany cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information made available by the contracting authority in a procurement procedure;
- 2. to the extent that the requirements of Article 346(1)(a) of the Treaty on the Functioning of the European Union are satisfied;
- 3. where the award and performance of the contract are declared to be secret or must be accompanied by special security measures in accordance with laws, regulations or administrative provisions; the prerequisite for this is a determination that the essential interests concerned cannot be guaranteed by less intrusive measures, such as by imposing requirements aimed at protecting the confidential nature of the information;
- 4. where the public contracting authority is obliged to carry out the award or performance in accordance with other procurement procedures that are laid down through
  - a) an international accord or agreement, concluded in conformity with the EU treaties, between the Federal Republic of Germany and one or more countries that are not Contracting

Parties of the Agreement on the European Economic Area or their subdivisions and covering supplies, works or services intended for the joint implementation or exploitation of a project by their signatories;

b) an international accord or agreement relating to the stationing of troops, which pertains to undertakings with their registered office in the Federal Republic of Germany or in a country that is not a Contracting Party of the Agreement on the European Economic Area; or

c) an international organisation; or

5. where the public contracting authority awards a public contract or organises a design contest in accordance with procurement rules provided by an international organisation or international financing institution and that public contract or design contest is fully financed through that organisation or institution. In the case of co-financing for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.

### **Section 118 Public Contracts Reserved for Certain Contractors**

(1) Public contracting authorities may reserve the right to participate in public procurement procedures to workshops for persons with disabilities and undertakings whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such public contracts to be performed in the context of sheltered employment programmes.

(2) It is required that at least 30 per cent of the employees of those workshops or undertakings are disabled or disadvantaged workers.

## **Subdivision 2**

### **Procurement Procedure and Contract Performance**

#### **Section 119 Types of Procedures**

(1) Public contracts shall be awarded in open procedures, restricted procedures, negotiated procedures, competitive dialogue or innovation partnerships.

(2) Contracting authorities may freely choose between the open procedure and the restricted procedure which always requires a prior publication of a call for competition. The other types of procedures are only available to the extent permitted by this Act.

(3) The open procedure is a procedure in which the contracting authority publicly invites an unlimited number of undertakings to submit tenders.

(4) The restricted procedure is a procedure in which the public contracting authority, after a previous public invitation to participate, selects a limited number of undertakings in accordance with objective, transparent and non-discriminatory criteria (procedure with prior publication) and invites these to submit tenders.

(5) The negotiated procedure is a procedure in which the public contracting authority, with or without prior publication, approaches selected undertakings in order to negotiate on the tenders with one or more of those undertakings.

(6) The competitive dialogue is a procedure for awarding public contracts with the objective of identifying and determining the means that best satisfy the needs of the public contracting authority. After prior publication, the public contracting authority shall open a dialogue with the selected undertakings to discuss all aspects of the contract award.

(7) The innovation partnership is a procedure for developing innovative supplies, works or services which are not yet available on the market and for acquisition of the services that result from this. After prior publication, the public contracting authority negotiates in several phases with the selected undertakings on the initial and subsequent tenders.

## **Section 120 Special Techniques and Instruments in Procurement Procedures**

- (1) A dynamic purchasing system is a short-term, exclusively electronic procedure for the procurement of performances that are generally available on the market, for which the characteristics that are generally available on the market satisfy the requirements of the public contracting authority.
- (2) An electronic auction is a repetitive electronic procedure for determining the most economically advantageous tender. Each electronic auction is preceded by a complete initial evaluation of all tenders.
- (3) An electronic catalogue is a list of the supplies, works and services to be procured, which is prepared in an electronic format based on the tender specifications. It can be utilised particularly for concluding framework agreements and can include illustrations, price information and product descriptions.
- (4) A central purchasing body is a public contracting authority that, on an ongoing basis, purchases supplies and services, awards public contracts or concludes framework agreements on behalf of other public contracting authorities (centralised purchasing activity). Public contracting authorities may procure supplies and services from central purchasing bodies or award contracts for supplies, works and services through central purchasing bodies. Public contracts for carrying out central purchasing activities may be awarded to a central purchasing body without conducting a procurement procedure in accordance with the provisions of this Part. Services contracts of this type can also include consulting and support services for the preparation or execution of procurement procedures. Parts 1 to 3 shall remain unaffected.

## **Section 121 Tender Specifications**

- (1) The subject matter of the contract shall be described as clearly and comprehensively as possible in the tender specifications so that the description is understandable in the same way for all undertakings and so that the tenders can be compared with each other. The tender specifications shall include the functional and performance requirements or a description of the task to be addressed, knowledge of which is required to prepare the tender, as well as the circumstances and conditions for provision of the performance.
- (2) For all procurement which is intended for use by natural persons, the accessibility criteria for persons with disabilities or the design for all users shall be taken into account when preparing the tender specifications, except in properly justified cases.
- (3) The tender specifications shall be enclosed with the procurement documents.

## **Section 122 Eligibility**

- (1) Public contracts shall be awarded to skilled and efficient (eligible) undertakings that have not been excluded under Section 123 or Section 124.
- (2) An undertaking is eligible if it meets the criteria (selection criteria) defined in detail by the public contracting authority for the proper execution of the public contract. The selection criteria may exclusively relate to:
  1. Qualification and authorisation to pursue the professional activity;
  2. Economic and financial standing;
  3. Technical and professional ability.
- (3) Proof of eligibility and the absence of grounds for exclusion under Sections 123 and 124 may be provided, entirely or in part, through participation in prequalification systems.
- (4) Selection criteria must be related and proportionate to the subject matter of the contract. They shall appear in the contract notice, the prior information notice or the invitation to confirm interest.

## **Section 123 Compulsory Grounds for Exclusion**

- (1) Public contracting authorities shall exclude an undertaking from participation at any point in the procurement procedure when they are aware that a person whose conduct is imputable to the undertaking in accordance with subsection (3) has been convicted by final judgement or a final

administrative fine has been issued against the undertaking under Section 30 of the German Administrative Offences Act [*Gesetz über Ordnungswidrigkeiten*] for a criminal offence under:

1. Section 129 of the German Criminal Code [*Strafgesetzbuch*] (forming criminal organisations), Section 129a of the German Criminal Code (forming terrorist organisations) or Section 129b of the German Criminal Code (foreign criminal and terrorist organisations);
  2. Section 89c of the German Criminal Code (financing of terrorism) or for participation in such a crime or for the provision or collection of financial resources with the knowledge that such financial resources will be used or are intended to be used, wholly or in part, to commit a crime under Section 89a(2) no 2 of the German Criminal Code;
  3. Section 261 of the German Criminal Code (money laundering; concealing unlawfully acquired assets);
  4. Section 263 of the German Criminal Code (fraud), provided that the criminal offence is directed against the budget of the European Union or against budgets administered by the European Union or on its behalf;
  5. Section 264 of the German Criminal Code (subsidy fraud), provided that the criminal offence is directed against the budget of the European Union or against budgets administered by the European Union or on its behalf;
  6. Section 299 of the German Criminal Code (taking and giving bribes in commercial practice), Sections 299a and 299b of the German Criminal Code (taking and giving bribes in the health sector);
  7. Section 108e of the German Criminal Code (taking of bribes by and giving of bribes to elected officials);
  8. Sections 333 and 334 of the German Criminal Code (granting benefits and giving bribes), each also in conjunction with Section 335a of the German Criminal Code (foreign and international officials);
  9. Article 2 Section 2 of the German Act on Combating International Bribery [*Gesetz zur Bekämpfung internationaler Bestechung*] (Bribery of Foreign Public Officials in International Business Transactions) or
  10. Sections 232, 232a (1) to (5), Sections 232b to 233a of the German Criminal Code (human trafficking, forced prostitution, forced labour, exploitation of labour, exploitation involving deprivation of liberty).
- (2) A conviction or the issuance of an administrative fine under the comparable provisions of other countries are the equivalent of a conviction or the issuance of an administrative fine within the meaning of subsection (1).
- (3) The conduct of a person convicted by final judgement shall be imputable to an undertaking if that person has acted as the person responsible for the management of the undertaking; this also includes supervision of management or the exercise of control in another manner in a managerial position.
- (4) Public contracting authorities shall at any point in the procurement procedure exclude an undertaking from participating in the procurement procedure if
1. the undertaking has not fulfilled its obligations relating to the payment of taxes, charges or social security contributions and this has been established by a judicial or administrative decision having final and binding effect or
  2. the public contracting authorities can prove the breach of an obligation under no 1 in another suitable manner.
- Sentence 1 shall not apply if the undertaking has fulfilled its obligations by making the payment or committing to pay the taxes, charges and social security contributions, including interest, fines for late payment and penalties.
- (5) An exclusion under subsection (1) may be disregarded if this is imperative for compelling reasons of public interest. An exclusion under subsection (4) sentence 1 may be disregarded if this is imperative for compelling reasons of public interest or if an exclusion would be obviously disproportionate. Section 125 shall remain unaffected.

