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Act against Restraints of Competition (Competition Act – GWB)

Act Against Restraints of Competition in the version published on 26 June 2013
(Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Art. 5
of the law of 21 July 2014 (BGBl. I p. 1066)

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 contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not

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

shall be exempted from the prohibition of § 1.

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

§ 3 Cartels of Small or Medium-Sized Enterprises

Agreements between competing undertakings and decisions by associations of undertakings whose subject matter is the rationalisation of economic activities through inter-firm cooperation 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.

**§§ 4 to 17
(abolished)**

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

**§ 18
Market Dominance**

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

1. has no competitors,
2. is not exposed to any substantial competition, or
3. has a paramount market position in relation to its competitors.

(2) The relevant geographic market within the meaning of this Act may be broader than the scope of application of this Act.

(3) In assessing the market position of an undertaking in relation to its competitors, account shall be taken in particular of the following:

1. its market share,
2. its financial strength,
3. its access to supply or sales markets,
4. its links with other undertakings,
5. legal or factual barriers to market entry by other undertakings,
6. actual or potential competition from undertakings domiciled within or outside the scope of application of this Act,
7. its ability to shift its supply or demand to other goods or commercial services,
and
8. the ability of the opposite market side to resort to other undertakings.

(4) An undertaking is presumed to be dominant if it has a market share of at least 40 per cent.

(5) Two or more undertakings are dominant to the extent that

1. no substantial competition exists between them with respect to certain kinds of goods or commercial services and
2. they comply in their entirety with the requirements of paragraph 1.

(6) 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 per cent, or

2. consists of five or fewer undertakings reaching a combined market share of two thirds.

(7) The presumption of paragraph 6 can be refuted if the undertakings demonstrate that

1. the conditions of competition are such that substantial competition between them can be expected, or
2. that the number of undertakings has no paramount market position in relation to the remaining competitors.

§ 19

Prohibited Conduct of Dominant Undertakings

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

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

1. directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification;
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;
3. demands less favourable payment or other business terms than the dominant undertaking 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 consideration, provided that without such joint 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 joint use is impossible or cannot reasonably be expected;
5. uses its market position to invite or cause other undertakings to grant it advantages without any objective justification.

(3) Paragraph 1 in conjunction with paragraph 2 nos 1 and 5 also applies to associations of competing undertakings within the meaning of §§ 2, 3, and 28(1), § 30(2a) and § 31(1) nos 1, 2 and 4. Paragraph 1 in conjunction with paragraph 2 no. 1 shall also apply to undertakings which set resale prices pursuant to § 28(2) or § 30(1) sentence 1 or § 31(1) no. 3.

§ 20

Prohibited Conduct of Undertakings with Relative or Superior Market Power

(1) § 19(1) in conjunction with paragraph 2 no. 1 shall also apply to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative market power). A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

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

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

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

unless there is, in each case, an objective justification. The offer of food below cost price is objectively justified if such an offer is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises through a timely sale, or in equally severe cases. The donation of food to charity organisations for use within the scope of their responsibilities shall not constitute an unfair impediment.¹

(4) If, on the basis of specific facts and in the light of general experience, it appears that an undertaking has abused its market power within the meaning of paragraph 3, the undertaking shall be obliged to disprove this appearance and to clarify such circumstances in its field of business which give rise to claims and which cannot be clarified by the competitor concerned or by an association within the meaning of § 33(2), but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which claims are made.

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

Footnote 1: As from 1 January 2018, pursuant to Article 2 in conjunction with Article 7 sentence 2 of the Act of 26 June 2013 (German Federal Law Gazette I p. 1738), § 20(3) shall be applicable with the following wording:

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

- 1 offers goods or commercial services not just occasionally below cost price, or
2. 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."

§ 21

Prohibition of Boycott and Other Restrictive Practices

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

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

1. under this Act,
 2. under Articles 101 or 102 of the *Treaty on the Functioning of the European Union*, or
 3. pursuant to a decision issued by the European Commission or the competition authority pursuant to this Act or pursuant to Articles 101 or 102 of the *Treaty on the Functioning of the European Union*.
- (3) Undertakings and associations of undertakings may not compel other undertakings
1. to accede to an agreement or a decision within the meaning of §§ 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 restricting competition.
- (4) It shall be prohibited to cause economic harm to another person because such person has applied for or suggested that action be taken by the competition authority.

Third Chapter Application of European Competition Law

§ 22

Relationship between this Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union

- (1) The provisions of this Act may also be applied to agreements between undertakings, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) of the *Treaty on the Functioning of the European Union*, which may affect trade between the Member States of the European Union within the meaning of that provision. Pursuant to Article 3(1) sentence 1 of *Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ EC 2003 No. L 1, p. 1)*, Article 101 of the *Treaty on the Functioning of the European Union* shall also apply in such cases.
- (2) Pursuant to Article 3(2) sentence 1 of Regulation (EC) No. 1/2003, the application of the provisions of this Act may not lead to the prohibition of agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States of the European Union but

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

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

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

(4) Without prejudice to European Union 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 101 and 102 of the *Treaty on the Functioning of the European Union* shall not be affected by the provisions of this Chapter.

**§ 23
(abolished)**

**Fourth Chapter
Competition Rules**

**§ 24
Definition, Application for Recognition**

- (1) Business and trade associations and professional organisations may establish competition rules within their area of business.
- (2) Competition rules are provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct in competition which 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) Business and trade associations and professional organisations may apply to the competition authority for recognition of their competition rules.
- (4) Applications for recognition of competition rules shall contain:
1. the name, legal form and address of the business and trade association or professional organisation;
 2. the name and address of the person representing it;
 3. a description of the subject matter and the territorial scope of the competition rules;
 4. the wording of the competition rules.

The following must be attached to the application:

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

The application may not contain or use incorrect or incomplete information in order to obtain surreptitiously 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 competition authority.

**§ 25
Third Party Comments**

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

§ 26 Recognition

(1) Recognitions are issued by decision of the competition authority. They shall state that the competition authority will not exercise 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 German *Act Against Unfair Competition* [*Gesetz gegen den unlauteren Wettbewerb*] or any other legal provision, the competition authority shall reject the application for recognition.

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

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

§ 27 Information on Competition Rules, Publications

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

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

1. applications made pursuant to § 24(3);
2. the setting of hearing dates 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 the recognition of which has been requested are open to public inspection at the competition authority.

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

(2) § 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 *Treaty on the Functioning of the European Union* as well as the goods resulting from the treatment or processing of such products, insofar as they are commonly treated or processed by agricultural producers or their associations.

§ 29 Energy Sector

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

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

2. demanding fees which unreasonably exceed the costs.

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

§ 30

Resale Price Maintenance Agreements for Newspapers and Magazines

(1) § 1 shall not apply to vertical resale price maintenance agreements 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 fulfilling the characteristics of a publishing product, as well as combined products the main feature of which is a newspaper or magazine.

(2) Agreements of the kind 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 German *Civil Code* [*Bürgerliches Gesetzbuch*] shall not be applicable.

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

(3) The Bundeskartellamt (*Federal Cartel Office*) may, acting *ex officio* or upon the request of a bound purchaser, declare the resale price maintenance invalid 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 combination with other restraints of competition is capable of increasing the price of the goods subject to resale price maintenance, or of preventing their prices from decreasing, or of restricting their production or sales.

If an industry agreement pursuant to paragraph 2a constitutes an abuse of the exemption, the Bundeskartellamt may declare it invalid in whole or in part.

§ 31

Water Management Contracts

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

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

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

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

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

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

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

§ 31a

Water Management, Notification Requirement

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

1. name or other designation;
 2. place of business or registered seat;
 3. legal form and address; and
 4. name and address of the appointed representative or other authorised agent; in case of legal persons: name and address of the legal representative.
- (2) The termination or cancellation of the agreements mentioned in § 31(1) nos 1, 2 and 4 must be notified to the competition authority.

§ 31b

Water Management, Duties and Powers of the Competition Authority, Sanctions

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

1. information pursuant to § 31a and
 2. the material content of the agreements and decisions, in particular information on the purpose, the intended measures and the term, termination, rescission and withdrawal.
- (2) The competition authority shall issue any orders under this Act that relate to the public supply of water using fixed pipelines in consultation with the relevant industry supervisory authority.
- (3) In cases of abuse pursuant to § 31(3), the competition authority may
1. oblige the undertakings concerned to end the abuse;
 2. oblige the undertakings concerned to modify the agreements or decisions; or
 3. declare the agreements and decisions invalid.
- (4) When deciding on a measure pursuant to paragraph 3, the competition authority shall take into account the intent and purpose of the exemption and, in particular, the aim of ensuring that supply is as secure and reasonably priced as possible.
- (5) Paragraph 3 shall apply *mutatis mutandis* if a public water supplier has a dominant position.
- (6) § 19 shall remain unaffected.

Sixth Chapter

Powers of the Competition Authorities, Sanctions

§ 32

Termination and Subsequent Declaration of Infringements

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

(3) To the extent that a legitimate interest exists, the competition authority may also declare that an infringement has been committed after the infringement has been terminated.

§ 32a

Interim Measures

(1) In urgent cases, the competition 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 exceed one year in total.

§ 32b

Commitments

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

(2) The competition 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 competition 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 101(1) or Article 102 of the *Treaty on the Functioning of the European Union* are not satisfied. The decision shall state that, subject to new findings, the competition authority will not exercise its powers under §§ 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 101(3) of the *Treaty on the Functioning of the European Union* and which arise in a domestic territory bearing all the characteristics of a distinct geographic market, the competition authority may withdraw the legal benefit of the block exemption for that territory.

§ 32e

Investigations into Sectors of the Economy and Types of Agreements

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

(2) In the course of this investigation, the Bundeskartellamt and the supreme *Land* authorities may conduct the enquiries necessary for the application of this Act or of Articles 101 or 102 of the *Treaty on the Functioning of the European Union*. 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) § 49(1) as well as §§ 57, 59 and 61 shall apply *mutatis mutandis*.

§ 33

Claims for Injunctions, Liability for Damages

(1) Whoever violates a provision of this Act, Articles 101 or 102 of the *Treaty on the Functioning of the European Union* or a decision taken by the competition authority shall be obliged to the person affected to rectify the infringement and, where there is a risk of recurrence, to desist from further infringements. A claim for injunction already exists if an infringement is likely. Affected persons are competitors or other market participants impaired by the infringement.

(2) Claims pursuant to paragraph 1 may also be asserted by

1. associations with legal capacity for the promotion of commercial or independent professional interests, provided they have a significant number of member undertakings that are affected persons within the meaning of paragraph 1 sentence 3 above and provided they are able, in particular with regard to their human, material and financial resources, to actually exercise their functions of pursuing commercial or independent professional interests, as laid down in the statutes of the association;

2. entities proving that they have been entered in

a) the list of qualified entities under § 4 of the German *Act on Injunctive Relief [Unterlassungsklagengesetz]* or

b) the European Commission's list of qualified entities pursuant to Article 4(3) of *Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110 of 1 May 2009, p. 30)*, as amended from time to time.

(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, the fact that the good or service has been resold shall not exclude the occurrence of a damage. The assessment of the size of the damage pursuant to § 287 of the German *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 pecuniary debts pursuant to sentence 1. §§ 288 and 289 sentence 1 of the German *Civil Code* shall apply *mutatis mutandis*.

(4) Where damages are claimed for an infringement of a provision of this Act or of Articles 101 or 102 of the *Treaty on the Functioning of the European Union*, the court shall be bound by a finding that an infringement has occurred, to the extent that such a finding was made in a final and non-appealable decision by the competition authority, the European Commission, or the competition authority – or court acting as such – in another Member State of the European Union. The same applies to such findings in final and non-appealable judgments on 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 267 of the *Treaty on the Functioning of the European Union*.

(5) The limitation period for a claim for damages pursuant to paragraph 3 shall be suspended if proceedings are initiated

1. by the competition authority for an infringement within the meaning of paragraph 1; or

2. by the European Commission or the competition authority of another Member State of the European Union for infringement of Article 101 or 102 of the *Treaty on the Functioning of the European Union*.

§ 204(2) of the German *Civil Code* shall apply *mutatis mutandis*.

§ 34

Disgorgement of Benefits by the Competition Authority

(1) If an undertaking has intentionally or negligently violated a provision of this Act, Articles 101 or 102 of the *Treaty on the Functioning of the European Union* or a decision of the competition authority and thereby gained an economic benefit, the competition authority may order the disgorgement of the economic benefit and require the undertaking to pay a corresponding sum.

