DEVELOPMENTS

Breaking the Habits: The German Competition Law after the 7th Amendment to the Act against Restraints of Competition (GWB)

By Andreas M. Klees[*]

A. Introduction

I. Background

The amended German Act against restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB) has been in force since 1 July 2005.[1] After a long and controversial debate, including a mediation procedure between the *Bundestag* (Lower House of the German Federal Parliament) and the *Bundesrat* (Upper House of the German Federal Parliament), and two and a half years after the adoption of Regulation No. 1/2003[2] in December 2002 the 7th Amendment to the Law against restraints of Competition was finally adopted in June 2005. Interestingly, the delay in passing the 7th Amendment – more than one year after Regulation No.1 came in force – was not so much caused by the fundamental changes that had become necessary in the light of Regulation No. 1. Rather, it was caused by those changes which did not become part of it: the proposed reform of merger control in the newspaper industry. Nonetheless, the latest amendment of the German competition law brought a greater number of fundamental changes than the six

[*] Dr. jur., Juniorprofessor of Business Law at the University of Hannover, Germany. Email: klees@jura.uni-hannover.de

[1] *Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, Federal Law Gazette (*Bundesgesetzblatt*, BGBl.) 2005, Part. I, 1954 -1969, last amended by *Gesetz zur Beschleunigung der Umsetzung von Öffentlich-Privaten Partnerschaften und zur Verbesserung gesetzlicher Rahmenbedingungen für Öffentlich-Private Partnerschaften*, BGBl. 2005, Part I, 2676-2681. A non-official English version of the GWB is available at: http://www.bundeskartellamt.de/wEnglisch/CompetitionAct/CompAct.shtml.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on The Implementation of the Rules on the Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1/1) [Regulation No. 1]. See Felix Müller, *The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition*, 5 GERMAN LAW JOURNAL 722 (2004).

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previous amendments adopted between 1958 and 1998.[3] More specifically, the 7th Amendment abolished numerous specialties of the German antitrust law, which had been cultivated during previous decades. At the same time, it pointed to the increasing "Europeanization" (or, in other words, the decreasing relevance) of the national competition law that primarily covers the rules regarding anti-competitive agreements, decisions and concerted practices and is likely to extend to other areas in the future, such as unilateral conduct and merger control.

II. Outline

This article deals with the most important changes the 7th Amendment has brought about in German competition law: its main focus is antitrust issues, including private antitrust enforcement[4] and merger control. While the so-called "modernization" of European competition law in the shape of Regulation No. 1 has primarily affected procedures in antitrust cases, the reform of German antitrust law covers both substantive and procedural issues. As a consequence, this article distinguishes between the substantive and the procedural side of the reform. In addition, this article gives an appraisal of the recent developments in competition law in Germany.

B. Antitrust

I. Substantive Law

The need for fundamental changes in German competition law was triggered by Art. 3 (1) Regulation No. 1. According to this provision Art. 81 and 82 EC Treaty have to be applied by national authorities[5] or by national courts whenever they apply national competition law to restraints of competition within the scope of Art. 81 and 82 EC Treaty. Furthermore, Art. 3 (2) Regulation No. 1 provides that the application of national competition law may not lead to the prohibition of agreements, decisions and concerted practices which may affect trade between

[3] INGO SCHMIDT, WETTBEWERBSPOLITIK UND KARTELLRECHT (7th ed., 2001) surveys the six amendments between 1958 to 1998.

[4] The rules relating to the private antitrust enforcement were already addressed by Wolfgang Wurmnest, *A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition*, 6 GERMAN LAW JOURNAL 1174 (2005).

[5] These are according to sec. 48 para. 1 GWB the Federal Cartel Office (*Bundeskartellamt*) and the highest administrative authorities of the states within the Federal Republic of Germany (*oberste Landesbehörden*). According to sec. 50 para. 1 GWB these authorities have jurisdiction over the application of Art. 81 and 82 EC Treaty (see also Art. 35 (1) Regulation No. 1).

Member States but which do not restrict competition within the meaning of Art. 81 (1) EC Treaty, or which fulfil the conditions of Art. 81 (3) EC Treaty or which are covered by a Regulation for the application of Art. 81 (3) EC Treaty. Hence, stricter national competition law could be applied only to local or regional cases which do not affect trade between Member States. In contrast, Member States are not precluded from adopting and applying stricter national laws in matters of unilateral conduct (Art. 3 (2) sent. 2 Regulation No. 1). Therefore, substantial changes in the German Competition Act were directed in the first place to anti-competitive agreements, decisions and concerted practices (see below 1.), whereas the rules relating to unilateral conduct have largely remained unchanged (see below 2.).

