

ACT AGAINST RESTRAINTS OF COMPETITION

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PART I

Restraints of Competition

FIRST CHAPTER

Agreements, Decisions and Concerted Practices Restricting Competition

§ 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, shall be prohibited.

§ 2

Exempted Agreements

- (1) Agreements between undertakings, decisions by associations of undertakings or concerted practices, which, while allowing consumers a fair share of the resulting benefit, contribute to improving the production or distribution of goods or to promoting technical or economic progress, 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 of § 1.

- (2) For the application of paragraph 1, Regulations of the Council or the Commission of the European Community on the application of Article 81(3) of the Treaty Establishing the European Community 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 inappropriate to affect trade between Member States of the European Community.

§ 3

Cartels of Small or Medium-Sized Enterprises

- (1) Agreements between competing undertakings and decisions by associations of undertakings, whose subject matter is the rationalisation of economic activities through cooperation among enterprises, fulfil the conditions of § 2(1) if:
 1. competition on the market is not significantly affected thereby, and
 2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises.
- (2) Unless the conditions of Article 81(1) of the EC Treaty are satisfied, undertakings or associations of undertakings are – upon application – entitled to a decision pursuant to § 32c, provided they demonstrate a significant legal or economical interest in such a decision. This provision becomes ineffective on June 30th 2009.

§§ 4 – 18: [Abolished]

SECOND CHAPTER

Market Dominance, Restrictive Practices

§ 19

Abuse of a Dominant Position

- (1) The abusive exploitation of a dominant position by one or several undertakings is prohibited.
- (2) An undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services on the relevant product and geographic market, it:
 1. has no competitors or is not exposed to any substantial competition, or
 2. has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.

Two or more undertakings are dominant insofar as no substantial competition exists between them with respect to certain kinds of goods or commercial services and they jointly satisfy the conditions of sentence 1. The relevant

geographic market within the meaning of this Act may be broader than the scope of application of this Act.

(3) An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if it:

1. consists of three or fewer undertakings reaching a combined market share of 50 percent, or
2. consists of five or fewer undertakings reaching a combined market share of two thirds,

unless the undertakings demonstrate that the conditions of competition may be expected to maintain substantial competition between them, or that the number of undertakings has no paramount market position in relation to the remaining competitors.

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

1. impairs the ability to compete of other undertakings in a manner affecting competition in the market and 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 prevails shall be taken into account;
3. demands less favourable payment or other business terms than the dominant undertaking itself demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;

4. refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such concurrent use is impossible or cannot reasonably be expected.

§ 20

Prohibition of Discrimination, Prohibition of Unfair Hindrance

- (1) Dominant undertakings, associations of competing undertakings within the meaning of §§ 2, 3, and 28(1) and undertakings which set retail prices pursuant to § 28(2), or § 30(1) sentence 1, shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification.
- (2) Paragraph 1 shall also apply to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.
- (3) Dominant undertakings and associations of undertakings within the meaning of paragraph 1 shall not use their market position to invite or to cause other undertakings in business activities to grant them advantages without any objective justification. Sentence 1 shall also apply to undertakings and

associations of undertakings in relation to the undertakings which depend on them.

- (4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market position directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking
1. offers food within the meaning of § 2(2) of the German Food and Feed Code (*Lebensmittel- und Futtermittelgesetzbuch, LFGB*) below its cost price, or
 2. offers other goods or commercial services not merely occasionally below its 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 and services which is higher than the price it itself offers on such market,

unless there is, in each case, an objective justification for this. The offer of food below cost price is objectively justified if such offer is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises by a timely sale, as well as in similarly severe cases. The donation of food to charity organisations for utilisation within the scope of their responsibilities shall not constitute an unfair hindrance.

- (5) If on the basis of specific facts and in the light of general experience it appears that an undertaking has used its market power within the meaning of paragraph 4, it shall be incumbent upon this undertaking to disprove the appearance and to clarify such circumstances in its field of business on which legal action may be based, which cannot be clarified by the competitor concerned or by an association referred to in § 33(2), but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which action is taken.

- (6) Trade and industry associations or professional organisations as well as quality mark associations shall not refuse to admit an undertaking if such refusal constitutes an objectively unjustified unequal treatment and would place the undertaking at an unfair competitive disadvantage.

Translator's Note

The amendment of paragraphs 3 and 4 by Article 1 no. 2 of the Act on the Prevention of Price Abuse in the areas of Energy Supply and the Food Trade (*Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels*) of 18 December 2007 will be reversed pursuant to Article 1a, Article 3 sentence 2 of such Act with effect from 1 January 2013. The original version, to be reinstated as from such date, of paragraphs 3 and 4 reads as follows:

- (3) *Dominant undertakings and associations of undertakings within the meaning of paragraph 1 shall not use their market position to invite or to cause other undertakings in business activities to grant them advantages without any objective justification. Sentence 1 shall also apply to undertakings and associations of undertakings within the meaning of paragraph 2 sentence 1, in relation to the undertakings which depend on them.*
- (4) *Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market position directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking offers goods or commercial services not merely occasionally below its cost price, unless there is an objective justification for this.*

§ 21

Prohibition of Boycott and Other Restrictive Practices

- (1) Undertakings and associations of undertakings shall not request another undertaking or other associations of undertakings to refuse to sell or purchase, with the intention of unfairly harming certain undertakings.
- (2) Undertakings and associations of undertakings shall not threaten or cause disadvantages, or promise or grant advantages, to other undertakings to induce them to engage in conduct which, under this Act or according to a decision issued by the cartel authority pursuant to this Act, shall not be made the subject matter of a contractual commitment.
- (3) Undertakings and associations of undertakings shall not compel other undertakings:

1. to accede to an agreement or decision within the meaning of §§ 2, 3 or 28(1), or
 2. to merge with other undertakings within the meaning of § 37, or
 3. to act uniformly in the market with the intention of restraining competition.
- (4) It shall be prohibited to cause economic harm to another because he has applied for or suggested action to be taken by the cartel authority.

THIRD CHAPTER

Application of the European Competition Law

§ 22

Relationship between this Act and Articles 81 and 82 of the Treaty Establishing the European Community

(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 81(1) of the EC Treaty, which may affect trade between Member States of the European Community within the meaning of that provision. 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 L1, p.1), Article 81 of the EC Treaty shall also apply in that case.

(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 Community but which do not restrict competition within the meaning of Article 81(1) of the EC Treaty, or which fulfil the conditions of Article 81(3) of the EC Treaty or which are covered by a Regulation for the application of Article 81(3) of the EC Treaty. The provisions of the Second Chapter shall remain unaffected. In other cases, the primacy of Article 81 of the EC Treaty is determined by the relevant European Community law.

(3) The provisions of this Act may also be applied to practices which constitute an abuse prohibited by Article 82 of the EC Treaty. Pursuant to Article 3(1) sentence 2 of Council Regulation (EC) No. 1/2003, Article 82 of the EC Treaty shall also apply in that case. The application of stricter provisions of this Act shall remain unaffected.

(4) Without prejudice to European Community law, paragraphs 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 81 and 82 of the EC Treaty shall not be affected by the provisions of this chapter.

§ 23: [Abolished]

FOURTH CHAPTER

Competition Rules

§ 24

Definition, Application for Recognition

- (1) Trade and industry associations and professional organisations may establish competition rules within their sphere of business.

- (2) Competition rules are provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct which violates the principles of fair competition or effective competition based on performance, and of encouraging conduct in competition which is in line with these principles.
- (3) Trade and industry associations and professional organisations may apply to the cartel authority for recognition of competition rules.
- (4) Applications for recognition of competition rules shall contain:
 1. the name, legal form and address of the trade and industry 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 text of the competition rules.

The following must be attached to the application:

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

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

- (5) Changes and amendments to recognised competition rules shall be notified to the cartel authority.

§ 25

Comments by Third Parties

The cartel authority shall give an opportunity to comment to third-party undertakings at the same level of the economy, to trade and industry associations and professional organisations of the suppliers and purchasers affected by the competition rules, as well as to the federal organisations of the levels of the economy involved. This shall also apply to consumer advice centers and other consumer associations supported by public funds if consumer interests are substantially affected. The cartel authority may hold a public hearing on the application for recognition where everyone shall be free to raise objections against the recognition.

§ 26

Recognition

- (1) Recognitions are issued by decision of the cartel authority. They shall state that there are no grounds for the cartel authority to make use of the powers conferred to it under the Sixth Chapter.
- (2) As far as a competition rule violates the prohibition in § 1 and is not exempted pursuant to §§ 2 or 3, or violates other provisions of this Act, of the Act Against Unfair Competition or of another legal provision, the cartel authority shall reject the application for recognition.

- (3) Trade and industry associations and professional organisations shall inform the cartel authority about the cancellation of recognised competition rules which have been established by them.
- (4) The cartel authority shall withdraw or revoke the recognition if it subsequently finds that the conditions for refusal of recognition pursuant to paragraph 2 are satisfied.

§ 27

Information on Competition Rules, Publications

- (1) Recognised competition rules shall be published in the Federal Gazette [*Bundesanzeiger*] or in the electronic version of the Federal Gazette.¹
- (2) The following shall be published in the Federal Gazette or in the electronic version of the Federal Gazette:
 1. applications pursuant to § 24(3);
 2. the setting of dates for hearings pursuant to § 25 sentence 3;
 3. the recognition of competition rules as well as any changes and amendments thereto;
 4. the refusal of recognition pursuant to § 26(2), the withdrawal or revocation of the recognition of competition rules pursuant to § 26(4).
- (3) The publication of applications pursuant to paragraph 2 no. 1 shall include a note to the effect that the competition rules whose recognition has been requested are open to public inspection at the cartel authority.

¹ Official note: www.bundesanzeiger.de

- (4) Insofar as applications pursuant to paragraph 2 no. 1 result in recognition, reference to the publication of the applications shall suffice for the purpose of publishing the recognition.
- (5) With respect to recognised competition rules which have not been published pursuant to paragraph 1, the cartel authority shall, upon request, provide information on the particulars provided pursuant to § 24(4) sentence 1.

FIFTH CHAPTER

Special Provisions for Certain Sectors of the Economy

§ 28

Agriculture

- (1) § 1 shall not apply to agreements between agricultural producers or to agreements and decisions of associations of agricultural producers and federations of such associations of agricultural producers which concern:
 1. the production or sale of agricultural products, or
 2. the use of joint facilities for the storage, treatment or processing of agricultural products,provided that they do not fix 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) § 1 shall not apply to vertical resale price maintenance agreements concerning the sorting, labelling or packaging of agricultural products.

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

§ 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, whereby the reversal of the burden of demonstration and proof (*Darlegungs- und Beweislast*) shall only apply in proceedings before the cartel 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. §§ 19 and 20 remain unaffected.

§ 30

Resale Price Maintenance for Newspapers and Magazines

- (1) § 1 shall not apply to 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 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 characteristic of publishing, as well as combined products, the main feature of which is a newspaper or magazine.

- (2) Agreements of the kind defined in paragraph 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. § 126(2) of the Civil Code [*Bürgerliches Gesetzbuch*] shall be inapplicable.
- (3) The Bundeskartellamt [*Federal Cartel Office*] may, acting *ex officio* or upon the request of a bound purchaser, declare the resale price maintenance to be of no effect and prohibit the implementation of a new and equivalent resale price maintenance if:
 1. the resale price maintenance is applied in an abusive manner, or
 2. the resale price maintenance or its connection with other restraints of competition is capable of increasing the price of the bound goods, or of preventing their prices from decreasing, or of restricting their production or sales.

§ 31: [Abolished]

SIXTH CHAPTER

Powers of the Cartel Authorities, Sanctions

§ 32

Termination and Subsequent Finding of Infringements

- (1) The cartel authority may require the undertakings or associations of undertakings to bring to an end an infringement of a provision of this Act or of Articles 81 or 82 of the EC Treaty.
- (2) For this purpose, it may impose on undertakings and associations of undertakings all measures which are necessary to effectively bring the infringement to an end and are proportionate to the infringement established.
- (3) To the extent that a legitimate interest exists the cartel authority may also declare that an infringement has occurred after an infringement has been brought to an end.

§ 32a

Interim Measures

- (1) In cases of urgency the cartel authority may order interim measures *ex officio* if there is a risk of serious and irreparable damage to competition.
- (2) Orders pursuant to paragraph 1 shall be limited in time. The time period may be extended. It should not normally exceed one year in total.

§ 32b

Commitments

- (1) Where, in the course of proceedings under § 32, undertakings offer to enter into commitments which are capable of dispelling the concerns communicated to them by the cartel authority upon preliminary assessment, the cartel 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 of paragraph 2 the cartel authority will not make use of its powers under §§ 32 and 32a. It may be limited in time.
- (2) The cartel authority may rescind the decision pursuant to paragraph 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 do not meet their commitments; or
 3. the decision was based on incomplete, incorrect or misleading information provided by the parties.

§ 32c

No Grounds for Action

The cartel authority may decide that there are no grounds for it to take any action if, on the basis of the information available to it, the conditions for a prohibition pursuant to §§ 1, 19 to 21 and 29, Article 81 paragraph 1 or Article 82 of the EC Treaty are not satisfied. The decision shall state that, subject to new findings the cartel authority will not make use of its powers under §§ 32 and 32a. It does not include an exemption from a prohibition within the meaning of sentence 1.

§ 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 § 2(1) or with Article 81(3) of the EC Treaty and which arise in a domestic territory bearing all the characteristics of a distinct geographic market, the cartel authority may withdraw the benefit of the block exemption for that territory.

§ 32 e
**Investigations into Sectors of the Economy
and into 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 or – across sectors - into a particular type of agreement.
- (2) In the course of this investigation the Bundeskartellamt and the supreme *Land* authorities may conduct the inquiries necessary for the application of this Act or of Articles 81 or 82 of the EC Treaty. 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 paragraph 1 and may invite third parties to comment.
- (4) §§ 57 and 59 to 62 shall apply *mutatis mutandis*.