## Section 124 Facultative Grounds for Exclusion

(1) Taking the principle of proportionality into account, public contracting authorities may at any point in the procurement procedure exclude an undertaking from participating in the procurement procedure if

1. the undertaking has demonstrably breached applicable environmental, social or labour obligations in carrying out public contracts;
2. the undertaking is insolvent, an insolvency proceeding or a comparable proceeding over the assets of the undertaking has been filed or opened, the opening of such a proceeding has been denied for lack of assets, the undertaking is in liquidation proceedings or has ceased to do business;
3. the undertaking has demonstrably committed grave professional misconduct which renders its integrity questionable; Section 123(3) shall apply *mutatis mutandis*;
4. the public contracting authority has sufficient indications that the undertaking has concluded agreements with other undertakings or engaged in concerted practices which have as their object or effect, the prevention, restriction or distortion of competition;
5. a conflict of interest exists in the execution of the procurement procedure which could compromise the impartiality and independence of a person working for the public contracting authority in the executing of the procurement procedure and which cannot be effectively remedied by other, less intrusive measures;
6. a distortion of competition results from the prior involvement of the undertaking in the preparation of the procurement procedure, and such distortion of competition cannot be remedied by other, less intrusive measures;
7. the undertaking has produced significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract or concession contract which led to an early termination, damages or other comparable sanctions;
8. the undertaking has committed a serious misrepresentation or withheld information or is not able to submit the required evidence with respect to the grounds for exclusion or the selection criteria; or
9. the undertaking
  - a) has attempted to unduly influence the decision-making process of the public contracting authority;
  - b) has attempted to obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
  - c) has negligently or intentionally provided misleading information that may have a material influence on the decision of the public contracting authority concerning the award decision, or has attempted to provide such information.

(2) Section 21 of the Posted Workers Act [*Arbeitnehmer-Entsendegesetz*], Section 98c of the Residence Act [*Aufenthaltsgesetz*], Section 19 of the Minimum Wage Act [*Mindestlohngesetz*] and Section 21 of the Act to Combat Undeclared Work and Unlawful Employment [*Schwarzarbeitsbekämpfungsgesetz*] shall remain unaffected.

## Section 125 Self-cleaning

(1) Public contracting authorities shall not exclude an undertaking for which a ground for exclusion exists under Section 123 or Section 124 from participation in the procurement procedure where the undertaking has proven that it

1. has paid or undertaken to pay compensation for any damage caused by the criminal offence or misconduct;
2. has comprehensively clarified the facts and circumstances associated with the criminal offence or misconduct and the damage caused thereby by actively collaborating with the investigating authorities and the public contracting authority; and

3. has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

Section 123(4) sentence 2 shall remain unaffected.

(2) The self-cleaning measures taken by the undertakings shall be evaluated by the public contracting authorities, taking into account the gravity and particular circumstances of the criminal offence or misconduct. If the public contracting authorities consider the self-cleaning measures by the undertaking to be insufficient, they shall provide the undertaking with justification for the decision.

### **Section 126 Allowable Period for Exclusion**

Where an undertaking for which a ground for exclusion exists has taken no or insufficient self-cleaning measures under Section 125,

1. if a ground for exclusion exists under Section 123, it may be excluded from participation in procurement procedures for up to five years from the day of the final conviction;
2. if a ground for exclusion exists under Section 124, it may be excluded from participation in procurement procedures for up to three years following the event at issue.

### **Section 127 Contract Award**

(1) The most economically advantageous tender shall be accepted. The basis for this is an evaluation by the public contracting authority concerning whether and to what extent the tender meets the specified award criteria. The most economically advantageous tender is determined according to the best price-quality ratio. Apart from the price or costs, to determine this, qualitative, environmental or social aspects may also be taken into account.

(2) Binding rules on pricing shall be observed in determining the most economically advantageous tender.

(3) The award criteria must be related to the subject matter of the contract. This relationship shall also be assumed when an award criterion refers to processes relating to the production, provision or disposal of the performance, to trading with the performance or to another stage in the life cycle of the performance, even when such factors do not affect material qualities of the subject matter of the contract.

(4) The award criteria must be specified and defined in a manner that ensures the possibility of effective competition, that the contract cannot be awarded arbitrarily and that it is possible to conduct an effective review on whether and to what extent the tenders meet the award criteria. If public contracting authorities allow variants, they shall define the award criteria in such a way as to apply both to main tenders and variants.

(5) The award criteria and their weighting must be specified in the contract notice or the procurement documents.

### **Section 128 Contract Performance**

(1) In performing the public contract, undertakings must comply with all legal obligations applicable to them, in particular the obligation to pay taxes, charges and social security contributions, to comply with occupational health and safety rules and to grant employees at least those minimum working conditions, including the minimum wage, mandated for the respective performance under the Minimum Wage Act [*Mindestlohngesetz*], under a collective agreement declared to be universally applicable under the Collective Agreements Act [*Tarifvertragsgesetz*] with the effects of the Posted Workers Act, or under a statutory instrument issued under Section 7, Section 7a or Section 11 of the Posted Workers Act or under Section 3a of the German Temporary Employment Act [*Arbeitnehmerüberlassungsgesetz*].

(2) Public contracting authorities may, in addition, set special conditions for the performance of a contract (contract performance conditions), provided that they are related to the subject matter of the contract in accordance with Section 127(3). The contract performance conditions must arise from the contract notice or the procurement documents. They may in particular include economic, innovation-related, environmental, social or employment-related considerations or the protection of information confidentiality.



## **Section 129 Mandatory Contract Performance Conditions**

Contract performance conditions which the public contracting authority is mandated to prescribe for the commissioned undertaking may only be specified based on a federal or *Land* statute.

## **Section 130 Award of Public Contracts for Social and Other Specific Services**

(1) When awarding public contracts for social and other specific services within the meaning of Annex XIV of Directive 2014/24/EU, public contracting authorities may freely choose between the open procedure, the restricted procedure, the negotiated procedure with prior publication, the competitive dialogue and the innovation partnership. A negotiated procedure without prior publication is only available to the extent permitted by this Act.

(2) In deviation from Section 132(3), it is permissible to modify a public contract for social and other specific services within the meaning of Annex XIV of Directive 2014/24/EU without conducting a new procurement procedure when the value of the modification amounts to no more than 20 per cent of the original contract value.

## **Section 131 Award of Public Contracts for Passenger Transport Services by Rail**

(1) When awarding public contracts for passenger transport services by rail, public contracting authorities may freely choose between the open and the restricted procedure, the negotiated procedure with prior publication, the competitive dialogue and the innovation partnership. A negotiated procedure without prior publication is only available to the extent permitted by this Act.

(2) Article 5(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council dated 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 of the Council (OJ L 315 of 3/12/2007, p. 1) shall be applied in place of Section 108(1). Article 5(5) and Article 7(2) of Regulation (EC) No. 1370/2007 shall remain unaffected.

(3) Public contracting authorities that award public contracts within the meaning of subsection (1) shall require pursuant to Article 4(5) of Regulation (EC) No 1370/2007 that where there is a change of operator of passenger transport services, the selected operator shall take on the employees who were employed by the previous operator to provide those transport services and grant them the rights to which they would have been entitled if there had been a transfer pursuant to Section 613a of the German Civil Code [*Bürgerliches Gesetzbuch*]. In the event that a public contracting authority should demand that employees be taken on within the meaning of sentence 1, such demand shall be limited to those employees who are actually required for provision of the transport services being transferred. The public contracting authority shall provide provisions to exclude an improper adaptation of provisions under the collective agreement to the detriment of the new operator between the publication of the contract notice and the takeover of the operation. If requested by the public contracting authority, the previous operator is obliged to provide all information required for this.

