

ACT AGAINST RESTRAINTS OF COMPETITION

PART I

Restraints of Competition

CHAPTER I

Cartel Agreements, Cartel Decisions and Concerted Practices

Section 1 Prohibition of Cartels

Agreements between competing 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.

Section 2 Standards-and-Types Cartels, Condition Cartels

- (1) Agreements and decisions whose subject matter is merely the uniform application of standards or types may be exempted from the prohibition under Section 1.

- (2) Agreements and decisions whose subject matter is the uniform application of general terms of business, delivery and payment, including cash discounts, may be exempted from the prohibition under Section 1 insofar as they do not relate to prices or price elements.

Section 3 Specialisation Cartels

Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation may be exempted from the prohibition under Section 1 provided the restraint of competition does not lead to the creation or strengthening of a dominant position.

Section 4 Cartels of Small or Medium-Sized Enterprises

- (1) Agreements and decisions whose subject matter is the rationalisation of economic activities through a form of cooperation among enterprises other than that described in Section 3 may be exempted from the prohibition under Section 1 provided
1. competition on the market is not substantially impaired thereby, and
 2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises.
- (2) Section 1 shall not apply to agreements and decisions whose subject matter is the joint purchasing of goods or the joint procurement of commercial services, but which do not, except in individual cases, compel the participating undertakings to purchase from that source, provided the conditions in subsection (1) nos. 1 and 2 are satisfied.

Section 5

Rationalisation Cartels

- (1) Agreements and decisions which serve to rationalise economic activities may be exempted from the prohibition under Section 1 provided they are a suitable means of substantially increasing the efficiency or productivity of the participating undertakings in technical, commercial or organisational respects and of thereby improving the satisfaction of demand. The rationalisation effect should be of sufficient importance when compared with the restraint of competition connected with it. The restraint of competition shall not result in the creation or strengthening of a dominant position.

- (2) If the agreement or decision aims to achieve the rationalisation in conjunction with price agreements or through the establishment of joint purchasing or selling organisations, an exemption from the prohibition under Section 1 may be granted, under the conditions of subsection (1), if the rationalisation effect cannot be achieved otherwise.

Section 6

Structural Crisis Cartels

In the event of a decline in sales due to a lasting change in demand, agreements and decisions of undertakings engaged in production, manufacturing or processing may be exempted from the prohibition under Section 1, provided the agreement or decision is necessary to systematically adjust capacity to demand, and the arrangement takes into account the conditions of competition in the economic sectors concerned.

Section 7

Other Cartels

- (1) Agreements and decisions which contribute to improving the development, production, distribution, procurement, taking back or disposal of goods or services, while allowing consumers a fair share of the resulting benefit, may be exempted from the prohibition under Section 1 provided the improvement cannot be achieved otherwise by the participating undertakings and is of sufficient importance when compared with the restraint of competition connected with it, and the restraint of competition does not result in the creation or strengthening of a dominant position.
- (2) Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation or in some other way, the joint purchasing of goods or the joint procurement of commercial services, or the uniform application of terms and conditions, may be exempted from the prohibition under Section 1 only pursuant to Section 2 (2) and Sections 3 to 5.

Section 8

Ministerial Authorisation

- (1) If the conditions of Sections 2 to 7 are not satisfied, the Federal Minister of Economics may exempt agreements and decisions from the prohibition under Section 1 if, exceptionally, the restraint of competition is necessary for prevailing reasons concerning the economy as a whole and the public interest.
- (2) If there is an immediate danger to the existence of a majority of the undertakings in a sector of the economy, the exemption may be granted only if other legislative or economic policy measures cannot be taken, or cannot be taken in time, and the restraint of competition is a suitable means of averting the danger. The exemption may be granted only in especially serious individual cases.

Section 9

Notification of Cartels Objection Procedure

- (1) Agreements and decisions of the kind described in Sections 2 to 4 (1) as well as changes and amendments thereto must be notified to the cartel authority in order to be exempted from the prohibition under Section 1. In the cases of Section 2 (1), comments of a rationalisation association and in the cases of Section 2 (2) comments of the suppliers and purchasers concerned are to be attached to the notification. Rationalisation associations within the meaning of the Act are associations whose functions as set out in their by-laws include the task of carrying out or reviewing standardisation and type defining projects while giving the suppliers and purchasers affected by the project an opportunity to participate adequately in the process.
- (2) Notifications shall include the following particulars:
1. name or other designation and place of business or registered seat of the participating undertakings;
 2. legal form and address of the cartel;
 3. name and address of the person appointed to represent the cartel (Section 13) or otherwise authorised by it; in the case of a legal person, name and address of the legal representative of the cartel.

The notification shall not contain or use any incorrect or incomplete information in order surreptitiously to obtain an exemption for the notifying party or for a third party, or to cause the cartel authority not to object in the cases of Sections 2 to 4 (1).

- (3) Agreements and decisions of the kind described in Sections 2 to 4 (1) shall be exempt from the prohibition under Section 1 and shall take effect unless the cartel authority objects within a period of three months from receipt of the notification. The cartel authority shall object if the conditions of Sections 2 to 4 (1) are not satisfied or if the comments required under subsection (1) sentence 2 have not

been submitted. The notifying undertakings shall prove that the conditions of Sections 2 to 4 (1) are satisfied and that the comments required under subsection (1) sentence 2 have been submitted. The period referred to in sentence 1 shall be one month for notifications of amendments or changes to an agreement or a decision of the kind described in Sections 2 to 4 (1) which do not alter the group of participating undertakings and which do not extend the agreement or the decision to other goods or services.

- (4) The cartel authority shall be notified without undue delay by the participating undertakings pursuant to sentence 2 of agreements and decisions of the kind described in Section 4 (2). The notification shall take effect only if the by-laws or the partnership agreement are attached thereto, the information pursuant to subsection (2) nos. 1 and 2 is included, and the notification provides information on the sector of the economy concerned, on proposed institutional committees and on the current internal and external sales of the participating undertakings. Every two years after the notification the participating undertakings shall notify the cartel authority of any changes in the information specified in sentence 2, in the by-laws or the partnership agreement and in the group of participating undertakings.
- (5) The termination or cancellation of agreements and decisions referred to in Sections 2 to 4 shall be communicated to the cartel authority.

Section 10

Application for Exemption, Granting of Exemption

- (1) Agreements and decisions of the kind described in Sections 5 to 8 may, upon application, be exempted from the prohibition under Section 1 by a decision of the cartel authority. They shall take effect when the decision becomes final. In the cases of Section 8, comments from the domestic producers and purchasers concerned are to be attached to the application unless no such comments can be obtained.

- (2) If the conditions for exemption pursuant to Sections 5 to 8 are not satisfied, the cartel authority shall, by way of a decision, reject the application referred to in subsection (1).
- (3) Section 9 (2) and (5) shall apply *mutatis mutandis* to applications pursuant to subsection (1) sentence 1.
- (4) Exemptions pursuant to Sections 5 to 8 shall be limited in time. The time period should, as a rule, not exceed five years. Exemptions may be granted subject to conditions and obligations.
- (5) Exemptions may, upon application, be extended if the conditions of Sections 5 to 8 continue to be satisfied. An extension shall be granted only for those participating undertakings which have declared their consent thereto in writing to the cartel authority; the declaration shall be made independently by each undertaking and may be made only three months prior to the expiry of the exemption. Subsection (2) shall apply *mutatis mutandis*.

Section 11

Information on Cartels, Publication

- (1) In respect of cartels exempted under Sections 2 to 8, the cartel authority shall, upon request, provide information on the following:
 1. particulars pursuant to Section 9 (2);
 2. the main content of the agreements and decisions, in particular details regarding the goods or services concerned, purpose, measures envisaged, duration, termination, rescission, and withdrawal;
 3. the time limits, conditions and obligations imposed by the cartel authority.

- (2) The following shall be published in the Federal Gazette [*Bundesanzeiger*]:
1. notifications of agreements and decisions of the kind described in Sections 2 to 4;
 2. applications for exemptions for agreements and decisions of the kind described in Sections 5 to 8;
 3. exemptions for agreements and decisions of the kind described in Sections 2 to 8; insofar as agreements or decisions are exempted in accordance with the notification or the application, reference to the publication of the notifications and applications shall suffice for the publication of the exemption;
 4. the termination of cartels.

With regard to the content of the publication pursuant to nos. 1 and 2, subsection (1) no. 2 and Section 9 (2) no. 2 shall apply *mutatis mutandis*.

Section 12

Abuse Control, Revocation of Exemption

- (1) If agreements or decisions of the kind described in Sections 2 to 4 or the manner of their implementation constitute an abuse of the market position obtained as a result of the exemption from the prohibition under Section 1, the cartel authority may
1. direct the participating undertakings to discontinue the abuse objected to,
 2. direct the participating undertakings to modify the agreements or decisions, or
 3. prohibit the agreements and decisions.

- (2) An exemption pursuant to Section 10 may be revoked, or modified by imposing conditions, or supplemented by obligations, insofar as
1. the circumstances of relevance to the exemption have substantially changed, or
 2. the parties contravene an obligation attached to the exemption, or
 3. the exemption is based on incorrect information or was obtained by means of deceit, or
 4. the parties abuse the exemption from Section 1.

In the cases of nos. 2 to 4, the exemption may also be revoked with retroactive effect.

Section 13 Cartel Representative

- (1) Cartels as well as trade and industry associations or professional organisations without legal capacity should, in their by-laws, appoint a person authorised to represent them before the cartel authority in all matters covered by this Act, as well as in appeal proceedings (Sections 63 to 73) and in proceedings involving appeals on points of law (Sections 74 to 76). The name and the address of the representative should be communicated to the cartel authority.
- (2) Should there be no representative pursuant to subsection (1), a representative shall be appointed, upon application by the cartel authority, by the local court in whose district the cartel authority has its seat. The cartel authority shall make the application *ex officio* or upon application of a third party having a legitimate interest in the appointment of a representative. The local court shall revoke the appointment when the omission has been remedied.

CHAPTER II

Vertical Agreements

Section 14

Prohibition of Agreements Concerning Prices or Terms of Business

Agreements between undertakings which concern goods or commercial services and which relate to markets within the area of application of this Act, shall be prohibited insofar as they restrict a party in its freedom to determine prices or terms of business in agreements which it concludes with third parties on the goods supplied, on other goods, or on commercial services.

Section 15

Resale Price Maintenance for Published Products

- (1) Section 14 shall not apply insofar as an undertaking binds the purchasers of its published products by legal or economic means to stipulate certain resale prices or to impose the same commitment upon their own customers, down to the resale to the ultimate consumer. The commitment can be applied in cross-border trade. However, as concerns agreements with tangible effects on cross-border trade within the European Community, Sentence 2 shall only apply, in relation to purchasers in Member States of the European Community, insofar as it [the commitment] is intended to protect a domestically-admissible resale price maintenance from being circumvented. Moreover, the fulfilment of obligations arising from the regulations in the Treaty Establishing the European Community shall not preclude the legal force and enforceability of the resale price maintenance.

- (2) Agreements of the kind described in subsection (1) shall be made in writing insofar as they concern prices and price elements. It shall suffice for the parties to sign documents referring to a price list or price notification. Section 126 (2) of the Civil Code [*Bürgerliches Gesetzbuch*] shall be inapplicable.
- (3) The Federal Cartel Office may, either *ex officio* or upon application by a purchaser so bound, declare the resale price maintenance to be of no effect and prohibit the implementation of a new and similar price maintenance scheme if
1. the resale price maintenance scheme is operated in an abusive manner, or
 2. the resale price maintenance scheme or its combination with other restraints of competition is likely to increase the price of the bound goods, or to prevent their prices from decreasing, or to restrict their production or sale.

Section 16

Abuse Control of Exclusive Dealing Agreements

The cartel authority may declare agreements between undertakings in respect of goods or commercial services to be of no effect, and prohibit the implementation of new and similar commitments insofar as they impose upon one of the parties

1. restrictions on the freedom to use the goods supplied, other goods or commercial services, or
2. restrictions on the purchase of other goods or commercial services from, or their sale to, third parties, or
3. restrictions on the sale of the supplied goods to third parties, or

4. an obligation to purchase goods or commercial services which, by their nature or in commercial practice, are unrelated,

insofar as, due to the extent of such restrictions, competition in the market for these or other goods or commercial services is substantially impaired.