§ 33

Claims for Injunctions, Liability for Damages

- (1) Whoever violates a provision of this Act, Articles 81 or 82 of the EC Treaty or a decision taken by the cartel authority shall be obliged to the person affected to remediate and, in case of danger of recurrence, to refrain from his conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons are competitors or other market participants impaired by the infringement.
- (2) The claims pursuant to paragraph 1 may also be asserted by associations with legal capacity for the promotion of commercial or independent professional interests, provided they have a significant number of member undertakings selling goods or services of a similar or related type on the same market, provided they are able, in particular with regard to their human, material and financial resources, to actually exercise their statutory functions of pursuing commercial or independent professional interests, and provided the infringement affects the interests of their members.
- (3) Whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom. If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service. The assessment of the size of the damage pursuant to § 287 of the Code of Civil Procedure [*Zivilprozessordnung*] may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the occurrence of the damage, the undertaking shall pay interest on its obligations to pay money pursuant to sentence 1. §§ 288 and 289 sentence 1 of the Civil Code shall apply *mutatis mutandis*.
- (4) Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding

was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority - or court acting as such - in another Member State of the European Community. The same applies to such findings in final judgments resulting from appeals against decisions pursuant to sentence 1. Pursuant to Article 16(1), sentence 4 of Regulation (EC) No. 1/2003 this obligation applies without prejudice to the rights and obligations under Article 234 of the EC Treaty.

- (5) The limitation period of a claim for damages pursuant to paragraph 3 shall be suspended if proceedings are initiated by the cartel authority for infringement within the meaning of paragraph 1, or by the Commission of the European Community or the competition authority of another Member State of the European Community for infringement of Article 81 or 82 of the EC Treaty. § 204(2) of the Civil Code shall apply *mutatis mutandis*.

§ 34

Skimming off of Benefits by the Cartel Authority

- (1) If an undertaking has intentionally or negligently violated a provision of this Act, Article 81 or 82 of the EC Treaty or a decision of the cartel authority and thereby gained an economic benefit, the cartel authority may order the skimming off of the economic benefit and require the undertaking to pay a corresponding amount of money.
- (2) Paragraph 1 shall not apply if the economic benefit has been skimmed off by the payment of damages, or the imposition of a fine, or an order of forfeiture. To the extent payments pursuant to sentence 1 are made by the undertaking only after the skimming off of benefits, the undertaking shall be reimbursed its funds in the amount of the proven payments.

- (3) If the skimming off 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 be omitted 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.
- (5) The skimming off of benefits may be ordered only within a time limit of up to five years from termination of the infringement, and only for a time period not exceeding five years. § 81(9) shall apply *mutatis mutandis*.

§ 34a

Skimming off of Benefits by Associations

- (1) Whoever intentionally commits an infringement within the meaning of § 34(1) and thereby gains an economic benefit at the expense of multiple purchasers or suppliers may be required by those entitled to an injunction under § 33(2) to surrender the economic benefit to the federal budget, to the extent that the cartel authority does not order the skimming off of the economic benefit by the imposition of a fine, by forfeiture or pursuant to § 34(1).
- (2) Payments made by the undertaking because of the infringement shall be deducted from the claim. § 34(2) sentence 2 shall apply *mutatis mutandis*.
- (3) If several creditors claim the skimming off of benefits, §§ 428 to 430 of the Civil Code shall apply *mutatis mutandis*.
- (4) The creditors shall supply the Bundeskartellamt with information about the assertion of claims pursuant to paragraph 1. They may demand reimbursement from the Bundeskartellamt for the expenses necessary for asserting the claim, to the extent they are unable to receive reimbursement from the party liable. The claim for reimbursement is

limited to the amount of the economic benefit paid to the federal budget.

- (5) § 33(4) and (5) shall apply *mutatis mutandis*.

SEVENTH CHAPTER

Control of Concentrations

§ 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 25 million and that of another undertaking concerned was more than EUR 5 million.
- (2) Paragraph 1 shall not apply:
1. where an undertaking which is not dependent within the meaning of § 36(2) and had a worldwide turnover of less than EUR 10 million in the last business year, merges with another undertaking, or
 2. as far as a market is concerned on which goods or commercial services have been offered for at least five years and which had a sales volume of less than EUR 15 million in the last calendar year.

Where the concentration restricts the competition in the field of publishing, producing or distributing newspapers or magazines or parts thereof, only sentence 1 no. 2 shall be applied.

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

§ 36

Principles for the Appraisal of Concentrations

- (1) A concentration which is expected to create or strengthen a dominant position shall be prohibited by the Bundeskartellamt unless the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the disadvantages of dominance.
- (2) If an undertaking concerned is a dependent or dominant undertaking within the meaning of § 17 of the Stock Corporation Act [*Aktiengesetz*] or a group company within the meaning of § 18 of the Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. Where several undertakings act together in such a way that they can jointly exercise a dominant influence on another undertaking, each of them shall be regarded as dominant.
- (3) If a person or association of persons which is not an undertaking holds a majority interest in an undertaking, it shall be regarded as an undertaking.

§ 37
Concentration

- (1) A concentration shall arise in the following cases:
1. acquisition of all or of a substantial part of the assets of another undertaking;
 2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking having regard to all factual and legal circumstances, in particular through:
 - a) ownership or the rights to use all or parts of the assets of the undertaking,
 - b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking;
 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 percent or
 - b) 25 percent

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 be deemed to also constitute a concentration among 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 competitively significant influence on another undertaking.
- (2) A concentration shall also arise 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 to constitute 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 substantiated that the resale was not reasonably possible within this period.

§ 38

Calculation of Turnover and Market Shares

- (1) § 277(1) of the Commercial Code [*Handelsgesetzbuch*] shall apply to the calculation of turnover. Revenues from the supply of goods and services between affiliated undertakings (intra-group revenues) as well as excise taxes shall not be taken into account.
- (2) For trade in goods, only three quarters of the turnover shall be taken into account.
- (3) For the publication, production and distribution of newspapers, magazines and parts thereof and for the production, distribution and broadcasting of radio and

television programs and the sale of radio and television advertising time, the twenty-fold amount of the turnover shall be taken into account.

- (4) In the case of credit institutions, financial institutions and building and loan associations, the turnover shall be replaced by the total amount of the proceeds referred to in § 34(2) sentence 1 no. 1 point (a-e) of the Regulation on the Rendering of Accounts of Credit Institutions [*Verordnung über die Rechnungslegung der Kreditinstitute*] of 10 February 1992 (*Federal Law Gazette [Bundesgesetzblatt]* I p. 203), minus value added tax and other taxes assessed directly on the basis of such proceeds. In the case of insurance undertakings, the premium income in the last completed business year shall be relevant. Premium income shall be income from insurance and reinsurance business including the portions ceded for cover.
- (5) In the case of an acquisition of the assets of another undertaking, the calculation of the market shares and the turnover of the seller shall take into account only the assets sold.

§ 39

Obligation to Notify

- (1) Concentrations shall be notified to the Bundeskartellamt pursuant to paragraphs 2 and 3 prior to being put into effect.
- (2) The obligation to notify shall be:
 1. upon the undertakings participating in the concentration,
 2. in the cases of § 37(1) no. 1 and 3, also upon the seller.
- (3) The notification shall indicate the form of the concentration. Furthermore, the notification shall contain the following particulars with respect to every undertaking concerned:

1. name or other designation and place of business or registered seat;
2. type of business;
3. the turnover in Germany, in the European Union and worldwide; instead of the turnover, the total amount of the proceeds within the meaning of § 38(4) shall be indicated in the case of credit institutions, financial institutions and building and loan associations, and the premium income in the case of insurance undertakings;
4. the market shares, including the bases for their calculation or estimate, if the combined shares of the undertakings concerned amount to at least 20 per cent in the scope 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 within the scope of application of this Act.

In the cases of § 37(1) no. 1 or 3, the particulars pursuant to sentence 2 no. 1 and 6 shall also be given with respect to the seller. If an undertaking concerned is an affiliated undertaking, the particulars required under sentence 2 no. 1 and 2 shall also be given with respect to the affiliated undertakings, and the particulars required under sentence 2 no. 3 and 4 with respect to each undertaking participating in the concentration and with respect to the entirety of all undertakings affiliated to it; intra-group relationships as well as control relationships among and interests held by the affiliated undertakings shall be reported. The notification shall not contain or use any incorrect or incomplete information in order to cause the cartel authority to refrain from issuing a prohibition pursuant to § 36(1) or from issuing a notice pursuant to § 40(1).

- (4) A notification shall not be required if the Commission of the European Communities has referred a concentration to the Bundeskartellamt and if the particulars required under paragraph 3 have 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 particulars pursuant to paragraph 3 are available in German.
- (5) The Bundeskartellamt may request from each undertaking concerned information on market shares, including the bases for their calculation or estimate, and on the turnover achieved by the undertaking in the last business year preceding the concentration in a certain kind of goods or commercial services.
- (6) The undertakings participating in the concentration shall notify the Bundeskartellamt without delay after having put the concentration into effect.

§ 40

Procedure of Control of Concentrations

- (1) The Bundeskartellamt shall not prohibit a concentration notified to it unless it informs the notifying undertakings within a period of one month from receipt of the complete notification that it has initiated an examination of the concentration (main examination proceedings). The main examination proceedings should be initiated if a further examination of the concentration is necessary.
- (2) In the main examination proceedings, the Bundeskartellamt shall decide by decision whether the concentration is prohibited or cleared. If the decision is not served upon the notifying undertakings within a period of four months from receipt of the complete notification, the concentration is deemed to be cleared. The parties involved in the proceedings have to be informed without delay of the date when 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 paragraph 1 or from prohibiting the concentration because of incorrect particulars or because of information pursuant to § 39(5) or § 59 not having been provided in time;
 3. contrary to § 39(3) sentence 2 no. 6, a person authorised to accept service in Germany is no longer named.
- (3) The clearance may be granted subject to conditions and obligations. These shall not aim at subjecting the conduct of the undertakings concerned to a continued control.
- (3a) The clearance may be revoked or modified if it is based on incorrect particulars, 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-performance of an obligation § 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 opportunity to comment.
- (5) In the cases of § 39(4) sentence 1 the time limits referred to in paragraphs 1 and 2 sentence 2 shall begin to run when the referral decision is received by the Bundeskartellamt and the necessary particulars pursuant to § 39(3) are available in German.
- (6) If the clearance by the Bundeskartellamt is repealed in whole or in part by a final and binding ruling, the time limit referred to in paragraph 2 sentence 2 shall begin to run anew at the time at which the ruling becomes final and binding.

§ 41

Prohibition of Putting a Concentration into Effect, Dissolution

- (1) The undertakings shall not, before the expiry of the time limit referred to in § 40(1) sentence 1 and (2) sentence 2, put into effect a concentration not cleared by the Bundeskartellamt, nor participate in putting into effect such a concentration. Legal transactions violating this prohibition shall be of no effect. This shall not apply to real estate agreements once they have become legally valid by entry into the cadastral register and to agreements on the transformation, integration or formation of an undertaking and to enterprise agreements within the meaning of §§ 291 and 292 of the Stock Corporation Act, once they have become legally valid by entry into the appropriate register.
- (2) The Bundeskartellamt may, upon application, grant exemptions from the prohibition of putting a concentration into effect if the undertakings concerned put forward important reasons for this, in particular to prevent serious damage to a participating undertaking 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. § 40(3a) shall apply *mutatis mutandis*.
- (3) A concentration which has been put into effect and which fulfils the conditions for prohibition pursuant to § 36(1) shall be dissolved unless the Federal Minister of Economics and Technology authorises the concentration pursuant to § 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 former situation.
- (4) To enforce its order, the Bundeskartellamt may in particular:
 1. [abolished]
 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.

§ 42

Ministerial Authorisation

- (1) The Federal Minister of Economics and Technology shall, upon application, authorise a concentration prohibited by the Bundeskartellamt if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest. In this context the competitiveness of the participating undertakings in markets outside the scope 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.
- (2) Authorisation may be granted subject to conditions and obligations. § 40(3) and (3a) shall apply *mutatis mutandis*.
- (3) The application shall be submitted in writing to the Federal Ministry of Economics and Technology within a period of one month from service of the prohibition. If the prohibition is appealed, the period shall run from the date when the prohibition becomes final.
- (4) The Federal Minister of Economics and Technology should decide on the application within four months. Prior to the decision, 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.

§ 43
Publications

- (1) The initiation of the main examination proceedings by the Bundeskartellamt pursuant to § 40 (1) sentence 1 and the application for a ministerial authorisation shall be published without delay in the Federal Gazette or in the electronic version of the Federal Gazette.
- (2) The following shall be published in the Federal Gazette or in the electronic version of the Federal Gazette:
 1. the decision issued by the Bundeskartellamt pursuant to § 40(2),
 2. the ministerial authorisation, its refusal and modification,
 3. the withdrawal or revocation of the clearance by the Bundeskartellamt or of the ministerial authorisation,
 4. the dissolution of a concentration and the other decisions taken by the Bundeskartellamt pursuant to § 41(3) and (4).
- (3) Publications under paragraphs 1 and 2 shall in each case contain the particulars pursuant to § 39(3) sentence 1 and sentence 2, nos. 1 and 2.

EIGHTH CHAPTER

Monopolies Commission

§ 44

Functions

- (1) Every two years, the Monopolies Commission [*Monopolkommission*] shall prepare an opinion assessing the situation and the foreseeable development of business concentration in the Federal Republic of Germany, evaluating the application of the provisions concerning the control of concentrations, and commenting on other topical issues of competition policy. The opinion should cover the situation in the last two full calendar years and be completed by June 30 of the following year. The Federal Government may instruct the Monopolies Commission to prepare further opinions. Moreover, the Monopolies Commission may deliver opinions at its discretion.
- (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 opinions to the Federal Government. The Federal Government shall without delay submit opinions pursuant to paragraph 1 sentence 1 to the legislative bodies and present its views and comments within a reasonable period. The opinions shall be published by the Monopolies Commission. In the case of opinions pursuant to paragraph 1 sentence 1, this shall be done at the time at which they are submitted by the Federal Government to the legislative body.

§ 45

Members

- (1) The Monopolies Commission shall consist of five members who shall have special knowledge and experience in the fields of economics, business administration, social policy, technology or commercial law. The Monopolies Commission shall elect a chairman 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 are 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 shall 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 shall neither represent nor be bound by a permanent employment or service relationship to an industry association or an employers' or employees' organisation. Furthermore, they shall not have held such a position during the year preceding their appointment to the Monopolies Commission.