## **Section 132 Modification of Contracts During Their Term**

(1) Significant modifications to a public contract during its term require a new procurement procedure. Modifications are significant if they result in the public contract differing substantially from the public contract originally awarded. A significant modification exists in particular where

1. the modification introduces conditions which, if they had applied to the original procurement procedure,
  - a) would have made it possible to admit other candidates or tenderers;
  - b) would have made it possible to accept a different tender; or
  - c) would have drawn the interest of further participants in the procurement procedure;
2. the modification shifts the economic balance of the public contract in favour of the contractor in a manner that was not provided for in the initial contract;
3. the modification significantly extends the scope of the public contract; or

4. a new contractor replaces the contractor in cases other than those provided for in subsection (2) no 4.
- (2) Notwithstanding subsection (1), it is permissible to modify a public contract without conducting a new procurement procedure where
1. the initial procurement documents provide clear, precise and unequivocal review clauses or options which contain statements on the scope and nature of and requirements for possible contract modifications, and the overall nature of the contract is not altered by the modification;
  2. additional supplies, works or services become necessary which were not provided for in the initial procurement documents and a change in the contractor
    - a) cannot be made for economic or technical reasons and
    - b) would cause significant inconvenience or substantial duplication of costs for the public contracting authority;
  3. the need for modification has been brought about by circumstances that a diligent public contracting authority could not have foreseen, and the overall nature of the contract is not altered by the modification; or
  4. a new contractor replaces the previous contractor
    - a) based on a review clause within the meaning of no 1;
    - b) based on the fact that a different undertaking that meets the requirements originally set for eligibility replaces the original contractor, wholly or in part, following corporate restructuring through, for example, takeover, merger, acquisition or insolvency, provided that this does not entail further material modifications within the meaning of subsection (1); or
    - c) based on the fact that the public contracting authority itself assumes the main contractor's obligations towards its subcontractors.

In the cases referred to in sentence 1 nos 2 and 3, the price may not be increased by more than 50 per cent of the value of the original contract. Where there are several successive modifications of the contract, this limitation applies to the value of each individual modification, provided that the modifications were not made with the aim to circumvent the provisions of this Part.

- (3) It is also permissible to modify a public contract without conducting a new procurement procedure if the overall nature of the contract is not altered and the value of the modification
1. does not exceed the respective thresholds under Section 106 and
  2. does not amount to more than 10 per cent of the original contract value in the case of contracts for supplies and services and not more than 15 per cent in the case of works contracts.

Where there are several successive modifications, the total value of the modifications is applicable.

(4) Where the contract includes an indexation clause, the higher price shall be the reference value for calculating the value under subsection (2) sentences 2 and 3 and subsection (3).

(5) Modifications under subsection (2) nos 2 and 3 shall be published in the Official Journal of the European Union.

### **Section 133 Termination of Public Contracts in Special Cases**

- (1) Notwithstanding Section 135, public contracting authorities may terminate a public contract during its term where
1. a significant modification was made, which would have required a new procurement procedure under Section 132;
  2. at the time the contract is awarded, a mandatory ground for exclusion existed under Section 123(1) to (4) or
  3. the public contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaty on the Functioning of the European Union or under the provisions of this Part that has been established by the Court of Justice of the European Union in a procedure pursuant to Article 258 of the Treaty on the Functioning of the European Union.

- (2) If a public contract is terminated pursuant to subsection (1), the contractor may demand a corresponding part of the remuneration for its previous efforts. In the case of subsection (1) no 2, the contractor is not entitled to remuneration to the extent that its previous efforts are of no interest to the public contracting authority as a result of the termination.
- (3) The right to demand damages is not excluded by the termination.

### **Section 134 Information and Standstill Obligation**

- (1) Public contracting authorities shall inform the unsuccessful tenderers in text form and without delay of the name of the successful undertaking, the reasons for the rejection of their tenders and of the earliest date of the conclusion of the contract. This shall also apply to candidates who were not informed of the rejection of their tenders before notification of the decision on the award was sent to the successful tenderers.
- (2) A contract may be concluded at the earliest 15 calendar days after the information pursuant to subsection (1) has been sent. If the information is sent electronically or by fax, the standstill period shall be reduced to 10 calendar days. The standstill period shall begin on the day after which the contracting authority despatches the information; the date of receipt by the tenderer and candidate in question shall be irrelevant.
- (3) The obligation to inform the tendering parties shall not apply in cases in which negotiated procedures without prior publication are justified on grounds of extreme urgency. In the case of contracts relating to defence or security, public contracting authorities may decide to refrain from disclosing certain information on the contract award or the conclusion of a framework agreement if the disclosure impedes law enforcement, is contrary to the public interest, particularly defence or security interests, harms legitimate commercial interests of undertakings or might prejudice fair competition between them.

### **Section 135 Ineffectiveness**

- (1) A public contract shall be deemed ineffective from the outset if the public contracting authority
  1. has violated Section 134 or
  2. has awarded the contract without prior publication or announcement in the Official Journal of the European Union without this being expressly permissible in accordance with the law and this violation has been ascertained in review proceedings.
- (2) Ineffectiveness pursuant to subsection (1) can be established only if this is claimed in review proceedings within 30 calendar days after the public contracting authority informs the affected candidates and tenderers concerning the conclusion of the contract, but at the latest six months after conclusion of the contract. If the contracting authority has published the award of the contract in the Official Journal of the European Union, the time limit for claiming ineffectiveness shall end 30 calendar days after publication of the notice of the award in the Official Journal of the European Union.
- (3) Ineffectiveness under subsection (1) no 2 shall not arise where
  1. the public contracting authority holds the view that it is permissible to award the contract without prior publication of an announcement in the Official Journal of the European Union;
  2. the public contracting authority has published an announcement in the Official Journal of the European Union, in which it expresses its intention to conclude the contract; and
  3. the contract was not concluded before the expiry of a period of at least 10 calendar days from the day of publication of that announcement.

The announcement according to sentence 1 no 2 must include the name and contact data of the public contracting authority, the description of the contract subject matter, the justification for the decision of the contracting authority to award the contract without prior publication of an announcement in the Official Journal of the European Union, and the name and contact data of the undertaking that is to be awarded the contract.

### **Subdivision 1**

### **Award of Public Contracts by Sector Contracting Entities**

## **Section 136 Scope**

This subdivision shall apply to the award of public contracts and the organisation of design contests by sector contracting entities for the purpose of conducting a sector activity:

## **Section 137 Special Exceptions**

(1) This Part shall not apply to the award of public contracts by sector contracting entities for the purpose of conducting a sector activity if these contracts have the following subject matter:

1. legal services within the meaning of Section 116(1) no 1,
2. research and development services within the meaning of Section 116(1) no 2,
3. broadcasting time or programme provision if these contracts are awarded to audiovisual or radio media service providers;
4. financial services within the meaning of Section 116(1) no 4,
5. loans within the meaning of Section 116(1) no 5,
6. services within the meaning of Section 116(1) no 6, if these contracts are awarded on the basis of an exclusive right,
7. the procurement of water in relation to the supply of drinking water,
8. the procurement of energy or fuels for the production of energy in relation to the supply of energy or
9. the resale or lease to third parties, provided that
  - a) the sector contracting entity has no special or exclusive right to sell or lease the subject of such contracts and
  - b) other undertakings are free to sell or lease the subject matter of the contract under the same conditions as the relevant sector contracting entity.

(2) Nor shall this Part apply to the award of public contracts and the organisation of design contests that have the following subject matter:

1. supplies, works and services as well as the organisation of design contests by sector contracting entities under Section 100(1) no 2, if they serve purposes other than for a sector activity, or
2. the carrying out of sector activities outside the territory of the European Union, where the contract is awarded in a way that does not involve the actual use of a network or facility within the European Union.

## **Section 138 Special Exception for Awards to Affiliated Undertakings**

(1) This Part shall not apply to the award of public contracts

1. that are granted by a sector contracting entity to an affiliated undertaking or
2. that are granted by a joint venture, formed exclusively by several sector contracting entities to carry out a sector activity, to an undertaking that is associated with one of these sector contracting entities.

(2) Within the meaning of subsection (1), an affiliated undertaking is

1. an undertaking the annual accounts of which are to be included with those of the contracting entity in a consolidated financial statement of a parent undertaking in accordance with Section 271(2) of the German Commercial Code [*Handelsgesetzbuch*] in line with the provisions on full consolidation, or
2. an undertaking that
  - a) can be subject to a direct or indirect controlling influence under Section 100(3) of the sector contracting entity,
  - b) can exercise a controlling influence under Section 100(3) on the sector contracting entity or

c) in conjunction with the contracting entity is, by virtue of the ownership structures, financial participation or rules governing said undertaking, subject to the controlling influence under Section 100(3) of another undertaking.

(3) Subsection (1) shall apply to contracts relating to supplies, works or services, if, taking into account all supplies, works or services provided by the affiliated undertaking in the preceding three years in the European Union, at least 80 per cent of the overall average turnover achieved by said undertaking in the particular sector derives from the provision of supplies, works or services for the sector contracting entity or other undertakings with which it is affiliated.