Section 17 Licence Agreements

- (1) Agreements regarding the sale or licensing of patents or utility models granted or applied for, of topographies or protected seed varieties shall be prohibited insofar as they impose restrictions on the acquirer or licensee in its business activities which go beyond the scope of the protected right. Restrictions pertaining to the nature, extent, technical area of application, quantity, territory or time of exercise of the protected right shall not be deemed to go beyond the scope of the protected right.
- (2) Subsection (1) shall not apply to commitments restricting the acquirer or licensee
 1. insofar and as long as they are justified by the seller's or licensor's interest in a technically satisfactory exploitation of the subject matter of the protected right,
 2. which impose an obligation to exchange experience or to grant non-exclusive licences in respect of inventions relating to improvements or new applications, provided such obligations correspond to similar obligations on the part of the seller or licensor,
 3. not to challenge the licensed protected right,
 4. to make minimum use of the licensed protected right or to pay a minimum fee,

5. to label the licensed products in a manner which does not exclude the reference to the manufacturer,

insofar as such restrictions do not exceed the term of the acquired or licensed protected right.

- (3) Agreements of the kind described in subsection (1) may, upon application, be exempted from the prohibition under subsection (1) if the commercial freedom of the acquirer or licensee or other undertakings is not unfairly restricted and if competition on the market is not substantially impaired because of the extent of the restrictions. They shall be exempt from the prohibition under subsection (1) and take effect unless the cartel authority objects within a period of three months from receipt of the application. Section 10 (4) and Section 12 (2) shall apply *mutatis mutandis*.
- (4) Sections 1 to 12 shall remain unaffected.

Section 18

Agreements on Other Protected and Unprotected Achievements and on Seeds

Section 17 shall be applied *mutatis mutandis*

1. to agreements on the sale or licensing of legally unprotected inventions, manufacturing methods, designs, other achievements furthering technology, achievements furthering plant cultivation in the field of plant breeding, insofar as they represent essential business secrets and are identified,
2. to mixed agreements on protected achievements within the meaning of Section 17 and unprotected achievements within the meaning of no. 1,
3. to agreements on the sale or licensing of other property rights such as trademarks, registered designs, copyrights (e.g. to software), insofar as these

agreements relate to agreements on protected achievements within the meaning of Section 17, on unprotected achievements within the meaning of no. 1 or to mixed agreements within the meaning of no. 2, and contribute to the achievement of the primary purpose of the sale or licensing of industrial property rights or unprotected achievements, and to

4. agreements regarding seeds of a variety approved under the Seed Trade Act between a plant breeder and a seed multiplier or an undertaking at the seed multiplication level.

CHAPTER III

Market Dominance, Restrictive Practices

Section 19

Abuse of a Dominant Position

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

supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.

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

- (3) An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if it
1. consists of three or fewer undertakings reaching a combined market share of 50 percent, or
 2. consists of five or fewer undertakings reaching a combined market share of two thirds,

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

- (4) An abuse exists in particular if a dominant undertaking, as a supplier or purchaser of certain kinds of goods or commercial services,
1. impairs the ability to compete of other undertakings in a manner affecting competition in the market and without any objective justification;
 2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account;
 3. demands less favourable payment or other business terms than the dominant undertaking itself demands from similar purchasers in

comparable markets, unless there is an objective justification for such differentiation;

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

Section 20
Prohibition of Discrimination;
Prohibition of Unfair Hindrance

- (1) Dominant undertakings, associations of undertakings within the meaning of Sections 2 to 8, 28 (1) as well as Section 29, and undertakings which set retail prices pursuant to Sections 15, 28 (2), 29 (2) and Section 30 (1), shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification.
- (2) Subsection (1) shall apply also to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient or reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

- (3) Dominant undertakings and associations of undertakings within the meaning of subsection (1) shall not use their market position to cause other undertakings in business activities to grant them preferential terms without any objective justification. Sentence 1 shall apply also to undertakings and associations of undertakings within the meaning of subsection (2) sentence 1, in relation to the undertakings which depend on them.
- (4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market power directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking offers goods or services not merely occasionally below its cost price, unless there is an objective justification for this.
- (5) If on the basis of specific facts and in the light of general experience it appears that an undertaking has used its market power within the meaning of subsection (4), it shall be incumbent upon this undertaking to disprove the appearance and to clarify such circumstances in its field of business on which legal action may be based, which cannot be clarified by the competitor concerned or by an association referred to in Section 33, but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which action is taken.
- (6) Trade and industry associations or professional organisations as well as quality-mark associations shall not refuse to admit an undertaking if such refusal constitutes an objectively unjustified unequal treatment and would place the undertaking at an unfair competitive disadvantage.

Section 21
Prohibition of Boycott and Other
Restrictive Practices

- (1) Undertakings and associations of undertakings shall not request another undertaking or other associations of undertakings to refuse to sell or purchase, with the intention of unfairly harming certain undertakings.
- (2) Undertakings and associations of undertakings shall not threaten or cause harm, or promise or grant advantages, to other undertakings to induce them to engage in conduct which, under this Act or according to a decision issued by the cartel authority pursuant to this Act, shall not be made the subject matter of a contractual commitment.
- (3) Undertakings and associations of undertakings shall not compel other undertakings
 1. to accede to an agreement or decision within the meaning of Sections 2 to 8, 28 (1) or Section 29, or
 2. to merge with other undertakings within the meaning of Section 37, or
 3. to act uniformly in the market with the intention of restraining competition.
- (4) It shall be prohibited to cause economic harm to another because he has applied for or suggested action to be taken by the cartel authority.

Section 22

Prohibition of Recommendations

- (1) Recommendations which have as their object or effect a circumvention, by way of uniform conduct, of the prohibitions imposed by this Act or of decisions taken by the cartel authority pursuant to this Act, shall be prohibited. The same shall apply to any recommendations by an undertaking to the purchasers of its goods to demand or offer certain prices when reselling to third parties, to use certain methods to determine prices or to observe certain maximum or minimum prices.

- (2) The prohibition in subsection (1) shall not apply to recommendations which are issued by associations of small or medium-sized enterprises exclusively to its members, provided such recommendations
1. serve to improve the parties' competitiveness in relation to large enterprises or other forms of large-scale business, and
 2. are expressly declared to be non-binding on the addressee of the recommendation, and no economic, social or other pressure is applied to enforce them.
- (3) The prohibition under subsection (1) sentence 1 shall not apply to
1. recommendations whose subject matter merely is the uniform application of standards and types, if the conditions of subsection (2) no. 2 are satisfied; if the recommendations are made by a rationalisation organisation, they need not be expressly declared to be non-binding.
 2. recommendations of trade and industry associations and professional organisations whose subject matter merely is the uniform application of general terms of business, delivery and payment, including cash discounts.
- (4) Recommendations pursuant to subsection (3) no. 1 shall be exempt from the prohibition under subsection (1) only if they have been notified to the cartel authority by the recommending party, and if the comments of a rationalisation organisation were attached to the notification. Sentence 1 shall not apply to recommendations of a rationalisation organisation. Sentence 1 shall apply *mutatis mutandis* to recommendations pursuant to subsection (3) no. 2, subject to the proviso that the comments of the trade and industry associations and professional organisations concerned be attached to the notification.
- (5) Notifications of recommendations of the kind described in subsection (3) shall be published in the Federal Gazette. Section 11 (1) no. 2 shall apply *mutatis*

mutandis to the content of the publication. Furthermore, the publication shall state by whom the recommendations were notified and to whom they were addressed.

- (6) The cartel authority may declare recommendations of the kind described in subsections (2) and (3) to be impermissible, and prohibit new and similar recommendations, insofar as it determines that the conditions in subsection (2) or (3) are not or no longer satisfied, or that the recommendations constitute an abuse of the exemption from the prohibition under subsection (1).

Section 23

Non-Binding Price Recommendations for Branded Goods

- (1) Section 22 (1) shall not apply to non-binding price recommendations by an undertaking for the resale of its branded goods which are in price competition with similar goods of other manufacturers, provided the recommendations
1. are expressly designated as non-binding, only indicate a specific price, and no economic, social or other pressure is applied to enforce them, and
 2. are issued with the expectation that the recommended price will correspond to the price likely to be charged by the majority of the addressees of the recommendation.
- (2) Branded goods within the meaning of subsection (1) are products whose supply in consistent or improved quality is guaranteed by the price-recommending undertaking, and
1. which themselves or
 2. whose packaging or presentation, as intended for delivery to the consumers, or
 3. whose containers from which they are sold

feature a mark indicating their origin (firm's symbol, word or pictorial symbol). Sentence 1 shall apply to agricultural products, provided that insignificant fluctuations in quality shall be disregarded if they are due to the nature of the product and cannot be remedied by the producer through measures that he may reasonably be expected to take.

- (3) The Federal Cartel Office may declare recommendations of the kind described in subsection (1) to be impermissible, and prohibit new and similar recommendations, if it determines that the recommendations constitute an abuse of the exemption from Section 22 (1). An abuse exists in particular if
1. the recommendation or its combination with other restraints of competition is likely to increase the price of the goods or to prevent their prices from decreasing, or to restrict their production or sale, or
 2. the recommendation is likely to deceive consumers as to the price demanded by the majority of the addressees of the recommendation, or
 3. the recommended price significantly exceeds, in the majority of cases, the prices actually demanded in the entire area of application of this Act or in a substantial part thereof, or
 4. certain undertakings or certain groups of purchasers are excluded from the distribution of the goods by distribution arrangements or other measures taken by the recommending undertaking without any objective justification.

CHAPTER IV

Competition Rules

Section 24
Definition; Application for Recognition

- (1) Trade and industry associations and professional organisations may establish competition rules within their sphere of business.
- (2) Competition rules are provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct which violates the principles of fair competition or effective competition based on performance, and of encouraging conduct in competition which is in line with these principles.
- (3) Trade and industry associations and professional organisations may apply to the cartel authority for recognition of competition rules.
- (4) Applications for recognition of competition rules shall contain:
 1. the name, legal form and address of the trade and industry association or professional organisation;
 2. the name and address of the person representing it;
 3. a description of the subject matter and the territorial scope of the competition rules;
 4. the text of the competition rules.

The following must be attached to the application:

1. the by-laws of the trade and industry association or professional organisation;
2. proof that the competition rules were established in conformity with the by-laws;

3. a list of unrelated trade and industry associations or professional organisations and undertakings at the same level of the economy as well as the suppliers' and purchasers' associations and the federal organisations for the relevant levels of the sector of the economy concerned.

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

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

Section 25

Comments by Third Parties

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

Section 26

Recognition

- (1) Recognitions are issued by way of a decision of the cartel authority.
- (2) Exercising duty-bound discretion, the cartel authority may exempt competition rules falling under Section 1 or Section 22 (1) from these prohibitions by decision pursuant to subsection (1). Insofar as such a rule violates other provisions of this

Act or of the Act Against Unfair Competition, or other legal provisions, the cartel authority shall reject the application for recognition.

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

Section 27

Information on Competition Rules; Publications

- (1) The cartel authority shall, upon request, provide information on recognised competition rules by disclosing the particulars provided pursuant to Section 24 (4) sentence 1.
- (2) The following shall be published in the Federal Gazette:
 1. applications pursuant to Section 24 (3);
 2. the setting of dates for hearings pursuant to Section 25 sentence 2;
 3. the recognition of competition rules as well as any changes and amendments thereto;
 4. the withdrawal or revocation of competition rules pursuant to Section 26 (4).
- (3) The publication of applications pursuant to subsection (2) no. 1 shall include a note to the effect that the competition rules whose recognition has been applied for are open for public inspection at the cartel authority.

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

CHAPTER V

Special Provisions for Certain Sectors of the Economy**Section 28
Agriculture**

- (1) Section 1 shall not apply to agreements between agricultural producers or to agreements and decisions of associations of agricultural producers and federations of such associations of agricultural producers which concern
1. the production or sale of agricultural products, or
 2. the use of joint facilities for the storage, treatment or processing of agricultural products,
- provided they do not fix prices and do not exclude competition. Agreements and decisions of federations of associations of producers shall be notified by them without undue delay to the cartel authority. Plant breeding and animal breeding undertakings as well as undertakings operating at this level of business shall also be deemed to be agricultural producers.
- (2) Section 14 shall not apply to agreements concerning the sorting, labelling or packaging of agricultural products.
- (3) Agricultural products shall be the products listed in Annex II to the Treaty Establishing the European Community as well as the goods arising from the treatment or processing of such products, insofar as they are commonly treated or processed by agricultural producers or their associations.
- (4) Section 12 (1) shall apply *mutatis mutandis*.