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

1. the payment of damages,
2. the imposition of a fine,
3. virtue of an order of forfeiture or
4. reimbursement.

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

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

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

(5) The disgorgement 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.

§ 33(5) shall apply *mutatis mutandis*.

§ 34a

Disgorgement 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 unless the competition authority orders the disgorgement of the economic benefit by the imposition of a fine, by forfeiture, by reimbursement 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 disgorgement of benefits, §§ 428 to 430 of the German *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 if they are unable to receive reimbursement from the debtor. The claim for reimbursement is limited to the amount of the economic benefit paid to the federal budget.

(5) § 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 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 business year preceding the concentration, merges with another undertaking. Paragraph 1 shall not apply to concentrations of public entities and enterprises that occur in connection with the territorial reform of municipalities, either.

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

§ 36

Principles for the Appraisal of Concentrations

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

1. the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impediment to competition; or
2. the requirements for a prohibition under sentence 1 are fulfilled on a market 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; or
3. the dominant position of a newspaper or magazine publisher acquiring a small- or medium-sized newspaper or magazine publisher is strengthened, where it is proven that the publisher that is acquired had a significant net annual deficit within the meaning of § 275(2) no. 20 of the German *Commercial Code* [*Handelsgesetzbuch*] in the last three years and its existence would be jeopardised without the concentration. Furthermore, it must be proven that before the concentration, no other acquirer was found that could have ensured a solution that would have been less harmful to competition.

(2) If an undertaking concerned is a dependent or dominant undertaking within the meaning of § 17 of the German *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 be deemed to exist 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 all factual and legal circumstances, confer the possibility of exercising decisive influence on an undertaking, in particular through:

- a) ownership or the right to use all or part of the assets of the undertaking;
 - b) rights or contracts which confer decisive influence on the composition, voting or decisions of the bodies 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 person for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking to the extent mentioned above, this shall also be deemed to constitute a concentration between the undertakings concerned with respect to those markets on which the other undertaking operates;

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

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

(3) If credit institutions, financial institutions or insurance companies 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 German *Commercial Code* shall apply to the calculation of turnover. Turnover from the supply of goods and services between affiliated undertakings (intra-group turnover) as well as excise taxes shall not be taken into account.

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

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

(4) In the case of credit institutions, financial institutions, building and loan associations and external investment management companies within the meaning of § 17 (2) no. 1 of the Investment Act [*Kapitalanlagegesetzbuch*], turnover shall be replaced by the total amount of the income referred to in § 34(2) sentence 1 no. 1 a) to e) of the Regulation on the Rendering of Accounts of Credit Institutions [*Verordnung über die Rechnungslegung der Kreditinstitute*], as amended from time to time, minus value added tax and other taxes directly levied on such income. In the case of insurance undertakings, the premium income 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) If a concentration arises as a result of the acquisition of parts of one or more undertakings, only that turnover or market share attributable to the divested parts is to be taken into account on the part of the seller, irrespective of whether or not these parts have a

separate legal personality. This shall not apply if the seller maintains control within the meaning of § 37 (1) no. 2 or continues to hold 25 per cent or more of the shares. Two or more acquisition transactions within the meaning of sentence 1 that are effected between the same persons or undertakings within a period of two years shall be treated as a single concentration if, as a result, the turnover thresholds under § 35 are reached for the first time; the date of the concentration shall be the date of the last acquisition transaction.

§ 39

Notification and Information Obligation

(1) Concentrations shall be notified to the Bundeskartellamt pursuant to paragraphs 2 and 3 prior to being implemented. The central De-Mail address set up by the Bundeskartellamt within the meaning of the German *De-Mail Act* [*De-Mail-Gesetz*] or – for e-mails with a qualified electronic signature – the central e-mail address set up by the Bundeskartellamt shall be the exclusive addresses for the receipt of electronic notifications. Both communication channels are accessible via the Bundeskartellamt's website.

(2) The obligation to notify shall be:

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

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

1. name or other designation and place of business or registered seat;
2. type of business;
3. turnover in Germany, in the European Union and worldwide; instead of turnover, the total amount of income within the meaning of § 38(4) shall be indicated in the case of credit institutions, financial institutions, building and loan associations and external investment management companies within the meaning of § 17(2) no. 1 of the Investment Act [*Kapitalanlagegesetzbuch*], and the premium income in the case of insurance companies;
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 within the scope of application of this Act or 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) nos 1 or 3, the particulars pursuant to sentence 2 nos 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 nos 1 and 2 shall also be given with respect to its affiliated undertakings, and the particulars required under sentence 2 nos 3 and 4 with respect to each undertaking participating in the concentration and with respect to the entirety of all undertakings affiliated to it; intra-group relationships as well as control relationships among and interests held by the affiliated undertakings shall also be indicated. The notification must not contain or use any incorrect or incomplete information in order to cause the competition authority to refrain from issuing a prohibition pursuant to § 36(1) or from issuing an information notice pursuant to § 40(1).

(4) A notification shall not be required if the European Commission 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 it is in possession of the necessary particulars pursuant to paragraph 3 in the German language.

(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 generated 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 inform the Bundeskartellamt without delay of the implementation of the concentration.

§ 40

Procedure of Control of Concentrations

(1) The Bundeskartellamt may only prohibit a concentration notified to it if 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 (second phase proceedings). Second phase proceedings are to be initiated if a further examination of the concentration is necessary.

(2) In the second phase proceedings, the Bundeskartellamt shall decide by way of 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 appointed.

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

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

(3a) Clearance may be revoked or modified if it is based on incorrect 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-compliance with 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 the opportunity to submit an opinion. In proceedings conducted in accordance with § 172a of the German *Social Code, Book V [Fünftes Buch Sozialgesetzbuch]*, the competent supervisory authorities must be consulted pursuant to § 90 of the German *Social Code, Book IV*.

(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 it is in possession of the necessary particulars pursuant to § 39 (3) in the German language.

(6) If clearance by the Bundeskartellamt is repealed in whole or in part by a final and non-appealable court 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 non-appealable.

§ 41

Prohibition on Implementing, Divestiture

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

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

(1a) Paragraph 1 does not preclude the realisation of acquisition transactions where control, shares or a material influence with respect to competition within the meaning of § 37 (1) or (2) is/are acquired from several sellers either by way of a public takeover bid or by way of a number of legal transactions in securities at a stock exchange, including securities that can be converted into other securities admitted to trading on an exchange or similar market, provided that the concentration is notified to the Bundeskartellamt pursuant to § 39 without undue delay and that the acquirer does not exercise the voting rights attached to the shares or only exercises them to preserve the full value of its investment based on an exemption granted by the Bundeskartellamt under paragraph 2.

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

(3) A concentration which has been implemented 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 *status quo ante*.

(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 will, upon application, authorise a concentration prohibited by the Bundeskartellamt if, in the individual case, the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest. In this context, the competitiveness of the undertakings concerned in markets outside the 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 jeopardise the market economy system.

(2) Authorisation may be granted subject to conditions and obligations. § 40(3) sentence 2 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 or from service of a dissolution order under § 41(3) sentence 1 in the absence of prior prohibition. If the prohibition is appealed, the period shall run from the date when the prohibition becomes final and non-appealable. If the dissolution order under § 41(3) sentence 1 is appealed, the period shall run from the date when the dissolution order becomes final and non-appealable.

(4) The Federal Minister of Economics and Technology shall decide on the application within four months. Prior to the decision, an opinion of the Monopolies Commission [*Monopolkommission*] shall be obtained, and the supreme *Land* authorities in whose territory the undertakings concerned have their registered seat shall be given the opportunity to submit comments.

§ 43 Publications

(1) Notice of the initiation of the second phase 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.

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

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

(3) Notices under paragraphs 1 and 2 shall in each case contain the particulars pursuant to § 39 (3) sentences 1 and 2, (1) and (2).

Eighth Chapter Monopolies Commission

§ 44 Tasks

(1) Every two years, the Monopolies Commission shall prepare an expert 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 expert opinion is to cover the situation in the last two full calendar years and be completed by 30 June of the following year. The Federal Government may instruct the Monopolies Commission to prepare further expert opinions. In addition, the Monopolies Commission may prepare expert 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 expert 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 on them within a reasonable period. The expert 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 must have special knowledge and experience in the fields of economics, business administration, social policy, technology or commercial law. The Monopolies Commission shall elect a 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 may not be members of the government or any legislative body of the Federation or a *Land*, or of the public service of the Federation, a *Land* or any other legal person under public law, except as university professors or staff members of a scientific institution. Furthermore, they may neither represent nor be bound by a permanent employment or service relationship to an industry association or an employers' or employees' organisation. Nor must they have held such a position during the year preceding their appointment to the Monopolies Commission.

§ 46

Decisions, Organisation, Rights and Duties of the Members

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

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

(2a) As far as this is required for the proper fulfilment of its functions, the Monopolies Commission shall be granted access to the files maintained by the competition authority, including access to 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 related documents designated as confidential by the Monopolies Commission. The secrecy obligation shall apply 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 Federation.

§ 47

Transmission of Statistical Data

(1) For the purpose of preparing expert opinions on the development of business concentration, the Monopolies Commission is provided by the Federal Statistical Office [*Statistisches Bundesamt*] with such summarised data from the business statistics 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) and from

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

(2) Persons who are to receive summarised data pursuant to paragraph 1 shall, prior to the transmission, be specifically committed to confidentiality unless they hold a public office or have special obligations in the public service. § 1(2), (3) and (4) no. 2 of the German *Act on the Obligations of Public Servants* [*Verpflichtungsgesetz*] shall apply *mutatis mutandis*. Persons specifically committed pursuant to sentence 1 shall, for the purpose of the application of the provisions of the German *Penal Code* [*Strafgesetzbuch*] concerning the violation of private 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 must 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 to confidentiality pursuant to paragraph 2 sentence 1 will receive summarised data.

(5) The transmissions shall be recorded in accordance with § 16(9) of the German *Federal Statistics Act* [*Bundesstatistikgesetz*]. 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.

Ninth Chapter

Market Transparency Units for Electricity and Gas Wholesale Trading and Fuels

I.

Market Transparency Unit for Electricity and Gas Wholesale Trading

§ 47a

Establishment, Competencies, Organisation

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

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

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

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

(4) The Federal Ministry of Economics and Technology is authorised to promulgate requirements regarding the terms and conditions of the cooperation agreement by means of an ordinance.

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

§ 47b Tasks

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

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

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

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

(5) Prior to issuing determinations under § 47g in conjunction with the ordinance to be issued under § 47f, the Market Transparency Unit shall give the authorities, stakeholders and market participants concerned the opportunity to comment within a specified period. In preparation of these consultations, the Market Transparency Unit shall, where necessary, prepare and amend a detailed list of all data and categories of data that must continuously be reported to it by the persons subject to the reporting obligation as specified in § 47e(1) pursuant to §§ 47e and 47g and based on the ordinance to be issued in accordance with

§ 47f, including the point in time when the data must be transmitted, the data format and the transmission channels to be complied with, as well as alternative reporting channels. The Market Transparency Unit is not bound by the comments.

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

(7) If there is any indication that a natural or legal person is violating any of the legal provisions referred to in paragraph 6, the Market Transparency Unit must immediately inform the competent authorities and delegate the issue to them. In case of a suspected violation of §§ 1, 19, 20 or 29 of this Act or of Articles 101 and 102 of the *Treaty on the Functioning of the European Union*, the Market Transparency Unit will inform the competent decision division of the Bundeskartellamt. If more than one authority is potentially competent to conduct investigations, the Market Transparency Unit will inform each of these authorities of the suspected violation and of the other authorities that have been informed. The Market Transparency Unit shall transfer all information and data required or requested by these authorities to them without undue delay in accordance with § 47i.

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

§ 47c

Use of Data

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

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

(2) The Market Transparency Unit shall further provide the data to the Federal Ministry of Economics and Technology and the Bundesnetzagentur for the fulfilment of their tasks under § 54a of the German *Energy Industry Act*.