§ 46

Decisions, Organisation, Rights and Duties of the Members

- (1) Decisions of the Monopolies Commission shall require the agreement 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 required for the proper fulfilment of its functions the Monopolies Commission shall be granted access to the files maintained by the cartel authority, including access to operating and business secrets and personal data.
- (3) The members of the Monopolies Commission and the staff of the secretariat shall be obliged to keep secret the deliberations and the documents designated as confidential by the Monopolies Commission. The secrecy obligation shall relate also to information given to the Monopolies Commission and designated as confidential, or obtained pursuant to paragraph 2a.
- (4) The members of the Monopolies Commission shall receive a lump-sum compensation and they shall be reimbursed for their travel expenses. These shall be determined by the Federal Ministry of Economics and Technology in agreement with the Federal Ministry of the Interior. The costs of the Monopolies Commission shall be borne by the Federal Republic.

§ 47

Transmission of Statistical Data

- (1) For the purpose of preparing opinions on the development of business concentration, the Monopolies Commission may be provided by the Federal Statistical Office [*Statistisches Bundesamt*] with such summarised data from the business statistics kept by it (statistics on the manufacturing industry, crafts, foreign trade, taxes, transport, statistics on wholesale and retail trade, the hotel and restaurant business and service sector) as 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 applies *mutatis mutandis* to the provision of information about the percentage shares of the largest undertakings. For collation purposes the Monopolies Commission shall provide the Federal Statistical Office with the names and addresses of the companies, their affiliation according to company group and their identification codes. The summarised data shall not concern fewer than three groups of undertakings, undertakings, businesses or divisions of undertakings. The combination or time proximity with other information provided or generally accessible shall not allow conclusions concerning summarised information with regard to less than three groups of undertakings, undertakings, businesses or divisions of undertakings. This shall apply *mutatis mutandis* to the calculation of summarised measures of concentration, in particular Herfindahl indexes and Gini coefficients. The *Land* statistical offices shall provide the Federal Statistical Office with the requisite particular data.

- (2) Persons who are to receive summarised data pursuant to paragraph 1 shall, prior to the transmission, be specifically committed to secrecy unless they hold a public office or have special obligations in the public service. § 1 (2), (3) and (4) no. 2 of the Act on the Obligations of Public Servants [*Verpflichtungsgesetz*] shall apply *mutatis mutandis*. Persons specially

committed pursuant to sentence 1 shall, for the purpose of the application of the provisions of the Penal Code concerning the violation of personal secrets (§ 203 (2), (4), (5); §§ 204, 205) and official secrets (§ 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 paragraph 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 committed pursuant to paragraph 2 sentence 1 will receive summarised data.
- (5) The transmissions shall be recorded in accordance with § 16(9) of the Federal Statistics Act. The records shall be kept for at least five years.
- (6) When the business statistics mentioned in paragraph 1 are compiled, the undertakings which are questioned shall be informed in writing that pursuant to paragraph 1 the summarised data may be transmitted to the Monopolies Commission.

PART II

Cartel Authorities

FIRST CHAPTER

General Provisions

§ 48

Competence

- (1) The cartel authorities are the Bundeskartellamt, the Federal Ministry of Economics and Technology, 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 cartel authority, the Bundeskartellamt shall exercise the functions and powers assigned to the cartel authority by 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.

§ 49

Bundeskartellamt and Supreme *Land* Authority

- (1) If the Bundeskartellamt institutes proceedings or conducts investigations, it shall at the same time 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 at the same time inform the Bundeskartellamt.

- (2) The supreme *Land* authority shall refer a matter to the Bundeskartellamt if the Bundeskartellamt is competent pursuant to § 48(2) sentence 1. The Bundeskartellamt shall refer a matter to the supreme *Land* authority if that authority is competent pursuant to § 48(2) sentence 2.
- (3) Upon application by the Bundeskartellamt, the supreme *Land* authority may refer to the Bundeskartellamt a matter falling under its competence pursuant to § 48(2) sentence 2, provided this is useful in view of the circumstances of the matter. Upon referral, the Bundeskartellamt shall become the competent cartel authority.
- (4) Upon application by the supreme *Land* authority, the Bundeskartellamt may refer to the supreme *Land* authority a matter falling under its competence pursuant to § 48(2) sentence 1, provided this is useful in view of the circumstances of the matter. Upon referral, the supreme *Land* authority shall become the competent cartel 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 it within a time limit to be set by the Bundeskartellamt.

§ 50

Implementation of European Law

- (1) To the extent they are competent under §§ 48 and 49, the Bundeskartellamt and the supreme *Land* authorities shall be the competition authorities responsible for the application of Articles 81 and 82 of the EC treaty within the meaning of Article 35(1) of the Council Regulation (EC) No 1/2003.
- (2) If the supreme *Land* authorities apply Articles 81 and 82 of the EC Treaty, all contacts with the Commission of the European Community or the competition authorities of other Member States of the European Community shall occur via the Bundeskartellamt. The Bundeskartellamt may provide guidance to the supreme *Land* authorities regarding the implementation of such contacts. In such cases, the Bundeskartellamt shall also attend as representative the

Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14(2) sentence 1 and (7) of Regulation (EC) No 1/2003.

- (3) The Bundeskartellamt shall be the exclusively competent competition authority for the cooperation in proceedings of the Commission of the European Community or in proceedings of the competition authorities of other Member States of the European Community for the application of Articles 81 and 82 of the EC Treaty. The procedural provisions which are relevant for the application of this Act shall apply.
- (4) The Bundeskartellamt may allow officials of the competition authority of a Member State of the European Community, as well as other accompanying persons authorized by such authority, to accompany its officials at inspections pursuant to Article 22(1) of Regulation No 1/2003.
- (5) In cases other than those falling under paragraphs 1 to 4, the Bundeskartellamt shall exercise the functions assigned to the authorities of the Member States of the European Community in Articles 84 and 85 of the EC Treaty as well as in the Regulations pursuant to Article 83 of the EC Treaty, also in conjunction with other enabling provisions of the EC Treaty. Paragraph 3 sentence 2 shall apply *mutatis mutandis* .

§ 50a

Cooperation within the Network of European Competition Authorities

- (1) Article 12(1) of Regulation No 1/2003 authorizes the cartel authority to provide, for the purpose of applying Articles 81 and 82 of the EC Treaty, the Commission of the European Community and the competition authorities of the other Member States of the European Community with any matter of fact or of law, including confidential information and in particular operating and business secrets, to transmit to them appropriate documents and data, to request these competition authorities to transmit such information, and to receive and use in evidence such information. § 50(2) shall apply *mutatis mutandis*.
- (2) The cartel authority shall use in evidence the information received only for the purpose of applying Article 81 or Article 82 of the EC Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, information exchanged under paragraph 1 may also be used for the application of this Act if provisions of this Act are applied in accordance with Article 12(2) sentence 2 of Regulation (EC) No 1/2003.
- (3) Information received by the cartel authority pursuant to paragraph 1 can only be used in evidence for the purpose of imposing sanctions on natural persons where the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the EC Treaty. Where the conditions set out in sentence 1 are not fulfilled, a use in evidence shall also be possible if the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the rules of the receiving cartel authority. The prohibition to use evidence pursuant to sentence 1 shall not exclude using the evidence against legal persons or associations of persons. However, compliance with prohibitions to use evidence which are based on constitutional law remains unaffected.

§ 50b

Other Cooperation with Foreign Competition Authorities

- (1) The Bundeskartellamt [*Federal Cartel Office*] shall have the powers pursuant to § 50a(1) also in other cases in which it cooperates with the Commission of the European Community or with the competition authorities of other States for the purpose of applying provisions of competition law.
- (2) The Bundeskartellamt shall forward information pursuant to § 50a (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 in respect of the subject-matter for which it was collected by the Bundeskartellamt,
 2. respects the protection of confidential information and will transmit such information to third parties only if the Bundeskartellamt agrees to such transmission; this shall also apply to the disclosure of confidential information in legal and administrative procedures.

Confidential information, including operating and business secrets, resulting from merger control proceedings shall only be transmitted by the Bundeskartellamt with the consent of the undertaking which has provided this information.

- (3) Provisions concerning legal cooperation in criminal matters as well as Treaties on administrative and legal cooperation shall remain unaffected.

§ 50c

Cooperation of Authorities

- (1) Irrespective of the form of procedure chosen in a given case the cartel authorities and regulatory authorities may exchange among themselves information including personal data and operating and business secrets, to the

extent this is necessary for the performance of their respective competition law functions, and use it in their proceedings. Prohibitions to make use of evidence shall remain unaffected.

- (2) In the performance of their functions the cartel authorities shall cooperate with the Federal Financial Supervisory Authority, the German Central Bank and the Media Institutions of the *Laender*. The authorities mentioned in sentence 1 may, upon request, exchange information among themselves, to the extent this is necessary for the performance of their respective functions. This shall not apply to
1. confidential information, in particular operating and business secrets, as well as
 2. information obtained pursuant to § 50a or pursuant to Article 12 of Regulation (EC) No 1/2003.

Sentences 2 and 3 no. 1 shall not affect the provisions on the cooperation with other authorities of the Securities Acquisition and Takeover Act [*Wertpapiererwerbs- und Übernahmegesetz*] and of the Securities Trade Act [*Gesetz über den Wertpapierhandel*].

SECOND CHAPTER

Bundeskartellamt [*Federal Cartel Office*]

§ 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 Economics and Technology.

- (2) Decisions of the Bundeskartellamt shall be made by decision divisions established in accordance with instructions to be issued by the Federal Ministry of Economics and Technology. As for other matters, the President shall determine the allocation and handling of business in the Bundeskartellamt by rules of procedure requiring confirmation by the Federal Ministry of Economics and Technology.
- (3) The decisions of the decision divisions shall be made by a chairman and two other members.
- (4) The chairman and the other members of the decision divisions shall be civil servants appointed for life and shall be qualified to serve as judges or senior civil servants.
- (5) The members of the Bundeskartellamt shall 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 trade and industry association or professional organisation.

§ 52

Publication of General Instructions

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

§ 53

Report on Activities

- (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 of

Economics and Technology pursuant to § 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 comments.

PART III

Procedure

FIRST CHAPTER

Administrative Matters

I. Proceedings Before Cartel Authorities

§ 54

Institution of the Proceedings; Parties

- (1) The cartel authority shall, acting on its own initiative or upon request, institute proceedings. If so requested, the cartel authority may, acting on its own initiative, institute proceedings for the protection of a complainant.
- (2) Parties to the proceedings before the cartel authority are:
 1. those who have applied for the institution of proceedings;
 2. cartels, undertakings, trade and industry 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 by the cartel authority to the proceedings; the interests of consumer advice centres and other consumer associations supported by public funds are substantially affected also in cases in which the decision has effects on numerous consumers and in which therefore the interests of consumers in general are substantially affected.
 4. in the cases of § 37 (1) no. 1 or 3, also the seller.
- (3) The Bundeskartellamt shall also be a party to proceedings before the supreme *Land* authorities.

§ 55

Preliminary Decision on Jurisdiction

- (1) If a party pleads that the cartel authority lacks territorial or subject matter jurisdiction, the cartel 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 suspensive effect.
- (2) If a party fails to plead that the cartel authority lacks territorial or subject matter jurisdiction, an appeal cannot be based upon the contention that the cartel authority erroneously assumed it had jurisdiction.

§ 56

Opportunity to Comment, Hearing

- (1) The cartel authority shall give the parties an opportunity to comment.
- (2) In appropriate cases, the cartel authority may give representatives of the business circles affected by the proceedings an opportunity to comment.

- (3) The cartel authority may, acting *ex officio* or upon request of a party, hold a public hearing. The public shall be excluded from the hearing or from a part thereof if it is to be feared that public order, in particular state security or important operating or business secrets may be endangered. In the cases of § 42 the Federal Ministry of Economics and Technology shall carry out a public hearing; with the consent of the parties a decision may be taken without a hearing.
- (4) §§ 45 and 46 of the Administrative Procedure Act shall be applied.

§ 57

Investigations, Taking of Evidence

- (1) The cartel authority may conduct any investigations and collect any evidence required.
- (2) §§ 372 (1), §§ 376, 377, 378, 380 to 387, 390, 395 to 397, 398 (1), §§ 401, 402, 404, 404a, 406 to 409, 411 to 414 of the Code of Civil Procedure shall apply *mutatis mutandis* to the taking of evidence by inspection, testimony of witnesses, and experts; detention shall not be ordered. The Court of Appeal [*Oberlandesgericht*] shall decide on appeals.
- (3) The testimony of witnesses should be recorded, and the record signed by the investigating member of the cartel authority; if a recording clerk attends, he shall also sign. The records 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 for his approval or be presented to be read by himself. 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 paragraphs 3 and 4 shall apply *mutatis mutandis* to the questioning of experts.

- (6) The cartel authority may request the Local Court [*Amtsgericht*] to 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 to be administered.

§ 58

Seizure

- (1) The cartel authority may seize objects which may be of importance as evidence in the investigation. The person affected by the seizure shall be informed thereof without delay.
- (2) Within three days of the seizure, the cartel authority shall seek judicial confirmation by the Local Court in whose district the seizure took place, if neither the person affected nor any relative of legal age was present at the seizure or if the person affected or, in his absence, a relative of legal age explicitly objected to the seizure.
- (3) The person affected may at any time request judicial review of the seizure. He shall be informed of this right. The court having jurisdiction under paragraph 2 shall rule on the request.
- (4) The court decision may be appealed. §§ 306 to 310 and 311a of the Code of Criminal Procedure shall apply *mutatis mutandis*.

§ 59

Requests for Information

- (1) To the extent necessary to perform the functions assigned to the cartel authority by this Act, the cartel authority may, until its decisions enter into binding force:

1. request from undertakings and associations of undertakings the disclosure of information regarding their economic situation, as well as the surrender of documents; this shall also include general market surveys which serve the purpose of evaluating or analysing the conditions of competition or market situation and are in the possession of the undertaking or the association of undertakings;
2. request from undertakings and associations of undertakings the disclosure of information on the economic situation of undertakings associated with them pursuant to § 36(2), as well as the surrender of documents of these undertakings, as far as this information is at their disposal or as far as existing legal relations enable them to obtain the requested information about the associated undertakings;
3. inspect and examine business documents of undertakings and associations of undertakings on their premises during normal business hours.

Sentence 1 no. 1 and 3 shall apply *mutatis mutandis* to trade and industry associations and professional organisations with respect to their activities, by-laws, decisions, as well as the number and names of the members affected by the decisions.