(4) If the same or similar supplies, works or services are provided by more than one undertaking affiliated and economically aligned with the sector contracting entity, the percentage figures shall be calculated in accordance with subsection (3), taking into account the total turnover achieved by these affiliated undertakings from the provision of the relevant supplies, works or services.

(5) If no turnover figures are available for the three preceding years, it shall be sufficient for the undertaking to show, by means of business activity projections for example, that the turnover target required under subsection (3) can be credibly achieved.

### **Section 139 Special Exception for Awards by or to a Joint Venture**

(1) This Part shall not apply to the award of public contracts

1. that are granted by a joint venture, formed exclusively by several sector contracting entities to carry out sector activities, to one of these sector contracting entities or
2. that are granted by a sector contracting entity that is part of a joint venture within the meaning of no 1 to said joint venture.

(2) It is required that

1. the joint venture within the meaning of subsection (1) no 1 has been formed to carry out the relevant sector activity over a period of at least three years, and
2. the instrument setting up the joint venture stipulates that the sector contracting entities forming the joint venture will be part of the joint venture for at least the same period.

### **Section 140 Special Exception for Activities that are Directly Exposed to Competition**

(1) This Part shall not apply to public contracts awarded for the purpose of conducting a sector activity if the sector activity is directly exposed to competition on unrestricted markets. The same applies to design contests organised in connection with the sector activity.

(2) The Bundeskartellamt charges costs (fees and disbursements) to cover the administrative expenses involved in the preparation of expert opinions and observations made based on the statutory instrument issued under Section 113 sentence 2 no 8. Section 62(1) sentence 3 and Section 61(2) sentence 1, sentence 2 no 1, sentences 3 and 4, Section 61(5) sentence 1 and Section 61(6) sentence 1 no 2, sentences 2 and 3 shall apply *mutatis mutandis*. Section 73(1) and (4) shall apply *mutatis mutandis* to the possibility of filing an appeal against the cost decision.

### **Section 141 Types of Procedures**

(1) Sector contracting entities may freely choose between the open procedure, the restricted procedure, the negotiated procedure with prior publication and the competitive dialogue.

(2) The negotiated procedure without prior publication and the innovation partnership are only available to the extent permitted by this Act.

### **Section 142 Other Applicable Provisions**

As other matters, for the award of public contracts by sector contracting entities for the purpose of carrying out sector activities, Section 118 and Section 119 shall apply, unless otherwise specified in Section 141, as well as Sections 120 to 129, Section 130 in conjunction with Annex XVII of Directive 2014/25/EU and Sections 131 to 135 subject to the proviso that

1. sector contracting entities in deviation from Section 122(1) and (2) shall select the undertakings on the basis of objective criteria that can be accessed by all interested undertakings,
2. sector contracting entities under Section 100(1) no 2 can exclude an undertaking under Section 123, but are not obliged to do so,
3. Section 132(2) sentences 2 and 3 shall not apply.

### **Section 143 Provision for Contracting Entities under the Federal Mining Act**

(1) In the award of contracts relating to supplies, works or services exceeding the contract thresholds under Section 106(2) no 2, sector contracting entities that are entitled under the German Federal Mining Act to explore for or extract oil, gas, coal or other solid fuels, must observe the principles of non-discrimination and competitive procurement in the award of contracts for the exploration for or extraction of oil, gas, coal or other solid fuels. In particular, they must provide adequate information to undertakings that could be interested in such a contract and apply objective criteria in the award of the contract. Sentences 1 and 2 shall not apply to the award of contracts for the purchase of energy or fuels for the production of energy.

(2) The contracting entities under subsection (1) shall inform the European Commission via the Federal Ministry for Economic Affairs and Energy of the award of the contracts covered by this provision in accordance with Commission Decision 93/327/EEC of 13 May 1993 defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the Commission information relating to the contracts they award (OJ EU no. L 129, p. 25). They may be exempted from the obligation to apply this provision under the procedure stipulated by the statutory instrument issued in accordance with Section 113 sentence 2 no 8.

## **Subdivision 2**

### **Award of Public Contracts Relating to Defence or Security**

#### **Section 144 Scope**

This subdivision shall be applied to the award of public contracts relating to defence or security by public contracting authorities and sector contracting entities.

#### **Section 145 Special Exceptions for the Award of Public Contracts Relating to Defence or Security**

This Part shall not apply to the award of public contracts relating to defence or security that

1. are used for the purpose of intelligence operations,
2. are awarded as part of a cooperation programme that
  - a) is based on research and development and
  - b) is conducted together with at least one other EU Member State for the development of a new product and, where applicable, the later phases of the entire or part of that product's life cycle;

upon the conclusion of such an agreement, the European Commission shall indicate the share of research and development expenditure relative to the overall costs of the programme, the cost-sharing arrangement and, if applicable, the planned share of purchases per Member State,

3. are awarded in a country outside the European Union; these contracts also include procurements for civilian purposes as part of a deployment of armed forces or of federal police or police forces of the *Länder* outside the territory of the European Union if the operation requires the relevant contract to be concluded with undertakings that are domiciled in the area of operation; procurements for civilian purposes means the procurement of non-military products, works or services for logistical purposes,

4. are awarded by the Federal government, the government of a *Land* or a local authority to another government or to a local authority of another state, and cover any of the following subject matters:
  - a) the supply of military equipment within the meaning of Section 104(2) or the supply of equipment awarded under a classified contract within the meaning of Section 104(3),
  - b) construction works and services directly connected to such equipment,
  - c) construction works and services specifically for military purposes, or
  - d) construction works and services awarded under a classified contract within the meaning of Section 104(3),
5. have financial services as their subject matter, excluding insurance services,
6. have research and development services as their subject matter, unless the results of such services become the sole property of the contracting authority for its use in the conduct of its own activities and the service is fully remunerated by the contracting authority, or
7. are subject to special procedural rules
  - a) arising under an international convention or international agreement concluded between one or more Member States on the one hand and one or more States that are not party to the Agreement on the European Economic Area on the other hand,
  - b) arising under an international convention or an international agreement in connection with a stationing of troops affecting undertakings of a Member State or a non-Member State, or
  - c) applicable to an international organisation if such organisation effects procurements for its own purposes or if a Member State must award public contracts based on such rules.

### **Section 146 Types of Procedure**

When awarding public contracts relating to defence or security, public contracting authorities and sector contracting entities may freely choose between the restricted procedure and the negotiated procedure with prior publication. The negotiated procedure without prior publication and the competitive dialogue are only available to the extent permitted by this Act.

### **Section 147 Other Applicable Provisions**

As for other matters, Sections 119, 120, 121(1) and (3) as well as Sections 122 to 135 shall apply to the award of public contracts relating to defence or security subject to the proviso that an undertaking under Section 124(1) can also be excluded from participating in a procurement procedure if said undertaking does not possess the required trustworthiness to exclude risks to national security. Protected data sources may be used as proof that risks to national security cannot be excluded.

### **Subdivision 3**

### **Award of Concessions**

#### **Section 148 Scope**

This subdivision shall be applied to the award of concessions by their grantors.

#### **Section 149 Special Exceptions**

This Part shall not apply to the award of:

1. concessions for legal services within the meaning of Section 116(1) no 1,
2. concessions for research and development services within the meaning of Section 116(1) no 2,

3. concessions for audiovisual or radio media services within the meaning of Section 116(1) no 3,
4. concessions for financial services within the meaning of Section 116(1) no 4
5. concessions for loans within the meaning of Section 116(1) no 5,
6. services concessions awarded to a concession grantor under Section 101(1) no 1 or Section 101(1) no 2 on the basis of an exclusive right established by an Act or ordinance,
7. services concessions that are awarded to an undertaking on the basis of an exclusive right granted to said undertaking in accordance with national and European Union law regulating market access for activities under Section 102(2) to (6); this excludes services concessions for activities for which European Union provisions impose no sector-specific transparency obligations; contracting authorities that grant an exclusive right to an undertaking within the meaning of this provision shall inform the European Commission of this within one month of granting this right,
8. concessions with the main purpose of allowing the concession grantor under Section 101(1) no 1 to provide or operate public communications networks or to provide to the public one or more electronic communications services.
9. concessions in the field of water that
  - a) relate to the provision or operation of fixed networks intended to provide a service to the public in connection with the collection, transport or distribution of drinking water or the supply of drinking water to such networks or
  - b) are related to an activity under a) and have as their subject matter one of the following:
    - aa) hydraulic engineering, irrigation and land drainage projects, provided that the volume of water to be used for the supply of drinking water represents more than 20 per cent of the total volume of water made available by such projects or irrigation or drainage installations, or
    - bb) the disposal or treatment of sewage,
10. services concessions for lottery services that are covered by the Common Procurement Vocabulary reference number 92351100-7 and that are granted to an undertaking on the basis of an exclusive right,
11. concessions awarded by grantors within the meaning of Section 101(1) no 2 and no 3 to carry out their activities in a country outside the European Union in a way that does not involve the physical use of a network or geographical territory within the European Union, or
12. concessions awarded in the field of air services on the basis of an operating licence issued within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293 of 31 October 2008, p. 3), or concessions relating to the transport of persons within the meaning of Section 1 of the Passenger Transport Act [*Personenbeförderungsgesetz*].