Section 29 Credit and Insurance Industry

- (1) Agreements, decisions and recommendations of associations of credit institutions or insurance undertakings may be exempted from the prohibition under Sections 14 and 22 (1) sentence 1. Section 7 shall apply *mutatis mutandis*.
- (2) Section 14 shall not apply to agreements between credit institutions or insurance undertakings concerning individual cases. Sections 1 and 14 shall not apply to the joint assumption of individual risks agreed in an individual case in the joint insurance business or in the syndicate business of credit institutions.
- (3) Sections 9, 11, 12 (1) and Section 22 (6) shall apply *mutatis mutandis* to the cases referred to in subsection (1). The cartel authority should give an opportunity to comment to the business circles affected by the restraint of competition. Section 12 (1) shall apply *mutatis mutandis* to the cases referred to in subsection (2).
- (4) Section 9 and Section 12 (1) shall apply instead of Section 10 and Section 12 (2) to agreements and decisions of the kind described in Sections 5 to 7 between credit institutions, insurance undertakings or associations of such undertakings with respect to the notification, the objection procedure and abuse control.
- (5) Subsections (1) to (4) shall apply only to agreements, decisions and recommendations related to facts which are subject to approval or supervision by the Federal Banking Supervisory Office, the Federal Insurance Supervisory Office or the insurance supervisory offices of the *Länder*. They shall apply also to the undertakings referred to in Section 1 (2) sentence 1 of the Insurance Supervisory Act. The cartel authority shall forward one copy of the application to the competent supervisory authority. It shall take decisions pursuant to this provision in consultation with the competent supervisory authority.

Section 30

Copyright Collecting Societies

- (1) Sections 1 and 14 shall not apply to the establishment of copyright collecting societies which are subject to supervision pursuant to the Act on the Administration of Copyrights and Related Rights, or to agreements and decisions by such copyright collecting societies, to the extent they are necessary for the effective administration of the rights within the meaning of Section 1 of the Act on the Administration of Copyrights and Related Rights, and have been notified to the supervisory authority. The supervisory authority shall forward the notifications to the Federal Cartel Office.
- (2) If the content of an agreement pursuant to Section 16 (4) of the Act on the Administration of Copyrights and Related Rights has been determined by the Court of Appeal, the Federal Cartel Office shall have powers under this Act only insofar as the agreement is operated abusively.

Section 31

Sports

Section 1 shall not apply to the central marketing of rights to television broadcasting of sports competitions organised according to by-laws, by sports associations which, in the performance of their socio-political responsibilities, are committed also to promoting youth and amateur sports activities, and which fulfil this commitment by allocating an adequate share of the income from the central marketing of these television rights.

CHAPTER VI

Sanctions

Section 32 Prohibition

The cartel authority may prohibit conduct by undertakings and associations of undertakings which is in contravention of this Act.

Section 33 Liability for Damages; Claims for Injunctions

Whoever violates a provision of this Act or a decision taken by the cartel authority shall, if such provision or decision serves to protect another, be obliged vis-à-vis the other to refrain from such conduct; if the violating party acted wilfully or negligently, it shall also be liable for the damages arising from the violation. The claim for injunction may also be asserted by associations for the promotion of trade interests provided the association has legal capacity.

Section 34 Skimming-off Additional Proceeds

- (1) If an undertaking wilfully or negligently, as a result of conduct prohibited by a cartel authority decision pursuant to Section 32, obtains additional proceeds after being served with the decision, the cartel authority may, after the decision or a determination pursuant to Section 71 (3) has become final, order the undertaking to pay to the cartel authority an amount equivalent to such additional proceeds (skimming-off additional proceeds). Sentence 1 shall not apply insofar as such additional proceeds have been balanced by payments of damages pursuant to

Section 33 or by a fine. An order to skim-off additional proceeds may be issued only within a period of three years from the date on which the decision or the determination pursuant to Section 71 (3) has become final.

- (2) If skimming-off additional proceeds would result in undue hardship, the order shall be limited to a reasonable amount of money, or not be issued at all. It shall also not be issued if the additional proceeds are insignificant.
- (3) The amount of the additional proceeds may be estimated. The amount of money to be paid shall be stated as a specific figure.
- (4) If an undertaking which has been ordered to pay additional proceeds submits to the cartel authority a final and binding ruling obliging it to pay damages for the same abusive conduct, the cartel authority shall order that to that extent the order to pay the additional proceeds shall not be enforced. If the additional proceeds have already been paid to the cartel authority and if the undertaking proves payment of damages to the injured party on the basis of the final and binding ruling, the cartel authority shall refund to the undertaking the additional proceeds in the amount of such proven payment of damages.

CHAPTER VII

Control of Concentrations

Section 35

Scope of Application

- (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 participating undertakings was more than DM 1,000 million, and

2. the domestic turnover of at least one participating undertaking was more than DM 50 million.

(2) Subsection (1) shall not apply:

1. insofar as an undertaking which is not controlled within the meaning of Section 36 (2) and had a worldwide turnover of less than DM 20 million in the last business year, merges with another undertaking, or
2. insofar as a market is concerned in which goods or commercial services have been offered for at least five years, and which had a sales volume of less than DM 30 million in the last calendar year.

Insofar as the concentration restricts competition in the field of publishing, producing or distributing newspapers or magazines or parts thereof, only sentence 1 no. 2 shall apply.

(3) The provisions of this Act shall not apply insofar as the Commission of the European Communities has exclusive jurisdiction pursuant to Council Regulation (EEC) no. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended.

Section 36

Principles for the Appraisal of Concentrations

- (1) A concentration which is expected to create or strengthen a dominant position shall be prohibited by the Federal Cartel Office unless the participating undertakings prove that the concentration will also lead to improvements of the conditions of competition, and that these improvements will outweigh the disadvantages of dominance.
- (2) If a participating undertaking is a controlled or controlling undertaking within the meaning of Section 17 of the Joint Stock Corporation Act [*Aktiengesetz*] or a

group company within the meaning of Section 18 of the Joint Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. If several undertakings act together in such a way that they can jointly exercise a controlling influence on another undertaking, each of them shall be regarded as controlling.

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

Section 37 Concentration

- (1) A concentration shall arise in the following cases:
1. acquisition of all or of a substantial part of the assets of another undertaking;
 2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular through
 - a) ownership or the rights 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 organs of the undertaking;
 3. acquisition of shares in another undertaking if the shares, either separately or together 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 include also the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking within the parameters mentioned above, this shall be deemed to also constitute a concentration among the acquiring undertakings with respect to those markets on which the other undertaking operates;

- 4. any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking.
- (2) A concentration shall also arise if the participating undertakings had already merged previously, unless the concentration does not result in a substantial strengthening of the existing affiliation between the undertakings.
- (3) If credit institutions, financial institutions or insurance undertakings acquire shares in another undertaking for the purpose of resale, this shall not be deemed to constitute a concentration as long as they do not exercise the voting rights attaching to the shares and provided the resale occurs within one year. This time limit may, upon application, be extended by the Federal Cartel Office if it is substantiated that the resale was not reasonably possible within this period.

Section 38

Calculation of Turnover and Market Shares

- (1) Section 277 (1) of the Commercial Code shall apply to the calculation of turnover. Revenues from the supply of goods and services between affiliated undertakings (intra-group revenues) as well as excise taxes shall not be taken into account.
- (2) For trade in goods, only three quarters of the turnover shall be taken into account.
- (3) For the publication, production and distribution of newspapers, magazines and parts thereof, the production, distribution and broadcasting of radio and television programmes, and the sale of radio and television advertising time, twenty times the amount of the turnover shall be taken into account.
- (4) The turnover shall be replaced, in the case of credit institutions, financial institutions and building and loan associations, by the total amount of the proceeds referred to in Section 34 (2) sentence 1 no. 1 a-e of the Ordinance on the Rendering of Accounts of Credit Institutions [*Verordnung über die Rechnungslegung der Kreditinstitute*] of 10 February 1992 (Federal Law Gazette [*Bundesgesetzblatt*] I p. 203), minus value added tax and other taxes assessed directly on the basis of such proceeds. In the case of insurance undertakings, the premium income in the last completed business year shall be relevant. Premium income shall be income from insurance and reinsurance business including the portions ceded for cover.
- (5) In the case of an acquisition of the assets of another undertaking, the calculation of the market shares and the turnover of the seller shall take into account only the assets sold.

Section 39

Obligation to Notify

- (1) Concentrations shall be notified to the Federal Cartel Office pursuant to subsections (2) and (3) prior to being put into effect.

- (2) The obligation to notify shall be:
1. upon the undertakings participating in the concentration,
 2. in the cases of Section 37 (1) nos. 1 and 3, also upon the seller.
- (3) The notification shall indicate the form of the concentration. Furthermore, the notification shall contain the following particulars with respect to every participating undertaking:
1. name or other designation and place of business or registered seat;
 2. type of business;
 3. the turnover in Germany, in the European Union and worldwide; instead of the turnover, the total amount of the proceeds within the meaning of Section 38 (4) shall be indicated in the case of credit institutions, financial institutions and building and loan associations, and the premium income in the case of insurance undertakings;
 4. the market shares, including the bases for their calculation or estimate, if the combined shares of all participating undertakings amount to at least 20% in the area of application of this Act or in a substantial part thereof;
 5. in the case of an acquisition of shares in another undertaking, the size of the interest acquired and of the total interest held;
 6. a person authorised to accept service in Germany, if the registered seat of the undertaking is not located in the area of application of this Act.

If a participating undertaking is an affiliated undertaking, the particulars required under sentence 2 nos. 1 and 2 shall also be given with respect to the 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 be reported. The notification shall not contain or use any incorrect or incomplete information in order to cause the cartel authority to refrain from issuing a prohibition pursuant to Section 36 (1) or from issuing a notice pursuant to Section 40 (1).

- (4) A notification shall not be required if the Commission of the European Communities has referred a concentration to the Federal Cartel Office and if the particulars required under subsection (3) have been provided to the Federal Cartel Office in German. The Federal Cartel Office shall inform the participating undertakings without undue delay of the time of receipt of the decision to refer.
- (5) The Federal Cartel Office may request from each participating undertaking information on market shares, including the bases for their calculation or estimate, and on the turnover achieved by the undertaking in the last business year preceding the concentration in a certain kind of goods or commercial services.
- (6) The participating undertakings shall notify the Federal Cartel Office without undue delay after having put the concentration into effect.

Section 40

Procedure of Control of Concentrations

- (1) The Federal Cartel Office shall not prohibit a concentration notified to it unless it informs the notifying undertakings within a period of one month from receipt of the complete notification that it has initiated an examination of the concentration (main examination proceedings). The main examination proceedings should be initiated if a further examination of the concentration is necessary.

- (2) In the main examination proceedings the Federal Cartel Office shall decide by way of a decision whether the concentration is prohibited or cleared. If the decision is not issued within a period of four months from receipt of the complete notification, the concentration is deemed to be cleared. This shall not apply if:
1. the notifying undertakings have consented to an extension of the time limit,
 2. the Federal Cartel Office has refrained from issuing the notice pursuant to subsection (1) or from prohibiting the concentration because of incorrect particulars or because of information pursuant to Section 39 (5) or Section 50 not having been provided in time;
 3. contrary to Section 39 (3) sentence 2 no. 6, a person authorised to accept service in Germany is no longer named.
- (3) The clearance may be granted subject to conditions and obligations. These shall not aim at subjecting the conduct of the participating undertakings to a continued control. Section 12 (2) sentence 1 nos. 2 and 3 shall apply *mutatis mutandis*.
- (4) Prior to a prohibition, the supreme *Land* authorities in whose territory the participating undertakings have their registered seat shall be given an opportunity to comment.
- (5) In the cases of Section 39 (4) sentence 1, the time limits referred to in subsections (1) and (2) sentence 2 shall begin to run upon receipt of the referral decision by the Federal Cartel Office.
- (6) If the clearance by the Federal Cartel Office is reversed in whole or in part by a final and binding ruling, the time limit referred to in subsection (2) sentence 2 shall begin to run anew at the time at which the ruling becomes final and binding.

Section 41

Prohibition of Putting a Concentration into Effect, Dissolution

- (1) The undertakings shall not, before the expiry of the time limit referred to in Section 40 (1) sentence 1 and (2) sentence 2, put into effect a concentration not cleared by the Federal Cartel Office, nor participate in putting into effect such a concentration. Legal transactions violating this prohibition shall be of no effect. This shall not apply to agreements on the transformation, integration or formation of an undertaking and to enterprise agreements within the meaning of Sections 291 and 292 of the Joint Stock Corporation Act, once they have become legally valid by entry into the appropriate register.
- (2) The Federal Cartel Office may, upon application, grant derogations from the prohibition of putting a concentration into effect if the participating undertakings put forward important reasons for this, in particular to prevent serious damage to a participating undertaking or to a third party. The derogation may be granted at any time, even prior to notification, and may be made subject to conditions and obligations. Section 12 (2) sentence 1 nos. 2 and 3 shall apply *mutatis mutandis*.
- (3) A concentration which has been put into effect and which the Federal Cartel Office has prohibited or the clearance of which it has revoked, shall be dissolved unless the Federal Minister of Economics authorises the concentration pursuant to Section 42. The Federal Cartel Office shall order the measures necessary to dissolve the concentration. The restraint of competition may be removed also in other ways than by restoring the former situation.
- (4) To enforce its order, the Federal Cartel Office may in particular
 1. impose, once or repeatedly, a penalty payment of DM 10,000 to DM 1,000,000,
 2. prohibit or limit the exercise of voting rights attaching to shares in a participating undertaking which are owned by another participating undertaking or are attributable to it,
 3. appoint a trustee who shall effect the dissolution of the concentration.