- (2) The owners of undertakings and their representatives, and in the case of legal persons, partnerships or associations without legal capacity the persons designated as representatives by law or statutes, shall be obliged to surrender the documents requested, make the requested disclosure of information, render the business documents available for inspection and examination, and allow the examination of these business documents as well as access to offices and business premises.
- (3) Persons entrusted by the cartel authority to carry out an examination may enter the offices of undertakings and associations of undertakings. The fundamental right under Article 13 of the Basic Law [*Grundgesetz*] is restricted to this extent.

- (4) Searches may be made only by order of the Local Court judge in whose district the search is to be made. Searches are permissible if it is to be assumed that documents are located in the relevant premises which may be inspected and/or examined, and the surrender of which may be requested, by the cartel authority pursuant to paragraph 1. The fundamental right to the inviolability of the home (Article 13(1) of the Basic Law) is restricted to this extent. §§ 306 to 310 and 311a of the Code of Criminal Procedure shall apply *mutatis mutandis* to appeals from such orders. If there is imminent danger, the persons referred to in paragraph 3 may conduct the necessary search during business hours without judicial order. A record of the search and its essential results shall be prepared on the spot, showing, if no judicial order was issued, also the facts which led to the assumption that there would be imminent danger.
- (5) Persons obliged to provide information may refuse to answer questions if the answers would expose them or their relatives referred to in § 383(1) no. 1 to 3 of the Code of Civil Procedure to the risk of criminal prosecution or of proceedings under the Administrative Offences Act [*Gesetz über Ordnungswidrigkeiten*].
- (6) Requests for information made by the Federal Ministry of Economics and Technology or the supreme *Land* authority shall be made by written individual order, those of the Bundeskartellamt by decision. The legal basis, the subject matter and the purpose of the request shall be stated therein and an appropriate time limit shall be fixed for providing the information.
- (7) Examinations shall be ordered by the Federal Ministry of Economics and Technology or the supreme *Land* authority by written individual order, and by the Bundeskartellamt by decision made with the consent of its President. The order or decision shall state the time, the legal basis, the subject matter and the purpose of the examination.

§ 60

Preliminary Injunctions

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

1. a decision pursuant to § 40(2), § 41(3) or a revocation or modification of a clearance pursuant to § 40(3a),
2. an authorisation pursuant to § 42(1), its revocation or modification pursuant to § 42(2) sentence 2,
3. a decision pursuant to § 26(4), § 30(3) or § 34(1).

§ 61

Completion of the Proceedings, Reasons for the Decision, Service

- (1) Decisions of the cartel authority shall contain a statement of reasons and be served together with advice as to the available legal remedies upon the parties pursuant to the provisions of the Act on Service in Administrative Procedure [Verwaltungszustellungsgesetz]. § 5(4) of the Act on Service in Administrative Procedure and § 178(1) no. 2 of the Code of Civil Procedure shall apply *mutatis mutandis* to undertakings and associations of undertakings as well as to contracting entities within the meaning of § 98. Decisions directed at undertakings with their registered seat outside the scope of application of this Act shall be served by the cartel authority upon the person who was named by the undertaking to the Bundeskartellamt as authorised to accept service. If the undertaking has not named any person authorised to accept service, the cartel 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 paragraph 1, the parties shall be informed in writing of the completion of the proceedings.

§ 62

Publication of Decisions

Decisions of the cartel authority pursuant to § 30(3), §§ 32 to 32b and § 32d shall be published in the Federal Gazette or in the electronic version of the Federal Gazette. Decisions pursuant to § 32c may be published by the cartel authority.

II. Appeals

§ 63

Admissibility; Jurisdiction

- (1) Decisions of the cartel authority may be appealed. An appeal may be based also upon new facts and evidence.
- (2) The appeal shall be open to the parties to the proceedings before the cartel authority (§ 54(2) and (3)).
- (3) An appeal may also be made if the cartel authority fails to take a decision requested in an application and the applicant claims to be entitled to demand such a decision. If the cartel authority without sufficient reason has failed to rule within a reasonable period of time on an application to take a decision, 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 made exclusively by the Court of Appeal for the district in which the cartel authority has its seat and, in the cases of §§ 35 to 42, exclusively by the Court of Appeal for the district in which the

Bundeskartellamt has its seat, also if the appeal is directed against a decision of the Federal Ministry of Economics and Technology. § 36 of the Code of Civil Procedure shall apply *mutatis mutandis*.

§ 64

Suspensive Effect

- (1) The appeal has suspensive effect insofar as the decision being appealed:
 1. [abolished]
 2. is a decision taken pursuant to § 26(4), § 30(3) or § 34(1), or
 3. revokes or modifies an authorisation pursuant to § 42(2) sentence 2.
- (2) If an appeal is made against a decision to issue a preliminary injunction pursuant to § 60, the appellate court may order that the appealed decision or a part thereof shall enter into force only upon completion of the appeal proceedings or upon the furnishing of security. Such order may be repealed or amended at any time.
- (3) § 60 shall apply *mutatis mutandis* to proceedings before the appellate court. This shall not apply in the cases of § 65.

§ 65

Order of Immediate Enforcement

- (1) In the cases of § 64(1), the cartel authority may order the immediate enforcement of the decision if this is required by the public interest or by the prevailing interest of a party.
- (2) Orders under paragraph 1 may be issued already before the appeal is filed.

- (3) The appellate court may, upon application, entirely or partly restore the suspensive effect of the appeal if:
1. the conditions for issuing an order under paragraph 1 were not satisfied or are no longer satisfied, or
 2. there are serious doubts as to the legality of the appealed decision, or
 3. the enforcement would result for the party concerned in undue hardship not demanded by prevailing public interests.

In the cases where the appeal has no suspensive effect, the cartel authority may suspend enforcement; such suspension should be made if the conditions of sentence 1 no. 3 are satisfied. The appellate court may, upon application, order the suspensive effect in full or in part if the conditions of sentence 1 no. 2 or 3 are satisfied. If a third party has lodged an appeal against a decision pursuant to § 40(2), the application by the third party for an order pursuant to sentence 3 is only admissible if the third party claims that its rights are infringed by the decision.

- (4) An application under paragraph 3 sentence 1 or 3 shall be admissible already prior to the appeal being 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 may be made contingent upon the furnishing of security or upon other conditions. A time limit may also be set.
- (5) Decisions on applications pursuant to paragraph 3 may be amended or repealed at any time.

§ 66

Time Limits and Formal Requirements

- (1) The appeal shall be filed in writing within one month with the cartel authority whose decision is being appealed. That period shall begin upon service of the decision of the cartel authority. If, in the cases of § 36(1), an application is made for authorisation pursuant to § 42, the period for the appeal against the decision of the Bundeskartellamt shall begin upon service of the order issued by the Federal Ministry of Economics and Technology. Receipt of the appeal by the appellate court within the time limit shall be sufficient.
- (2) If no decision is taken on an application (§ 63(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 of paragraph 1 sentence 3, the time limit shall begin upon service of the order issued by the Federal Ministry of Economics and Technology. If such decision is appealed, the time limit shall begin upon the prohibition becoming unappealable. In the case of paragraph 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 shall be signed by a lawyer admitted to practice before a German court; this shall not apply to appeals by the cartel authorities.

§ 67

Parties to the Appeal Proceedings

- (1) The following are parties to the proceedings before the appellate court:
 1. the appellant,
 2. the cartel 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 by the cartel authority to the proceedings.
- (2) If an appeal is directed against a decision issued by a supreme *Land* authority, the Bundeskartellamt shall also be a party to the proceedings.

§ 68

Mandatory Representation by Lawyers

In proceedings before the appellate court the parties shall be represented by a lawyer admitted to practise before a German court. The cartel authority may be represented by a member of the authority.

§ 69

Hearing

- (1) The appellate court shall decide on the appeal on the basis of a hearing; with the consent of the parties, a decision may be taken without a hearing.
- (2) If the parties, having been summoned in time, do not appear at the hearing or are not duly represented, the case may nevertheless be heard and decided.

§ 70

Principle of Investigation

- (1) The appellate court shall, acting on its own initiative, investigate the facts.
- (2) The presiding judge shall endeavour to have formal defects eliminated, unclear motions explained, relevant motions made, insufficient factual information completed, and all declarations essential for ascertaining and assessing the facts 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 record regardless of evidence which has not been produced.
- (4) If a request pursuant to § 59(6) or an order pursuant to § 59(7) is challenged by way of appeal, the cartel authority shall substantiate the factual aspects. § 294(1) of the Code of Civil Procedure shall be applicable. No substantiation shall be required insofar as § 20 presupposes that small or medium-sized enterprises are dependent on undertakings in such a way that sufficient or reasonable alternatives of resorting to other undertakings do not exist.

§ 71

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 proceed differently insofar as, for important reasons, in particular to safeguard operating or business secrets, third parties admitted to the proceedings were not allowed to inspect the files, and the content of the files was not part of the pleadings for these reasons. This shall not apply to such parties admitted to the proceedings who 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 decision of the cartel authority to be inadmissible or unfounded, it shall reverse the decision. If meanwhile the decision has been withdrawn or otherwise become moot, the appellate court shall declare, upon application, that the decision of the cartel authority was inadmissible or unfounded, provided the appellant has a legitimate interest in such a declaration.
- (3) If a decision pursuant to §§ 32 to 32b or § 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 refusal or failure to issue the decision to be inadmissible or unfounded, it shall decree the obligation of the cartel authority to issue the decision applied for.
- (5) The decision shall also be inadmissible or unfounded if the cartel 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 appraisal by the cartel authority of the general economic situation and trends 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 advice as to the available legal remedies.

§ 71a

Relief in Case of Violation of the Right to be Heard

- (1) Upon objection of a party aggrieved by a court decision the proceedings shall be continued if
 1. an appeal or other legal remedy against the decision is not available, and
 2. the court has violated 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 decision.

- (2) The objection shall be raised within two weeks from obtaining knowledge of the violation of the right to be heard; the time at which knowledge was obtained shall be substantiated by prima facie evidence. After the expiration of one year from the announcement of the appealed decision, the objection may no longer be raised. Decisions which are communicated informally are deemed to be announced by the third day after their posting. The objection shall be made in writing or shall be recorded by the clerk of the court the decision of which is appealed. The objection must indicate the decision being appealed and show that the conditions mentioned in paragraph 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 permissible 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 is taken by way of a final decree. The decree should be accompanied by a brief statement of reasons.

- (5) If the objection is founded, the court shall grant relief by continuing the proceedings as far as required by the objection. The proceedings shall be relegated to the state at which they were at 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. § 343 of the Code of Civil Procedure shall apply as regards the judicial pronouncement.
- (6) § 149(1) sentence 2 of the Code of the Administrative Courts [Verwaltungsgerichtsordnung] shall apply *mutatis mutandis*.

§ 72

Inspection of Files

- (1) The parties referred to in § 67(1) no. 1 and 2 and (2) may inspect the court files and may obtain certified and other copies and excerpts at their own expense from the court clerk. § 299(3) of the Code of Civil Procedure shall apply *mutatis mutandis*.
- (2) The inspection of preparatory files, supplementary files, expert opinions and other information shall be allowed only with the consent of the authorities to whom the files belong or who have obtained the information. The cartel authority shall refuse to consent to an inspection of its records if this is necessary for important reasons, in particular to protect operating or business secrets. If inspection is refused or impermissible, the decision may be based on such records only insofar as their content formed part of the pleadings. The appellate court may, after hearing the person 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 operating or business secrets, insofar as such facts or evidence are relevant for the decision, there is no other way to ascertain the facts and, considering all circumstances in the particular case, the significance of the matter in protecting competition outweighs the interests of the person affected in maintaining confidentiality. The decree shall contain a statement of reasons.

In proceedings pursuant to sentence 4, the person affected need not be represented by a lawyer.

- (3) The appellate court may permit the parties referred to in § 67(1) no. 3 to inspect files to the same extent, having heard those to whom the files belong.

§ 73

Application of the Provisions of the Courts Constitution Act and the Code of Civil Procedure

Unless otherwise provided for herein, the following provisions shall apply *mutatis mutandis* in proceedings before the appellate court:

1. the provisions in §§ 169 to 197 of the Courts Constitution Act [*Gerichtsverfassungsgesetz*] regarding admission of the public to proceedings, maintenance of order in court, the language to be used in court cases, judicial deliberation and voting;
2. the provisions of the Code of Civil Procedure regarding the exclusion or challenge of a judge, representation and assistance in court, service of process by the court, summons, dates of hearings and time limits, orders for the personal appearance of the parties, joining of several proceedings, taking of testimony of witnesses and experts, as well as other procedures for taking evidence, and reinstatement of prior conditions.

III. Appeal on Points of Law

§ 74

Leave to Appeal, Absolute Reasons for Appeal

- (1) Appeals on points of law to the Federal Court of Justice [*Bundesgerichtshof*] from decrees issued by the Courts of Appeal shall be admissible if the Court of Appeal grants leave to appeal on points of law.
- (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 court practice.
- (3) The decision of the Court of Appeal 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 complains of, one of the following procedural defects:
 1. if the court having made the decision was not duly constituted,
 2. if a judge participating in the decision was excluded by law from the exercise of 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.

§ 75

Appeal from Refusal to Grant Leave

- (1) The refusal to grant leave to appeal on points of law may be challenged separately by way of an appeal from refusal to grant leave.
- (2) The decision on the appeal from refusal to grant leave 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 from refusal to grant leave shall be filed in writing with the Court of Appeal within one month. The time period shall begin upon service of the decision being appealed.
- (4) § 64(1) and (2), § 66(3), (4) no. 1 and (5), §§ 67, 68, 72 and 73 no. 2 of this Act as well as §§ 192 to 197 of the Courts Constitution Act regarding the deliberation and voting of the court shall apply *mutatis mutandis*. The appellate court shall be competent to issue preliminary injunctions.
- (5) If leave to appeal on points of law is refused, the decision of the Court of Appeal shall become final and binding upon service of the decree of the Federal Court of Justice. If leave to appeal on points of law is granted, the time period for filing the appeal shall begin upon service of the decree of the Federal Court of Justice.