## **Section 150 Special Exceptions for the Award of Concessions in the Fields of Defence and Security**

This Part shall not apply to the award of concessions in the fields of defence and security

1. where the application of the provisions of this Part would oblige the concession grantor to supply information, the disclosure of which it considers contrary to the essential interests of the security of the Federal Republic of Germany, or where the award and performance of the concession are to be declared secret or must be accompanied by special security measures in accordance with the applicable laws, regulations or administrative provisions, provided that the grantor of the concession has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as by imposing requirements aimed at protecting the confidential nature of the information made available by the concession grantors in a concession award procedure,
2. that are awarded as part of a cooperation programme that
  - a) is based on research and development and



- b) is conducted together with at least one other EU Member State for the development of a new product and, where applicable, the later phases of the entire or part of that product's life cycle,
- 3. that are awarded by the Federal Government to another government for construction works and services directly connected to military or sensitive equipment or for construction works and services specifically for military purposes or for sensitive construction works and services,
- 4. that are awarded in a country that is not a Contracting Party of the Agreement on the European Economic Area as part of the deployment of troops outside the territory of the European Union, if the deployment requires these concessions to be awarded to undertakings domiciled in the area of operation,
- 5. that are covered by other exception provisions in this Part,
- 6. that are not already excluded in accordance with nos 1 to 5, when the protection of essential interests of security of the Federal Republic of Germany cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information made available by the concession grantors in a concession award procedure or
- 7. that are subject to special procedural rules
  - a) arising under an international convention or international agreement concluded between one or more EU Member States on the one hand and one or more States that are not party to the Agreement on the European Economic Area on the other hand,
  - b) arising under an international convention or an international agreement in connection with a stationing of troops affecting undertakings of a Member State or a non-Member State, or
  - c) applicable to an international organisation if such organisation effects procurements for its own purposes or if a Member State of the European Union must award contracts based on such rules.

### **Section 151 Procedure**

Concession grantors shall declare their intention to award a concession. The obligation to publish notice of the intention to award a concession may only be waived to the extent permitted by this Act. As for other matters, concession grantors may freely decide on how to organise the procedure for awarding concessions subject to the statutory instrument, issued in connection with this Act, on the details of the procurement procedure.

### **Section 152 Requirements of the Concession Award Procedure**

- (1) For the tender specifications, Section 121(1) and (3) shall be applied *mutatis mutandis*.
- (2) Concessions shall be awarded to eligible undertakings within the meaning of Section 122.
- (3) The award shall be made on the basis of objective criteria used to ensure that the tenders are assessed under conditions of effective competition in order to identify an overall economic advantage for the concession grantor. The award criteria must be related to the subject matter of the concession and must not allow the grantor unrestricted freedom of choice. They may comprise qualitative, environmental or social concerns. The award criteria must be accompanied by a description that allows the information submitted by the tenderers to be reviewed effectively and an evaluation to be carried out as to whether and the extent to which the tenders meet the award criteria.
- (4) The provisions on contract performance under Section 128 and on the mandatory contract performance conditions under Section 129 shall apply *mutatis mutandis*.

### **Section 153 Award of Concessions for Social and Other Specific Services**

For the procedure for awarding concessions relating to social and other specific services within the meaning of Annex IV of Directive 2014/23/EU, Sections 151 and 152 shall apply.

## **Section 154 Other Applicable Provisions**

As for other matters, the following provisions shall apply to the award of concessions, including the concessions under Section 153:

1. Section 118 relating to reserved concessions,
2. Sections 123 to 126, provided that
  - a) concession grantors under Section 101(1) no 3 can exclude an undertaking under the requirements of Section 123, but are not obliged to do so,
  - b) In the case of a concession in the fields of defence and security, concession grantors can exclude an undertaking from participating in a procurement procedure if said undertaking does not possess the required trustworthiness to exclude risks to national security; protected data sources maybe used as proof,
3. Section 131(2) and (3) and Section 132 provided that
  - a) Section 132(2) sentences 2 and 3 for the award of concessions relating to activities under Section 102(2) to (6) does not apply and
  - b) the upper limit in Section 132(3) no 2 for works and services concessions uniformly amounts to 10 per cent of the value of the original concession,
4. Sections 133 to 135,
5. Section 138 relating to the award of concessions by grantors within the meaning of Section 101(1) nos 2 and 3 to affiliated undertakings,
6. Section 139 relating to the award of concessions by grantors within the meaning of Section 101(1) nos 2 and 3 to a joint venture or by joint ventures to a grantor of concessions within the meaning of Section 101(1) nos 2 and 3 and
7. Section 140 relating to the award of concessions by grantors within the meaning of Section 101(1) no 2 and 3 for activities that are directly exposed to competition.

## **Division 1**

### **Reviewing Authorities**

#### **Section 155 Principle**

Without prejudice to review by the supervisory authorities, any award of public contracts or concessions shall be subject to review by the public procurement tribunals.

#### **Section 156 Public Procurement Tribunals**

- (1) The federal public procurement tribunals shall review the award of public contracts and concessions for public contracts and concessions attributable to the Federation, while the *Land* public procurement tribunals shall review public contracts and concessions attributable to the *Länder*.
- (2) Rights under Section 97(6) as well as other claims against public contracting authorities for the performance or omission of an act in procurement procedures may only be asserted before the public procurement tribunals and the appellate court.
- (3) The jurisdiction of the civil courts over damage claims and the powers of the competition authorities to prosecute infringements, especially of Sections 19 and 20, remains unaffected.

#### **Section 157 Composition, Independence**

- (1) The public procurement tribunals shall exercise their functions independently and under their own responsibility within the limits of the law.
- (2) The public procurement tribunals shall take their decisions through a chairperson and two associate members of which one shall serve in an honorary capacity (honorary associate member). The chairperson and the regular associate member must be civil servants appointed for life with the

qualification to serve in the senior civil service, or comparable expert employees. Either the chairperson or the regular associate member must be qualified to serve as a judge; this should generally be the chairperson. The associate members should have in-depth knowledge of public procurement, the honorary associate members should additionally have several years of practical experience in the field of public procurement. Where the awarding of contracts relevant under defence or security aspects within the meaning of Section 104 is reviewed, the public procurement tribunals may, in deviation from sentence 1, also take their decisions through a chairperson and two regular associate members.

(3) The tribunal may assign the case to the chairperson or to the regular associate member without a hearing by unappealable decision, for him/her to decide alone. Such an assignment shall be possible only if the case involves no major factual or legal difficulties, and the decision will not be of fundamental importance.

(4) The members of the tribunal shall be appointed for a term of office of five years. They take their decisions independently and are bound only by the law.

### **Section 158 Establishment, Organisation**

(1) The Federation shall establish the necessary number of public procurement tribunals at the Bundeskartellamt. The establishment and composition of the public procurement tribunals as well as the allocation of duties shall be determined by the President of the Bundeskartellamt. Honorary associate members and their substitute members shall be appointed by the President upon a proposal by the central organisations of the chambers under public law. Having obtained approval from the Federal Ministry for Economic Affairs and Energy, the President of the Bundeskartellamt shall issue rules of procedure and publish these in the Federal Gazette.

(2) The establishment, organisation and composition of the entities (reviewing authorities) of the *Länder* mentioned in this Division shall be determined by the authorities competent under the laws of the *Länder* or, in the absence of any such determination, by the *Land* government, which may delegate this power. The *Länder* may establish joint reviewing authorities.