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

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

§ 47d

Powers

(1) In order to fulfil its tasks, the Market Transparency Unit has the powers conferred upon it pursuant to § 59 in relation to natural and legal persons. In accordance with § 47f, it may determine in respect of one, some or all of the persons and undertakings mentioned in § 47e(1) the category of data and the timing and form of transmission for the areas set out in § 47g. The Market Transparency Unit has the power, in accordance with § 47f, to change the determination, where required, to the extent that this is necessary for the fulfilment of its tasks. It may, in particular, stipulate that an online platform must be used to enter the required information and reports. In accordance with § 47f, the Market Transparency Unit may also stipulate that information and data be delivered to a third party assigned to collect data; however, the data will be analysed and used by the Market Transparency Unit only. §§ 48 and 49 of the German *Administrative Procedure Act* [*Verwaltungsverfahrensgesetz*] remain unaffected. §§ 50c, 54, 56, 57 and 61 to 67 as well as §§ 74 to 76, 83, 91 and 92 shall apply *mutatis mutandis*. In case of decisions made by the Market Transparency Unit by determination, delivery under § 61 may be replaced by publication in the Federal Gazette. § 55 of the German *Code of Criminal Procedure* applies *mutatis mutandis* to disclosure obligations under sentence 1 and reporting obligations under § 47e.

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

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

§ 47e

Reporting Obligations

(1) The following persons and undertakings are subject to the reporting obligation set out in paragraphs 2 to 5:

1. wholesale customers within the meaning of § 3 no. 21 of the German *Energy Industry Act*,
2. energy supply companies within the meaning of § 3 no. 18 of the German *Energy Industry Act*,
3. operators of energy facilities within the meaning of § 3 no. 15 of the German *Energy Industry Act* except for operators of final consumer distribution facilities or, in case of gas supply, operators of ultimate shut-off devices in consumption systems,

4. customers within the meaning of § 3 no. 24 of the German *Energy Industry Act* except for final consumers within the meaning of § 3 no. 25 of the German *Energy Industry Act*, and

5. trading platforms.

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

1. on transactions in wholesale markets where electricity and natural gas are traded, including orders to trade, with precise details on the wholesale energy products bought and sold, the prices and quantities agreed, the dates and times of execution and the parties to and beneficiaries of the transactions,

2. on the capacity and use of facilities and installations for the production/generation, storage, consumption or transmission of electricity or natural gas or on the capacity and use of facilities for liquefied natural gas (LNG facilities), including any planned and unplanned unavailability or any under-consumption,

3. in the field of electricity generation that enables identification of individual generation units,

4. on costs incurred in connection with the operation of the generation units that are subject to the reporting obligation, in particular on marginal costs, fuel costs, CO₂ costs, opportunity costs and start-up costs,

5. on technical information relevant for the operation of the generation units that are subject to the reporting obligation, in particular on minimum idle times, minimum run times and minimum production volumes,

6. on any planned decommissioning of plants or cold reserves,

7. on drawing rights agreements,

8. on planned investment projects, and

9. on import agreements and balancing services in natural gas trading.

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

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

1. those subject to the reporting obligation pursuant to paragraph 1 have reported the information to be reported or requested in accordance with Article 8 of Regulation (EU) No 1227/2011 and prompt data access by the Market Transparency Unit is secured, or

2. third parties have communicated the information to be reported or requested in the name of a person subject to reporting obligations pursuant to paragraph 1 also in conjunction with § 47f nos 3 and 4 and the Market Transparency Unit has been informed thereof, or

3. those subject to the reporting obligation pursuant to paragraph 1 also in conjunction with § 47f nos 3 and 4 have communicated the information to be reported or requested to a third party appointed for this purpose pursuant to § 47d(1) sentence 5 in conjunction with § 47f no. 2, or

4. those subject to the reporting obligation pursuant to paragraph 1 no. 3 in conjunction with § 47g(6) have reported the information to be reported or requested in accordance with the provisions of the German *Renewable Energy Act* [*Erneuerbare Energien-Gesetz*] or an ordinance based on that Act to the network operator, the Market Transparency Unit has been informed thereof and prompt access to the data by the Market Transparency Unit is secured.

(5) The obligations set forth in paragraphs 1 to 4 shall apply also to undertakings with registered seat in another Member State of the European Union or another state party to the *Agreement on the European Economic Area* if they are admitted to trading on a German exchange or if their activities have an effect within the scope of application of this Act. If any such undertaking fails to communicate the information requested, the Market Transparency Unit may request the competent authority of the country of domicile to take appropriate measures to improve access to that information.

§ 47f

Power to issue an Ordinance

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

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

§ 47g

Areas for issuing Determinations

- (1) The Market Transparency Unit shall decide, by making determinations for the areas referred to in paragraphs 2 to 12 and subject to § 47d(1) and § 47e as well as subject to the ordinance to be issued based on § 47f, which data and categories of data are to be transmitted and how.
- (2) The Market Transparency Unit may determine that operators of electricity generation units and of storage facilities with an installed generation or storage capacity of more than 10

megawatts must transmit information on the following data and categories of data for each unit:

1. for each electricity generation unit, in particular, the name, location, control area, installed generation capacity and type of generation,
2. for each individual generation unit, on an hourly basis
 - a) net generation capacity,
 - b) generation planned on the previous day,
 - c) actual generation,
 - d) marginal costs of generation, including information on the cost components, in particular fuel costs, CO₂ costs, opportunity costs,
 - e) planned and unplanned unavailability due to technical restrictions,
 - f) unavailability due to grid restrictions,
 - g) balancing services and operating reserves held available and supplied,
 - h) unused available capacities,
3. for each individual generation unit
 - a) start-up costs (warm starts and cold starts), minimum idle times, minimum run times and minimum production volumes,
 - b) planned decommissioning of plants and cold reserves,
4. drawing rights agreements,
5. planned investment projects,
6. for cross-border trading activities: volumes, trading venues used or trade partners, to be listed separately for each country in which trading took place, and
7. information enabling the Market Transparency Unit to observe and assess the supply behaviour in trading.²

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

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

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

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

1. the transmission capacity at cross-border interconnectors on an hourly basis,
2. import and export data on an hourly basis,

3. the forecast and actual feed-in of energy from facilities for which tariffs are governed by the German *Renewable Energy Sources Act [Erneuerbare-Energien-Gesetz]* on an hourly basis,
 4. the sales offers made based on the German *Equalisation Scheme Ordinance [Ausgleichsmechanismusverordnung]* on an hourly basis and
 5. the offers and results of auctions for balancing services.
- (6) The Market Transparency Unit may determine that operators of facilities generating electricity from renewable energy sources with an installed generation capacity of more than 10 megawatts must transmit information on the following data and categories of data:
1. the volumes produced by type of facility and
 2. the selling method within the meaning of § 20(1) of the German *Renewable Energy Sources Act* chosen, and the volumes attributable to each selling method.
- (7) The Market Transparency Unit may determine that trading platforms for trading electricity and natural gas must transmit information on the following data and categories of data:
1. the offers made on the platforms,
 2. trading results and
 3. all off-exchange non-standardised trading activities where the counterparties individually negotiate bilateral trades (OTC transactions) that are secured by cash or commodities clearing through the trading platform.
- (8) The Market Transparency Unit may determine that wholesalers within the meaning of § 3 no. 21 of the German *Energy Industry Act* that trade in electricity must transmit information on the transactions specified in § 47e(2) no. 1, to the extent that these transactions do not fall under the scope of paragraph 7. As regards the trading of electricity generated from renewable energy sources, the Market Transparency Unit may also determine that wholesalers within the meaning of sentence 1 must transmit information on the form of direct selling within the meaning of § 5 no. 9 of the German *Renewable Energy Sources Act* and on the quantities of electricity traded thereunder.
- (9) The Market Transparency Unit may determine that wholesalers within the meaning of § 3 no. 21 of the German *Energy Industry Act* that trade in natural gas must transmit information on the following data and categories of data:
1. cross-border quantities and prices as well as data on import and export quantities,
 2. quantities of gas produced in Germany and the initial sales prices for these quantities,
 3. import agreements (cross-border agreements),
 4. delivery volumes for each distribution level in the distribution system,
 5. transactions concluded with wholesale customers, transmission systems operators and operators of storage and LNG facilities under gas supply contracts and energy derivatives within the meaning of § 3(15a) of the German *Energy Industry Act* that are based on gas, including the term, volume, date and time of execution, the stipulations on term, delivery and settlement, and transaction prices,
 6. offers and results of their own natural gas auctions,
 7. existing gas procurement and supply contracts and
 8. any other gas trading activities concluded as OTC transactions.

(10) The Market Transparency Unit may determine that transmission system operators within the meaning of § 3 no. 5 of the German *Energy Industry Act* must transmit information on the following data and categories of data:

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

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

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

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

Footnote 2: Pursuant to Article 4(2) of the Act of 5 December 2012 (Federal Law Gazette I p. 2403), § 47g(2) will cease to be in force on 31 December 2015. [Translators note: Pursuant to Articles 2 to 4 of the Act of 21 April 2015 (Federal Law Gazette I p. 582) the date on which § 47g(2) will cease to be in force has been postponed to 31 December 2018.]

§ 47h

Reporting Duties, Publications

(1) The Market Transparency Unit shall inform the Federal Ministry of Economics and Technology of the transmission of information pursuant to § 47b(7) sentence 1.

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

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

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

§ 47i

Cooperation with other Authorities and Supervisory Entities

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

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

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

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

§ 47j

Confidential Information, Operational Reliability, Data Protection

(1) Information that the Market Transparency Unit has obtained or prepared in the ordinary course of business when fulfilling its duties must be kept confidential. The Market Transparency Unit's members of staff are subject to a duty of confidentiality regarding the confidential information referred to in sentence 1. Other persons who are to receive confidential information shall, prior to transmission thereof, be specifically committed to secrecy unless they hold a public office or are bound by special obligations in the public service. § 1(2), (3) and (4) no. 2 of the German *Act on the Obligations of Public Servants* [*Verpflichtungsgesetz*] shall apply *mutatis mutandis*.

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

(3) Paragraph 1 applies *mutatis mutandis* to persons that are to receive data pursuant to § 47d(1) sentence 5 or that receive information pursuant to § 47c(4).

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

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

II.

Market Transparency Unit for Fuels

§ 47k

Fuel Market Monitoring

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

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

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

(4) If there is any indication that an undertaking is in violation of the legal provisions referred to in paragraph 1, the Market Transparency Unit for Fuels must immediately inform the competent competition authority and refer the issue to it. To this end, it shall transfer all information and data required or requested by the competition authority to the competition authority without undue delay. In addition, the Market Transparency Unit for Fuels shall provide the data collected by it pursuant to paragraph 2 to the following authorities and entities:

1. the Bundeskartellamt for merger control proceedings under §§ 35 to 41,
2. the competition authorities for sector inquiries as provided under § 32e,
3. the Federal Ministry of Economics and Technology for statistical purposes, and
4. the Monopolies Commission for the purpose of performing its tasks under this Act.

(5) Subject to the ordinance pursuant to paragraph 8, the Market Transparency Unit for Fuels shall be authorised to pass on the price data collected pursuant to paragraph 2 electronically to providers of consumer information services for consumer information purposes. When publishing or passing on this price data to consumers, the providers of consumer information services must abide by the requirements specified in more detail in the ordinance referred to in paragraph 8 no. 5. If these requirements are not met, the Market Transparency Unit for Fuels is authorised to refrain from passing on the data.

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

(7) For the purpose of fulfilling its tasks under paragraph 1 sentence 1, the Market Transparency Unit for Fuels has the powers set out in § 59.

(8) The Federal Ministry of Economics and Technology is empowered to impose certain requirements regarding the reporting duty provided for in paragraph 2 and the passing on of the price data pursuant to paragraph 5 by way of an ordinance not requiring the consent of the Bundesrat, in particular

1. to issue more detailed provisions on the exact timing and the type and form of reporting the price data pursuant to paragraph 2,
2. to determine appropriate *de minimis* thresholds for the reporting duty under paragraph 2 and to provide for more detailed provisions as regards a voluntary

submission to the reporting duties under paragraph 2 where the relevant threshold is not reached,

3. to issue more detailed provisions on the requirements applicable to providers of consumer information services as referred to in paragraph 5,

4. to issue more detailed provisions on the content, type, form and scope of the passing-on of price data by the Market Transparency Unit for Fuels to the providers referred to in paragraph 5, as well as

5. to issue more detailed provisions on the content, type, form and scope of the publication or passing-on of price data to consumers by the providers of consumer information services referred to in paragraph 5.