§ 76

Right to Appeal, Formal Requirements and Time Limits

- (1) The cartel authority as well as 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; §§ 546, 547 of the Code of Civil Procedure shall apply *mutatis mutandis*. The appeal on points of law cannot be based upon the contention that the cartel authority erroneously, contrary to § 48, assumed it had jurisdiction.
- (3) The appeal on points of law shall be filed in writing with the Court of Appeal within one month. The time period shall begin upon service of the decision being appealed.
- (4) The Federal Court of Justice shall be bound by the findings of fact 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.
- (5) As for other matters, § 64(1) and (2), § 66 (3), (4) no. 1 and (5), §§ 67 to 69, 71 to 73 shall apply *mutatis mutandis* to appeals on points of law. The appellate court shall be competent to issue preliminary injunctions.

IV. Common Provisions

§ 77

Capacity to Participate in the Proceedings

In addition to natural and legal persons, associations of persons without legal capacity shall have the capacity to participate in proceedings before the cartel authority, in appeal proceedings and in appeal proceedings on points of law.

§ 78

Apportionment and Taxation of Costs

In appeal proceedings and in appeal proceedings on points of law, the court may order that the costs necessary for the due pursuit of the matter shall be reimbursed, in whole or in part, by one of the parties if equity so requires. If a party caused costs to be incurred due to an unfounded appeal or by gross fault, the costs shall be imposed upon that party. As for other matters, the provisions of the Code of Civil Procedure regarding the taxation of costs and the enforcement of court decisions allocating costs shall apply *mutatis mutandis*.

§ 78a

Electronic Transmission of Documents

In appeal proceedings and in appeal proceedings on points of law, § 130a (1) and (3) as well as § 133 (1) sentence 2 of the Code of Civil Procedure shall apply *mutatis mutandis*, provided that the parties pursuant to § 67 may use electronic legal communication services (*elektronischer Rechtsverkehr*). The Federal Government and the *Land* governments shall determine, by ordinance, the time from which electronic documents may be submitted to the courts and the format suitable for the processing thereof. The *Land* governments may delegate this authority, by ordinance, to the *Land* judicial administrations. The permissibility of the electronic form may be restricted to individual courts or proceedings.

§ 79

Ordinances

The details of the proceedings before the cartel authority shall be determined by the Federal Government in ordinances [*Rechtsverordnungen*] requiring the approval of the *Bundesrat* [*Federal Council*].

§ 80

Chargeable Acts

(1) In proceedings before the cartel authority, costs (fees and expenses) shall be imposed to cover administrative effort. The following acts shall be subject to fees (chargeable acts):

1. notifications pursuant to § 39 (1);
2. official acts on the basis of §§ 26, 30 (3), §§ 32 to 32d - also in conjunction with §§ 50 to 50b –, §§ 36, 39, 40, 41, 42 and 60
3. the provision of certified copies from the files of the cartel authority.

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

(2) The amount of the fees shall be determined according to the personnel and material expenses of the cartel authority, account being taken of the economic significance of the subject matter of the chargeable act. However, the fee rates shall not exceed:

1. EUR 50,000 in the cases of §§ 36, 39, 40, 41(3) and (4) and § 42;
2. EUR 25,000 in the cases of §§ 32 and 32b (1), §§ 32d and 41 (2) sentences 1 and 2;
3. EUR 7,500 in the cases of § 32c;
4. EUR 5,000 in the cases of § 26(1) and (2) and § 30(3);
5. EUR 17.50 for the issue of certified copies (paragraph 1 no. 3);
6.
 - a) in the cases of § 40(3a), also in conjunction with § 41(2) sentence 3 and § 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 § 28(1);
 - c) in the cases of § 26(4), the amount for the decision pursuant to § 26(1) no. 4;
 - d) in the cases of §§ 32a and 60, one fifth of the fee in the main proceedings.

If the personnel and material expenses of the cartel authority are unusually high in a particular case, taking into account the economic importance of the chargeable act concerned, the fee may be increased 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 allow for the minor extent of administrative effort 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 of § 42 if the preceding decision of the Bundeskartellamt pursuant to § 36(1) has been reversed.
- (5) If an application is withdrawn before a decision is made thereon, one half of the fee shall be paid. The same shall apply if an application is withdrawn within three months from its receipt by the cartel authority.
- (6) The person liable to pay the costs shall be:
1. in the cases of paragraph 1 sentence 2 no. 1: whoever has submitted a notification;
 2. in the cases of paragraph 1 sentence 2 no. 2: whoever has, by making an application or a notification, caused the cartel authority to act, or the person against whom the cartel authority has issued a decision;
 3. in the cases of paragraph 1 sentence 2 no. 3: whoever caused the copies to be made.
- The person liable to pay the costs is also whoever, by declaration made before the cartel authority or communicated to it, assumed the obligation to pay the costs, or is liable by virtue of the law for the cost owed by another person. Several persons owing costs shall be jointly and severally liable.
- (7) The claim to payment of fees shall become statute-barred four years after the assessment of the fees. The claim to reimbursement of expenditures shall become statute-barred four years after they have arisen.

- (8) The Federal Government is authorised to regulate, by way of ordinances which require the approval of the *Bundesrat*, the fee rates and the collection of the fees from persons liable to pay fees under the provisions in paragraphs 1 to 6, as well as the reimbursement of expenditures for the publications referred to in paragraph 1 sentence 3. For this purpose, it may also make regulations which concern the exemption of legal persons under public law from costs, the statute of limitations, and the collection of costs.
- (9) The Federal Government shall regulate, by way of ordinances requiring the approval of the *Bundesrat*, the details of reimbursement of the costs incurred in proceedings before the cartel authority according to the principles of § 78.

SECOND CHAPTER

Proceedings Concerning Administrative Fines

§ 81

Provisions Concerning Administrative Fines

- (1) An administrative offence is committed by whoever violates the EC Treaty in the version published on 24 December 2002 (OJ EC C 325 p. 33), by intentionally or negligently
1. reaching an agreement, making a decision or concerting practices contrary to Article 81 (1) or
 2. abusing a dominant position contrary to Article 82 sentence 1.
- (2) An administrative offence is committed by whoever intentionally or negligently
1. violates a provision in §§ 1, 19 (1), § 20 (1), also in conjunction with (2) sentence 1, § 20 (3) sentence 1, also in conjunction with sentence 2,

§ 20(4) sentence 1 or (6), § 21(3) or (4), § 29 sentence 1 or § 41(1) sentence 1 concerning the prohibition of an agreement referred to therein, of a decision referred to therein, of a concerted practice, of an abuse of a dominant position, 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, the infliction of an economic disadvantage or the implementation of a concentration,

2. acts contrary to an enforceable order issued pursuant to
 - a) § 30(3), § 32(1), § 32a (1), § 32b (1) sentence 1 or § 41 (4) no. 2, also in conjunction with § 40 (3a) sentence 2, also in conjunction with § 41 (2) sentence 3 or § 42 (2) sentence 2, or § 60 or
 - b) § 39 (5),
3. contrary to § 39 (1), fails to notify a concentration correctly or completely,
4. contrary to § 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 § 40 (3) sentence 1 or § 42 (2) sentence 1, or
6. contrary to § 59 (2), fails to provide information or to provide information correctly, completely or in time, fails to deliver documents or to surrender documents completely or in time, fails to present business documents for the purpose of inspection and examination or to present them completely or in time, or does not tolerate the examination of such business documents or access to offices and business premises.

(3) An administrative offence is committed by whoever

1. contrary to § 21 (1), requests to refuse to supply or purchase,

2. contrary to § 21 (2), threatens or causes a disadvantage or promises or grants an advantage, or
 3. contrary to § 24 (4) sentence 3 or § 39 (3) sentence 5, gives or uses information.
- (4) In the cases of paragraph 1, paragraph 2 no. 1, no. 2 lit. a) and no. 5 and paragraph 3 the administrative offence may be punished by a fine of up to EUR 1 million. Beyond sentence 1 a higher fine may be imposed on an undertaking or an association of undertakings; the fine must not exceed 10 percent of the total turnover of such undertaking or association of undertakings achieved in the business year preceding the decision of the authority. Calculation of the total turnover must be based on the turnover achieved worldwide by all natural and legal persons operating as a single economic entity. The amount of the total turnover may be estimated. In all other cases, the administrative offence may be punished by a fine of up to EUR 100,000. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.
- (5) § 17(4) of the Administrative Offences Act shall be applied to the assessment of the fine, with the proviso that the economic benefit which was derived from the administrative offence may be skimmed off by the fine pursuant to paragraph 4. If the fine is imposed for reasons of punishment only, this must be taken into account in fixing the amount of the fine.
- (6) Interest is payable on fines imposed on legal persons and associations of persons in an order imposing an administrative fine; fines bear interest as of two weeks after service of the order imposing an administrative fine. § 288(1) sentence 2 and § 289 sentence 1 of the Civil Code shall apply *mutatis mutandis*.
- (7) The Bundeskartellamt may lay down general administrative principles on the exercise of its discretionary powers in assessing the fine, in particular in setting the amount of the fine, and also with regard to its cooperation with foreign competition authorities.

- (8) Proceedings for administrative offences as defined in paragraph 1 to 3 shall become statute-barred in accordance with the provisions of the Administrative Offences Act also if the offence is committed by the dissemination of printed material. Administrative offences as defined in paragraph 1, paragraph 2 no. 1 and paragraph 3 shall become statute-barred after five years.
- (9) Where the Commission of the European Community or the competition authorities of other Member States of the European Community, acting *ex officio* or upon a complaint, are engaged in proceedings for an infringement of Article 81 or 82 of the EC Treaty against the same agreement, the same decision or the same practice as the cartel authority, the limitation period for administrative offences pursuant to paragraph 1 shall be interrupted by all acts of these competition authorities corresponding to those under § 33(1) of the Administrative Offences Act.
- (10) The administrative authority within the meaning of § 36(1) no. 1 of the Administrative Offences Act shall be the authority which is competent pursuant to § 48, also in conjunction with § 49(3) and (4), or § 50.

§ 82

Jurisdiction in Proceedings to Assess an Administrative Fine Against a Legal Person or Association of Persons

The cartel authority shall be exclusively competent in proceedings to assess an administrative fine against a legal person or association of persons (§ 30 of the Administrative Offences Act) in cases arising from:

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

This shall not apply if the proceedings pursuant to § 30 of the Administrative Offences Act are referred by the authority to the public prosecutor.

§ 82a

Competences and Jurisdiction in Legal Proceedings Concerning Administrative Fines

- (1) In legal proceedings concerning administrative fines, the representative of the cartel authority may be allowed to address questions to parties, witnesses and experts.
- (2) If the Bundeskartellamt has acted as the administrative authority in the preliminary proceedings, the enforcement of the administrative fine and of the amount of money, the forfeit of which has been ordered, shall be made by the Bundeskartellamt as the law enforcement authority, pursuant to the provisions on the enforcement of administrative fines, on the basis of a certified copy of the operative provisions of the judgment to be issued by the clerk of the court and endowed with the declaration of enforceability. The administrative fines and amounts of money, the forfeit of which has been ordered, shall accrue to the Federal Cash Office [*Bundeskasse*] which also bears the costs imposed on the Treasury.

§ 83

Jurisdiction of the Court of Appeal in Judicial Proceedings

- (1) The Court of Appeal in whose district the competent cartel authority has its seat shall decide in judicial proceedings concerning an administrative offence pursuant to § 81; it shall also decide on an application for judicial review (§ 62 of the Administrative Offences Act) in the cases of § 52(2) sentence 3 and § 69(1) sentence 2 of the Administrative Offences Act. § 140(1) no. 1 of the Code of Criminal Procedure in conjunction with § 46(1) of the Administrative Offences Act shall not be applicable.
- (2) The decisions of the Court of Appeal shall be made by three members including the presiding judge.

§ 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 (§ 79 of the Administrative Offences Act). If the decision being appealed is reversed without a decision being taken on the merits of the case, the Federal Court of Justice shall refer the case back to the Court of Appeal whose decision has been reversed.

§ 85

Reopening of Proceedings against an Administrative Fine

Reopening proceedings on a decision of the cartel authority imposing an administrative fine (§ 85(4) of the Administrative Offences Act), shall be decided by the court having jurisdiction pursuant to § 83.

§ 86

Court Decisions Concerning Enforcement

The court decisions which become necessary for enforcement (§ 104 of the Administrative Offences Act) shall be made by the court having jurisdiction pursuant to § 83.

THIRD CHAPTER

Enforcement

§ 86a

Enforcement

The cartel authority may enforce its orders pursuant to the provisions applying to the enforcement of administrative measures. The amount of the penalty payment shall be at least EUR 1,000 and shall not exceed EUR 10 million.

FOURTH CHAPTER

Civil Actions

§ 87

Exclusive Jurisdiction of the District Courts

- (1) Regardless of the value of the matter in dispute, the District Courts [*Landgerichte*] shall have exclusive jurisdiction in civil actions concerning the application of this Act, of Articles 81 or 82 of the EC Treaty or of Articles 53 or 54 of the Convention on the European Economic Area. Sentence 1 shall apply

also 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 Articles 81 or 82 of the EC Treaty or of Articles 53 or 54 of the Convention on the European Economic Area. Sentence 1 shall not apply to civil actions arising from the legal relations mentioned in § 69 of the Fifth Book of the Code of Social Law [*Sozialgesetzbuch*], also as far as rights of third parties are affected hereby.

- (2) Such actions shall be regarded as commercial matters within the meaning of §§ 93 to 114 of the Courts Constitution Act.

§ 88

Joining of Actions

Another cause of action may be joined with one arising under § 87(1) if the former has a legal or direct economic connection with the claim to be asserted before the court having jurisdiction pursuant to § 87; this shall apply also if another court has exclusive jurisdiction over the other cause of action.

§ 89

Jurisdiction of one District Court for Several Court Districts

- (1) The *Land* governments are authorised to refer, by way of ordinances, civil actions for which the District Courts have exclusive jurisdiction pursuant to § 87 to one District Court for the districts of several District Courts if such centralisation serves the administration of justice in cartel matters, in particular to ensure the uniformity of court practice. The *Land* governments may delegate this authority to their judicial administrations.
- (2) The jurisdiction of one District Court for several districts or for 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 paragraphs 1 and 2 also by lawyers admitted to practice before the court which in the absence of paragraphs 1 and 2 would have jurisdiction over the legal action.