Section 42

Ministerial Authorisation

- (1) The Federal Minister of Economics shall, upon application, authorise a concentration prohibited by the Federal Cartel Office if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest. In this context the competitiveness of the participating undertakings in markets outside the area of application of this Act shall also be taken into account. Authorisation may be granted only if the scope of the restraint of competition does not jeopardize the market economy system.
- (2) Authorisation may be granted subject to conditions and obligations. Section 40 (3) shall apply *mutatis mutandis*.
- (3) The application shall be submitted in writing to the Federal Minister of Economics within a period of one month from service of the prohibition. If the prohibition is appealed, the period shall run from the date when the prohibition becomes final.
- (4) The Federal Minister of Economics should decide on the application within four months. Prior to the decision, an opinion of the Monopolies Commission shall be obtained, and the supreme *Land* authorities in whose territory the participating undertakings have their registered seat shall be given an opportunity to comment.

Section 43

Publications

The following shall be published in the Federal Gazette:

1. the notification that a concentration has been put into effect,

2. the decision issued by the Federal Cartel Office pursuant to Section 40 (2),
3. the application for ministerial authorisation,
4. the ministerial authorisation, its refusal or modification,
5. the withdrawal or revocation of clearance by the Federal Cartel Office or of the ministerial authorisation,
6. the dissolution of a concentration and other orders taken by the Federal Cartel Office pursuant to Section 41 (3) and (4).

With regard to the content of the publication, Section 39 (3) sentence 1 as well as sentence 2 nos. 1 and 2 shall apply *mutatis mutandis*.

CHAPTER VIII

Monopolies Commission

Section 44 Functions

- (1) Every two years, the Monopolies Commission shall prepare an opinion assessing the level and the foreseeable development of business concentration in the Federal Republic of Germany, evaluating the application of the provisions concerning the control of concentrations, and commenting on other topical issues of competition policy. The opinion should cover the situation in the last two full calendar years and be completed by June 30 of the following year. The Federal Government may instruct the Monopolies Commission to prepare further opinions. Moreover, the Monopolies Commission may deliver opinions at its discretion.

- (2) The Monopolies Commission shall be bound only by the mandate established by this Act, and shall be independent in pursuing its activities. If a minority holds dissenting views when an opinion is drafted, it may express them in the opinion.
- (3) The Monopolies Commission shall submit its opinions to the Federal Government. The Federal Government shall without undue delay submit opinions pursuant to subsection (1) sentence 1 to the legislative bodies and present its views and comments within a reasonable period. The opinions shall be published by the Monopolies Commission. In the case of opinions pursuant to subsection (1) sentence 1, this shall be done at the time at which they are submitted by the Federal Government to the legislative body.

Section 45 **Members**

- (1) The Monopolies Commission shall consist of five members who shall have special knowledge and experience in the fields of economics, business administration, social policy, technology or commercial law. The Monopolies Commission shall elect a chairperson from among its members.
- (2) The members of the Monopolies Commission shall be appointed for a term of four years by the Federal President on a proposal by the Federal Government. Reappointments shall be permissible. The Federal Government shall hear the members of the Commission before nominating new members. The members are entitled to resign from office by giving notice to the Federal President. If a member leaves office prematurely, a new member shall be appointed for the former member's term of office.
- (3) The members of the Monopolies Commission shall not be members of the government or any legislative body of the Federation or a *Land*, or of the public service of the Federation, a *Land* or any other legal person under public law, except as university teachers or staff members of a scientific institution. Furthermore, they shall neither represent nor be bound by a permanent

employment or service relationship to an industry association or an employers' or employees' organisation. Furthermore, they shall not have held such a position during the year preceding their appointment to the Monopolies Commission.

Section 46

Decisions, Organisation, Rights and Duties of the Members

- (1) Decisions of the Monopolies Commission shall require the agreement of at least three members.
- (2) The Monopolies Commission has rules of procedure and a secretariat. The function of the latter is to scientifically, administratively and technically support the Monopolies Commission.
- (3) The members of the Monopolies Commission and the staff of the secretariat shall be obliged to keep secret the deliberations and the documents designated as confidential by the Monopolies Commission. The secrecy obligations shall relate also to information given to the Monopolies Commission and designated as confidential.
- (4) The members of the Monopolies Commission shall receive a lump-sum compensation and they shall be reimbursed for their travelling expenses. These shall be determined by the Federal Ministry of Economics in agreement with the Federal Ministry of the Interior. The costs of the Monopolies Commission shall be borne by the Federation.

Section 47

Transmission of Statistical Data

- (1) For the purpose of preparing opinions on the development of business concentration, the Monopolies Commission is provided by the Federal Statistical Office with such summarised data from business statistics (statistics on the manufacturing industry, crafts, foreign trade, taxes, transport, statistics on wholesale and retail trade and on the hotel and restaurant business, statistics on the service sector) and from the business register for statistical purposes 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 shall apply *mutatis mutandis* for the transmission of data on the percentage shares of the largest groups of undertakings. In order to assign the data to the respective groups of undertakings, the Monopolies Commission shall provide the Federal Statistical Office with the names and addresses of the undertakings, information on which group of undertakings they belong to as well as means of identification. The summarised data shall not concern fewer than three groups of undertakings, three undertakings, businesses or divisions of undertakings. The combination or time proximity with other information provided or generally accessible shall not allow conclusions concerning summarised information with regard to less than three groups of undertakings, three

undertakings, businesses or divisions of undertakings. This shall apply *mutatis mutandis* to the calculation of summarised measures of concentration, in particular Herfindahl indexes and Gini coefficients. The *Land* statistical offices shall provide the Federal Statistical Office with the requisite particular data.

- (2) Persons who are to receive summarised data pursuant to subsection (1) shall, prior to the transmission, be specifically committed to secrecy unless they hold a public office or have special obligations in the public service. Section 1 (2), (3) and (4) no. 2 of the Act on the Obligations of Public Servants [*Verpflichtungsgesetz*] shall apply *mutatis mutandis*. Persons specially committed pursuant to sentence 1 shall, for the purpose of the application of the provisions of the Penal Code concerning the violation of personal secrets (Section 203 (2), (4), (5); Sections 204, 205) and official secrets (Section 353b (1)), be treated like persons having special obligations in the public service.
- (3) The summarised data may be used only for the purposes for which they were provided. They shall be deleted as soon as the purpose referred to in subsection (1) has been achieved.
- (4) The Monopolies Commission shall take organisational and technical measures to ensure that only holders of a public office, persons having special obligations in the public service or persons committed pursuant to subsection (2) sentence 1 will receive summarised data.
- (5) The transmissions shall be recorded in accordance with Section 16 (9) of the Federal Statistics Act. The records shall be kept for at least five years.
- (6) When the business statistics mentioned in subsection (1) are compiled, the undertakings which are questioned shall be informed in writing that pursuant to subsection (1) the summarised data may be transmitted to the Monopolies Commission.

PART II

Cartel Authorities

CHAPTER I

General Provisions

Section 48 Competence

- (1) The cartel authorities are the Federal Cartel Office, the Federal Ministry of Economics, and the supreme *Land* authorities competent according to the laws of the respective *Land*.
- (2) Unless a provision of this Act assigns competence for a particular matter to a particular cartel authority, the Federal Cartel Office shall exercise the functions and powers assigned to the cartel authority by this Act if the effect of the influence on the market or 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.

Section 49 Federal Cartel Office and Supreme *Land* Authority

- (1) If the Federal Cartel Office institutes proceedings or conducts investigations, it shall at the same time inform the supreme *Land* authority in whose district the undertakings concerned have their registered seat. If a supreme *Land* authority institutes proceedings or conducts investigations, it shall at the same time inform the Federal Cartel Office.

- (2) The supreme *Land* authority shall refer a matter to the Federal Cartel Office if the Federal Cartel Office is competent pursuant to Section 48 (2) sentence 1. The Federal Cartel Office shall refer a matter to the supreme *Land* authority if that authority is competent pursuant to Section 48 (2) sentence 2.

Section 50
Implementation of European Law -
Activities of the Federal Cartel Office

- (1) The functions assigned to the authorities of the member states by Articles 88 and 89 of the Treaty Establishing the European Community and by Regulations pursuant to Article 87 of this Treaty, also in conjunction with other provisions of the Treaty granting power to issue Regulations or Directives, shall be exercised by the Federal Cartel Office.
- (2) To perform these functions, the Federal Cartel Office shall have the powers assigned to it for the application of this Act. It may prohibit illegal agreements, decisions and concerted practices as well as the prohibited abuse of a dominant position, and may grant exemptions. Furthermore, it may conduct the requisite investigations, also when taking part in proceedings conducted by the Commission of the European Communities. The procedural provisions of this Act shall apply. No fees to cover the administrative costs shall be charged.
- (3) The Federal Cartel Office shall inform the Commission of the European Communities of any proceedings pursuant to subsections (1) and (2), and give it an opportunity to comment.

CHAPTER II

Federal Cartel Office

Section 51 Seat, Organisation

- (1) The Federal Cartel Office is an independent higher federal authority with its seat in Bonn. It is responsible to the Federal Ministry of Economics.
- (2) Decisions of the Federal Cartel Office shall be made by decision divisions established in accordance with instructions to be issued by the Federal Ministry of Economics. As for other matters, the President shall determine the allocation and handling of duties in the Federal Cartel Office by rules of procedure requiring confirmation by the Federal Ministry of Economics.
- (3) The decisions of the decision divisions shall be made by a chairperson and two other members.
- (4) The chairperson and the other members of the decision divisions shall be civil servants appointed for life and shall be qualified to serve as judges or senior civil servants.
- (5) The members of the Federal Cartel Office shall not own or manage any undertakings, nor may they be members of the management board or supervisory board of an undertaking, a cartel, or a trade and industry association or professional organisation.

Section 52

**Publication of General Instructions Issued by
the Federal Ministry of Economics**

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

**Section 53
Report on Activities**

- (1) Every two years the Federal Cartel Office 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 pursuant to Section 52. The Federal Cartel Office shall also regularly publish its administrative principles.
- (2) The Federal Government shall without undue delay submit the report of the Federal Cartel Office to the *Bundestag* together with its comments.

PART III

Procedure

CHAPTER I

Administrative Matters

I. Proceedings Before Cartel Authorities

Section 54

Institution of the Proceedings; Parties

- (1) The cartel authority shall institute proceedings *ex officio* or upon application. If so requested, the cartel authority may institute proceedings *ex officio* for the protection of a complainant.
- (2) Parties to the proceedings before the cartel authority are:
 1. those who have applied for the institution of proceedings;
 2. cartels, undertakings, trade and industry associations or professional organisations against which the proceedings are directed;
 3. persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted by the cartel authority to the proceedings;
 4. in the cases of Section 37 (1) no. 1 or 3, also the seller.
- (3) The Federal Cartel Office shall also be a party to proceedings before the supreme *Land* authorities.

Section 55
Preliminary Decision on Jurisdiction

- (1) If a party pleads that the cartel authority lacks territorial or subject matter jurisdiction, the cartel authority may issue a preliminary decision on the question of jurisdiction. Such decision may be challenged independently by way of appeal; the appeal shall have suspensive effect.
- (2) If a party fails to plead that the cartel authority lacks territorial or subject matter jurisdiction, an appeal cannot be based upon the contention that the cartel authority erroneously assumed it had jurisdiction.

Section 56
Opportunity to Comment; Hearing

- (1) The cartel authority shall give the parties an opportunity to comment and, upon the application of a party, shall summon them to a hearing.
- (2) In appropriate cases, the cartel authority may give representatives of the business circles affected by the proceedings an opportunity to comment.
- (3) In the cases of Section 19, the cartel authority shall decide on the basis of a public hearing; with the consent of the parties, a decision may be taken without hearing. Upon application of a party, or acting *ex officio*, the cartel authority shall exclude the public from the hearing or from a part thereof if it is to be feared that public order, in particular state security or important business or operating secrets may be endangered. In the cases of Section 42, sentences 1 and 2 shall apply *mutatis mutandis* to proceedings before the Federal Ministry of Economics.

Section 57

Investigations; Taking of Evidence

- (1) The cartel authority may conduct any investigations and collect any evidence required.
- (2) Sections 372 (1), Sections 376, 377, 378, 380 to 387, 390, 395 to 397, 398 (1), Sections 401, 402, 404, 404a, 406 to 409, 411 to 414 of the Code of Civil Procedure shall apply *mutatis mutandis* to the taking of evidence by inspection, testimony of witnesses, and experts; detention shall not be ordered. The Court of Appeal [*Oberlandesgericht*] shall decide on appeals.
- (3) The testimony of witnesses should be recorded, and the record signed by the investigating member of the cartel authority; if a recording clerk attends, he shall also sign. The records should indicate the place and the date of the hearing as well as the names of those who conducted it and of the parties.
- (4) The record shall be read to the witness for his approval or be presented to be read by himself. The approval given shall be recorded and signed by the witness. If the signature is omitted, the reason for this shall be indicated.
- (5) The provisions of subsections (3) and (4) shall apply *mutatis mutandis* to the questioning of experts.
- (6) The cartel authority may request the Local Court [*Amtsgericht*] to administer the oath to witnesses if it considers such an oath to be necessary to obtain truthful testimony. The court shall decide whether the oath is to be administered.