The Federal Ministry of Economics and Technology must transmit the ordinance to the Bundestag. The ordinance may be amended or refused by resolution of the Bundestag. Any amendments or a refusal are to be communicated by the Bundestag to the Federal Ministry of Economics and Technology. If the Bundestag has not dealt with the ordinance within three sitting weeks of receipt thereof, the consent of the Bundestag shall be deemed granted.

(9) Decisions by the Market Transparency Unit for Fuels shall be taken by the person heading the Unit. § 51(5) shall apply *mutatis mutandis* to all members of staff of the Market Transparency Unit for Fuels. For the purpose of fulfilling its tasks under paragraph 1 sentence 1, the Market Transparency Unit for Fuels has the powers set out in § 59.

III.

Evaluation

§ 471

Evaluation of the Market Transparency Units

The Federal Ministry of Economics and Technology shall report to the legislative bodies on the results of the market transparency units' work and the experiences gained therefrom. The reporting for the wholesale trade in electricity and gas shall be carried out five years after the beginning of the notification duties pursuant to § 47e(2) to (5) in conjunction with the ordinance referred to in § 47f. The reporting for the trade in fuels shall be carried out three years after the beginning of the notification duty pursuant to § 47k(2) in conjunction with the ordinance referred to in § 47k(8) and should in particular include information on the development of prices and the situation of the small and medium-sized mineral oil industry.

Part II

Competition Authorities

First Chapter

General Provisions

§ 48

Competencies

(1) The competition 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 competition authority, the Bundeskartellamt shall exercise the functions and powers assigned to the competition 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.

(3) The Bundeskartellamt shall monitor the level of transparency, including of wholesale prices, and the level and effectiveness of market opening and the extent of competition at the wholesale and retail levels of the gas and electricity markets and on the gas and

electricity exchanges. The Bundeskartellamt shall, without delay, make the data compiled from its monitoring activities available to the Bundesnetzagentur.

§ 49

Bundeskartellamt and Supreme *Land* Authority

- (1) If the Bundeskartellamt institutes proceedings or conducts investigations, it shall simultaneously inform the supreme *Land* authority in whose district the undertakings concerned have their registered seat. If a supreme *Land* authority institutes proceedings or conducts investigations, it shall simultaneously 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 the competence of the supreme *Land* authority pursuant to § 48(2) sentence 2, provided this is expedient in view of the circumstances of the matter. Upon referral, the Bundeskartellamt shall become the competent competition authority.
- (4) Upon application by the supreme *Land* authority, the Bundeskartellamt may refer to the supreme *Land* authority a matter falling under the Bundeskartellamt's competence pursuant to § 48(2) sentence 1, provided this is expedient in view of the circumstances of the matter. Upon referral, the supreme *Land* authority shall become the competent competition authority. Prior to the referral, the Bundeskartellamt shall inform the other supreme *Land* authorities concerned. The referral shall not take place if a supreme *Land* authority concerned objects to it within a time limit to be set by the Bundeskartellamt.

§ 50

Enforcement 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 101 and 102 of the *Treaty on the Functioning of the European Union* within the meaning of Article 35(1) of Council Regulation (EC) No 1/2003.
- (2) If the supreme *Land* authorities apply Articles 101 and 102 of the *Treaty on the Functioning of the European Union*, all dealings with the European Commission or the competition authorities of other Member States of the European Union shall be made via the Bundeskartellamt. The Bundeskartellamt may provide guidance to the supreme *Land* authorities regarding the execution of such dealings. The Bundeskartellamt will, also in such cases, attend the Advisory Committee on Restrictive Practices and Dominant Positions as a representative pursuant to Article 14 (2) sentence 1 and Article 14(7) of Regulation (EC) No 1/2003.
- (3) The Bundeskartellamt shall be the competent competition authority for the cooperation in proceedings of the European Commission or the competition authorities of other Member States of the European Union for the application of Articles 101 and 102 of the *Treaty on the Functioning of the European Union*. The procedural provisions 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 Union, as well as other accompanying persons authorised by that competition authority, to assist in searches and interviews pursuant to Article 22(1) of Regulation (EC) 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 Union in Articles 104 and 105 of the *Treaty on the Functioning of the European Union* as well as in the Regulations issued under Article 103 of the *Treaty on the Functioning of the European Union*, also in conjunction with Article 43(2), Article 100(2), Article 105(3) and

Article 352(1) of the *Treaty on the Functioning of the European Union*. Paragraph 3 sentence 2 above shall apply *mutatis mutandis*.

§ 50a

Cooperation within the Network of European Competition Authorities

(1) Article 12(1) of Regulation (EC) No 1/2003 authorises the competition authority to inform, for the purpose of applying Articles 101 and 102 of the *Treaty on the Functioning of the European Union*, the European Commission and the competition authorities of the other Member States of the European Union

1. of any matter of fact or of law, including confidential information and in particular operating and business secrets, and to transmit to them appropriate documents and data, and

2. to request these competition authorities to transmit information pursuant to no. 1 above, and to receive and use in evidence such information.

§ 50(2) shall apply *mutatis mutandis*.

(2) The competition authority may use in evidence the information received only for the purpose of applying Articles 101 or 102 of the *Treaty on the Functioning of the European Union* and in respect of the subject-matter of the investigation for which it was collected by the transmitting authority. However, information exchanged under paragraph 1 may also be used for the purpose of applying this Act if provisions of this Act are applied in accordance with Article 12(2) sentence 2 of Regulation (EC) No 1/2003.

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

§ 50b

Other Cooperation with Foreign Competition Authorities

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

(2) The Bundeskartellamt may only forward information pursuant to § 50a(1) 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 of the investigation for which it was collected by the Bundeskartellamt, and

2. maintains the confidentiality of the information and transmits such information to third parties only if the Bundeskartellamt agrees to such transmission; this shall also apply to the disclosure of confidential information in court and administrative proceedings.

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

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

§ 50c

Cooperation of Authorities

(1) Irrespective of the type of proceeding chosen in a given case, the competition authorities, the regulatory authorities and the competent authorities within the meaning of § 2 of the German *EC Consumer Protection Enforcement Act* [*EG-Verbraucherschutzdurchsetzungsgesetz*] may exchange information, including personal data and operating and business secrets, to the extent that this is necessary for the performance of their respective functions, and use such information in their proceedings. Prohibitions on the use of evidence shall remain unaffected.

(2) In the performance of their functions the competition authorities shall cooperate with the German Federal Financial Supervisory Authority [*Bundesanstalt für Finanzdienstleistungsaufsicht*], the German Central Bank [*Bundesbank*], the competent supervisory authorities pursuant to § 90 of the German *Social Code, Book IV* [*Viertes Buch Sozialgesetzbuch*] and the German *Land* media authorities [*Landesmedienanstalten*]. The competition authorities may, upon request, exchange information with the authorities mentioned in sentence 1 on a mutual basis, to the extent that 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 German *Securities Acquisition and Takeover Act* [*Wertpapiererwerbs- und Übernahmegesetz*] and the German *Securities Trading Act* [*Gesetz über den Wertpapierhandel*].

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

Second Chapter Bundeskartellamt

§ 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 the decision divisions established as determined by the Federal Ministry of Economics and Technology. Further to this, the President shall determine the allocation and handling of business in the Bundeskartellamt by means of rules of procedure; these rules of procedure require confirmation by the Federal Ministry of Economics and Technology.

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

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

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

§ 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 opinion.

(3) The Bundeskartellamt shall prepare a report on its monitoring activities under § 48(3) in agreement with the Bundesnetzagentur to the extent that aspects of regulation of the distribution networks are concerned, and shall transmit the report to the Bundesnetzagentur.

Part III

Proceedings and Legal Protection against Protracted Judicial Proceedings

First Chapter

Administrative Matters

I.

Proceedings before the Competition Authorities

§ 54

Institution of Proceedings; Parties

(1) The competition authority shall, acting *ex officio* or upon application, institute proceedings. If so requested, the competition authority may *ex officio* institute proceedings for the protection of a complainant.

(2) Parties to the proceedings before the competition authority are

1. those who have applied for proceedings to be initiated;
2. cartels, undertakings, business and trade associations or professional organisations against which the proceedings are directed;
3. persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted by the competition 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 affects a wide range of consumers and in which therefore the interests of consumers in general are substantially affected.
4. in the cases of § 37(1) nos 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 competition authority lacks territorial or subject matter jurisdiction, the competition authority may issue a preliminary decision on the issue of jurisdiction. Such decision may be challenged independently by way of appeal; the appeal shall have suspensive effect.

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

§ 56

Opportunity to Comment, Hearing

- (1) The competition authority shall give the parties an opportunity to state their case.
- (2) In appropriate cases, the competition authority may give representatives of the business sectors affected by the proceedings an opportunity to comment.
- (3) The competition authority may, upon application of a party or acting *ex officio*, hold a public hearing. The public shall be excluded from the hearing or from a part thereof if it is 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 conduct a public hearing; with the consent of the parties a decision may be taken without a hearing.
- (4) §§ 45 and 46 of the German *Administrative Procedure Act* [*Verwaltungsverfahrensgesetz*] shall be applied.

§ 57

Investigations, Evidence

- (1) The competition 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 German *Code of Civil Procedure* shall apply *mutatis mutandis* to the gathering of evidence by inspection, testimony of witnesses and experts; detention may not be imposed. The Higher Regional Court [*Oberlandesgericht*] shall have jurisdiction over appeals.
- (3) The testimony of witnesses should be recorded, and the record signed by the investigating member of the competition authority and, if a recording clerk attends, also by the clerk. The record should indicate the place and the date of the hearing as well as the names of those who conducted it and of the parties.
- (4) The record shall be read to the witness or be presented to be read by the witness him/herself for his/her approval. The approval given shall be recorded and signed by the witness. If the signature is omitted, the reason for this shall be indicated.
- (5) The provisions of paragraphs 3 and 4 shall apply *mutatis mutandis* to the questioning of experts.
- (6) The competition authority may request that the Local Court [*Amtsgericht*] administer the oath to witnesses if it considers such an oath to be necessary to obtain truthful testimony. The court shall decide whether the oath is required.

§ 58

Seizure

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

§ 59

Requests for Information

(1) To the extent necessary to perform the functions assigned to the competition authority by this Act, the competition authority may, until its decisions enter into 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 the 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 affiliated 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 affiliated undertakings;
3. inspect and examine business documents of undertakings and associations of undertakings on their premises during normal business hours.

Sentence 1 nos 1 and 3 shall apply *mutatis mutandis* to business and trade 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. The competition authority may prescribe the form in which the information referred to in sentences 1 and 2 must be disclosed; in particular, it may stipulate that an online platform must be used to enter the required information.

(2) The owners of undertakings and their representatives, and in the case of legal persons, corporations and associations without legal capacity the persons designated as representatives by law or statutes, shall be obliged to surrender the documents requested, disclose the requested 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 competition authority to carry out an examination may enter the offices of undertakings and associations of undertakings. The fundamental right under Article 13 of the German *Basic Law* [*Grundgesetz*] is restricted to this extent.

(4) Searches may be conducted only by order of the Local Court judge of the district in which the competition authority has its seat. 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 competition authority pursuant to paragraph 1. The fundamental right to the inviolability of the home (Article 13(1) of the German *Basic Law*) is restricted to this extent. §§ 306 to 310 and 311a of the German *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) § 55 of the German *Code of Criminal Procedure* shall apply *mutatis mutandis* to the person obliged to provide the information.

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

1. a decision pursuant to § 31b(3), § 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 competition authority shall contain a statement of reasons and be served upon the parties together with advice as to the available legal remedies in accordance with the provisions of the German *Act on Service in Administrative Procedure* [Verwaltungszustellungsgesetz]. § 5(4) of the German *Act on Service in Administrative Procedure* and § 178(1) (2) of the German *Code of Civil Procedure* shall apply *mutatis mutandis* to undertakings and associations of undertakings as well as to contracting entities within the meaning of § 98. Decisions directed at undertakings with their registered seat outside the scope of application of this Act shall be served by the competition authority upon the person resident or domiciled in Germany who was named by the undertaking to the Bundeskartellamt as authorised to accept service. If the undertaking has not named any person authorised to accept service, the competition authority shall serve the decisions by way of publication in the Federal Gazette.

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

§ 62

Publication of Decisions

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

II.

Appeals

§ 63

Admissibility; Jurisdiction

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

(2) The appeal may be filed by the parties to the proceedings before the competition authority (§ 54(2) and (3)).