§ 89a

Adjustment of the Value in Dispute

- (1) If, within a legal action in which a claim pursuant to §§ 33 or 34a is asserted, a party substantiates by prima facie evidence 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 request, order the obligation of this party to pay the court fees to be assessed on the basis of a part of the value in dispute which is adjusted to its economic situation. The court may make its order contingent on the party substantiating by prima facie evidence that the costs of litigation to be borne by it are not directly or indirectly taken over by a third party. The order shall entail that the benefiting party also has to pay its lawyer's fees only according to the adjusted part of the value in dispute. Where costs of litigation are imposed upon or taken over by it, it shall reimburse the opposing party for paid court fees and the fees of its lawyer only on a pro-rata basis. Where the extra-judicial costs are imposed upon or taken over by the opposing party, the lawyer of the benefiting party may recover his fees from the opposing party according to the value in dispute applying to the opposing party.
- (2) The request pursuant to paragraph 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. Thereafter the request shall only be admissible if the assumed or assessed value in dispute is subsequently raised by the court. The opposing party shall be heard prior to the decision on the request.

FIFTH CHAPTER

Common Provisions

§ 90

Information of and Participation by the Cartel Authorities

- (1) The Bundeskartellamt shall be informed by the court of all legal actions pursuant to § 87(1). The court shall, upon request, transmit to the Bundeskartellamt copies of all briefs, records, orders and decisions. Sentences 1 and 2 shall apply *mutatis mutandis* in other legal actions which concern the application of Articles 81 and 82 of the EC Treaty.
- (2) The President of the Bundeskartellamt may, if he considers it to be 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, to attend hearings, to present arguments there, and to address questions to parties, witnesses and experts. 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 paragraph 1 sentence 2 and paragraph 2.
- (4) Paragraphs 1 and 2 shall apply *mutatis mutandis* to legal actions which have as their subject matter the enforcement of a price set pursuant to § 30 against a purchaser bound thereby or against another undertaking.

§ 90a

Cooperation of the Courts with the Commission of the European Community and the Cartel Authorities

- (1) In all judicial proceedings where Article 81 or 82 of the EC Treaty are applied the court shall, without undue delay after serving the decision on the parties, forward a duplicate of any decision to the Commission of the European Community via the Bundeskartellamt. The Bundeskartellamt may transmit to the Commission of the European Community the documents which it has obtained pursuant to § 90(1) sentence 2.
- (2) In proceedings pursuant to paragraph 1 the Commission of the European Community may, acting on its own initiative, transmit written observations to the court. In case of a request pursuant to Art. 15(3) sentence 5 of Council Regulation (EC) No 1/2003 the court shall provide the Commission of the European Community with all documents necessary for the assessment of the case, including copies of all briefs and duplicates of all records, orders and decisions. § 4b (5) and (6) of the Federal Data Protection Act [*Bundesdatenschutzgesetz*] shall apply *mutatis mutandis*. The court shall provide the Bundeskartellamt and the parties with a copy of the written observations of the Commission of the European Community made pursuant to Art. 15(3) sentence 3 of Council Regulation (EC) No 1/2003. The Commission of the European Community may also submit oral observations in the hearing.
- (3) In proceedings pursuant to paragraph 1 the court may ask the Commission of the European Community to transmit information in its possession or for its observations on questions concerning the application of Article 81 or 82 of the EC Treaty. 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 reply of the Commission of the European Community.
- (4) In the cases of paragraphs 2 and 3 the contacts between the court and the Commission of the European Community may also occur via the Bundeskartellamt.

§ 91

Cartel Division of the Court of Appeal

The Courts of Appeal shall establish cartel divisions. They shall decide on legal matters assigned to them pursuant to § 57(2) sentence 2, § 63(4), §§ 83, 85 and 86, and on appeals from final judgments and other decisions in civil actions pursuant to § 87(1).

§ 92

Jurisdiction of a Court of Appeal or of the Supreme Court of a *Land* for Several Court Districts in Administrative Matters and Proceedings Concerning Administrative Fines

- (1) Where several Courts of Appeal exist in a *Land*, the legal matters for which the Court of Appeal has exclusive jurisdiction pursuant to § 57(2) sentence 2, § 63(4), §§ 83, 85 and 86, may be assigned by the *Land* governments by way of ordinance to one or several of the Courts of Appeal or to the Supreme Court of a *Land* [*Oberstes Landesgericht*], if such centralisation serves the administration of justice in cartel matters, in particular to ensure the uniformity of court practice. The *Land* governments may delegate this authority to their judicial administrations.
- (2) The jurisdiction of one Court of Appeal or of the Supreme Court of a *Land* for individual districts or for the entire territory of several *Länder* may be established by treaty between the *Länder*.

§ 93

Jurisdiction over Appeals

§ 92(1) and (2) shall apply *mutatis mutandis* to decisions on appeals from final judgments and from other decisions in civil actions pursuant to § 87(1).

§ 94

Cartel Division of the Federal Court of Justice

- (1) The Federal Court of Justice shall establish a cartel division; it shall decide on the following judicial remedies:
 1. in administrative matters, on appeals on points of law from decisions of the Courts of Appeal (§§ 74, 76) and on appeals from the refusal to grant leave to appeal (§ 75);
 2. in proceedings concerning administrative fines, on appeals on points of law from decisions of the Courts of Appeal (§ 84);
 3. in civil actions pursuant to § 87(1):
 - a) on appeals on points of law from final judgments of the Courts of Appeal including appeals from the refusal to grant leave to appeal,
 - b) on reviews from final judgments of the District Courts,
 - c) on appeals from decisions of the Courts of Appeal in the cases of § 574(1) of the Code of Civil Procedure.
- (2) In proceedings concerning administrative fines, the cartel division shall constitute a division for criminal matters within the meaning of § 132 of the Courts Constitution Act, in all other cases it shall constitute a division for civil matters.

§ 95
Exclusive Jurisdiction

The jurisdiction of the courts which are competent under this Act shall be exclusive.

§ 96: [Abolished]

PART IV

Award of Public Contracts

FIRST CHAPTER

Award Procedures

§ 97
General Principles

- (1) Contracting entities shall procure goods, works and services in accordance with the following provisions through competition and by way of transparent award procedures.
- (2) The participants in an award procedure shall be treated equally unless discrimination is expressly required or allowed by this Act.
- (3) The interests of small and medium-sized undertakings shall primarily be taken into account in an award procedure. Contracts shall be subdivided into 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 economic or technical reasons require this. If an undertaking, which is not a public contracting entity, is entrusted with the realisation or execution of a public assignment, it shall be obliged by the contracting entity, so far as it subcontracts to third parties, to proceed according to sentences 1 to 3.

- (4) Contracts shall be awarded to skilled, efficient, law-abiding and reliable undertakings. Contractors may be expected to meet other or further requirements involving social, environmental or innovative aspects if these have a direct relation to the subject matter of the contract and arise from the description of the service to be rendered. Contractors may be expected to meet other or further requirements only if federal law or the laws of a Land provide for this.
- (4a) Contracting entities can implement or allow the use of pre-qualification systems to verify the suitability of undertakings.
- (5) The economically most advantageous tender shall be accepted.
- (6) The Federal Government is empowered to more precisely define, by ordinance with the approval of the *Bundesrat*, the procedure to be followed in awarding contracts, in particular concerning the notice, the course and the categories of awards, the selection and examination of undertakings and tenders, the conclusion of the contract as well as other issues relating to the award procedure.
- (7) Undertakings have a right to the provisions concerning the award procedure being complied with by the contracting entity.

§ 98
Contracting Entities

Contracting entities within the meaning of this Part are:

1. regional or local authorities as well as their special funds,
2. other legal persons under public or private law which were established for the specific purpose of meeting non-commercial needs in the general interest, if they are for the most part financed individually or jointly through a participation or in some other way by entities within the meaning of no. 1 or 3, or if such entities supervise their management or have appointed more than half of the members of one of their management or supervisory boards. The same shall apply if the entity which individually or together with others provides, for the most part, such financing, or has appointed the majority of the members of a management or supervisory board, falls under sentence 1,
3. associations whose members fall under no. 1 or 2,
4. natural or legal persons under private law which operate in the fields of drinking water, energy supply or transport, if these activities are exercised on the basis of special or exclusive rights granted by a competent authority, or if contracting entities falling under no. 1 to 3 can individually or jointly exercise a controlling influence upon these persons; special or exclusive rights are rights, the effect of which is to limit the exercise of these activities to one or more undertakings and which substantially affect the ability of other undertakings to carry out such activity. Activities in the fields of drinking water, energy supply or transport shall be services as listed in the annex,
5. 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 no. 1 to 3, which are used to finance more than 50% of these projects,

6. natural or legal persons under private law who have concluded a works contract with entities falling under no. 1 to 3, with respect to contracts awarded to third parties (works concession).

§ 99

Public Contracts

- (1) Public contracts are contracts for pecuniary interest concluded between public contracting entities and undertakings for the procurement of services whose subject matter is supplies, works or services, works concessions and design contests intended to lead to service contracts.
- (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 the simultaneous design and execution of a work project or a work for the public contracting entity which is the result of civil engineering or building construction work and is to fulfil a commercial or technical function, or for the execution of a work by a third party which is for the direct economic benefit of the contracting entity, corresponding to the requirements specified by the contracting entity.
- (4) Service contracts are contracts for the performance of services which are not covered by paragraph 2 or paragraph 3.
- (5) Design contests within the meaning of this Part are only such award procedures which are intended to enable the contracting entity to acquire a plan on the basis of a comparative evaluation by a jury with or without the award of prizes.

- (6) A works concession is a contract for the execution of a works contract, whereby consideration for the building work consists, instead of remuneration, in the limited right to use the installation, if appropriate, plus the payment of a fee.
- (7) Public contracts, whose subject matter is both the purchase of goods and the procurement of services, shall be deemed service contracts if the value of the services performed exceeds the value of the goods supplied. Public contracts which in addition to services involve the execution of works which, in relation to the principal subject matter, are ancillary services shall be deemed service contracts.
- 8) In the case of contracts for the execution of several activities, the provisions shall apply to the activity which constitutes the principal subject matter. If, in the case of contracts for the exercise of activities in the fields of drinking water, energy supply or transport or in the area of the contracting entities under the Federal Mining Act [*Bundesberggesetz*] and in the case of activities of contracting entities in accordance with § 98 no. 1 to 3, it cannot be determined which activity constitutes the principal subject matter, the contract shall be awarded according to the provisions applying to contracting entities under § 98 no. 1 to 3. If one of the activities, the exercise of which forms the subject matter of the contract , concerns both an activity in the fields of drinking water, energy supply or transport or in the area of the contracting parties under the Federal Mining Act, as well as an activity which does not fall into the areas of contracting entities under § 98 no. 1 to 3, and it cannot be determined which activity constitutes the principal subject matter, the contract shall be awarded according to those provisions applying to contracting entities operating in the fields of drinking water, energy supply, transport or the Federal Mining Act.

§ 100

Scope of Application

- (1) This Part shall apply only to contracts which reach or exceed the contract values fixed by ordinance pursuant to § 127 (thresholds).
- (2) This Part shall not apply to employment contracts and to contracts:
 - a) which are awarded in pursuance of an international agreement relating to the stationing of troops and which are subject to special procedural rules;
 - b) which are awarded in pursuance of an international agreement concluded between the Federal Republic of Germany and one or more countries which are not parties to the Treaty on the European Economic Area and which cover a project to be jointly implemented and financed by the signatory states which are subject to different procedural rules;
 - c) which are awarded pursuant to the particular procedure of an international organisation;
 - d)
 - aa) which are declared secret in accordance with the legal and administrative provisions in the Federal Republic of Germany,
 - bb) whose execution, in accordance with these provisions, must be accompanied by special security measures,
 - cc) which require the deployment of the armed forces or the implementation of counter-terrorism measures or the consideration of essential security interests in the procurement of information technology or telecommunications systems or
 - dd) when the protection of other essential interests of state security so requires;

- e) which are covered by the scope of application of Article 296(1) (b) of the EC Treaty;
- f) which have as their object, in the case of activities in the supply of drinking water, the procurement of water, or, in the case of activities in the supply of energy, the procurement of energy or fuels for the production of energy;
- g) which are awarded to a person who is a contracting entity within the meaning of § 98 no. 1, 2 or 3 and has an exclusive right to render the performance by virtue of a law or ordinance;
- h) for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereto;
- i) which are awarded by contracting entities within the meaning of § 98 no. 4 if they serve purposes other than sectoral activities;
- j) which have as their object the purchase, development, production or co-production of programmes which are intended for broadcast via radio or television channels as well as contracts for the broadcast of programmes;
- k) whose main purpose is to enable the contracting entity to provide or operate public telecommunication networks or to provide one or several telecommunication services for the public;
- l) for arbitration and conciliation services;
- m) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting entities to raise money or capital, as well as central bank services;

- n) for research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting entity.
- o) of
 - aa) contracting entities which are active in the fields of drinking water, energy supply or transport, awarded to an undertaking which is affiliated with this contracting entity or
 - bb) a joint venture, formed exclusively by a number of contracting entities active in the fields of drinking water, energy supply or transport for the purpose of carrying out these activities, awarded to an undertaking which is affiliated with one of these contracting entities,

provided that at least 80 % of the average turnover achieved by this affiliated undertaking in the European Union in the preceding three years in the respective supply, works or services sector derives from the provision of such supply services or services to the contracting entity with which it is affiliated; this shall also apply if the undertaking has been in existence for less than three years if it is expected to achieve at least 80 % in the first three years of its existence; if the same or similar supplies, works or services are provided by more than one undertaking affiliated with the contracting entity, the percentage figure shall be calculated taking into account the total turnover achieved by these affiliated undertakings from the provision of the supplies or services; § 36 no. 2 and 3 shall apply *mutatis mutandis*;

- p) which
 - aa) a joint venture, formed exclusively by a number of contracting entities active in the fields of drinking water, energy supply or transport for the purpose of carrying out these activities, awards to one of these contracting entities or
 - bb) a contracting entity active in the fields of drinking water, energy supply or transport, awards to a joint venture within the meaning of the double

letters aa) of which it forms a part, provided that the joint venture has been set up to carry out the activity concerned over a period of at least three years, and that the instrument setting up the joint venture stipulates that the contracting entities which form it will be part thereof for at least the same period;

- q) which are awarded for carrying out activities in the fields of drinking water, energy supply or transport outside the territory of the European Union, where this does not involve the physical use of a network or facility within the Community;
- r) which are awarded by contracting entities active in the fields of drinking water, energy supply or transport to third parties for the purpose of resale or lease, provided that the contracting entity has no special or exclusive right to sell or lease the subject of such contracts and that other undertakings are free to sell or lease these products under the same conditions as the respective contracting entity;
- s) of contracting entities active in the fields of drinking water, energy supply or transport, which have as their object works concessions for carrying out these activities;
- t) for the purpose of carrying out an activity in the fields of drinking water, energy supply or transport, if the European Commission, in accordance with Article 30 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, has established that this activity in Germany is directly exposed to competition on markets to which access is not restricted, and this has been published by the Federal Ministry of Economics and Technology in the Federal Gazette.