Section 58

Seizure

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

Section 59

Requests for Information

- (1) To the extent necessary to perform the functions assigned to the cartel authority by this Act, the cartel authority may
 1. request from undertakings and associations of undertakings information regarding their economic situation, as well as the surrender of documents;
 2. inspect and examine business documents of undertakings and associations of undertakings on their premises during normal business hours;

3. request information from trade and industry associations and professional organisations about their by-laws, their decisions, and the number and names of the members affected by the decisions.
- (2) The owners of undertakings and their representatives, in the case of legal persons, partnerships or associations without legal capacity, the persons designated as representatives by law or the by-laws, as well as the persons appointed as representatives pursuant to Section 13 (2) sentence 1, shall be obliged to surrender the documents requested, to provide the information requested, to make the business documents available for inspection and examination, and to allow the examination of these business documents as well as access to offices and business premises.
 - (3) Persons entrusted by the cartel authority to carry out an examination may enter the offices of undertakings and associations of undertakings. The fundamental right under Article 13 of the Basic Law [*Grundgesetz*] is restricted to this extent.
 - (4) Searches may be made only by order of the Local Court judge in whose district the search is to be made. Sections 306 to 310 and 311a of the Code of Criminal Procedure shall apply *mutatis mutandis* to appeals from such orders. If there is danger in delay, the persons referred to in subsection (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 danger in delay.
 - (5) Persons obliged to provide information may refuse to answer questions if the answers would expose them or their relatives referred to in Section 383 (1) nos. 1 to 3 of the Code of Civil Procedure to the risk of criminal prosecution or of proceedings under the Administrative Offences Act.
 - (6) Requests for information made by the Federal Ministry of Economics or the supreme *Land* authority shall be made by written individual order, those of the Federal Cartel Office 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 or the supreme *Land* authority by written individual order, and by the Federal Cartel Office 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.

Section 60

Preliminary Injunctions

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

1. an exemption pursuant to Sections 5 to 8, 17 (3) or Section 18, its extension pursuant to Section 10 (5), its revocation or modification pursuant to Section 12 (2),
2. an authorisation pursuant to Section 42 (1), its revocation or modification pursuant to Section 42 (2) sentence 2,
3. a decision pursuant to Section 12 (1), Section 15 (3), Sections 16, 22 (6), Section 23 (3), Section 26 (4), Section 29 (3) or (4), Sections 32, 36 (1), Section 40 (3) or Section 42 (2).

Section 61

Completion of the Proceedings; Reasons for the Decision; Service

- (1) Decisions of the cartel authority shall contain a statement of reasons and be served together with advice as to the available legal remedies upon the parties pursuant to the provisions of the Act on Service in Administrative Procedure. Decisions directed at undertakings with their registered seat outside the area of application of this Act shall be served by the cartel authority upon the person who was named by the undertaking to the Federal Cartel Office as authorised to accept service. If the undertaking has not named any person authorised to accept service, the cartel authority shall serve the decisions by way of publication in the Federal Gazette.
- (2) If proceedings are not completed by way of a decision served upon the parties pursuant to subsection (1), the parties shall be informed in writing of the completion of the proceedings.

Section 62 Publication of Decisions

Decisions of the cartel authority

1. rejecting an application for exemption of agreements and decisions of the kind described in Sections 5 to 8 or for recognition of a competition rule,
2. containing an objection by the cartel authority pursuant to Section 9 (3) or Section 29 (3) or (4),
3. issued pursuant to Section 12 (1), Section 15 (3), Sections 16, 22 (6), Section 23 (3) as well as Section 29 (3) or (4),

shall be published in the Federal Gazette and, if the decision was issued by a supreme *Land* authority, also in an official gazette of the *Land*.

II. Appeals

Section 63 Admissibility; Jurisdiction

- (1) Decisions of the cartel authority may be appealed. An appeal may be based also upon new facts and evidence.
- (2) The appeal shall be open to the parties to the proceedings before the cartel authority (Section 54 (2) and (3)).
- (3) An appeal may also be made if the cartel authority fails to take a decision requested in an application and the applicant claims to be entitled to demand such a decision. If the cartel authority without sufficient reason has failed to rule within a reasonable period of time on an application to take a decision, this shall also be deemed a failure to act. Failure to act shall in such a case be regarded as a rejection of the application.
- (4) Decisions on an appeal shall be made exclusively by the Court of Appeal for the district in which the cartel authority has its seat and, in the cases of Sections 35 to 42, exclusively by the Court of Appeal for the district in which the Federal Cartel Office has its seat, also if the appeal is directed against a decision of the Federal Ministry of Economics. Section 36 of the Code of Civil Procedure shall apply *mutatis mutandis*.

Section 64 Suspensive Effect

- (1) The appeal has suspensive effect insofar as the decision being appealed
 1. revokes or amends an exemption pursuant to Section 12 (2) or an authorisation pursuant to Section 42 (2), or
 2. is issued pursuant to Section 12 (1), Section 15 (3), Sections 16, 17 (3) sentence 3, Section 23 (3), Section 26 (4), Section 29 (3) or (4), Sections 32 or 34 (1).
- (2) If an appeal is made against a decision to issue a preliminary injunction pursuant to Section 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) Section 60 shall apply *mutatis mutandis* to proceedings before the appellate court.

Section 65

Order of Immediate Enforcement

- (1) In the cases of Section 64 (1), the cartel authority may order the immediate enforcement of the decision if this is required by the public interest or by the prevailing interest of a party.
- (2) Orders under subsection (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 subsection (1) were not satisfied or are no longer satisfied, or

2. there are serious doubts as to the legality of the appealed decision, or
3. the enforcement would result for the party concerned in undue hardship not demanded by prevailing public interests.

In the cases where the appeal has no suspensive effect, the cartel authority may suspend enforcement; such suspension should be made if the conditions of sentence 1 no. 3 are satisfied. The appellate court may, upon application, order the suspensive effect in full or in part if the conditions of sentence 1 no. 2 or 3 are satisfied.

- (4) An application under subsection (3) sentence 1 or 3 shall be admissible already prior to the appeal being lodged. The applicant shall substantiate the facts upon which the application is based. If the decision has already been enforced at the time of the court ruling, the court may also order the enforcement measures to be lifted. Orders restoring or ordering the suspensive effect may be made contingent upon the furnishing of security or upon other conditions. A time limit may also be set.
- (5) Decisions on applications pursuant to subsection (3) may be amended or repealed at any time. Insofar as applications are granted by them, they shall be final.

Section 66

Time Limits and Formal Requirements

- (1) The appeal shall be filed in writing within one month with the cartel authority whose decision is being appealed. That period shall begin upon service of the decision of the cartel authority. If, in the cases of Section 36 (1), an application is made for authorisation pursuant to Section 42, the period for the appeal against the decision of the Federal Cartel Office shall begin upon service of the order

issued by the Federal Minister of Economics. Receipt of the appeal by the appellate court within the time limit shall be sufficient.

- (2) If no decision is taken on an application (Section 63 (3) sentence 2), the appeal shall not be subject to any time limit.
- (3) The appeal shall include a statement of reasons. The time limit for filing the statement of reasons is one month; it shall begin upon the filing of the appeal and may, upon application, be extended by the presiding judge of the appellate court.
- (4) The statement of reasons for the appeal shall contain:
 1. a statement as to the extent to which the decision is being appealed and its modification or revocation is being sought,
 2. details of the facts and evidence on which the appeal is based.
- (5) The appeal and the statement of reasons for the appeal shall be signed by a lawyer admitted to practice before a German court; this shall not apply to appeals by the cartel authorities.

Section 67

Parties to the Appeal Proceedings

- (1) The following are parties to the proceedings before the appellate court:
 1. the appellant,
 2. the cartel authority whose decision is being appealed,
 3. persons and associations of persons whose interests are substantially affected by the decision and who, upon their application, have been admitted by the cartel authority to the proceedings.

- (2) If an appeal is directed against a decision issued by a supreme *Land* authority, the Federal Cartel Office shall also be a party to the proceedings.

Section 68

Mandatory Representation by Lawyers

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

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

Section 70

Principle of Investigation

- (1) The appellate court shall investigate the facts *ex officio*.
- (2) The presiding judge shall endeavour to have formal defects eliminated, unclear motions explained, relevant motions made, insufficient factual information completed, and all declarations essential for ascertaining and assessing the facts made.
- (3) The appellate court may direct the parties to file statements within a specified time on issues requiring clarification, to specify evidence, and to submit documents as well as other evidence in their possession. In the event of failure to observe the time limit, a decision may be made on the basis of the record regardless of evidence which has not been produced.
- (4) If a request pursuant to Section 59 (6) or an order pursuant to Section 59 (7) is challenged by way of appeal, the cartel authority shall substantiate the factual aspects. Section 294 (1) of the Code of Civil Procedure shall be applicable. No substantiation shall be required insofar as Section 20 presupposes that small or medium-sized enterprises are dependent on undertakings in such a way that sufficient or reasonable alternatives of resorting to other undertakings do not exist.

Section 71

Decision on the Appeal

- (1) The appellate court shall decide by decree on the basis of its conclusions freely reached from the overall results of the proceedings. The decree may be based only on facts and evidence on which the parties had an opportunity to comment. The appellate court may proceed differently insofar as, for important reasons, in particular to safeguard manufacturing or operating or business secrets, third parties admitted to the proceedings were not allowed to inspect the files, and the content of the files was not part of the pleadings for these reasons. This shall not apply to such parties admitted to the proceedings who are involved in the

disputed legal relationship in such a way that the decision can only be made uniformly also in relation to them.

- (2) If the appellate court holds the decision of the cartel authority to be inadmissible or unfounded, it shall reverse the decision. If meanwhile the decision has been withdrawn or otherwise become moot, the appellate court shall declare, upon application, that the decision of the cartel authority was inadmissible or unfounded, provided the appellant has a legitimate interest in such a declaration.
- (3) If a decision pursuant to Section 32 has become moot because of a subsequent change of the factual situation or for other reasons, the appellate court shall decree, upon application, whether, to what extent and up to what time the decision was well founded.
- (4) If the appellate court holds the refusal or failure to issue the decision to be inadmissible or unfounded, it shall decree the obligation of the cartel authority to issue the decision applied for.
- (5) The decision shall also be inadmissible or unfounded if the cartel authority has improperly exercised its discretionary powers, in particular if it has exceeded the statutory limits of its discretionary powers or if it has exercised its discretion in a manner violating the purpose and intent of this Act. The appraisal by the cartel authority of the general economic situation and trends shall not be subject to review by the court.
- (6) The decree shall contain a statement of reasons and be served upon the parties together with advice as to the available legal remedies.

Section 72

Inspection of Files

- (1) The parties referred to in Section 67 (1) nos. 1 and 2 and (2) may inspect the court files and may obtain certified and other copies and excerpts at their own expense from the court clerk. Section 299 (3) of the Code of Civil Procedure shall apply *mutatis mutandis*.
- (2) The inspection of preparatory files, supplementary files, expert opinions and other information shall be allowed only with the consent of the authorities to whom the files belong or who have obtained the information. The cartel authority shall refuse to consent to an inspection of its records if this is necessary for important reasons, in particular to protect manufacturing, operating or business secrets. If inspection is refused or impermissible, the decision may be based on such records only insofar as their content formed part of the pleadings. The appellate court may, after hearing the person affected by such disclosure, order by decree the disclosure of facts or evidence, the confidentiality of which is demanded for important reasons, in particular to protect manufacturing or operating or business secrets, insofar as such facts or evidence are relevant for the decision, there is no other way to ascertain the facts and, considering all circumstances in the particular case, the significance of the matter in protecting competition outweighs the interests of the person affected in maintaining confidentiality. The decree shall contain a statement of reasons. In proceedings pursuant to sentence 4, the person affected need not be represented by a lawyer.
- (3) The appellate court may permit the parties referred to in Section 67 (1) no. 3 to inspect files to the same extent, having heard those to whom the files belong.

Section 73
Application of the Provisions of the
Courts Constitution Act and the Code of Civil Procedure

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

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

III. Appeal on Points of Law

Section 74

Leave to Appeal; Absolute Reasons for Appeal

- (1) Appeals on points of law to the Federal Supreme Court [*Bundesgerichtshof*] from decrees on the merits issued by the Courts of Appeal shall be admissible if the Court of Appeal grants leave to appeal on points of law.
- (2) Leave to appeal on points of law shall be granted if
 1. a legal issue of fundamental importance is to be decided, or
 2. a decision by the Federal Supreme Court is necessary to develop the law or to ensure uniform court practice.