(3) An appeal may also be made if the competition authority fails to take a decision requested in an application and the applicant claims to be entitled to demand such a decision. If the competition authority 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 by the Higher Regional Court for the district in which the competition authority has its seat and, in the cases of §§ 35 to 42, by the Higher Regional Court 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

German *Code of Civil Procedure* shall apply *mutatis mutandis*. § 202 sentence 3 of the German *Social Courts Act* [*Sozialgerichtsgesetz*] shall apply to all disputes regarding decisions of the Bundeskartellamt relating to voluntary associations of health insurance funds under § 172a of the German *Social Code, Book V*.

§ 64

Suspensive Effect

(1) The appeal has suspensive effect insofar as the decision being appealed:

1. (abolished)
2. is a decision pursuant to § 26(4), § 30(3), § 31b(3), § 32(2a) sentence 1, 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 competition 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 justified by prevailing public interests.

In cases where the appeal has no suspensive effect, the competition 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 nos 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 sentences 1 or 3 shall also be admissible 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. They may also be limited in time.

(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 competition authority whose decision is being appealed. That period shall begin upon service of the decision of the

competition authority. If, in the cases of § 36(1), an application is made for the issuance of an 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 decision issued by the Federal Ministry of Economics and Technology. If such decision is appealed, the time limit shall begin to run 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 must be signed by a lawyer admitted to practise before a German court; this shall not apply to appeals by the competition authorities.

§ 67

Parties to the Appeal Proceedings

(1) The following are parties to the proceedings before the appellate court:

1. the appellant,

2. the competition authority whose decision is being appealed,

3. persons and associations of persons whose interests are substantially affected by the decision and who, upon their application, have been admitted by the competition 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 must be represented by a lawyer admitted to practise before a German court. The competition authority may be represented by a member of the authority.

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

§ 70

Principle of Investigation

(1) The appellate court shall, acting *ex officio*, 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 established facts without consideration 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 competition authority shall substantiate the factual aspects. § 294(1) of the German *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 switching 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 depart from this requirement insofar as, for important reasons, in particular to protect business or trade 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 third 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 competition 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 competition 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 competition authority to issue the decision applied for.

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

(6) The decree shall contain a statement of reasons and be served upon the parties together with 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 final 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 credibly

demonstrated. 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 and non-appealable 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 German *Code of Civil Procedure* shall apply as regards the judicial pronouncement.

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

§ 72

Access to Files

(1) The parties referred to in § 67(1) nos 1 and 2 and § 67(2) may access the court files and may obtain executed copies, excerpts and transcripts at their own expense from the court clerk. § 299(3) of the German *Code of Civil Procedure* shall apply *mutatis mutandis*.

(2) Access to preparatory files, supplementary files, expert opinions and other information shall be permissible only with the consent of the entities to which the files belong or which have obtained the respective statement. The competition authority shall refuse to grant access to its records if this is necessary for important reasons, in particular to protect operating or business secrets. If access is refused or impermissible, the decision may be based on such records only to the extent that their content formed part of the pleadings. The 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, to the extent that such facts or evidence are relevant for the decision, there is no other way to ascertain the facts and, considering all circumstances of 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 grant the parties referred to in § 67(1) no. 3 access to files to the same extent, having heard those to whom the files belong.

§ 73

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

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

1. the provisions in §§ 169 to 201 of the German Courts Constitution Act [Gerichtsverfassungsgesetz] regarding admission of the public to proceedings, maintenance of order in court, the official court language, judicial deliberation and voting as well as legal protection against excessively long judicial proceedings;

2. the provisions of the German Code of Civil Procedure regarding the exclusion or challenge of a judge, representation and assistance in court, service of process ex

officio, summons, dates of hearings and time limits, orders for the appearance in person of the parties, joining of several proceedings, taking of testimony of witnesses and experts and any other procedures for gathering evidence, and reinstatement of prior conditions where a time limit has not been complied with.

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 Higher Regional Courts shall be admissible if the Higher Regional Court grants leave to appeal on points of law. § 202 sentence 3 of the German *Social Courts Act* shall apply to all decisions of a Higher Social Court [*Landessozialgericht*] in disputes regarding voluntary associations of health insurance funds under §172a of the German *Social Code, Book V*.

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

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

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

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

1. if the court that rendered the decision was not duly constituted,
2. if a judge participating in the decision was excluded by law from 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 in accordance with 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 against 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 against refusal to grant leave.

(2) The decision on the appeal against a 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 against refusal to grant leave shall be filed in writing with the Higher Regional Court within one month. The time period shall begin upon service of the decision being appealed.

(4) § 64(1) and (2), § 66(3), (4)no.1 and (5), §§ 67, 68, 72 and 73 (2) of this Act as well as §§ 192 to 201 of the German *Courts Constitution Act* regarding the deliberation and voting of the court and on legal protection against protracted judicial proceedings shall apply *mutatis mutandis* to the appeal against a refusal to grant leave. 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 Higher Regional Court 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 competition 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 German *Code of Civil Procedure* shall apply *mutatis mutandis*. The appeal on points of law cannot be based upon the contention that the competition authority erroneously and in breach of § 48 assumed it had jurisdiction.
- (3) The appeal on points of law shall be filed in writing with the Higher Regional Court within one month. The time period shall begin upon service of the decision being appealed.
- (4) The 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 competition 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 duly pursuing the matter shall be reimbursed, in whole or in part, by one of the parties if equity so requires. If a party caused costs 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 German *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 German *Code of Civil Procedure* shall apply *mutatis mutandis*, provided that the parties pursuant to § 67 may use electronic legal communication services. The Federal Government and the *Land* governments shall determine, by way of an 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 their powers in this regard, by way of an 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 competition authority shall be determined by the Federal Government by ordinance requiring the approval of the Bundesrat.

§ 80 **Chargeable Acts**

(1) In proceedings before the competition 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 § 31a(1) and § 39(1); in concentrations referred to the Bundeskartellamt by the European Commission, the application for referral submitted to the European Commission or the notification filed with the European Commission shall be deemed equal to the notification pursuant to § 39(1);
2. official acts on the basis of §§ 26, 30(3), § 31b(3), §§ 32 to 32d, § 34 – also in conjunction with §§ 50 to 50b –, §§ 36, 39, 40, 41, 42 and 60;
3. any discontinuation of the divestiture proceedings pursuant to § 41(3);
4. the issue of certified copies from the files of the competition authority.

The costs of publications, of public notices and of additional executed copies, duplicates and excerpts, as well as the contributions to be paid due to the analogous application of the German *Judicial Remuneration and Compensation Act* [*Justizvergütungs- und -entschädigungsgesetz*] shall also be charged as expenditures. The fee for the notification of a concentration pursuant to § 39(1) shall be credited against the fees 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 competition authority, taking into account 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 § 31b(3), §§ 32 and 32b(1) as well as §§ 32c, 32d, 34 and 41(2) sentences 1 and 2;
3. (abolished)
4. EUR 5,000 in the cases of § 26(1) and (2), § 30(3) and § 31a (1);
5. EUR 17.50 for the issue of certified copies (paragraph 1 sentence 2 no. 4);
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 competition 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) or § 41(3) 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 competition 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 or an application for referral;
2. in the cases of paragraph 1 sentence 2 no. 2, whoever has, by making an application or a notification, caused the competition authority to act, or the person against whom the competition authority has issued a decision;
3. in the cases of paragraph 1 sentence 2 no. 3, whoever was required to make the notification pursuant to § 39(2);
4. in the cases of paragraph 1 sentence 2 no. 4, whoever caused the copies to be made.

Liable to pay the costs shall also be whoever, by declaration made before the competition 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 debtors shall be jointly and severally liable.

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

(8) The Federal Government is authorised to regulate, by way of an ordinance which requires 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 disbursements pursuant to paragraph 1 sentence 3. For this purpose, it may also issue provisions 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 an ordinance requiring the approval of the Bundesrat, the details of reimbursement of the costs incurred in proceedings before the competition authority in accordance with the principles of § 78.

Second Chapter Administrative Fine Proceedings

§ 81

Provisions Concerning Administrative Fines

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

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

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

1. violates a provision in §§ 1, 19, 20(1) to (3) sentence 1 or 20(5), § 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), § 31b(3) nos 1 and 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) or
 - c) § 47d(1) sentence 2 in conjunction with an ordinance pursuant to § 47f no. 1 or
 - d) § 47d(1) sentence 5 first half of the sentence in conjunction with an ordinance pursuant to § 47f(2),
 3. contrary to § 39(1), fails to file a notification correctly or completely,
 4. contrary to § 39(6), fails to file a notice or to file a notice correctly or completely or in time,
 5. acts contrary to an enforceable obligation pursuant to § 40(3) sentence 1 or § 42(2) sentence 1,
 - 5a. acts contrary to an ordinance pursuant to § 47f no. 3(a), (b) or (c) or an enforceable order based on such ordinance, to the extent that the ordinance refers to this fine provision for a specific offence,
 - 5b. contrary to § 47k(2) sentence 1, also in conjunction with sentence 2 and in each case in conjunction with an ordinance pursuant to § 47k(8) sentence 1 nos 1 or 2, fails to communicate any of the changes referred to in § 47k(2) sentence 1 or to communicate such change correctly or completely or in time, or
 6. contrary to § 59(2), also in conjunction with § 47d(1) sentence 1 or § 47k(7), fails to provide information or to provide information correctly, completely or in time, fails to surrender 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, or
 7. contrary to § 81a(1) sentence 1, fails to provide information or to provide information correctly, completely or in time, or fails to surrender documents or to surrender documents correctly, completely or in time.
- (3) An administrative offence is committed by whoever
1. contrary to § 21(1), requests a refusal 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 (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 German *Administrative Offences Act* shall be applied to the setting of the fine, with the proviso that the economic benefit which was derived from the administrative offence may be disgorged by the fine pursuant to paragraph 4. If the fine is imposed for reasons of punishment only, this must be taken into account in setting the amount of the fine.

(6) Interest is payable on fines imposed on legal persons and associations of persons by way of an order imposing an administrative fine; fines bear interest as of two weeks after service of the order imposing the fine. § 288(1) sentence 2 and § 289 sentence 1 of the German *Civil Code* shall apply *mutatis mutandis*.

(7) The Bundeskartellamt may lay down general administrative principles on the exercise of its discretionary powers in determining 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 paragraphs 1 to 3 shall become statute-barred in accordance with the provisions of the German *Administrative Offences Act* also if the offence is committed by 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 European Commission or the competition authorities of other Member States of the European Union, acting upon a complaint or *ex officio*, are engaged in proceedings for an infringement of Articles 101 or 102 of the *Treaty on the Functioning of the European Union* against the same agreement, the same decision or the same practice as the competition authority, the limitation period for administrative offences pursuant to paragraph 1 shall be interrupted by all acts of these competition authorities which correspond to acts under § 33(1) of the German *Administrative Offences Act*.

(10) The administrative authorities within the meaning of § 36(1) no. 1 of the German *Administrative Offences Act* shall be

1. the Bundesnetzagentur as the market transparency unit for electricity and gas for administrative offences under paragraph 2 no. 2 lit. c and d, no. 5a and no. 6 in cases of violation of § 47d(1) sentence 1 in conjunction with § 59(2),
2. the Bundeskartellamt as the market transparency unit for fuels for administrative offences under paragraph 2 no. 5b and no. 6 in cases of violation of § 47k(7) in conjunction with § 59(2), and
3. in all other cases referred to in paragraphs 1, 2 and 3 the Bundeskartellamt and the highest-ranking *Land* authority competent under the applicable laws of the respective *Land*, each for their own area of competence.

§ 81a

Disclosure Duties

(1) Where the imposition of a fine against a legal person or association of persons is considered under § 81(4) sentences 2 and 3, the legal person or association of persons is required under § 81 (10) to disclose, upon demand, the following information to the administrative authority:

1. total turnover of the undertaking or association of undertakings for the financial year that presumably was or is likely to be relevant for the authority's decision under § 81(4) sentence 2, and for the five preceding financial years,

2. the turnover of the undertaking or association of undertakings generated within a defined or definable period with all customers or products, with specific customers or products, or with customers or products that can be determined by abstract criteria, and to surrender documents. § 81(4) sentence 3 shall apply to the calculation of turnover and total turnover. In this context, § 136(1) sentence 2 and § 163a(3) and (4) of the German *Code of Criminal Procedure* shall not apply *mutatis mutandis*.