Against this background, the German legislator created a rule referring to the relationship between national competition law and Art. 81 and 82 EC Treaty. Sec. 22 para. 1 GWB provides for the possibility (not the obligation) to apply national law in addition to Art. 81 EC Treaty. Furthermore, sec. 22 para. 2 GWB iterates the general priority of Art. 81 EC Treaty stipulated in Art. 3 (2) Regulation No. 1 whereby the application of national competition law may not lead to prohibition of agreements[6] which may affect trade between Member States but which do not restrict competition within the meaning of Art. 81 (1) EC Treaty or which meet the requirements of Art. 81 (3) EC Treaty or which are covered by a regulation for application of Art. 81 (3) EC Treaty. According to sec. 22 para. 3 GWB, national competition law may be applied in addition to Art. 82 EC Treaty (sent. 1 and 2) and – exercising the option established in Art. 3 (2) sent. 2 Regulation No. 1 – it remains applicable even if it is stricter than Art. 82 EC Treaty (sent. 3).

1. Anti-Competitive Agreements

The German legislator realized that, in principle, it had not been reasonable to uphold national rules which could be applied only to local or regional cases according to Art. 3 (2) Regulation No. 1. Instead, these cases should follow the same rules as cases within the scope of Art. 81 EC Treaty. This conviction allowed the legislator to break the mould: the former German Act against restraints of Competition drew a distinction between horizontal and vertical restraints of competition. In contrast to European competition law (and many other jurisdictions) there was no general prohibition of vertical restraints of competition; merely agreements concerning prices or terms of business (previously sec. 14 GWB) were barred while other forms of vertical restraints were subject to an abuse control that

[6] This term is used instead of "agreements of undertakings, decisions by associations of undertakings and concerted practices" in this article.

existed on the basis that vertical restraints of competition might also have positive effects on competition.[7] The 7th Amendment dismissed this traditional distinction: sec. 1 GWB is (just as Art. 81 (1) EC Treaty) directly applicable to both types of restraints of competition and prohibits horizontal and vertical restraints similarly. As a result, secs. 14 to 18 GWB were deleted and sec. 1 GWB was brought in line with Art. 81 (1) EC Treaty, apart from the requirement of affecting the trade between Member States and the list of prohibited actions. However, in the legislator's view the effects of this amendment will be less dramatic since the German and the European approach in terms of vertical restraints had already converged due to the adoption of Regulation (EC) No. 2790/1999[8].[9] Although there is no rule in the amended German Competition Act expressly demanding a "Europhile application" of sec. 1 GWB – this had been recommended by the *Bundestag*[10] but was finally overruled by the *Bundesrat*[11] – it is clear that the interpretation of sec. 1 GWB has to be brought in line with the interpretation of Art. 81 (1) EC Treaty by the European Courts and the European Commission.[12]

No differences exist between Art. 81 EC Treaty and sec. 1 GWB regarding the burden of proof. This holds true even though the GWB does not include a rule like Art. 2 sent. 1 Regulation No. 1 (Burden of proof) which covers "any national or Community proceedings for the application of Articles 81 and 82 of the Treaty". According to the general principles of German procedural law the burden of proving an infringement of sec. 1 GWB is on the competition authority pursuing a potential infringement or on the person seeking to claim for injunctive relief or damages (see sec. 33 GWB).[13]

The special exemption rules (previously secs. 2 to 6 GWB) were almost completely replaced by a general exemption (sec. 2, para. 1 GWB) whose conditions are consistent with the conditions of Art. 81 (3) EC Treaty.[14] As a consequence, the

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[7] HERMANN-JOSEF BUNTE, KARTELLRECHT 142 (2003).

[8] Commission Regulation (EC) No. 2790/1999 on the application of Article 81 (3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21.

[9] Drucksachen des Bundesrates (BR-Drs.) No. 441/04, 40.

[10] See sec. 23 of the draft of the 7th Amendment, BR-Drs. No. 210/05, 1, 9; BR-Drs. No. 441/04, 1, 53.

[11] Drucksachen des Deutschen Bundestages (BT-Drs.) 15/5430.