- (3) The decision of the Court of Appeal shall state whether leave to appeal on points of law is granted or not. If leave to appeal is refused, the reasons shall be given.
- (4) No leave to appeal on points of law against a decision of an appellate court shall be required if the appeal is based on, and complains of, one of the following procedural defects:
1. if the court having made the decision was not duly constituted,
 2. if a judge participating in the decision was excluded by virtue of the law from the exercise of judicial functions or was successfully challenged on grounds of prejudice,
 3. if a party was denied its right to be heard,
 4. if a party to the proceedings was not represented according to the provisions of the law, unless such party consented explicitly or implicitly to the conduct of the proceedings,
 5. if the decision was made on the basis of a hearing at which the provisions regarding the admission of the public to the proceedings were violated, or
 6. if the decision does not contain a statement of reasons.

Section 75

Appeal from Refusal to Grant Leave

- (1) The refusal to grant leave to appeal on points of law may be challenged separately by way of an appeal from refusal to grant leave.

- (2) The decision on the appeal from refusal to grant leave shall be made by the Federal Supreme Court by decree which shall contain a statement of reasons. The decree may be issued without hearing.
- (3) The appeal from refusal to grant leave shall be filed in writing with the Court of Appeal within one month. The time period shall begin upon service of the decision being appealed.
- (4) Section 64 (1) and (2), Section 66 (3), (4) no. 1 and (5), Sections 67, 68, 72 and 73 no. 2 of this Act as well as Sections 192 to 197 of the Courts Constitution Act regarding the deliberation and voting of the court shall apply *mutatis mutandis* to the appeal from 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 Court of Appeal shall become final and binding upon service of the decree of the Federal Supreme Court. 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 Supreme Court.

Section 76

Right to Appeal; Formal Requirements and Time Limits

- (1) The cartel authority as well as the parties to the appeal proceedings shall be entitled to file an appeal on points of law.
- (2) The appeal on points of law may be based only on the contention that the decision rests upon a violation of the law; Sections 550, 551 nos. 1 to 3, 5 to 7 of the Code of Civil Procedure shall apply *mutatis mutandis*. The appeal on points of law cannot be based upon the contention that the cartel authority erroneously, contrary to Section 48, assumed it had jurisdiction.

- (3) The appeal on points of law shall be filed in writing with the Court of Appeal within one month. The time period shall begin upon service of the decision being appealed.
- (4) The Federal Supreme Court 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, Section 64 (1) and (2), Section 66 (3), (4) no. 1 and (5), Sections 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

Section 77

Capacity to Participate in the Proceedings

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

Section 78

Apportionment and Taxation of Costs

In appeal proceedings and in appeal proceedings on points of law, the court may order that the costs necessary for the due pursuit of the matter shall be reimbursed, in whole or in part, by one of the parties if equity so requires. If a party caused costs to be incurred

due to an unfounded appeal or by gross fault, the costs shall be imposed upon that party. As for other matters, the provisions of the Code of Civil Procedure regarding the taxation of costs and the enforcement of court decisions allocating costs shall apply *mutatis mutandis*.

Section 79 Ordinances

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

Section 80 Chargeable Acts

- (1) In proceedings before the cartel authority, fees shall be imposed to cover administrative expenses. The following acts shall be subject to fees (chargeable acts):
1. notifications pursuant to Section 9 (1), Section 22 (4), Section 28 (1) sentence 2, Section 29 (3) or (4), Section 30 (1) sentence 2 in conjunction with sentence 1 as well as Section 39 (1);
 2. official acts on the basis of Sections 10, 12, 15 to 18, 22 (6), Section 23 (3), Sections 24, 26, 29, 32, 36 and 60;
 3. the furnishing of copies from the files of the cartel authority.

In addition, the costs of public notices shall be charged as expenditures. The fee for the notification of a concentration pursuant to Section 39 (1) shall be credited against the fee for the prohibition of a concentration pursuant to Section 36 (1).

- (2) The amount of the fees shall be determined according to the personnel and material expenses of the cartel authority, account being taken of the economic significance of the subject matter of the chargeable act. However, the fee rates shall not exceed
1. DM 100,000 in the cases of Sections 36, 39, 40, 41 and 42;
 2. DM 50,000 in the cases of Sections 10, 29 (1) – also in conjunction with (3) – and Section 32;
 3. DM 15,000 in the cases of Sections 9 and 29 (4),
 4. DM 10,000 in the cases of Section 15 (3), Sections 16, 17 (3), Sections 18, 22 (6), Section 23 (3), Section 26 (1) and Section 29 (2) – also in conjunction with (3) -;
 5. DM 5,000 in the cases of Section 28 (1) sentence 2 and Section 30 (1) sentence 2;
 6. DM 2,500 in the cases of Section 22 (4);
 7. DM 500 in the cases of Section 8 (3) sentences 5 to 7 of the Act Regulating the Transportation of Persons and Section 12 (7) of the General Railway Act;
 8. DM 35 for the issuance of certified copies (subsection (1) no. 3);
 9.
 - a) in the cases of Section 12 (2), the amount charged for the exemption;
 - b) in the cases of Section 12 (1) and Section 29 (3) and (4), the amount for the notification (nos. 2 to 5), DM 15,000 for decisions in relation to agreements or decisions of the kind described in

Section 4 (2), and DM 500 for decisions in relation to agreements or decisions of the kind described in Section 28 (1);

- c) in the cases of Section 26 (4), the amount for the decision pursuant to Section 26 (1) (no. 4);
- d) in the cases of Section 60, one fifth of the fee in the main issue.

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

- (3) As regards payment for several similar official acts or similar notifications by the same person liable to pay the fee, provision may be made for lump-sum fee rates which allow for the minor extent of administrative effort involved.
- (4) Fees shall not be charged
 - 1. for oral and written information and suggestions;
 - 2. if they would not have arisen had the matter been handled correctly;
 - 3. in the cases of Section 42 if the preceding decision of the Federal Cartel Office pursuant to Section 36 (1) has been reversed.
- (5) If an application is withdrawn before a decision is made thereon, one half of the fee shall be paid. The same shall apply if an application is withdrawn within three months from its receipt by the cartel authority.
- (6) The person liable to pay the fees shall be
 - 1. in the cases of subsection (1) sentence 2 no. 1: whoever has submitted a notification;

2. in the cases of subsection (1) sentence 2 no. 2: whoever has, by making an application, caused the cartel authority to act, or the person against whom the cartel authority has issued a decision;
3. in the cases of subsection (1) sentence 2 no. 3: whoever caused the copies to be made.

The person liable to pay the fees is also whoever, by declaration made before the cartel authority or communicated to it, assumed the obligation to pay the fees, or is liable by virtue of the law for the fee owed by another person. Several persons owing fees shall be jointly and severally liable.

- (7) The claim to payment of fees shall become statute-barred four years after the assessment of the fees. The claim to reimbursement of expenditures shall become statute-barred four years after they have arisen.
- (8) The Federal Government is authorised to regulate, by way of ordinances which require the approval of the *Bundesrat*, the fee rates and the collection of the fees from persons liable to pay fees under the provisions in subsections (1) to (6), as well as the reimbursement of expenditures for the publications referred to in Section 11 (2), Section 22 (5), Section 27 (2) to (4), Sections 43 and 62. For this purpose, it may also make regulations which concern the exemption of legal persons under public law from costs, the statute of limitations, and the collection of costs.
- (9) The Federal Government shall regulate, by way of ordinances requiring the approval of the *Bundesrat*, the details of reimbursement of the costs incurred in proceedings before the cartel authority according to the principles of Section 78.

CHAPTER II

Proceedings Concerning Administrative Fines

Section 81
Provisions Concerning Administrative Fines

- (1) An administrative offence is committed by whoever wilfully or negligently
1. violates a provision in Sections 1, 14, 17 (1) sentence 1, also in conjunction with Section 18, Section 19 (1), Section 20 (1), also in conjunction with (2) sentence 1, Section 20 (3) sentence 1, also in conjunction with sentence 2, Section 20 (4) sentence 1 or (6), Sections 21, 22 (1) or Section 41 (1) sentence 1 concerning the prohibitions of agreements or contracts referred to therein, of the abuse of a dominant position, the hindrance or different treatment of undertakings or other conduct restricting competition, or concerning the prohibition of recommendations or of putting a concentration into effect,
 2. contrary to Section 9 (2) sentence 2, also in conjunction with Section 29 (3) sentence 1 or (4), Section 24 (4) sentence 3 or Section 39 (3) sentence 4, provides or uses information,
 3. contrary to Section 9 (4) sentence 1 or Section 28 (1) sentence 2, does not notify agreements and decisions or fails to notify them correctly or completely or in time,
 4. contrary to Section 9 (4) sentence 3 or Section 39 (6), fails to make a notification or does not make a notification correctly or completely or in time,
 5. acts contrary to an enforceable obligation pursuant to Section 10 (4) sentence 3, Section 12 (2) sentence 1, in each case also in conjunction with Section 17 (3) sentence 3, Section 40 (3) sentence 1 or Section 42 (2) sentence 1,
 6. acts contrary to an enforceable order pursuant to

- a) Section 12 (1) no. 1, also in conjunction with Section 29 (4), Section 15 (3), Sections 16, 22 (6), Section 23 (3) sentence 1, Sections 32, 41 (4) no. 2 or Section 50 (2) sentence 2, or
 - b) Section 39 (5),
- 7. contrary to Section 39 (1), fails to notify concentrations or to notify concentrations correctly, completely or in time,
 - 8. contrary to Section 59 (2), 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 fails to allow examination of such business documents as well as access to offices and business premises, or
 - 9. acts contrary to a preliminary injunction pursuant to Section 60 or 64 (3) or to an order pursuant to Section 65.
- (2) The administrative offence may be punished in the cases of subsection (1) nos. 1, 2, 5, 6a and 9 by a fine of up to DM 1 million, and in excess of this amount up to three times the additional proceeds obtained as a result of the violation, in all other cases by a fine of up to DM 50,000. The amount of the additional proceeds may be estimated.
 - (3) Proceedings for administrative offences as defined in subsection (1) shall become statute-barred in accordance with the provisions of the Administrative Offences Act also if the offence is committed by dissemination of printed material. Administrative offences as defined in subsection (1) no. 1 shall become statute-barred after five years.
 - (4) The administrative authority within the meaning of Section 36 (1) no. 1 of the Administrative Offences Act is

1. the authority competent pursuant to Section 48, insofar as administrative offences pursuant to subsection (1) are concerned,
 2. the Federal Cartel Office, insofar as proceedings pursuant to Section 50 are concerned.
- (5) Agreements and decisions of the kind described in Section 1 which have been notified pursuant to Section 9 shall not be proceeded against as an administrative offence as long as the cartel authority has not objected pursuant to Section 9 (3). The same shall apply to agreements and decisions with respect to which an application has been made pursuant to Section 10, as long as the cartel authority has not rejected the application pursuant to Section 10 (2).

Section 82

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

The authority competent pursuant to Section 48 shall be exclusively competent in proceedings to assess a fine against a legal person or association of persons (Section 30 of the Administrative Offences Act) in cases arising from

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

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

Section 83

Jurisdiction of the Court of Appeal in Judicial Proceedings

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

Section 84

Appeal to the Federal Supreme Court on Points of Law

The Federal Supreme Court shall decide on appeals on points of law (Section 79 of the Administrative Offences Act). If the decision being appealed is reversed without a decision being taken on the merits of the case, the Federal Supreme Court shall refer the case back to the Court of Appeal whose decision has been reversed.

Section 85

Reopening of Proceedings Against an Administrative Fine

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

Section 86
Court Decisions Concerning Enforcement

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

CHAPTER III

Civil Actions

Section 87
Exclusive Jurisdiction of the District Courts

- (1) The District Courts [*Landgerichte*] shall have exclusive jurisdiction in civil actions arising from this Act or from cartel agreements and cartel decisions, regardless of the amount in dispute. 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. Sentence 1 shall not apply to legal actions arising from the legal relationships referred to in Section 69 of the Social Security Code, Book V, also insofar as these concern third-party rights.
- (2) Such actions shall be regarded as commercial matters within the meaning of Sections 93 to 114 of the Courts Constitution Act.

Section 88
Joining of Actions

Another cause of action may be joined with one arising under this Act or arising from cartel agreements and cartel decisions (Section 87) if the former has a legal or direct

economic connection with the claim to be asserted before the court having jurisdiction pursuant to Section 87; this shall apply also if another court has exclusive jurisdiction over the other cause of action.