(2) Paragraph 1 shall apply *mutatis mutandis* to a disclosure of information or surrender of documents to the court.

(3) Individuals acting on behalf of the legal person or association of persons may refuse to answer questions if the answers would expose them personally or a relative as specified in § 52(1) of the German *Code of Criminal Procedure* to the risk of being prosecuted for a criminal or administrative offence; the individual acting on behalf of the legal person or association of persons must be informed hereof. § 56 of the German *Code of Criminal Procedure* shall apply *mutatis mutandis*. Sentences 1 and 2 shall apply *mutatis mutandis* to a surrender of documents.

§ 82

Jurisdiction in Proceedings for the Imposition of an Administrative Fine against a Legal Person or Association of Persons

The competition authority shall be exclusively competent in proceedings for the imposition of an administrative fine against a legal person or association of persons (§ 30 of the German *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 German *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 German *Administrative Offences Act* are referred to the public prosecutor by the authority.

§ 82a

Competences and Jurisdiction in Judicial Proceedings Concerning Administrative Fines

(1) In judicial proceedings concerning administrative fines, the representative of the competition 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 part of the judgment to be issued by the clerk of the court and endowed with the certificate of enforceability. The administrative fines and amounts of money the forfeit of which has been ordered shall accrue to the German Federal Treasury [*Bundeskasse*], which also bears the costs imposed on the State Treasury [*Staatskasse*].

§ 83

Jurisdiction of the Higher Regional Court in Judicial Proceedings

(1) The Higher Regional Court in whose district the competent competition authority has its seat shall decide in judicial proceedings concerning an administrative offence pursuant to § 81; it shall also decide on an application for judicial review (§ 62 of the German *Administrative Offences Act*) in the cases of § 52(2) sentence 3 and § 69(1) sentence 2 of the German *Administrative Offences Act*. § 140(1) no. 1 of the German *Code of Criminal Procedure* in conjunction with § 46(1) of the German *Administrative Offences Act* shall not be applicable.

(2) The decisions of the Higher Regional Court shall be made by three members including the presiding member.

§ 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 German *Administrative Offences Act*). If the decision being appealed is set aside without a decision being taken on the merits of the case, the Federal Court of Justice shall refer the case back to the Higher Regional Court whose decision is being reversed.

§ 85

Proceedings for Revision of an Order Imposing an Administrative Fine

Proceedings for revision of an order of the competition authority imposing an administrative fine (§ 85(4) of the German *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 German *Administrative Offences Act*) shall be made by the court having jurisdiction pursuant to § 83.

Third Chapter Enforcement

§ 86a

Enforcement

The competition 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 Regional Courts

Regardless of the value of the matter in dispute, the Regional Courts [*Landgerichte*] shall have exclusive jurisdiction in civil actions concerning the application of this Act, of Articles 101 or 102 of the *Treaty on the Functioning of the European Union* or of Articles 53 or 54 of the *Agreement on the European Economic Area*. 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 101 or 102 of the *Treaty on the Functioning of the European Union* or of Articles 53 or 54 of the *Agreement on the European Economic Area*.

§ 88

Joining of Actions

An action under § 87(1)[sic] may be joined with an action based on another cause if the other cause 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 Regional Court for Several Court Districts

(1) The *Land* governments are authorised to refer, by way of an ordinance, civil actions for which the Regional Courts have exclusive jurisdiction pursuant to § 87 to one Regional Court for the districts of several Regional Courts if such centralisation serves the administration of justice in cartel matters, in particular to ensure the uniformity of court practice. The *Land* governments may delegate their powers in this regard to their judicial administrations.

(2) The jurisdiction of one Regional Court for individual 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 satisfies the court that its economic situation would be seriously jeopardised if it had to bear the costs of litigation calculated on the basis of the full value in dispute, the court may, upon such party's application, order 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 credibly demonstrating that the costs of litigation to be borne by it are not directly or indirectly assumed by a third party. The order entails 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 assumed by the benefiting party, it shall reimburse the opposing party for paid court fees and the fees of its lawyer only on the basis of the adjusted value in dispute. Where the extra-judicial costs are imposed upon or assumed by the opposing party, the lawyer of the benefiting party may recover his fees from the opposing party according to the value in dispute applying to the opposing party.

(2) The application 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 specified value in dispute is subsequently raised by the court. The opposing party shall be heard prior to the decision on the application.

Fifth Chapter Common Provisions

§ 90

Information of and Participation by the Competition Authorities

(1) The Bundeskartellamt shall be informed by the court of all legal actions pursuant to § 87(1)[sic]. The court shall, upon demand, 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 101 and 102 of the *Treaty on the Functioning of the European Union*.

(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, attend hearings, present arguments and address questions to parties, witnesses and experts in such hearings. Written statements made by the representative shall be communicated to the parties by the court.

(3) If the significance of the legal action does not extend beyond the territory of a *Land*, the supreme *Land* authority shall take the place of the Bundeskartellamt for the purposes of 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 European Commission and the Competition Authorities

(1) In all judicial proceedings where Articles 101 or 102 of the *Treaty on the Functioning of the European Union* are applied the court shall, without undue delay after serving the

decision on the parties, forward a duplicate of any decision to the European Commission via the Bundeskartellamt. The Bundeskartellamt may transmit to the European Commission the documents which it has obtained pursuant to § 90(1) sentence 2.

(2) In proceedings pursuant to paragraph 1, the European Commission may, acting on its own initiative, submit 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 European Commission with all documents necessary for the assessment of the case. The court shall provide the Bundeskartellamt and the parties with a copy of the written observations of the European Commission made pursuant to Article 15(3) sentence 3 of Council Regulation (EC) No 1/2003. The European Commission may also submit oral observations in the hearing.

(3) In proceedings pursuant to paragraph 1, the court may ask the European Commission to transmit information in its possession or for its observations on questions concerning the application of Articles 101 or 102 of the *Treaty on the Functioning of the European Union*. The court shall inform the parties about a request made pursuant to sentence 1, and shall provide them as well as the Bundeskartellamt with a copy of the reply of the European Commission.

(4) In the cases of paragraphs 2 and 3, the dealings between the court and the European Commission may also be made via the Bundeskartellamt.

§ 91

Antitrust Division of the Higher Regional Court

The Higher Regional Courts shall set up antitrust 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)[sic].

§ 92

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

(1) Where several Higher Regional Courts exist in a *Land*, the legal matters for which the Higher Regional Courts have exclusive jurisdiction pursuant to § 57(2) sentence 2, § 63(4), §§ 83, 85 and 86, may be assigned by the *Land* governments by way of an ordinance to one or several of the Higher Regional Courts or to the Supreme Court of a *Land* if such centralisation serves the administration of justice in cartel matters, in particular to ensure the uniformity of court practice. The *Land* governments may delegate their powers in this regard to their judicial administrations.

(2) The jurisdiction of one Higher Regional Court or of the Supreme Court of a *Land* for individual districts or for the entire territory of several *Länder* may be established by treaties between the *Länder*.

§ 93

Jurisdiction over Appeals

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

§ 94

Cartel Panel of the Federal Court of Justice

(1) The Federal Court of Justice shall set up a cartel panel; it shall decide on the following judicial remedies:

1. in administrative matters, on appeals on points of law from decisions of the Higher Regional Courts (§§ 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 Higher Regional Courts (§ 84);

3. in civil actions pursuant to § 87(1)[sic]:

a) on appeals on points of law from final judgments of the Higher Regional Courts including appeals from the refusal to grant leave to appeal,

b) on leap-frog appeals from final judgments of the Regional Courts,

c) on appeals on points of law from decisions of the Higher Regional Courts in the cases of § 574(1) of the German *Code of Civil Procedure*.

(2) In proceedings concerning administrative fines, the cartel panel shall constitute a criminal panel within the meaning of § 132 of the German *Courts Constitution Act*, in all other matters it shall constitute a civil panel.

§ 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) Public contracting entities shall procure goods, works and services in accordance with the following provisions through competition and transparent award procedures.

(2) The participants in an award procedure shall be treated equally unless discrimination is expressly required or permitted under 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 this is required for economic or technical reasons. 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 additional 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. Other or further requirements may only be imposed on contractors 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 tender which is the most economically advantageous shall be accepted.

(6) The Federal Government is empowered to define more precisely, by way of an ordinance requiring the approval of the *Bundesrat*, the procedure to be followed in awarding contracts, in particular with regard to the tender notice, the process and the types of procedure, 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 shall have a right to the provisions concerning the award procedure being complied with by the contracting entity.

§ 98

Contracting Entities

Public contracting entities within the meaning of this Part are:

1. regional or local authorities and 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 nos 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 nos 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 nos 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 nos 1 to 3, and where these funds are used to finance more than 50% of these projects,
6. natural or legal persons under private law who have concluded a works concession contract with entities falling under nos 1 to 3, with respect to contracts awarded to third parties.

§ 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 for the award of a service contract.
- (2) Supply contracts are contracts for the procurement of goods involving in particular a purchase or hire purchase or leasing, or a lease with or without a purchase option. The contracts may also include ancillary services.
- (3) Works contracts are contracts either for the execution or both the design and execution of a work project or building 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 where consideration for the construction work consists, instead of remuneration, in the limited right to use the installation plus, if appropriate, the payment of a fee.

(7) Contracts relevant under defence or security aspects are contracts for at least one of the services set out under nos 1 to 4 below:

1. the supply of military equipment within the meaning of paragraph 8, including any related parts, components or assembly kits;
2. the supply of equipment awarded under a classified contract within the meaning of paragraph 9, including any related parts, components or assembly kits;
3. construction works, supplies and services directly connected with the equipment referred to in nos 1 and 2 in all phases of the equipment's life cycle;
4. construction works and services specifically for military purposes or construction works and services awarded under a classified contract within the meaning of paragraph 9.

(8) Military equipment is any equipment that is designed specifically for military purposes or adjusted to suit military purposes and destined to be used as a weapon, ammunition or war material.

(9) A classified contract is a contract for security purposes

1. in the performance of which classified information under § 4 of the German Act on the Prerequisites and Procedures for Security Clearance Checks Undertaken by the Federal Government [Sicherheitsüberprüfungsgesetz] or corresponding provisions on the level of the Länder is used, or
2. which requires or contains classified information within the meaning of no. 1.

(10) Public contracts the subject matter of which 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 construction works which, in relation to the principal subject matter, are ancillary services shall be deemed service contracts.

(11) In the case of contracts for the execution of several activities, the relevant provisions shall be those which apply to the activity which constitutes the principal subject matter.

(12) 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 German *Federal Mining Act* [Bundesberggesetz] and in the case of activities of contracting entities in accordance with § 98 nos 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 nos 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 nos 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 and transport or the Federal Mining Act.

(13) If parts of a contract for works, supplies or services are relevant to defence or security, that contract will as a whole be awarded in accordance with the provisions applicable to contracts relevant to defence or security, provided that procurement by way of a uniform award is justified for objective reasons. If part of a contract for works, supplies or services is

relevant to defence or security, but the other part neither falls into that area nor under the scope of application of the German *Ordinance on the Award of Public Contracts* [*Vergabeverordnung*] or of the German *Sector Ordinance* [*Sektorenverordnung*], the award of that contract will not be subject to Part IV of this Act if procurement by way of a uniform award is justified for objective reasons.

§ 100 Scope of Application

(1) This Part shall apply to contracts whose contract value reaches or exceeds the thresholds applicable in each case. The threshold is determined for contracts

1. that are awarded by contracting entities within the meaning of § 98 nos 1 to 3, 5 and 6 and do not fall under nos 2 or 3, based on § 2 of the German *Ordinance on the Award of Public Contracts*,
2. that are awarded by contracting entities within the meaning of § 98 nos 1 to 4 and include activities in the fields of transport or drinking water or energy supply, based on § 1 of the German *Sector Ordinance*,
3. that are awarded by contracting entities within the meaning of § 98 and are relevant under defence or security aspects within the meaning of § 99(7), based on the rules issued by regulation pursuant to § 127 no. 3 of this Act.

(2) This Part shall not apply to the cases referred to in paragraphs 3 to 6 and 8 and in §§ 100a to 100c.

(3) This Part shall not apply to employment contracts.

(4) This Part shall not apply to the award of contracts the subject matter of which is the following:

1. arbitration and conciliation services, or
2. research and development services, unless the results of such services become the sole property of the contracting entity for its use in the conduct of its own activities and the service is fully remunerated by the contracting entity.