### **Section 159 Delimitation of Competence of the Public Procurement Tribunals**

(1) The federal public procurement tribunal shall be responsible for reviewing the procurement procedures

1. of the Federation;

2. of contracting authorities within the meaning of Section 99 no 2, of sector contracting entities within the meaning of Section 100(1) no 1 in conjunction with Section 99 no 2 and concession grantors within the meaning of Section 101(1) no 1 in conjunction with Section 99 no 2, so far as the Federation for the most part manages the participation, or has otherwise predominantly provided means of financing or predominantly supervises the management or has appointed the majority of the members of the management or supervisory board, unless the undertakings that are part of the contracting authority have agreed that another public procurement tribunal shall be competent;

3. of sector contracting entities within the meaning of Section 100(1) no 2 and of concession grantors within the meaning of Section 101(1) no 3, so far as the Federation exercises a controlling influence over them; a controlling influence exists if the Federation directly or indirectly owns the majority of the subscribed capital of the contracting authority or holds the majority of the voting rights attached to the shares of the contracting authority or can appoint more than half of the members of the administrative, management or supervisory board of the contracting authority;

4. of contracting authorities within the meaning of Section 99 no 4, so far as funding has been granted for the most part by the Federation;

5. that are performed for the Federation by way of an official delegation of powers;

6. in cases where both the federal public procurement tribunals and one or more *Land* public procurement tribunals are the competent authorities.

(2) If the procurement procedure is carried out for the Federation by a *Land* acting on federal commission, the public procurement tribunal of the *Land* shall be the competent authority. If, in

application of subsection (1) nos 2 to 5, a contracting authority is attributable to a *Land*, the public procurement tribunal of the respective *Land* shall be the competent authority

(3) In all other cases the competence of the public procurement tribunals shall be determined according to the seat of the contracting authority. In the case of procurements involving more than one *Land*, the contracting authorities shall name only one competent public procurement tribunal in the contract notice.

## **Division 2**

### **Proceedings before the Public Procurement Tribunal**

#### **Section 160 Initiation of the Proceedings, Application**

- (1) The public procurement tribunal shall initiate review proceedings only upon application.
- (2) Every undertaking that has an interest in the public contract or the concession and claims that its rights under Section 97(6) have been violated by non-compliance with the provisions governing the awarding of public contracts has the right to file an application. In doing so, the undertaking must show that it has been or risks being harmed by the alleged violation of public procurement provisions.
- (3) The application is inadmissible if
  1. the applicant became aware of the claimed violation of public procurement provisions before filing the application for review, but did not complain to the contracting authority within a time limit of 10 calendar days; the expiry of the time limit under Section 134(2) remains unaffected,
  2. violations of public procurement provisions which become apparent from the tender notice are not notified to the contracting authority by the end of the time limit for the application or the submission of a tender specified in the notice,
  3. violations of public procurement provisions which only become apparent from the procurement documents are not notified to the contracting authority by the end of the time limit for the application or the submission of a tender specified in the notice,
  4. more than 15 calendar days have expired since receipt of notification from the contracting entity that it is unwilling to redress the objection.

Sentence 1 shall not apply to an application under Section 135(1) no 2 to have the contract declared ineffective. Section 134(1) sentence 2 shall remain unaffected.

#### **Section 161 Form, Content**

- (1) The application shall be submitted in writing to the public procurement tribunal and substantiated without delay. It should state a specific request. An applicant without a domicile or habitual residence, seat or headquarters within the scope of application of this Act shall appoint an authorised receiving agent within the scope of application of this Act.
- (2) The substantiation must designate the respondent, contain a description of the alleged violation of rights with a description of the facts, as well as a list of the available evidence, and show that an objection was made to the contracting authority; it should name the other parties, if known.

#### **Section 162 Parties to the Proceedings, Admission to the Proceedings**

The parties to the proceedings are the applicant, the contracting authority and the undertakings the interests of which are severely affected by the decision and which are therefore admitted to the proceedings by the public procurement tribunal. The decision to admit a party to the proceedings shall be incontestable.

#### **Section 163 Principle of Investigation**

- (1) The public procurement tribunal shall investigate the facts *ex officio*. In doing so, it may limit itself to the facts presented by the parties or those of which it can be reasonably expected to be aware. The public procurement tribunal shall not be obliged to review extensively the lawfulness of the procurement

procedure. In its entire activities, it shall take care to not unduly impede the course of the procurement procedure.

(2) The public procurement tribunal shall review the application for manifest inadmissibility or unfoundedness. In doing so, it shall also consider a written statement lodged by the contracting authority as a precautionary measure (protective writ). Unless the application is clearly inadmissible or unfounded, the public procurement tribunal shall serve a copy thereof upon the contracting authority and request from the contracting authority the files documenting the procurement procedure (award files). The contracting authority shall immediately make the award files available to the tribunal. Sections 57 to 59(1) to (5) and Section 61 shall apply *mutatis mutandis*.

### **Section 164 Storing of Confidential Documents**

(1) The public procurement tribunal ensures the confidentiality of classified information and other confidential information contained in the documents transmitted by the parties.

(2) The members of the public procurement tribunal are subject to a duty of confidentiality; the type and content of the deeds, files, electronic documents and information kept confidential must not be recognisable from the reasons given for the decision.

### **Section 165 Access to Files**

(1) The parties may access the files at the public procurement tribunal and may obtain executed copies, excerpts or transcripts from the clerk's office at their own expense.

(2) The public procurement tribunal shall refuse access to documents where this is necessary for important reasons, in particular for the protection of secrets or to protect business or trade secrets.

(3) Every party shall indicate the secrets named in subsection (2) when sending its files or representations and shall mark them accordingly in the documents. If this is not done, the public procurement tribunal may assume that the party consents to access being granted.

(4) Refusal to grant access to the files may be challenged only in connection with an immediate appeal on the merits of the case.

### **Section 166 Hearing**

(1) The public procurement tribunal shall decide on the basis of a hearing, which should be limited to one date. All parties shall have an opportunity to state their case. With the consent of the parties or in the case of the inadmissibility or manifest unfoundedness of the application, a decision may be taken on the basis of the files.

(2) The case may be discussed and decided also if the parties do not appear or are not duly represented at the hearing.

### **Section 167 Expedition**

(1) The public procurement tribunal shall take its decision and give reasons in writing within a period of five weeks of receipt of the application. In the case of particular factual or legal difficulties, the chairperson may in exceptional cases by notice to the parties extend this period by the required time. The extended period shall not exceed two weeks. The chairperson shall give reasons in writing for this order.

(2) The parties shall co-operate in clarifying the facts in a manner appropriate to a course of action designed to further and speedily conclude the proceedings. Time limits may be set for the parties, after the expiry of which further submissions may be disregarded.

### **Section 168 Decision of the Public Procurement Tribunal**

(1) The public procurement tribunal shall decide whether the applicant's rights have been violated, and shall take suitable measures to remedy a violation of rights, and to prevent any impairment of the

interests affected. It shall not be bound by the applications and may also independently intervene to ensure the lawfulness of the procurement procedure.

(2) Once an award has been made, it cannot be revoked. If the review procedure becomes obsolete by the granting of the award, cancellation, discontinuance of the procurement procedure or in any other way, the public procurement tribunal shall determine, upon the application of a party, whether there has been a violation of rights. Section 167(1) shall be inapplicable in this case.

(3) The public procurement tribunal shall decide by way of an administrative act. Decisions shall be enforced, also against public authorities, in accordance with the administrative enforcement acts of the Federation and the *Länder*. The amount of the penalty payment shall be at least EUR 1,000 and shall not exceed EUR 10 million. Section 61(1) and (2) shall apply *mutatis mutandis*.

### **Section 169 Suspension of the Procurement Procedure**

(1) If the public procurement tribunal informs the contracting authority in writing about the application for review, the latter must not make the award prior to the decision of the public procurement tribunal and before the expiry of the time limit for a complaint pursuant to Section 172(1).

(2) The public procurement tribunal may allow the contracting authority, upon its application or upon application by the undertaking named by the contracting authority pursuant to Section 134 as the undertaking to be awarded the contract, to award the contract after the expiry of two weeks after the announcement of this decision if, taking into account all interests that may be impaired as well as the interest of the general public in the quick conclusion of the award procedure, the negative consequences of delaying the award until the end of the review outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting authority carrying out its tasks efficiently; where contracts relevant to defence or security within the meaning of Section 104 are concerned, special defence and security interests must additionally be taken into account. The special defence and security interests prevail as a rule where the public contract or the concession is directly associated with

1. a crisis,
2. a mandated deployment of the German Federal Armed Forces,
3. an obligation of the German Federal Armed Forces equivalent to a deployment or
4. an alliance commitment.

The public procurement tribunal shall also consider the overall prospects of the applicant of winning the award in the procurement procedure. The prospects of success of the application for review need not be taken into account in every case. The appellate court may, upon application, reinstate the prohibition of the award pursuant to subsection (1); Section 168(2) sentence 1 remains unaffected. If the public procurement tribunal does not allow the award, the appellate court may, upon application by the contracting authority, allow the immediate award subject to the conditions in sentences 1 to 4. Section 176(2) sentences 1 and 2 and Section 176(3) shall apply *mutatis mutandis* to the proceedings before the appellate court. An immediate appeal pursuant to Section 171(1) shall not be admissible against decisions taken by the public procurement tribunal under this subsection.