Section 89

Jurisdiction of one District Court for Several Court Districts

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

Section 90

Information to and Participation of the Federal Cartel Office

- (1) The court shall inform the Federal Cartel Office of all legal actions arising from this Act or from cartel agreements and cartel decisions. The court shall, upon request, transmit to the Federal Cartel Office copies of all briefs, records, orders and decisions.

- (2) The President of the Federal Cartel Office may, if he considers it to be appropriate to protect the public interest, appoint from among the members of the Federal Cartel Office and, if the legal action concerns one of the undertakings referred to in Section 29, also from among the members of the competent supervisory authority, a representative authorised to submit written statements to the court, to point out facts and evidence, to attend hearings, to present arguments there, and to address questions to parties, witnesses and experts. Written statements made by the representative shall be communicated to the parties by the court.
- (3) If the significance of the legal action does not extend beyond the territory of a *Land*, the supreme *Land* authority shall take the place of the Federal Cartel Office for the purposes of subsection (1) sentence 2 and subsection (2).
- (4) Subsections (1) and (2) shall apply *mutatis mutandis* to legal actions which have as their subject matter the enforcement of a price set pursuant to Section 15 against a purchaser bound thereby or against another undertaking.

CHAPTER IV

Common Provisions

Section 91

Cartel Division of the Court of Appeal

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

Section 92

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

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

Section 93

Jurisdiction over Appeals

Section 92 (1) and (2) shall apply *mutatis mutandis* to decisions on appeals from final judgments and from other decisions in civil actions pursuant to Section 87 (1). The parties may be represented before the Courts of Appeal referred to in sentence 1 in conjunction with Section 92 (1) and (2) also by lawyers admitted to practice before the Court of Appeal which would have jurisdiction over the judicial remedy in the absence of sentence 1.

Section 94

Cartel Division of the Federal Supreme Court

- (1) The Federal Supreme Court shall establish a cartel division; it shall decide on the following judicial remedies:
1. in administrative matters, on appeals on points of law from decisions of the Courts of Appeal (Sections 74, 76) and on appeals from refusal to grant leave to appeal (Section 75);
 2. in proceedings concerning administrative fines, on appeals on points of law from decisions of the Courts of Appeal (Section 84);
 3. in civil actions arising from this Act or from agreements or decisions of the kind described in Sections 1 to 8,
 - a) on appeals on points of law from final judgments of the Courts of Appeal,
 - b) on appeals on points of law from final judgments of the District Courts in the case of Section 566a of the Code of Civil Procedure,

- c) on appeals from decisions of the Courts of Appeal in the cases of Section 519b (2), Section 542 (3) in conjunction with Section 341 (2) and Section 568a of the Code of Civil Procedure.
- (2) In proceedings concerning administrative fines, the cartel division shall constitute a division for criminal matters within the meaning of Section 132 of the Courts Constitution Act, in all other cases it shall constitute a division for civil matters.

Section 95 Exclusive Jurisdiction

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

Section 96 Civil Actions

Sections 87 to 90 and 91 to 95 shall apply *mutatis mutandis* to civil actions arising from Articles 85 or 86 of the Treaty Establishing the European Community or from Articles 53 or 54 of the Treaty on the European Economic Area; if the decision in a legal action depends, in whole or in part, on the applicability of Article 85 or Article 86 of the Treaty Establishing the European Community or Article 53 or Article 54 of the Treaty on the European Economic Area, Section 87 (1) shall apply *mutatis mutandis*. Sentence 1 shall also apply to legal actions arising from the legal relationships referred to in Section 69 of the Social Security Code, Book V, also insofar as these concern third-party rights.

PART IV

Award of Public Contracts

CHAPTER I

Award Procedures

Section 97 General Principles

- (1) Contracting entities shall procure goods, works and services in accordance with the following provisions through competition and by way of transparent award procedures.
- (2) The participants in an award procedure shall be treated equally unless discrimination is expressly required or allowed by this Act.
- (3) The interests of small and medium-sized undertakings shall primarily be taken into account in an appropriate manner by subdividing contracts into trade-specific and partial lots.
- (4) Contracts shall be awarded to skilled, efficient and reliable undertakings; contractors may be expected to meet other or further requirements only if federal law or the laws of a *Land* provides for this.
- (5) The economically most advantageous tender shall be accepted.
- (6) The Federal Government is empowered to more precisely define, by ordinance with the approval of the *Bundesrat*, the procedure to be

followed in awarding contracts, in particular concerning the notice, the course and the categories of awards, the selection and examination of undertakings and tenders, the conclusion of the contract as well as other issues relating to the award procedure.

- (7) The undertakings have a right to the provisions concerning the award procedure being complied with by the contracting entity.

Section 98 Contracting Entities

Contracting entities within the meaning of this Part are:

1. regional or local authorities as well as their special funds,
2. other legal persons under public or private law which were established for the specific purpose of meeting non-commercial needs in the general interest if they are, for the most part, financed individually or jointly through a participation or in some other way by entities within the meaning of no. 1 or 3, or if such entities supervise their management or have appointed more than half of the members of one of their management or supervisory boards. The same shall apply if the entity which individually or together with others provides, for the most part, such financing, or has appointed the majority of the members of a management or supervisory board, falls under sentence 1,
3. associations whose members fall under no. 1 or 2,
4. natural or legal persons under private law which operate in the fields of drinking water, energy, transport or telecommunications, 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,

5. natural or legal persons under private law 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 procedures relating to a public offer of a reward from entities falling under nos. 1 to 3, which are used to finance more than 50% of these projects,
6. natural or legal persons under private law who have concluded a works contract with entities falling under nos. 1 to 3, if consideration for such building work consists, instead of remuneration, of the right to exploit the building works, if appropriate plus payment of a price, with respect to contracts awarded to third parties (works concession).

Section 99 Public Contracts

- (1) Public contracts are contracts for pecuniary interest concluded between contracting entities and undertakings whose subject matter is supplies, works or services, and procedures relating to a public offer of a reward intended to lead to service contracts.
- (2) Supply contracts are contracts for the procurement of goods involving in particular a purchase or hire purchase or leasing, or a tenancy with or without a purchase option. The contracts may also include ancillary services.
- (3) Works contracts are contracts either for the execution or the simultaneous design and execution of works or a work 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 corresponding to the requirements specified by the contracting entity.
- (4) Service contracts are contracts for performances which are not covered by subsections (2) or (3) and are not reward procedures.

- (5) Procedures relating to a public offer of a reward within the meaning of this Part are only such reward procedures which are intended to give the contracting entity a plan on the basis of a comparative evaluation by a jury with or without the award of prizes.

Section 100 Scope of Application

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

- e) which are covered by the scope of application of Article 223 (1)b of the Treaty establishing the European Community;
- f) which are awarded by contracting entities which operate in the fields of drinking water, energy, transport or telecommunications, in accordance with more precise definitions in an ordinance pursuant to Section 127 in the field in which they operate themselves;
- g) which are awarded to a person who is a contracting entity within the meaning of Section 98 no. 1, 2 or 3 and has an exclusive right to render the performance by virtue of a law or ordinance;
- h) for the acquisition or tenancy, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereto;
- i) for services by affiliated undertakings specified by ordinance pursuant to Section 127 for contracting entities which operate in the fields of drinking water, energy, transport or telecommunications;
- j) for broadcasting time;
- k) for voice telephony, telex, radiotelephony, paging and satellite services;
- l) for arbitration and conciliation services;
- m) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services;
- n) for research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting entity.

Section 101
Categories of Awards

- (1) Public supply, works and service contracts shall be awarded through open procedures, restricted procedures or negotiated procedures.
- (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) 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.
- (5) Contracting entities shall apply the open procedure unless otherwise allowed by this Act. Contracting entities within the meaning of Section 98 no. 4 may freely choose among the three procedures.

CHAPTER II

Review Procedures

I. Reviewing Authorities

Section 102

Principle

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

Section 103

Public Procurement Review Offices

- (1) The Federation and the *Länder* may establish public procurement review offices responsible for reviewing whether contracting entities within the meaning of Section 98 nos. 1 to 3 comply with the award provisions to be applied by them. They may also be established at specialised and legal supervisory authorities.
- (2) The public procurement review office reviews, upon application or *ex officio*, compliance with the award provisions to be applied by contracting entities within the meaning of Section 98 nos. 1 to 3. It may oblige the authority conducting the award procedure to set aside unlawful measures and to take lawful measures, advise these authorities and undertakings as to the application of the award provisions, and act in a conciliatory capacity.

- (3) To safeguard rights under Section 97 (7), an appeal against a decision by the public procurement review office may be lodged only with the public procurement tribunal. A review by the public procurement review office is not a precondition for bringing the matter before the public procurement tribunal.

Section 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 Section 97 (7) as well as other claims against contracting entities for the performance or omission of an act in award procedures may be asserted, if not before the public procurement review offices, then only before the public procurement tribunals and the appellate court. The jurisdiction of the civil courts over damage claims and the powers of the cartel authorities shall remain unaffected.

Section 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 chairperson and two associate members, one of whom shall serve in an honorary capacity. The chairperson and the full-time associate member shall be civil servants appointed for life with the qualification to serve in the higher administrative service, or comparably expert employees. Either the chairperson or the full-time associate member shall be qualified to serve as a judge; generally this should be the chairperson. The associate

members should have in-depth knowledge of the practice of awarding public contracts, and honorary associate members should also have several years of practical experience in the field of the awarding of public contracts.

- (3) The tribunal may assign the case to the chairperson or to the full-time associate member without a hearing by a final decision, for him to decide alone. Such an assignment shall be possible only if the case involves no major difficulties as to the facts or the legal issues, and the decision will not be of fundamental importance.
- (4) The members of the tribunal shall be appointed for a term of office of five years. They take their decisions independently and are bound only by law.

Section 106

Establishment, Organisation

- (1) The Federation shall establish the necessary number of public procurement tribunals at the Federal Cartel Office. The establishment and composition of the public procurement tribunals as well as the allocation of duties shall be determined by the President of the Federal Cartel Office. Honorary associate members and their substitute members shall be appointed by him on a proposal by the central organisations of the chambers under public law. The President of the Federal Cartel Office shall issue rules of procedure, after obtaining approval from the Federal Ministry of Economics, and publish these in the Federal Gazette.
- (2) The establishment, organisation and composition of the authorities (reviewing authorities) of the *Länder* mentioned in this Chapter shall be determined by the authorities competent under the laws of the *Länder* or, in the absence of any such determination, by the *Land* government, which may delegate this power. In appointing the members of the public procurement tribunals, it shall be ensured that at least one member is qualified to serve as a judge and that, if possible, there is in-depth

knowledge of the practice of awarding public contracts. The *Länder* may establish joint reviewing authorities.

II. Proceedings before the Public Procurement Tribunal

Section 107

Initiation of the Proceedings, Application

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

Section 108

Form

- (1) The application shall be submitted in writing to the public procurement tribunal and reasons shall be given without undue delay. It should state a certain request. An applicant without a domicile or habitual residence, seat or headquarters within the area of application of this Act shall appoint an authorised receiving agent within the area of application of this Act.
- (2) The reasons shall designate the respondent, contain a description of the alleged violation of rights with a description of the facts as well as the designation of the available evidence, and show that an objection was made to the contracting entity; it should name the other parties, if known.

Section 109

Parties to the Proceedings, Admission to the Proceedings

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

Section 110

Investigation Principle

- (1) The public procurement tribunal shall investigate the facts *ex officio*. In its entire activities, it shall take care not to unduly impede the course of the award procedure.
- (2) Unless it is clearly inadmissible or unfounded, the public procurement tribunal shall serve the application upon the contracting entity after receipt thereof, and request from the contracting entity the files which document

the award procedure (award files). If a public procurement review office has been established, the public procurement tribunal shall send one copy of the application to the public procurement review office. The contracting entity shall make the award files available to the tribunal immediately. Sections 57 to 59 (1) to (5) shall apply *mutatis mutandis*.

Section 111

Inspection of Files

- (1) The parties may inspect the files at the public procurement tribunal and may obtain certified and other copies and excerpts from the clerk's office at their own expense.
- (2) The public procurement tribunal shall refuse the inspection of documents where this is necessary for important reasons, in particular for the protection of secrets or to protect manufacturing, operating or business secrets.
- (3) Every party shall indicate the secrets named in subsection (2) when sending its files or statements, and shall mark them in the documents. If this is not done, the public procurement tribunal may assume that the party consents to the inspection.
- (4) Refusal to allow an inspection of the files may be challenged only in connection with an immediate complaint in the main issue.

Section 112

Hearing

- (1) The public procurement tribunal shall decide on the basis of a hearing which should be limited to one date. All parties shall have an opportunity to comment. With the consent of the parties or in the case of the

inadmissibility or clear unfoundedness of the application, a decision may be taken on the basis of the documents.

- (2) The case may be discussed and decided also if the parties do not appear or are not duly represented at the hearing.