(5) This Part shall not apply to contracts concerning

1. the acquisition of land, existing buildings or other immovable property,
2. the rental of land, existing buildings or other immovable property,
3. rights to land, existing buildings, or other immovable property,

irrespective of how these contracts are financed.

(6) This Part shall not apply to the award of contracts

1. where application of this Part would force the contracting entity to supply information in connection with the award procedure or the execution of the order the disclosure of which it considers contrary to the essential interests of the security of the Federal Republic of Germany within the meaning of Article 346(1)(a) of the *Treaty on the Functioning of the European Union*,
2. that fall within the scope of application of Article 346(1)(b) of the *Treaty on the Functioning of the European Union*.

(7) Essential interests of security within the meaning of paragraph 6 justifying non-application of this Part may be affected in the operation or deployment of the armed forces, in the implementation of measures to combat terrorism or in the procurement of information technology or telecommunication systems.

(8) This Part shall not apply to the award of contracts that are not relevant to defence or security within the meaning of § 99(7), and

1. are declared to be secret in accordance with German legal and administrative provisions,
2. the performance of which requires special security measures to be taken under the provisions set forth in no. 1,
3. warrant non-application of procurement law for purposes of the operation or deployment of the armed forces or the implementation of measures to combat terrorism or in connection with the procurement of information technology or telecommunication systems in order to protect essential national security interests,
4. 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 *Agreement on the European Economic Area*, and cover a project which is to be implemented and financed jointly by the signatory states and which is subject to different procedural rules,
5. are awarded in pursuance of an international agreement relating to the stationing of troops and are subject to special procedural rules, or
6. are awarded pursuant to the particular procedure of an international organisation.

§ 100a

Special Exceptions for Contracts that are not Sector-Specific and not Relevant to Defence or Security

- (1) In the case of § 100(1) sentence 2 no. 1, this Part shall not only not apply to the cases set forth in § 100(3) to (6) and (8), but shall equally not apply to the contracts specified in paragraphs 2 to 4.
- (2) This Part shall not apply to the award of contracts the subject matter of which is the following:
 1. the purchase, development, production or co-production of programmes that are intended for broadcast via radio or television channels, as well as the broadcast of programmes, or
 2. financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions entered into by the contracting entities to raise money or capital, as well as central bank services.
- (3) This Part shall not apply to the award of service contracts to a person that is itself a contracting entity within the meaning of § 98 nos 1, 2 or 3 and, by virtue of a law or ordinance, has an exclusive right to perform the contract.
- (4) This Part shall not apply to the award of contracts the main purpose of which is to enable the contracting entity to provide or operate public telecommunication networks or to provide one or several telecommunication services to the public.

§ 100b

Special Exceptions for Certain Sectors

- (1) In the case of § 100(1) sentence 2 no. 2, this Part shall not only not apply to the cases set forth in § 100(3) to (6) and (8), but shall equally not apply to the contracts specified in paragraphs 2 to 9.
- (2) This Part shall not apply to the award of contracts the subject matter of which is the following:
 1. financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions entered into by the contracting entities to raise money or capital, as well as central bank services,

2. in the case of activities relating to the supply of drinking water: the procurement of water, or

3. in the case of activities relating to the supply of energy: the procurement of energy or fuels for the production of energy.

(3) This Part shall not apply to the award of contracts to a person that is itself a contracting entity within the meaning of § 98 nos 1, 2 or 3 and, by virtue of a law or ordinance, has an exclusive right to perform the contract.

(4) This Part shall not apply to the award of contracts

1. that are awarded by a contracting entity within the meaning of § 98 no. 4 if they serve purposes other than those relevant to the sectoral activity,

2. that are awarded for carrying out activities in the fields of drinking water or 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 European Union,

3. that are awarded for the purpose of resale or lease to third parties, provided that

a) the contracting entity has no special or exclusive right to sell or lease the subject of such contracts and

b) other undertakings are free to sell or lease these products under the same conditions as the respective contracting entity, or

4. that serve the purpose of carrying out an activity in the fields of drinking water or 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 (OJ L 7 of 7 January 2005, p. 7)*, 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 in the Federal Gazette by the Federal Ministry of Economics and Technology.

(5) This Part shall not apply to the award of works concessions for the purpose of carrying out an activity in the fields of drinking water or energy supply or transport.

(6) Subject to the provisions of paragraph 7, this Part shall not apply to the award of contracts

1. that are awarded to an undertaking affiliated with the contracting entity or

2. that are awarded by a joint venture formed by several contracting entities active in the fields of drinking water or energy supply or transport exclusively for the purpose of carrying out these activities, to an undertaking affiliated with one of these contracting entities.

(7) Paragraph 6 shall apply only if at least 80% of the average turnover achieved by the affiliated undertaking in the preceding three years within the European Union in the respective supply, works or services sector derives from the provision of such supplies or services to the contracting entities with which it is affiliated. If the undertaking has been in existence for less than three years, paragraph 6 shall apply if it is expected that the undertaking will 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(2) and (3) shall apply *mutatis mutandis*.

(8) Subject to the provisions of paragraph 9, this Part shall not apply to the award of contracts

1. that are awarded by a joint venture formed by several contracting entities active in the fields of drinking water or energy supply or transport exclusively for the purpose of carrying out these activities, to one of these contracting entities, or
2. that are awarded by a contracting entity to a joint venture within the meaning of paragraph 1 of which it forms part.

(9) Paragraph 8 shall apply only if

1. the joint venture has been set up to carry out the activity concerned over a period of at least three years, and
2. the instrument setting up the joint venture stipulates that the contracting entities constituting the joint venture will be part thereof for at least the same period.

§ 100c

Special Exceptions for the Defense and Security Sectors

(1) In the case of § 100(1) sentence 2 no. 3, this Part shall not only not apply to the cases set forth in § 100(3) to (6), but shall equally not apply to the contracts specified in paragraphs 2 to 4.

(2) This Part shall not apply to the award of contracts

1. the subject matter of which is financial services, excluding insurance services,
2. that are awarded for the purpose of intelligence operations,
3. that are awarded as part of a cooperation programme
 - a) that is based on research and development and
 - b) is conducted together with at least one other EU Member State for the development of a new product and, where applicable, the later phases of the entire or part of the product's life cycle,
4. that are awarded by the Federal government, the government of a *Land* or a local authority to another government or to a local authority of another state, and cover any of the following subject matters:
 - a) the supply of military equipment or equipment awarded under a classified contract within the meaning of § 99(9),
 - b) construction works and services directly connected to such equipment,
 - c) construction works and services specifically for military purposes, or
 - d) construction works and services awarded under a classified contract within the meaning of § 99(9).

(3) This Part shall not apply to the award of contracts that are awarded in a country outside the European Union; this also includes procurements for civilian purposes as part of a deployment of armed forces or of federal police or police forces of the *Länder* outside the territory of the European Union if the operation requires the relevant contract to be concluded with undertakings that are domiciled in the area of operation. Procurements for civilian purposes means the procurement of non-military products, works or services for logistical purposes.

(4) This Part shall not apply to the award of contracts subject to special procedural rules

1. arising under an international convention or international agreement concluded between one or more Member States on the one hand and one or more non-Member States that are not party to the *Agreement on the European Economic Area* on the other,

2. arising under an international convention or an international agreement in connection with a stationing of troops affecting undertakings of a Member State or a non-Member State, or
3. applicable to an international organisation if such organisation effects procurements for its own purposes or if a Member State must award contracts based on such rules.

§ 101

Types of Award Procedures

- (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 within the meaning of § 98 nos 1 to 3, so far as they are not active in the fields of drinking water or 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) Negotiated procedures are procedures whereby the contracting entity consults undertakings of its choice, with or without any prior public invitation to participate, to negotiate the terms of the contract with one or more of them.
- (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 permitted by this Act. Contracting entities active in the fields of drinking water or energy supply or transport may freely choose between the open procedure, the restricted procedure and the negotiated procedure. Where the contracts to be awarded are relevant to defence or security, public contracting entities may choose between the restricted procedure and the negotiated procedure.

§ 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 of the rejection of their tenders before the notification of the decision on the award was sent to the successful tenderers. A contract may be concluded at the earliest 15 calendar days after the 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 from the outset 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 and 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 public contracting entities for the performance 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 (honorary associate member). The chairman and the regular associate member must be civil servants appointed for life with the qualification to serve in the senior civil service, or comparable expert employees. Either the chairman or the regular associate member must be qualified to serve as a judge; generally this should be the chairman. The associate members should have in-depth knowledge of public procurement, the honorary associate members should additionally have several years of practical experience in the field of public procurement. Where the awarding of contracts relevant under defence or security aspects within the meaning of § 99(7) is reviewed, the public procurement tribunals may, in deviation of sentence 1, also take their decisions through a chairman and two regular associate members.

(3) The tribunal may assign the case to the chairman or to the regular associate member without a hearing by unappealable decision, for him/her to decide alone. Such an assignment shall be possible only if the case involves no major factual or legal difficulties, and the decision will not be of fundamental importance.

(4) The members of the tribunal shall be appointed for a term of office of five years. They take their decisions independently and are bound only by the law.

§ 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 the President upon a proposal by the central organisations of the chambers under public law. Having obtained approval from the Federal Ministry of Economics and Technology, the President of the Bundeskartellamt shall issue rules of procedure and publish these in the Federal Gazette.

(2) The establishment, organisation and composition of the entities (review bodies) 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. The *Länder* may establish joint review bodies.

§ 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 no. 2 so far as the Federation for the most part manages the participation, or has otherwise predominantly provided means of financing or predominantly supervises 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 no. 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 no. 5 so far as funding has been granted for the most part by the Federation;
5. of contracting entities within the meaning of § 98 no. 6 so far as the contracting entity falling under § 98 nos 1 to 3 is attributable to the Federation;
6. that 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* acting on federal commission, the public procurement tribunal of the *Land* shall be the competent authority. If, in application of paragraph 1 nos 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 Proceedings, Application

- (1) The public procurement tribunal shall initiate review proceedings only upon application.
- (2) Every undertaking that 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 show that it has been or risks being harmed by the alleged violation of public procurement provisions.
- (3) The application is inadmissible if
 1. the applicant became aware of the violation of public procurement provisions during the award procedure, but did not complain to the contracting entity without undue delay,
 2. violations of public procurement provisions which become apparent from the tender notice are not notified to the contracting entity by the end of the period for the submission of a tender or application specified in the notice,
 3. violations of public procurement provisions which only become apparent from the award documents are not notified to the contracting entity by the end of the period for the submission of a tender or application specified in the notice,
 4. more than 15 calendar days have expired since receipt of notification from the contracting entity that it is unwilling to redress the 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 substantiated without undue delay. It should state a specific request. An applicant without a domicile or habitual residence, seat or headquarters within the scope of application of this Act shall appoint an authorised receiving agent within the scope of application of this Act.
- (2) The substantiation must designate the respondent, contain a description of the alleged violation of rights with a description of the facts, as well as a list of the available evidence, and show that an objection was made to the contracting 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 the interests of which 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

Principle of Investigation

- (1) The public procurement tribunal shall investigate the facts *ex officio*. In doing so, it may limit itself to the facts presented by the parties or those of which it can be reasonably expected to be aware. The public procurement tribunal shall not be obliged to review extensively the lawfulness of the award procedure. In its entire activities, it shall take care to not unduly impede the course of the award procedure.

(2) The public procurement tribunal shall review the application for manifest inadmissibility or unfoundedness. In doing so, it shall also consider a written statement lodged by the contracting 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*.

§ 110a

Storing of Confidential Documents

- (1) The public procurement tribunal ensures the confidentiality of classified information and other confidential information contained in the documents transmitted by the parties.
- (2) The members of the public procurement tribunal are subject to a duty of confidentiality; type and content of the deeds, files, electronic documents and information kept confidential must not be recognisable from the reasons given for the decision.

§ 111

Access to Files

- (1) The parties may access the files at the public procurement tribunal and may obtain executed copies, excerpts or transcripts from the clerk's office at their own expense.
- (2) The public procurement tribunal shall refuse access to documents where this is necessary for important reasons, in particular for the protection of secrets or to protect business or trade secrets.
- (3) Every party shall indicate the secrets named in paragraph 2 when sending its files or representations and shall mark them accordingly in the documents. If this is not done, the public procurement tribunal may assume that the party consents to access being granted.
- (4) Refusal to grant access to the files may be challenged only in connection with an immediate appeal on the merits of the case.