§ 101

Categories of Awards

- (1) Public supply, works and service contracts shall be awarded through open procedures, restricted procedures, negotiated procedures or in competitive dialogue.
- (2) Open procedures are procedures whereby an unlimited number of undertakings is publicly invited to submit a tender.
- (3) Restricted procedures are procedures whereby a public invitation to participate is made and a limited number of undertakings from among the candidates is invited to submit a tender.
- (4) Competitive dialogue is a procedure for the award of particularly complex contracts by public contracting entities in accordance with § 98 no. 1 to 3, so far as they are not active in the fields of drinking water, energy supply or transport, and § 98 no. 5. In this procedure an invitation to participate is made and selected undertakings are invited to negotiate all the details of the contract.
- (5) Competitive dialogue is a procedure for the award of particularly complex contracts by public contracting entities. In this procedure an invitation to participate is made and selected undertakings are invited to negotiate all the details of the contract.
- (6) An electronic auction serves to determine electronically the most economically advantageous tender. A dynamic electronic procedure is an open time-limited and completely electronic award procedure for the procurement of services which are customary on the market, where the specifications generally available on the market meet the requirements of the contracting entity.
- (7) Public contracting entities shall apply the open procedure unless otherwise allowed by this Act. Contracting entities active in the fields of drinking water,

energy supply or transport may freely choose between open, restricted and negotiated procedures.

§ 101a

Information and Standstill Obligation

- (1) The contracting entity shall inform the unsuccessful tenderers in writing and without undue 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 about the rejection of their tenders before the notification of the decision on the award was sent to the successful tenderers. A contract may only be concluded at the earliest 15 calendar days after this information, pursuant to sentences 1 and 2, has been sent. If the information is sent by fax or electronically, the standstill period shall be reduced to ten calendar days. The standstill period shall begin on the day after which the contracting entity despatches the information; the date of receipt by the tenderer and candidate in question shall be irrelevant.
- (2) The obligation to inform the tendering parties shall not apply in cases in which negotiation procedures are justified without previous notification on grounds of extreme urgency.

§ 101b

Ineffectiveness

- (1) A contract shall be deemed ineffective *ab initio* if the contracting entity
1. has violated § 101a or

2. has awarded a public contract directly to an undertaking without inviting other undertakings to participate in the award procedure and without this being expressly permissible in accordance with the law

and this violation has been established in review proceedings in accordance with paragraph 2.

(2) Ineffectiveness pursuant to paragraph 1 can only be established if this is claimed in review proceedings within 30 calendar days after knowledge of the infringement, however at the latest six months after conclusion of the contract. If the contracting entity 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.

SECOND CHAPTER

Review Procedures

I. Reviewing Authorities

§ 102

Principle

Without prejudice to review by the supervisory authorities, any award of public contracts shall be subject to review by the public procurement tribunals.

§ 103 [Abolished]

§ 104

Public Procurement Tribunals

- (1) For contracts attributable to the Federation, the federal public procurement tribunals shall review the awarding of public contracts, and the *Land* public procurement tribunals for contracts attributable to the *Länder*.
- (2) Rights under § 97 (7) as well as other claims against contracting entities for the undertaking or omission of an act in award 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 §§ 19 and 20, shall remain unaffected.

§ 105

Composition, Independence

- (1) The public procurement tribunals shall exercise their functions independently and on their own responsibility within the limits of the law.
- (2) The public procurement tribunals shall take their decisions through a chairman and two associate members of which one shall serve in an honorary capacity. The chairman and the full-time associate member shall be civil servants appointed for life with the qualification to serve in the higher administrative service, or comparably expert employees. Either the chairman or the full-time associate member shall be qualified to serve as a judge; generally this should be the chairman. The associate members should have in-depth knowledge of the practice of awarding public contracts, and honorary associate members should also have several years of practical experience in the field of the awarding of public contracts.
- (3) The tribunal may assign the case to the chairman or to the full-time associate member without a hearing by unappealable decision, for him to decide alone.

Such an assignment shall be possible only if the case involves no major difficulties as to the facts or the legal issues, 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 law.

§ 106

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 him on a proposal by the central organisations of the chambers under public law. The President of the Bundeskartellamt shall issue rules of procedure, after obtaining approval from the Federal Ministry of Economics and Technology, and publish these in the Federal Gazette.
- (2) The establishment, organisation and composition of the authorities (reviewing authorities) of the *Länder* mentioned in this Chapter 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. In appointing the members of the public procurement tribunals, it shall be ensured that at least one member is qualified to serve as a judge and that, if possible, there is in-depth knowledge of the practice of awarding public contracts. The *Länder* may establish joint reviewing authorities.

§ 106a

Delimitation of Competence of the Public Procurement Tribunals

- (1) The federal public procurement tribunal shall be responsible for reviewing the procedures for the award of public contracts

1. of the Federation;
 2. of contracting entities within the meaning of § 98 (2) so far as the Federation for the most part manages the participation, or has otherwise predominantly provided means of financing or supervises its management or has appointed the majority of the members of the management or supervisory board, unless the undertakings which are part of the contracting entity have agreed that another public procurement tribunal shall be competent;
 3. of contracting entities within the meaning of § 98 (4) so far as the Federation exercises a controlling influence on them; a controlling influence exists if the Federation directly or indirectly owns the majority of the subscribed capital of the contracting entity or holds the majority of the voting rights attached to the shares of the contracting entity or can appoint more than half of the members of the administrative, management or supervisory board of the contracting entity;
 4. of contracting entities within the meaning of § 98 (5) so far as the Federation has for the most part approved the financing;
 5. of contracting entities within the meaning of § 98 (6) so far as the contracting authority within the meaning of § 98 no. 1 to 3 is attributable to the Federation;
 6. which are performed for the Federation by way of an official delegation of powers.
- (2) If the award procedure is carried out for the Federation by a *Land* as the delegated authority, the public procurement tribunal of the *Land* shall be the competent authority. If, in application of paragraph 1, no. 2 to 6 a contracting

entity 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 entity. In the case of procurements which involve more than one *Land*, the contracting entities shall name only one competent public procurement tribunal in the publication of the contract notice.

II. Proceedings before the Public Procurement Tribunal

§ 107

Initiation of the Proceedings, Application

- (1) The public procurement tribunal shall initiate review proceedings only upon application.
- (2) Every undertaking which has an interest in the contract and claims that its rights under § 97(7) were violated by non-compliance with the provisions governing the awarding of public contracts has the right to file an application. In doing so, it must be shown that the undertaking has suffered a loss, or may be about to suffer a loss, in consequence of the alleged violation of provisions governing the awarding of public contracts.
- (3) The application is inadmissible if
1. the applicant became aware of the violation of provisions governing the awarding of public contracts during the award procedure and did not object to the contracting entity without undue delay,
 2. violations of provisions governing the awarding of public contracts which become apparent from the tender notice are not notified to the contracting entity by the end of the period specified in the notice for the submission of a tender or application,

3. violations of provisions governing the awarding of public contracts which only become apparent from the award documents are not notified to the contracting entity by the end of the period specified in the notice for the submission of a tender or application,
4. more than 15 calendar days have expired since receipt of notification from the contracting entity that it is unwilling to redress the complaint.

Sentence 1 shall not apply to an application under § 101b (1) no. 2 to have the award contract declared ineffective. § 101a (1) sentence 2 shall remain unaffected.

§ 108

Form

- (1) The application shall be submitted in writing to the public procurement tribunal and reasons shall be given without undue delay. It should state a certain 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 reasons shall designate the respondent, contain a description of the alleged violation of rights with a description of the facts as well as the designation of the available evidence, and show that an objection was made to the contracting entity; it should name the other parties, if known.

§ 109

Parties to the Proceedings, Admission to the Proceedings

The parties to the proceedings are the applicant, the contracting entity, and the undertakings whose interests are severely affected by the decision and which are therefore admitted by the public procurement tribunal to the proceedings. The decision to admit a party to the proceedings shall be incontestable.

§ 110
Investigation Principle

- (1) The public procurement tribunal shall, acting on its own initiative, investigate the facts. In doing so, it may limit itself to the facts presented by the parties or those it can be reasonably expected to know. The public procurement tribunal shall not be obliged to extensively review the legitimacy of the application for review. In its entire activities, it shall take care not to unduly impede the course of the award procedure.
- (2) The public procurement tribunal shall review the application for evident inadmissibility or unfoundedness. In doing so, it shall also consider a written statement lodged by the contracting entity 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 entity and request from the contracting entity the files which document the award procedure (award files). The contracting entity shall immediately make the award files available to the tribunal. §§ 57 to 59 (1) to (5) and § 61 shall apply *mutatis mutandis*.

§ 111
Inspection of Files

- (1) The parties may inspect the files at the public procurement tribunal and may obtain certified and other copies and excerpts from the clerk's office at their own expense.
- (2) The public procurement tribunal shall refuse the inspection of documents where this is necessary for important reasons, in particular for the protection of secrets or to protect operating or business secrets.
- (3) Every party shall indicate the secrets named in paragraph 2 when sending its files or statements, and shall mark them in the documents. If this is not done,

the public procurement tribunal may assume that the party consents to the inspection.

- (4) Refusal to allow an inspection of the files may be challenged only in connection with an immediate complaint in the main issue.

§ 112 **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 comment. With the consent of the parties or in the case of the inadmissibility or clear unfoundedness of the application, a decision may be taken on the basis of the documents.
- (2) The case may be discussed and decided also if the parties do not appear or are not duly represented at the hearing.

§ 113 **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 difficulties regarding the facts or the law, the chairman may in exceptional cases by statement to the parties extend this period by the required time. The extended period shall not exceed two weeks. The chairman shall give reasons in writing for this order.
- (2) The parties shall co-operate in clearing up the facts in a manner appropriate to a course of action designed to further and quickly conclude the proceedings. Time limits may be set for the parties, after the expiry of which further arguments may be disregarded.

§ 114

Decision of the Public Procurement Tribunal

- (1) The public procurement tribunal shall decide whether the applicant's rights were 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 bring an influence to bear on the lawfulness of the award procedure.
- (2) Once an award has been made, it cannot be cancelled. If the review procedure becomes obsolete by the granting of an award, by cancellation, by the discontinuance of the award procedure or in any other way, the public procurement tribunal shall determine, on the application of a party, whether there has been a violation of rights. Section 113 (1) shall be inapplicable in this case.
- (3) The public procurement tribunal shall decide by administrative act. Decisions shall be enforced, also against public authorities, in accordance with the administrative enforcement acts of the Federation and the *Länder*. §§ 61 and 86a sentence 2 shall apply *mutatis mutandis*.

§ 115

Suspension of the Award Procedure

- (1) If the public procurement tribunal informs the contracting entity 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 period for a complaint pursuant to § 117 (1).
- (2) The public procurement tribunal may allow the contracting entity, upon its application or upon application by the undertaking that has been named by the contracting entity pursuant to § 101a 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 which may

be impaired as well as the interests 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 interests of the general public that the contracting entity carries out its tasks efficiently. The public procurement tribunal shall also consider the overall prospects of the applicant to win the award in the award 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 paragraph (1); § 114 (2) sentence 1 shall remain unaffected. If the public procurement tribunal does not allow the award, the appellate court may, upon application by the contracting entity, allow the immediate award subject to the conditions in sentences 1 to 4. § 121 (2) sentences 1 and 2 and (3) shall apply *mutatis mutandis* to the proceedings before the appellate court. An immediate complaint pursuant to § 116 (1) shall not be admissible against decisions taken by the public procurement tribunal under this paragraph.

- (3) If during the award procedure any rights of the applicant under § 97 (7) are jeopardised other than by the imminent award, the tribunal may, on a specific application, intervene in the award procedure through further preliminary measures. In doing so, it shall apply the evaluation criterion of paragraph 2 sentence 1. This decision shall not be separately challengeable. The public procurement tribunal may enforce the further preliminary measures under the administrative enforcement acts of the Federation and the *Länder*; the measures shall be immediately enforceable. § 86a sentence 2 shall apply *mutatis mutandis*.
- (4) If the contracting entity claims that the requirements of § 100 (2) letter d are fulfilled, the prohibition of the award pursuant to paragraph 1 shall lapse two days after service of a corresponding brief to the applicant; the public procurement tribunal shall serve the brief without undue delay after its receipt. The appellate court may, upon application, reinstate the prohibition of the award. § 121 (1) sentence 1, (2) sentences 1 and (3) and (4) shall apply *mutatis mutandis*.

§ 115a

Exclusion of divergent *Land* law

Any deviation under *Land* law from the provisions on the administrative procedure contained in this subdivision of the Act shall not be permitted.

III. Immediate Complaint

§ 116

Admissibility, Jurisdiction

- (1) Decisions of a public procurement tribunal shall be subject to an immediate complaint. It shall be open to the parties to the proceedings before the public procurement tribunal.
- (2) An immediate complaint shall be admissible also if the public procurement tribunal does not decide upon an application for review within the period set out in § 113(1); in this case the application shall be deemed to have been rejected.
- (3) The immediate complaint shall be decided exclusively by the Court of Appeal having jurisdiction at the seat of the public procurement tribunal. An award division shall be set up at every Court of Appeal.
- (4) Legal matters pursuant to paragraphs 1 and 2 may be assigned to other Courts of Appeal or the Supreme Court of a *Land* by ordinance issued by the *Land* governments. The *Land* governments may delegate this power to the *Land* judicial administrations.

§ 117

Time Limit, Formal Requirements

- (1) An immediate complaint shall be filed in writing with the appellate court within a non-extendable time limit of two weeks beginning upon service of the decision, in the case of § 116(2) upon the expiry of the time period.
- (2) Reasons for the immediate complaint shall be given when it is filed. The statement of reasons for the complaint 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 complaint is based.
- (3) The complaint shall be signed by a lawyer admitted to practise before a German court. This shall not apply to complaints by legal persons under public law.
- (4) At the same time as the filing of the complaint, the other parties to the proceedings before the public procurement tribunal shall be informed by the complainant by way of the transmission of a copy of the complaint.