Section 113 Expedition

- (1) The public procurement tribunal shall take its decision and give reasons in writing within a period of five weeks of receipt of the application. In the case of particular difficulties regarding the facts or the law, the chairperson may in exceptional cases by statement to the parties extend this period by the required time. He shall give reasons in writing for this order.
- (2) The parties shall co-operate in clearing up the facts in a manner appropriate to a course of action designed to further and quickly conclude the proceedings. Time limits may be set for the parties, after the expiry of which further arguments may be disregarded.

Section 114 Decision of the Public Procurement Tribunal

- (1) The public procurement tribunal shall decide whether the applicants' rights were violated, and shall take suitable measures to remedy a violation of rights, and to prevent any impairment of the interests affected. It shall not be bound by the applications and may also independently bring an influence to bear on the lawfulness of the award procedure.
- (2) An award already made cannot be cancelled. If the review procedure becomes obsolete by the granting of an award, by cancellation, or by the discontinuance of the award procedure or in any other way, the public procurement tribunal shall determine on the application of a party whether

there has been a violation of rights. Section 113 (1) shall be inapplicable in this case.

- (3) The public procurement tribunal shall decide by administrative act. Decisions shall be enforced, also against public authorities, in accordance with the administrative enforcement acts of the Federation and the *Länder*. Section 61 shall apply *mutatis mutandis*.

Section 115

Suspension of the Award Procedure

- (1) After service of an application for a review on the contracting entity, it 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 Section 117 (1).
- (2) The public procurement tribunal may allow the contracting entity, upon application, to award the contract after the expiry of two weeks after the announcement of this decision if, taking into account all interests which may be impaired as well as the interests of the general public in the quick conclusion of the award procedure, the negative consequences of delaying the award until the end of the review outweigh the advantages involved. The appellate court may, upon application, reinstate the prohibition of the award pursuant to subsection (1); Section 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 sentence 1. Section 121 (2) sentence 1 and 2 shall apply *mutatis mutandis* to the proceedings before the appellate court. No immediate complaint pursuant to Section 116 (1) shall be admissible against decisions taken by the public procurement tribunal under this subsection.
- (3) If during the award procedure any rights of the applicants under Section 97 (7) are jeopardised in some other way than by the imminent award, the

tribunal may, on a specific application, intervene in the award procedure through further preliminary measures. In doing so, it shall apply the evaluation criterion of subsection (2) sentence 1. This decision shall not be separately challengeable.

III. Immediate Complaint

Section 116

Admissibility, Jurisdiction

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

Section 117
Time Limit, Formal Requirements

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

Section 118

Effect

- (1) The immediate complaint shall have a suspensive effect upon the decision of the public procurement tribunal. The suspensive effect shall lapse two weeks after the expiry of the time limit for the complaint. If the public procurement tribunal refuses, upon application, to review the award, the appellate court may, upon application by the complainant, extend the suspensive effect up to the time of the decision on the complaint.
- (2) In its decision on the application pursuant to subsection (1) sentence 3, the court shall consider the prospects of success of the complaint. It shall reject the application if, taking into account all interests which may be impaired as well as the interests of the general public in the quick conclusion of the award procedure, the negative consequences of delaying the award up to the time of the decision on the complaint outweigh the advantages involved.
- (3) If the public procurement tribunal grants the application for a review by prohibiting the award, the award shall not be made as long as the appellate court does not reverse the decision of the public procurement tribunal pursuant to Section 121 or Section 123.

Section 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.

Section 120

Procedural Provisions

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

Section 121

Preliminary Decision on the Award

- (1) Upon application by the contracting entity, the court may, considering the prospects of success of the immediate complaint, allow the continuation of the award procedure and the award. The court may allow the award also if, taking into account all interests which may be impaired as well as the interests of the general public in a quick conclusion of the award procedure, the negative consequences of delaying the award up to the time of the decision on the complaint outweigh the advantages involved.
- (2) The application shall be made in writing and reasons shall be given at the same time. The facts to be put forth as reasons for the application, as well as the reason for the urgency of the matter, shall be substantiated. The appeal proceedings may be suspended until a decision on the application is made.
- (3) The decision shall be made and reasons shall be given without undue delay and in no case later than five weeks after receipt of the application; in the event of particular difficulties as to the facts or legal difficulties, the chairperson may in exceptional cases extend the period by the required

time by declaration to the parties with reasons. The decision may be made without a hearing. The reasons shall explain the lawfulness or unlawfulness of the award proceedings. Section 120 shall apply.

- (4) No appeal is admissible against a decision made pursuant to this provision.

Section 122

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

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

Section 123

Decision on the Appeal

If the court considers the appeal to be well founded, it shall reverse the decision of the public procurement tribunal. In this case, the court shall decide on the matter itself or oblige the public procurement tribunal to decide again on the matter with due consideration of the court's opinions as to the law. Upon application, it shall state whether the rights of the undertaking having applied for the review were violated by the contracting entity. Section 114 (2) shall apply *mutatis mutandis*.

Section 124

Binding Effect and Duty to Refer the Matter

- (1) If damages are claimed because of a violation of the provisions governing the award of public contracts, and proceedings were conducted before the

public procurement tribunal, the court of general jurisdiction shall be bound by the final decision of the public procurement tribunal and the decision of the Court of Appeal, and of the Federal Supreme Court on the complaint in the case of a referral pursuant to subsection (2).

- (2) If a Court of Appeal wishes to deviate from a decision of another Court of Appeal or of the Federal Supreme Court, it shall refer the matter to the Federal Supreme Court. The Federal Supreme Court shall decide instead of the Court of Appeal. The duty to refer the matter shall not apply in proceedings pursuant to Section 118 (1) sentence 3 and to Section 121.

CHAPTER III Other Provisions

Section 125 Damages in the Event of an Abuse of Law

- (1) If an application pursuant to Section 107 or the immediate complaint pursuant to Section 116 is unjustified *ab initio*, the applicant or the complainant shall be obliged to compensate the opponent and the parties for the damage incurred by them due to the abuse of the right to file an application or a complaint.
- (2) An abuse shall exist in particular
1. if a suspension or further suspension of the award procedure is achieved through incorrect statements made intentionally or with gross negligence;
 2. if the review is applied for with the intention of obstructing the award procedure or of harming competitors;

3. an application is made with the intention of subsequently withdrawing it for payment of money or other benefits.
- (3) If the temporary measures taken by the public procurement tribunal in accordance with a specific application pursuant to Section 115 (3) were unjustified *ab initio*, the applicant shall compensate the contracting entity for the damage arising from the enforcement of the measures that were ordered.

Section 126

Claim to Compensation for Damage

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

Section 127

Empowering Provisions

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

1. to implement the thresholds of the directives of the European Communities concerning the coordination of procedures to award public contracts in German law;
2. to more precisely define the activities in the fields of drinking water or energy supply, transport or telecommunications insofar as this is necessary to perform obligations arising from the directives of the European Communities;

3. to more precisely define the affiliated undertakings to whose services to contracting entities operating in the field of drinking water or energy supply, transport or telecommunications this Part is not applicable pursuant to the directives of the European Communities;
4. to more precisely define the contracts of undertakings of drinking water or energy supply, transport or telecommunications to which this Part is not applicable pursuant to the directives of the European Communities;
5. to precisely delimit the competence of the public procurement tribunals of the Federation and the *Länder* as well as of the public procurement tribunals of the *Länder* in relation to each other;
6. concerning a procedure whereby contracting entities may obtain a certificate by independent auditors to the effect that their award conduct is in compliance with the provisions of this Act and of the provisions issued on the basis of this Act;
7. concerning a corrective mechanism pursuant to Chapter 3 and a voluntary conciliation procedure of the European Commission pursuant to Chapter 4 of Directive 92/13/EEC of the Council of the European Communities of 25 February 1992 (OJ EC No. L 76 p. 14);
8. concerning the information to be transmitted by the contracting entities, the public procurement tribunals and the appeal courts to the Federal Ministry of Economics in order to fulfil obligations arising from directives of the Council of the European Communities.

Section 128

Costs of the Proceedings before the Public Procurement Tribunal

- (1) Costs (fees and expenses) to cover the administrative expense shall be charged for official acts of the public procurement tribunals. The Administrative Cost Act shall apply.
- (2) The amount of the fees shall be determined according to the personnel and material expenses of the public procurement tribunal, account being taken the economic significance of the subject matter of review. The fee shall amount to at least DM 5,000; this amount may for reasons of equity be reduced to a minimum of one tenth of its amount. The fee should not exceed the amount of DM 50,000, but may be increased up to an amount of DM 100,000 in individual cases if the expense or the economic significance is unusually high.
- (3) A party to the proceedings shall bear the costs insofar as the party is unsuccessful. Several debtors shall be jointly and severally liable. If the application becomes obsolete by withdrawal or otherwise before the decision of the public procurement tribunal, half of the fee shall be payable. For reasons of equity, payment of the fee may be waived entirely or partially.
- (4) Insofar as an action before the public procurement tribunal is successful, or the public procurement review office grants an application, the expenses necessary to appropriately pursue the matter shall be refunded. Insofar as a party to the proceedings is unsuccessful, that party shall bear the respondent's expenses necessary for appropriately pursuing the matter or legally defending itself. Section 80 of the Administrative Procedure Act and the corresponding provisions of the administrative procedure acts of the *Länder* shall apply *mutatis mutandis*.

Section 129
Costs of the Public Procurement Review Offices

For the official acts of the public procurement review offices of the Federation which go beyond the reviewing activities specified in Section 103 (2) sentence 1 and the measures of the public procurement review offices involved therein, costs to cover the administrative costs shall be charged. Section 128 shall apply *mutatis mutandis*. The fee shall amount to 20 percent of the minimum fee pursuant to Section 128 (2); if the expense or the economic significance is unusually high in an individual case, the fee may be increased up to the amount of the full minimum fee.

PART V

Area of Application of the Act

Section 130

Public Undertakings; Area of Application

- (1) This Act shall apply also to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities. The provisions of the Parts I to III of this Act shall not be applicable to the German Federal Bank and to the Reconstruction Loan Corporation.
- (2) This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act.
- (3) The provisions of the Energy Industry Act shall not preclude the application of Sections 19 and 20.

PART VI

Transitional and Final Provisions

Section 131

Repeal, Transitional Provisions

- (1) The Act Against Restraints of Competition as published on 20 February 1990 (Federal Law Gazette I, p. 235), last amended by Articles 1,2 (3) of the Act of 26 August 1998 (Federal Law Gazette I, p. 2512) , is repealed.
- (2) Agreements and decisions within the meaning of Section 5c of the Act Against Restraints of Competition in the version referred to in subsection (1) shall be exempt from the prohibition under Section 1 until the expiry of two years after the entry into force of this Act.
- (3) Agreements and decisions for which an authorisation was granted pursuant to Section 5 (2) or (3), Section 6 (2) or Section 7 of the Act Against Restraints of Competition in the version referred to in subsection (1) shall be exempt from the prohibition under Section 1 until the expiry of one year after the entry into force of this Act. If the authorisation was granted for a shorter time period, the exemption shall expire on the expiry of that shorter time period.
- (4) Agreements within the meaning of Sections 20 and 21 of the Act Against Restraints of Competition in the version referred to in subsection (1) which impose obligations upon the acquirer or licensee as regards the determination of prices for the protected object shall be exempt from the prohibition under Section 17 (1) until the expiry of one year after the entry into force of this Act.
- (5) Competition rules recognised by the cartel authority pursuant to Sections 28 to 31 of the Act Against Restraints of Competition in the version referred to in subsection (1) shall be exempt from the prohibition under Section 1 until the expiry of one year after the entry into force of this Act.

- (6) Section 1 shall not be applicable to agreements between airlines which took effect before the entry into force of this Act, until the expiry of two years after the entry into force of this Act, if and insofar as they deal with transportation services beyond the borders of the territory in which the Treaty Establishing the European Community is applicable.
- (7) Agreements, decisions and recommendations of the kind described in Section 29 which took effect before the entry into force of this Act shall also remain effective thereafter. The cartel authority shall declare them to be of no effect within a period of two years after the entry into force of this Act if they no longer satisfy the conditions of this Act. Section 29 (5) sentence 4 shall be applicable.
- (8) Sections 103, 103a and 105 of the Act Against Restraints of Competition in the version referred to in subsection (1), as well as those other provisions which refer to them, shall continue to apply insofar as they concern the public supply of water. The same shall apply in this respect to provisions to which the above provisions refer.
- (9) Sections 23 to 24a of the Act Against Restraints of Competition in the version referred to in subsection (1), as well as those other provisions which refer to them, shall continue to apply to concentrations reaching the thresholds of Section 35 (1) which were put into effect and not notified or not finally reviewed by the Federal Cartel Office before the entry into force of this Act. The same shall apply in this respect to provisions to which the above provisions refer.