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

§ 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 factual or legal difficulties, the chairman may in exceptional cases by notice to the parties extend this period by the required time. The extended period shall not exceed two weeks. The chairman shall give reasons in writing for this order.
- (2) The parties shall co-operate in clarifying the facts in a manner appropriate to a course of action designed to further and speedily conclude the proceedings. Time limits may be set for the parties, after the expiry of which further submissions may be disregarded.

§ 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 intervene to ensure the lawfulness of the award procedure.

(2) Once an award has been made, it cannot be revoked. If the review procedure becomes obsolete by the granting of the award, cancellation, discontinuance of the award procedure or in any other way, the public procurement tribunal shall determine, upon the application of a party, whether there has been a violation of rights. § 113(1) shall be inapplicable in this case.

(3) The public procurement tribunal shall decide by way of an administrative act. Decisions shall be enforced, also against public authorities, in accordance with the administrative enforcement acts of the Federation and the Länder. §§ 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 interest of the general public in the quick conclusion of the award procedure, the negative consequences of delaying the award until the end of the review outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting entity carrying out its tasks efficiently; where contracts relevant to defence or security within the meaning of § 99(7) are concerned, special defence and security interests must additionally be taken into account. The public procurement tribunal shall also consider the overall prospects of the applicant of winning 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 §121(3) shall apply *mutatis mutandis* to the proceedings before the appellate court. An immediate appeal pursuant to § 116(1) shall not be admissible against decisions taken by the public procurement tribunal under this paragraph.

(3) If during the procurement procedure any rights of the applicant under § 97(7) are jeopardised in another way than by the imminent award, the tribunal may, upon 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 additional 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(8) nos 1 to 3 are fulfilled, the prohibition of the award pursuant to paragraph 1 shall lapse five business 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, §121(2) sentence 1 and §121(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 admissible.

III. Immediate Appeal

§ 116 Admissibility, Jurisdiction

- (1) Immediate appeals shall be admissible against decisions of a public procurement tribunal. An immediate appeal may be filed by the parties to the proceedings before the public procurement tribunal.
- (2) An immediate appeal shall also be admissible if the public procurement tribunal does not decide upon an application for review within the period set out in § 113(1); in this case the application shall be deemed to have been rejected.
- (3) The immediate appeal shall be decided exclusively by the Higher Regional Court having jurisdiction at the seat of the public procurement tribunal. An award division shall be established at the Higher Regional Courts.
- (4) Legal matters pursuant to paragraphs 1 and 2 may be assigned to other Higher Regional Courts or the Supreme Court of a *Land* by an ordinance issued by the *Land* governments. The *Land* governments may delegate this authority to their judicial administrations.

§ 117 Time Limit, Formal Requirements

- (1) An immediate appeal shall be filed in writing with the appellate court within a non-extendable period of two weeks beginning upon service of the decision or, in the case of § 116(2), upon the expiry of the time period.
- (2) Reasons for the immediate appeal shall be given when it is filed. The statement of reasons for the appeal shall contain:
 1. a statement as to the extent to which the decision of the public procurement tribunal is challenged and a deviating decision is applied for,
 2. details of the facts and evidence on which the appeal is based.
- (3) The notice of appeal shall be signed by a lawyer admitted to practise before a German court. This shall not apply to appeals lodged by legal persons under public law.
- (4) Upon the filing of the appeal, the other parties to the proceedings before the public procurement tribunal shall be informed by the appellant by way of transmission of a copy of the appeal.

§ 118 Effect

- (1) The immediate appeal shall have a suspensive effect upon the decision of the public procurement tribunal. The suspensive effect shall lapse two weeks after the expiry of the time limit for the appeal. If the public procurement tribunal rejects the application to review the award, the appellate court may, upon application by the appellant, extend the suspensive effect up to the time of the decision on the appeal.
- (2) The court shall reject the application pursuant to 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 appeal outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting entity carrying out its tasks efficiently; where contracts relevant under defence or security aspects within the meaning of § 99(7) are concerned, special defence and security interests must additionally be taken into account. In its decision, the court shall also consider the prospects of success of the appeal, the overall prospects of the applicant to win the award in the award procedure and 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 unless the appellate court annuls 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 who acts as their authorised representative. Legal persons under public law may be represented by civil servants or by employees qualified to serve as a judge.

(2) §§ 69, 70(1) to (3), § 71(1) and (6), §§ 71a, 72, 73 with the exception of the reference to § 227(3) of the German *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 appeal outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interests of the general public in the contracting entity carrying out its tasks efficiently; where contracts relevant under defence or security aspects within the meaning of § 99(7) are concerned, special defence and security interests must additionally be taken into account. In its decision, the court shall also consider the prospects of success of the immediate appeal, the overall prospects of the applicant of winning the award in the award procedure and the interest of the general public in the quick conclusion of the award procedure.

(2) The application shall be made in writing, stating the reasons. The facts to be put forward as reasons for the application as well as the reason for the urgency of the matter shall be substantiated. The appeal proceedings may be suspended until a decision is made on the application.

(3) The decision shall be made and reasons shall be given without undue delay and in no event later than five weeks after receipt of the application; in the event of particular factual or legal difficulties, the chairman may, in exceptional cases, extend the period for the required amount of time by declaration to the parties stating the reasons for the extension. The decision may be made without a hearing. The reasons shall explain the lawfulness or unlawfulness of the award procedure. § 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 ten days after service of the decision unless the contracting entity takes the measures following from the decision in order to restore the lawfulness of the procedure; 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 legal opinion of the court. 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 Higher Regional Court, as well as, where applicable, by the decision of the Federal Court of Justice on the appeal in the case of a referral pursuant to paragraph 2.

(2) If a Higher Regional Court wishes to deviate from a decision taken by another Higher Regional Court or the Federal Court of Justice, it shall refer the matter to the Federal Court of Justice. The Federal Court of Justice shall decide in lieu of the Higher Regional Court. The Federal Court of Justice may confine itself to deciding only on the matter of divergence and assigning the decision on the merits of the case to the court of appeal, if this seems appropriate based on the factual and legal context of the appeal proceedings. The duty to refer the matter shall not apply to proceedings pursuant to § 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 appeal pursuant to § 116 proves to have been unjustified from the outset, the applicant or the appellant shall be obliged to compensate the opponent and the parties for the damage incurred by them due to the abuse of the right to file an application or an appeal.

(2) An abuse 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 harming competitors;
3. if an application is made with the intention of subsequently withdrawing it against payment of money or other benefits.

(3) If the preliminary measures taken by the public procurement tribunal in accordance with a specific application pursuant to § 115(3) prove to have been unjustified from the outset, the applicant shall compensate the contracting entity for the damage arising from the enforcement of the measures that were ordered.

§ 126

Claim for Damages arising from Reliance

If the contracting entity has violated a provision intended to protect undertakings, the undertaking may claim damages for the costs incurred in connection with the preparation of the tender or the participation in a procurement procedure if, without such violation, the undertaking would have had a real chance of being awarded the contract after assessment

of the tenders, and provided that such chance was impaired as a consequence of the violation. Further claims for damages shall remain unaffected.

§ 127

Authorisations

The Federal Government may, by an ordinance requiring the approval of the Bundesrat, issue rules

1. to implement the thresholds of the public procurement directives of the European Union as applicable at that time;
2. to define award procedures to be observed by contracting entities engaged in the fields of drinking water, energy supply or transport, including the selection and examination of the undertakings and the tenders, the conclusion of the contract, as well as other provisions relating to the award procedure;
3. regarding the procedure to be observed in awarding public contracts that are relevant in terms of defence and security, regarding the selection and examination of the undertakings and the tenders, the exclusion from the award procedure, the conclusion of the contract, the discontinuation of the award procedure and other provisions relating to the award procedure, including any defence and security-related requirements as regards secrecy, general rules on the protection of confidentiality, the security of supply as well as specific rules on the award of sub-contracts;
4. (abolished)
5. (abolished)
6. to define 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 with the provisions issued on the basis of this Act;
7. concerning 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 to the Federal Ministry of Economics and Technology in order to fulfil obligations arising from directives of the Council of the European Community or the European Union;
9. to define the conditions under which contracting entities active in the fields of drinking water or 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, and to define the procedure to be followed in this respect, including the necessary investigatory powers of the Bundeskartellamt in this context.

§ 127a

Costs for Expert Opinions and Observations under the German Sector Ordinance; Power to Introduce Ordinances

- (1) The Bundeskartellamt charges costs (fees and disbursements) to cover the administrative expenses involved in the preparation of expert opinions and observations made based on the provision issued under § 127 no. 9. § 80 (1) sentence 3 and §127(2) sentence 1, sentence 2 no. 1, sentences 3 and 4, (5) sentence 1 and §127(6) sentence 1 no. 2, sentences 2 and 3 shall apply *mutatis mutandis*. § 63(1) and (4) shall apply *mutatis mutandis* to the possibility to file an appeal regarding the cost decision.
- (2) The Federal Government may define more precisely, by way of an ordinance requiring the approval of the Bundesrat, the costs charged. Measures of clemency may be provided for.

§ 128

Costs of Proceedings before the Public Procurement Tribunal

(1) Costs (fees and expenses) to cover the administrative expense shall be charged for official acts of the public procurement tribunals. The German *Administrative Costs Act* [*Verwaltungskostengesetz*] of 23 June 1970 (*BGBI. I p. 821*) as amended on 14 August 2013 shall apply.

(2) The fee shall amount to at least EUR 2,500; this amount may, for reasons of equity, be reduced to a minimum of one tenth. The fee should not exceed the amount of EUR 50,000, but may be increased up to an amount of EUR 100,000 in individual cases if the expense involved or the economic significance is unusually high.

(3) If a party to the proceedings is unsuccessful, it shall bear the costs. 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 reasonable discretion. For reasons of equity, payment of the fee may be waived entirely or partially.

(4) If a party to the review proceedings is unsuccessful, that party shall bear the respondent's expenses necessary for appropriately pursuing the matter or legally defending himself. Any expenses of third parties admitted to the proceedings shall only be reimbursable if the public procurement tribunal imposes them on the unsuccessful party for reasons of equity. If the applicant withdraws his application, he shall bear the respondent's and any third parties' expenses necessary for appropriately pursuing the matter. § 80(1), (2) and (3) sentence 2 of the German *Administrative Procedure Act* [*Verwaltungsverfahrensgesetz*] and the corresponding provisions of the administrative procedure acts of the Länder shall apply mutatis mutandis. No separate proceedings for the taxation of costs shall take place.

§ 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 EU 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 suspended for other reasons.

(3) If the award procedure is subject to review proceedings or has been suspended, 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 31 January 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), as 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 German Federal Mining Act [Bundesberggesetz] to explore for or extract oil, gas, coal or other solid fuels, must observe the principles of non-discrimination and competitive procurement in the award of contracts for the exploration for or extraction of oil, gas, coal or other solid fuels. In particular, they must provide adequate information to undertakings which could be interested in such a contract 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 paragraph 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 regulation issued in accordance with § 127 number 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. §§ 19, 20, and 31b(5) shall not apply to any charges and fees under public law. The provisions of Parts I to III of this Act shall not apply to the German Central Bank and to the German *Kreditanstalt für Wiederaufbau* (KfW).

(2) This Act shall apply to all restraints of competition having an effect within the scope of application of this Act, even if they were caused outside the scope of application of this Act.

(3) The provisions of the German *Energy Industry Act* shall not preclude the application of §§ 19, 20 and 29 provided that § 111 of the German *Energy Industry Act* does not state otherwise.

Part VI Transitional and Final Provisions

§ 131 Transitional Provisions

(1) § 29 shall no longer be applied after 31 December 2017.

(2) 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.

(3) Award proceedings which were initiated before 14 December 2011 shall be terminated in accordance with rules previously applicable to these proceedings; this shall also apply to any ensuing review proceedings, and review proceedings pending on 14 December 2011.

Annex (to § 98 number 4)

Activities in the fields of drinking water, energy supply or transport 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 number 4 the activity shall not be considered an activity in 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 of electricity or gas to these networks; the activity of contracting entities under § 98 number 4 shall not be considered an activity in 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;

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 supply of heat where the production of heat by contracting entities under § 98 number 4 is the unavoidable consequence of carrying out an activity other than the supply 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) number 1 of the *Air Traffic Licensing Ordinance*

[*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.