(3) If during the procurement procedure any rights of the applicant under Section 97(6) are jeopardised in another way than by the imminent award, the tribunal may, upon specific application, intervene in the procurement procedure through further preliminary measures. In doing so, it shall apply the evaluation criterion under subsection 2 sentence 1. This decision shall not be separately challengeable. The public procurement tribunal may enforce the additional preliminary measures under the administrative enforcement acts of the Federation and the *Länder*; the measures shall be immediately enforceable. Section 86a sentence 2 shall apply *mutatis mutandis*.

(4) If the contracting authority claims that the requirements of Section 117 nos 1 to 3 or Section 150 no 1 or 6 are fulfilled, the prohibition of the award pursuant to subsection (1) shall lapse five business days after service of a corresponding brief to the applicant; the public procurement tribunal shall serve the brief without delay after its receipt. The appellate court may, upon application, reinstate the prohibition of the award. Section 176(1) sentence 1, Section 176(2) sentence 1 and Section 176(3) and (4) shall apply *mutatis mutandis*.

## **Section 170 Exclusion of Divergent *Land* Law**

Any deviation under *Land* law from the provisions on the administrative procedure contained in this subdivision shall not be admissible.

### **Division 3**

## **Immediate Appeal**

### **Section 171 Admissibility, Jurisdiction**

- (1) Immediate appeals shall be admissible against decisions of a public procurement tribunal. An immediate appeal may be filed by the parties to the proceedings before the public procurement tribunal.
- (2) An immediate appeal shall also be admissible if the public procurement tribunal does not decide upon an application for review within the period set out in Section 167(1); in this case the application shall be deemed to have been rejected.
- (3) The immediate appeal shall be decided exclusively by the higher regional court having jurisdiction at the seat of the public procurement tribunal. An award division shall be established at the higher regional courts.
- (4) Legal matters pursuant to subsections (1) and (2) may be assigned to other higher regional courts or the supreme court of a *Land* by way of a statutory instrument issued by the *Land* governments. The *Land* governments may delegate this authority to their judicial administrations.

### **Section 172 The Limit, Formal Requirements, Content**

- (1) An immediate appeal shall be filed in writing with the appellate court within a non-extendable period of two weeks beginning upon service of the decision or, in the case of Section 171(2), upon the expiry of the time period.
- (2) Reasons for the immediate appeal shall be given when it is filed. The statement of reasons for the appeal shall contain:
  1. a statement as to the extent to which the decision of the public procurement tribunal is challenged and a deviating decision is applied for,
  2. details of the facts and evidence on which the appeal is based.
- (3) The notice of appeal must be signed by a lawyer admitted to practise before a German court. This shall not apply to appeals lodged by legal persons under public law.
- (4) When the appeal is filed, the other parties to the proceedings before the public procurement tribunal shall be informed by the appellant by way of transmission of a copy of the appeal.

### **Section 173 Effect**

- (1) The immediate appeal shall have a suspensive effect upon the decision of the public procurement tribunal. The suspensive effect shall lapse two weeks after the expiry of the time limit for the appeal. If the public procurement tribunal rejects the application to review the award, the appellate court may, upon application by the appellant, extend the suspensive effect up to the time of the decision on the appeal.
- (2) The court shall reject the application pursuant to subsection (1) sentence 3 if, taking into account all interests that may be impaired, the negative consequences of delaying the award up to the time of the decision on the appeal outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interests of the general public in the contracting entity carrying out its tasks efficiently; where contracts relevant under defence or security aspects within the meaning of Section 104 are concerned, special defence and security interests must additionally be taken into account. The special defence and security interests prevail as a rule where the public contract or the concession is directly associated with

1. a crisis,

2. a mandated deployment of the German Federal Armed Forces,
3. an obligation of the German Federal Armed Forces equivalent to a deployment or
4. an alliance commitment.

In its decision, the court shall also consider the appeal's prospects of success, the applicant's overall prospects of winning the public contract or concession in the procurement procedure and the interests of the general public in the quick conclusion of the procurement procedure.

(3) If the public procurement tribunal grants the application for review by prohibiting the award, the award shall not be made unless the appellate court annuls the decision of the public procurement tribunal pursuant to Section 176 or Section 178.

### **Section 174 Parties to the Appeal Proceedings**

The parties to the proceedings before the public procurement tribunal are the parties to the proceedings before the appellate court.

### **Section 175 Procedural Provisions**

(1) The parties shall be represented before the appellate court by a lawyer admitted to practise before a German court who acts as their authorised representative. Legal persons under public law may be represented by civil servants or by employees qualified to serve as a judge.

(2) Sections 65, 69 to 72 with the exception of the reference to Section 227(3) of the German Code of Civil Procedure [*Zivilprozessordnung*], Sections 75(1) to (3) 76(1) and (6), Sections 165 and 167(2) sentence 1 shall apply *mutatis mutandis*.

### **Section 176 Preliminary Decision on the Award**

(1) Upon application by the contracting authority or upon application by the undertaking named in accordance with Section 134 by the contracting authority as the undertaking to be awarded the contract, the court may allow the continuation of the procurement procedure and the award if, taking into account all interests that may be impaired, the negative consequences of delaying the award up to the time of the decision on the appeal outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting authority carrying out its tasks efficiently; where contracts relevant under defence or security aspects within the meaning of Section 104 are concerned, special defence and security interests must additionally be taken into account. The special defence and security interests prevail as a rule where the public contract or the concession is directly associated with

1. a crisis,
2. a mandated deployment of the German Federal Armed Forces,
3. an obligation of the German Federal Armed Forces equivalent to a deployment or
4. an alliance commitment

In its decision, the court shall also consider the immediate appeal's prospects of success, the applicant's overall prospects of winning the public contract or concession in the procurement procedure and the interests of the general public in the quick conclusion of the procurement procedure.

(2) The application shall be made in writing, stating the reasons. The facts to be put forward as reasons for the application as well as the reason for the urgency of the matter shall be substantiated. The appeal proceedings may be suspended until a decision is made on the application.

(3) The decision shall be made and reasons shall be given without delay and in no event later than five weeks after receipt of the application; in the event of particular factual or legal difficulties, the chairperson may, in exceptional cases, extend the period by the required amount of time by declaration to the parties stating the reasons for the extension. The decision may be made without a hearing. The reasons shall explain the lawfulness or unlawfulness of the award procedure. Section 175 shall apply.

(4) No appeal is admissible against a decision made pursuant to this provision.



## **Section 177 End of the Procurement Procedure after the Decision of the Appellate Court**

If an application of the contracting authority pursuant to Section 176 is rejected by the appellate court, the procurement procedure shall be deemed to have ended upon the expiry of ten days after service of the decision unless the contracting authority takes the measures following from the decision in order to restore the lawfulness of the procedure; the procedure must not be continued.

## **Section 178 Decision on the Appeal**

If the court considers the appeal to be well founded, it shall reverse the decision of the public procurement tribunal. In this case, the court shall decide on the matter itself or oblige the public procurement tribunal to decide again on the matter with due consideration of the legal opinion of the court. Upon application, it shall state whether the rights of the undertaking having applied for the review were have been violated by the contracting authority. Section 168(2) shall apply mutatis mutandis.

## **Section 179 Binding Effect and Duty to Refer the Matter**

(1) If damages are claimed because of a violation of the provisions governing the award of public contracts, and proceedings were conducted before the public procurement tribunal, the court of general jurisdiction shall be bound by the final decision of the public procurement tribunal and the decision of the higher regional court, as well as, where applicable, by the decision of the Federal Court of Justice on the appeal in the case of a referral pursuant to subsection (2).

(2) If a higher regional court wishes to deviate from a decision taken by another higher regional court or the Federal Court of Justice, it shall refer the matter to the Federal Court of Justice. The Federal Court of Justice shall decide in lieu of the higher regional court. The Federal Court of Justice may confine itself to deciding only on the matter of divergence and assign the decision on the merits of the case to the court of appeal if this seems appropriate based on the factual and legal context of the appeal proceedings. The duty to refer the matter shall not apply to proceedings pursuant to Section 173(1) sentence 3 and Section 176.

## **Section 180 Damages in the Event of an Abuse of Rights**

(1) If an application pursuant to Section 160 or the immediate appeal pursuant to Section 171 proves to have been unjustified from the outset, the applicant or the appellant shall be obliged to compensate the opponent and the parties for the damage incurred by them due to the abuse of the right to file an application or an appeal.