§ 118

Effect

- (1) The immediate complaint 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 complaint. If the public procurement tribunal refuses, upon application, to review the award, the appellate court may, upon application by the complainant, extend the suspensive effect up to the time of the decision on the complaint.

- (2) The court shall reject the application pursuant to paragraph 1 sentence 3 if, taking into account all interests which may be impaired, the negative consequences of delaying the award up to the time of the decision on the complaint outweigh the advantages involved. In its consideration, the court shall take account of the interests of the general public that the contracting entity carries out its tasks efficiently. In its decision, the court shall also consider the prospects of success of the complaint, the overall prospects of the applicant to win the award in the award procedure, as well as the interests of the general public in the quick conclusion of the award procedure.
- (3) If the public procurement tribunal grants the application for review by prohibiting the award, the award shall not be made as long as the appellate court does not reverse the decision of the public procurement tribunal pursuant to § 121 or § 123.

§ 119

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.

§ 120

Procedural Provisions

- (1) The parties shall be represented before the appellate court by a lawyer admitted to practise before a German court, acting as their representative. Legal persons under public law may be represented by civil servants or by employees qualified to serve as a judge.
- (2) § 69, § 70 (1) to (3), § 71 (1) and (6), §§ 71a, 72, and 73 with the exception of the reference to § 227 (3) of the Code of Civil Procedure, §§ 78, 111 and 113 (2) sentence 1 shall apply *mutatis mutandis*.

§ 121

Preliminary Decision on the Award

- (1) Upon application by the contracting entity or upon application by the undertaking named in accordance with § 101a by the contracting entity as the undertaking to be awarded the contract, the court may allow the continuation of the award procedure and the award if, taking into account all interests which may be impaired, the negative consequences of delaying the award up to the time of the decision on the complaint outweigh the advantages involved. In its consideration, the court shall take account of the interests of the general public that the contracting entity carries out its tasks efficiently. In its decision the court shall also consider the prospects of success of the immediate complaint, the overall prospects of the applicant to win the award in the award procedure, and the interests of the general public in a quick conclusion of the award procedure.
- (2) The application shall be made in writing and reasons shall be given at the same time. The facts to be put forth 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 on the application is made.
- (3) The decision shall be made and reasons shall be given without undue delay and in no case later than five weeks after receipt of the application; in the event of particular difficulties as to the facts or legal difficulties, the chairman may in exceptional cases extend the period by the required time by declaration to the parties with reasons. The decision may be made without a hearing. The reasons shall explain the lawfulness or unlawfulness of the award proceedings. § 120 shall apply.
- (4) No appeal is admissible against a decision made pursuant to this provision.

§ 122

End of the Award Procedure after the Decision of the Appellate Court

If an application of the contracting entity pursuant to § 121 is rejected by the appellate court, the award procedure shall be deemed to have ended upon the expiry of 10 days after service of the decision unless the contracting entity takes the measures to restore the lawfulness of the procedure which follow from the decision; the procedure must not be continued.

§ 123

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 court's opinions as to the law. Upon application, it shall state whether the rights of the undertaking having applied for the review were violated by the contracting entity. § 114(2) shall apply *mutatis mutandis*.

§ 124

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 Court of Appeal, and of the Federal Court of Justice on the complaint in the case of a referral pursuant to paragraph 2.
- (2) If a court of appeal wishes to deviate from a decision of another court of appeal or of the Federal Court of Justice, or if it considers the legal dispute to be of general significance on account of its deviation from decisions of a higher social court or the Federal Social Court, it shall refer the matter to the

Federal Court of Justice. The Federal Court of Justice shall decide in lieu of the court of appeal. The Federal Court of Justice may confine itself to deciding only on the matter of divergence and assigning the decision on the merits of the case to the court of appeal, if this seems appropriate from the factual and legal context of the appeal proceedings. The duty to refer the matter shall not apply in proceedings pursuant to § 118 (1) sentence 3 and § 121.

THIRD CHAPTER

Other Provisions

§ 125

Damages in the Event of an Abuse of Law

- (1) If an application pursuant to § 107 or the immediate complaint pursuant to § 116 is unjustified *ab initio*, the applicant or the complainant 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 a complaint.
- (2) An abuse shall exist in particular:
 1. if a suspension or further suspension of the award 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 award procedure or of harming competitors;
 3. an application is made with the intention of subsequently withdrawing it for payment of money or other benefits.
- (3) If the temporary measures taken by the public procurement tribunal in accordance with a specific application pursuant to § 115(3) were unjustified *ab*

initio, the applicant shall compensate the contracting entity for the damage arising from the enforcement of the measures that were ordered.

§ 126

Claim to Compensation for Damages

If the contracting entity violates a provision intended to protect undertakings, and if the undertaking would have had a real chance without this violation of being granted the award upon an assessment of the tenders, which, as a consequence of that infringement, was adversely affected, the undertaking may demand compensation for the costs of preparing the tender or of participating in an award procedure. Further damage claims shall remain unaffected.

§ 127

Empowering Provisions

The Federal Government may by ordinance issue rules with the approval of the *Bundesrat*:

1. to implement the thresholds of the public procurement directives of the European Union in their current version;
2. to define award procedures for contracts where the contracting entity is active in the fields of drinking water, energy supply or transport, including the selection and examination of undertakings and tenders, the conclusion of the contract, as well as other provisions relating to the award procedure.
3. (abolished)
4. (abolished)
5. (abolished)
6. concerning a procedure whereby contracting entities may obtain a certificate by independent auditors to the effect that their award conduct is in compliance

with the provisions of this Act and of the provisions issued on the basis of this Act;

7. concerning a corrective mechanism pursuant to Chapter 3 and a voluntary conciliation procedure of the European Commission pursuant to Chapter 4 of Directive 92/13/EEC of the Council of the European Communities of 25 February 1992 (OJ EC No. L 76 p. 14);
8. concerning the information to be transmitted by the contracting entities, the public procurement tribunals and the appeal courts to the Federal Ministry of Economics and Technology in order to fulfil obligations arising from directives of the Council of the European Communities.
9. to define the conditions under which contracting entities active in the fields of drinking water, energy supply or transport, as well as contracting entities under the Federal Mining Act may be exempted from the obligation to apply the provisions of this part of the Act, and to define the procedure to be followed in this respect, including the necessary investigatory powers of the Bundeskartellamt in this context.

§ 128

Costs of the 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 Administrative Costs Act 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 of its amount. 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 or the economic significance is unusually high.
- (3) A party to the proceedings shall bear the costs insofar as the party is unsuccessful. Several debtors shall be jointly and severally liable. Costs

caused by the fault of a party may be imposed upon that party. If the application becomes obsolete by withdrawal or otherwise before the decision of the public procurement tribunal, half of the fee shall be payable by the applicant. The decision which party has to bear the costs shall be based on equitable considerations. For reasons of equity, payment of the fee may be waived entirely or partially.

- (4) Insofar as a party to the review proceedings is unsuccessful, that party shall bear the respondent's expenses necessary for appropriately pursuing the matter or legally defending itself. The expenses of third parties admitted to the proceedings shall only be reimbursable to the extent that the public procurement tribunal imposes them on the unsuccessful party for equitable reasons. If the applicant withdraws his application, he shall bear the respondent's and the third parties' expenses necessary for appropriately pursuing the matter. § 80 (1), (2) and (3) sentence 2 of the Administrative Procedure Act and the corresponding provisions of the administrative procedure acts of the *Länder* shall apply *mutatis mutandis*. Separate proceedings for the taxation of costs shall not take place.

§ 129

Corrective Mechanism of the Commission

- (1) If, in the course of an award procedure before the conclusion of a contract, the Federal Government receives a notice from the European Commission informing it of a severe violation of Community law in the area of public contracts which has to be remedied, the Federal Ministry of Economics and Technology shall inform the contracting entity accordingly.
- (2) Within 14 calendar days from receipt of this notice, the contracting entity shall submit to the Federal Ministry of Economics and Technology 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 award procedure is subject to review proceedings or has been discontinued for other reasons.

- (3) If the award procedure is subject to review proceedings or has been discontinued, the contracting entity shall inform the Federal Ministry of Economics and Technology without undue delay of the outcome of the review proceedings.

§ 129a

Information Duties of the Review Bodies

The public procurement tribunals and the higher regional courts shall inform the Federal Ministry of Economics and Technology by January 31 of each year of the number of review proceedings conducted in the previous year and their results.

§ 129b

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 set by Article 16 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector (OJ EU no. L 134, p.1), last amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ EU no. L 317, p. 34), contracting entities which are entitled under the 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 awarding contracts for the exploration for or extraction of oil, gas, coal or other solid fuels. In particular, they must provide undertakings which could be interested in such a contract with adequate information, and apply objective criteria in the award of the contract. This 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 (1) shall inform the European Commission via the Federal Ministry of Economics and Technology 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 ordinance issued in accordance with § 127 no. 9.

PART V

Scope of application of the Act

§ 130

Public Undertakings, Scope of application

- (1) This Act shall apply also to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities. The provisions of the Parts I to III of this Act shall not be applicable to the German Central Bank [*Deutsche Bundesbank*] and to the *Reconstruction Loan Corporation* [*Kreditanstalt für Wiederaufbau*].
- (2) This Act shall apply to all restraints of competition having an effect within the scope of application of this Act, also if they were caused outside the scope of application of this Act.
- (3) The provisions of the Energy Industry Act shall not preclude the application of §§ 19, 20 and 29 to the extent that no other regulation is provided under § 111 of the Energy Industry Act.

PART VI

Transitional and Final Provisions

§ 131

Transitional Provisions

- (1) Exemptions of agreements and decisions pursuant to § 4(2) and § 9(3) sentence 1 and 4 and exemptions of recommendations issued by small or medium-sized enterprises pursuant to § 22(2) of the Act against Restraints of Competition in the version applicable on 30 June 2005, shall become ineffective on 31 December 2007. Before this date §11(1), §§ 12 and 22(6) shall continue to be applied in the version applicable on 30 June 2005.
- (2) Decisions of the cartel authority by which agreements and decisions are exempted pursuant to § 10(1) in the version applicable on 30 June 2005, and exemptions of licence agreements pursuant to § 17(3) in the version applicable on 30 June 2005, shall become ineffective on 31 December 2007. If the decision of exemption of the cartel authority expires at an earlier point in time, this earlier point in time period shall prevail. Before the date mentioned in sentence 1, §11(1) and § 12 shall continue to be applied in the version applicable on 30 June 2005.
- (3) Paragraph 2 sentence 1 shall apply *mutatis mutandis* to decisions of the cartel authority by which competition rules are exempted pursuant to § 26(1) and (2) sentence 1 in the version applicable on 30 June 2005.
- (4) Instead of §§ 34 and 34a, only § 34 in the version applicable on 30 June 2005 shall be applied to an infringement of a provision of competition law or a violation of a decision by the cartel authority that has been committed until 30 June 2005.

- (5) § 82a (1) shall apply to proceedings in which the court has not scheduled a hearing until the entry into force of this Act. § 82a (2) shall apply to all judgments that have been rendered after 30 June 2009.
- (6) §§ 103, 103a and 105 as well as those other provisions of the Act Against Restraints of Competition as published on 20 February 1990 (Federal Gazette I, page 235), last amended by Article 2(3) of the Act of 26 August 1998 (Federal Gazette I, page 2512) which refer to them, shall continue to apply insofar as they concern the public supply of water. The same shall apply, to the extent mentioned above, to provisions to which the above provisions refer.
- (7) § 29 shall no longer be applied after 31 December 2012.
- (8) Award proceedings which were initiated before 24 April 2009, including ensuing review proceedings, and review proceedings pending on 24 April 2009 shall be terminated in accordance with the previously applicable rules.

Annex (to § 98 no. 4)

(Source: Federal Law Gazette, I 2009, p. 797)

Activities in the field of the supply of drinking water, energy or transport services are:

1. Supply of Drinking Water:

The provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water and the supply of drinking water to such networks; this shall also apply if this activity is connected with the disposal or treatment of sewage or 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% of the total volume of water made available by such projects

or irrigation or drainage installations; in the case of contracting entities under § 98 no. 4 the activity shall not be considered an activity in the field of the supply of drinking water where the production of drinking water is necessary for carrying out an activity other than the supply of drinking water or energy or transport services, and where the supply to the public network depends only on the contracting entity's own consumption and has not exceeded 30% of the entity's total production of drinking water, having regard to the average for the preceding three years, including the current year.

2. Supply of Electricity and Gas:

The provision and operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the production of gas as well as the supply to these networks with electricity or gas; the activity of contracting entities under § 98 no. 4 shall not be considered an activity in the field of the supply of electricity and gas where the production of electricity or gas is necessary for carrying out an activity other than the supply of drinking water or energy or transport services, where the supply of electricity or gas to the public network depends only on the contracting entity's own consumption, where the supply of gas is also aimed only at the economic exploitation of such production, if the supply of electricity has not exceeded 30 per cent of the entity's total production of energy, having regard to the average for the preceding three years, including the current year, and if the supply of gas amounts to not more than 20 per cent of the entity's turnover pursuant to § 98 no. 4;

3. Supply of Heat:

The provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of heat and the supply of heat to these networks; this activity shall not be considered

an activity in the field of heat supply where the production of heat by contracting entities under § 98 no. 4 is the unavoidable consequence of carrying out an activity in the field of drinking water or energy supply or transport services, where the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the entity's turnover, having regard to the average for the preceding three years, including the current year;

4. Transport:

The provision and operation of airports intended to provide a service to carriers in the air transport sector by airport undertakings which in particular have been granted a licence under § 38 (2) no. 1 of the Regulation on Certification and Licensing in Aviation [*Luftverkehrszulassungsordnung*] as published on 10 July 2008 (Federal Law Gazette I p. 1229) or require such a licence;

the provision and operation of ports or other terminal facilities intended to provide a service to carriers by sea or inland waterway;

the provision of transport services, the provision or operation of infrastructure facilities intended to provide a service to the public in the field of transport by railway, tramway or other rail transport, by cable and automated systems, in the public transport of passengers within the meaning of the Passenger Transport Act [*Personenbeförderungsgesetz*] also by bus and trolleybus.