(2) An abuse of the right to file an application or an appeal shall exist in particular

1. if a suspension or further suspension of the procurement procedure is achieved through incorrect statements made intentionally or with gross negligence;
2. if the review is applied for with the intention of obstructing the procurement procedure or harming competitors;
3. if an application is made with the intention of subsequently withdrawing it in return for payment of money or other benefits.

(3) If the preliminary measures taken by the public procurement tribunal in accordance with a specific application pursuant to Section 169(3) prove to have been unjustified from the outset, the applicant shall compensate the contracting authority for the damage arising from the enforcement of the measures that were ordered.

## **Section 181 Claim for Damages Arising from Reliance**

If the contracting authority has violated a provision intended to protect undertakings, the undertaking may claim damages for the costs incurred in connection with the preparation of the tender or the participation in a procurement procedure if, without such violation, the undertaking would have had a real chance of being awarded the contract after assessment of the tenders, and provided that such

chance was impaired as a consequence of the violation. Further claims for damages shall remain unaffected.

### **Section 182 Costs of Proceedings before the Public Procurement Tribunal**

(1) Costs (fees and expenses) to cover the administrative expense shall be charged for official acts of the public procurement tribunals. The German Administrative Costs Act [*Verwaltungskostengesetz*] of 23 June 1970 (Federal Law Gazette I p. 821) as amended on 14 August 2013 shall apply.

(2) The fee shall amount to at least EUR 2,500; this amount may, for reasons of equity, be reduced to a minimum of one tenth. The fee should not exceed the amount of EUR 50,000, but may be increased up to an amount of EUR 100,000 in individual cases if the expense involved or the economic significance is unusually high.

(3) If a party to the proceedings is unsuccessful, said party shall bear the costs. Several debtors shall be jointly and severally liable. Costs caused by the fault of a party may be imposed upon said party. If the application becomes obsolete by withdrawal or otherwise before the decision of the public procurement tribunal is rendered, half of the fee shall be payable. The decision as to which party has to bear the costs shall be based on reasonable discretion. For reasons of equity, payment of the fee may be waived entirely or partially.

(4) If a party to the review proceedings is unsuccessful, said party shall bear the respondent's expenses necessary for appropriately pursuing the matter or legally defending itself. Any expenses of third parties admitted to the proceedings shall only be reimbursable if the public procurement tribunal imposes them on the unsuccessful party for reasons of equity. If the application is withdrawn or otherwise becomes obsolete, the decision as to which party will bear another party's expenses necessary for appropriately pursuing the matter or securing legal defence shall be based on reasonable discretion; sentence 2 shall otherwise apply *mutatis mutandis* in relation to reimbursing expenses of third parties. Section 80(1), (2) and (3) sentence 2 of the German Administrative Procedure Act [*Verwaltungsverfahrensgesetz*] and the corresponding provisions of the administrative procedure acts of the *Länder* shall apply *mutatis mutandis*. No separate proceedings for the taxation of costs shall take place.

### **Section 183 Corrective Mechanism of the Commission**

(1) If, in the course of a procurement procedure before the conclusion of a contract, the Federal Government receives a notice from the European Commission informing it of a severe violation of EU law in the area of awarding public contracts or concessions which must be remedied, the Federal Ministry for Economic Affairs and Energy shall inform the contracting authority accordingly.

(2) Within 14 calendar days from receipt of this notice, the contracting authority is obliged to submit to the Federal Ministry for Economic Affairs and Energy a detailed description of the facts of the case and state whether the alleged violation has been remedied or provide reasons why it has not been remedied, and whether the procurement procedure is subject to review proceedings or has been suspended for other reasons.

(3) If the procurement procedure is subject to review proceedings or has been suspended, the contracting authority shall inform the Federal Ministry for Economic Affairs and Energy without delay of the outcome of said proceedings.

### **Section 184 Information Duties of the Review Bodies**

The public procurement tribunals and the higher regional courts shall inform the Federal Ministry for Economic Affairs and Energy by 31 January of each year of the number of review proceedings conducted in the previous year and their results.

## **Part 5** **Scope of Application of Parts 1 to 3**

## **Section 185 Public Undertakings, Scope of Application**

(1) The provisions of Parts 1 to 3 of this Act shall apply also to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities. Sections 19, 20 and 31b(5) shall not be applicable to public fees or charges. The provisions of Parts 1 to 3 of this Act shall not apply to Deutsche Bundesbank and Kreditanstalt für Wiederaufbau (KfW).

(2) The provisions of Parts 1 to 3 of this Act shall be applied to all restraints of competition having an effect within the area of application of this Act, even if they were caused outside the area of application of this Act.

(3) The provisions of the German Energy Industry Act shall not preclude the application of Sections 19, 20 and 29 provided that Section 111 of the German Energy Industry Act does not state otherwise.

## **Part 6** **Transitional and Final Provisions**

### **Section 186 Transitional Provisions**

(1) Section 29 shall no longer be applied after 31 December 2022.

(2) Award proceedings which were initiated before 18 April 2016, including ensuing review proceedings, and review proceedings pending on 18 April 2016 shall be terminated in accordance with the rules applicable at the time the proceedings were initiated.

(3) With the exception of Section 33c(5), Sections 33a to 33f shall be applicable solely to claims for damages that have arisen after 26 December 2016. Section 33h shall be applicable to claims pursuant to Section 33a(1) or Section 33a(1) which have arisen after 26 December 2016 as well as to claims for injunction, removal and damages which have arisen before 27 December 2016 on account of a violation of a provision within the meaning of Section 33(1) or a decision of the competition authority and which were not statute-barred on 9 June 2017. For the period until 8 June 2017, the start, suspension, suspension of expiry and recommencement of the limitation period of claims that have arisen before 27 December 2016 shall, however, be determined by the respective provisions on limitation previously applicable to such claims.

(4) Section 33c(5) and Sections 33g and 89b to 89e shall be applicable only in legal actions filed after 26 December 2016 irrespective of the time at which such claims for damages arose.

(5) Section 81a shall be applicable where the legal person or association of persons liable pursuant to Section 30 of the German Administrative Offences Act ceases to exist or assets are transferred after 9 June 2017. If the offence was not terminated on this date, the provisions of Section 81(3a) to (3e) shall take precedence.

(6) Section 30(2b) shall apply only to agreements which have taken effect after 9 June 2017 and before 31 December 2027.

(7) For a concentration that was notified to the Bundeskartellamt pursuant to Section 39 between 1 March 2020 and the end of the day on 31 May 2020 the time limit pursuant to Section 40(1) sentence 1 shall be two months and the time limit pursuant to Section 40(2) sentence 2 shall be six months. Sentence 1 shall also apply in the case under Section 40(5). Sentences 1 and 2 shall not apply if on 29 May 2020

1. the time limit pursuant to Section 40(1) sentence 1 had elapsed without the Bundeskartellamt having informed the notifying undertakings that it initiated an examination of the concentration (second phase proceedings),
2. the time limit pursuant to Section 40(2) sentence 2 had elapsed, or
3. the concentration had been cleared by the Bundeskartellamt.

(8) Section 81f sentence 1 shall not be applicable until the end of the day on 30 June 2021 to the extent that easier means of payment pursuant to Section 18 or Section 93 of the German Administrative Offences Act have been granted for the payment of a fine.

(9) Sections 35 to 41 shall not be applicable to any concentration in the hospital sector to the extent that

1. the concentration concerns the merger of several hospitals or individual specialised areas of several hospitals across locations,
2. the concentration does not conflict with other provisions of competition law and the *Land* has confirmed this at the time the application is filed pursuant to Section 14(2) no 3a) of the German Regulation on Structural Funds for Hospitals [*Krankenhausstrukturfonds-Verordnung*],
3. it has been established by way of a payment notice pursuant to Section 15 of the German Regulation on Structural Funds for Hospitals that the other requirements for support pursuant to Section 12a(1) sentence 4 of the German Hospital Financing Act [*Krankenhausfinanzierungsgesetz*] in conjunction with Section 11(1) no 2 of the German Regulation of Structural Funds for Hospitals have been met and
4. the concentration will be implemented by 31 December 2027.

Any concentration within the meaning of sentence 1 shall be notified to the Bundeskartellamt after it has been implemented. In order to evaluate this provision, Sections 32e and 21(3) sentence 8 of the German Hospital Fees Act [*Krankenhausentgeltgesetz*] shall apply *mutatis mutandis*. For the purposes of this evaluation and in order to examine the effects of this provision on the conditions of competition and the quality of care, data from official hospital statistics may be merged.

### **Annex (omitted)**