[12] KNUT-WERNER LANGE, EUROPÄISCHES UND DEUTSCHES KARTELLRECHT 58 (2006).

[13] BR-Drs. No. 441/04, 39.

[14] BR-Drs. No. 441/04, 41.

general exemption clause (previously sec. 7 GWB) was deleted. Furthermore, the ministerial authorization (previously sec. 8 GWB) was abolished.

The special exemption clause in terms of small and medium-sized enterprises, (see sec. 4 para. 1 GWB in its previous version), has been maintained (sec. 3 GWB). The German legislator considered this exemption necessary to encourage small and medium-sized enterprises to enhance their market positions through cooperation, on the basis that agreements between small and medium-sized enterprises can have positive effects even if they harm competition among these enterprises.[15] Sec. 3 para. 1 GWB aims only at horizontal restraints ("agreements between competing undertakings"). If an agreement meets the conditions of sec. 3 GWB (competition on the relevant market is not substantially impaired; the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises) there is no need to examine the conditions of sec. 2 para. 1 GWB due to the legal fiction stipulated in sec. 3 GWB. On the other hand, if the conditions of sec. 3 para. 1 GWB are not fulfilled, the general exemption of sec. 2 para. 1 GWB has to be verified and might be appropriate.[16] In any case, due to the general priority of Art. 81 EC Treaty (see Art. 3 (1) Regulation No. 1 and sec. 22 para. 1 GWB) it must be ensured in each individual case that sec. 3 para. 1 GWB is actually applicable.[17]

The four requirements, which must be satisfied to benefit from the exemption laid down in sec. 2 para. 1 GWB, are well known from Art. 81 (3) EC Treaty: first, there must be an improvement in the production or distribution of goods or in the technical or economic progress, second, there must be a fare share of the resulting benefit to the consumers, without, third, imposing restrictions which are not indispensable to the attainment of these objectives and without, fourth, affording the possibility of eliminating competition in respect of a substantial part of the products in question. These requirements have to be interpreted and applied in accordance with the interpretation and application of Art. 81 (3) EC Treaty by the European Courts and the European Commission.[18]

The burden of proving that an agreement fulfils these requirements is, as a basic principle, on the undertaking seeking to defend the agreement.[19] This applies to

[15] BR-Drs. No. 441/04, 76; TOBIAS LETTL, KARTELLRECHT 219 (2005).

[16] BR-Drs. No. 441/04, 77.

[17] LANGE, *supra* note 12, at 58.

[18] Harald Kahlenberg & Christian Haellmigk, *Neues Deutsches Kartellgesetz*, 60 BETRIEBSBERATER [BB] 1509, 1510 (2005).

[19] *Id.*, 1510.

actions pursuant to sec. 33 GWB and it may also be the case if the national competition authorities come to a decision in accordance with sec. 32 GWB.[20] However, according to the presumption of innocence assured by the Basic Law (*Grundgesetz* – GG) in Germany (see Art. 20 and 28 GG), this principle is not applicable if national competition authorities seek to impose a fine on an undertaking pursuant to sec. 81 GWB.[21]

According to sec. 2 para. 2 sent. 1 GWB the block exemption regulations adopted by the European Council and the European Commission apply *mutatis mutandis* to sec. 2 para. 1 GWB. Naturally, this has no relevance for the application of Art. 81 EC Treaty by the national competition authorities in Germany: the block exemption regulations are inherently directly applicable within the Community (see Art. 249 (2) EC Treaty) regardless whether this Article is applied by the European Commission, by a national competition authority (see Art. 5 Regulation No. 1) or by a national court (see Art. 6 Regulation No. 1). However, sec. 2 para. 2 GWB extends the scope of the European block exemption regulations by implementing a "dynamic link" (*dynamischer Verweis*) from the national to the European level. It follows, first, that block exemptions apply *mutatis mutandis* in cases within the exclusive scope of the national competition law and, second, that future changes at the European level in the range of the block exemption regulations will have an immediate impact on the national level. Hence, the explanatory Commission guidelines[22] are of particular importance for the *mutatis mutandis* application of the block exemption regulations even at the national level.

Compared to the second option, a "static link" (*statischer Verweis*) solely to the existing block exemption regulations either in the Competition Act itself or in a national regulation based on the Competition Act, the German legislator deemed a "dynamic link" the better approach because it would render future changes in the field unnecessary.[23] This holds especially true since the substitution of the "old" block exemption regulations for the "new style" block exemption regulations which

[20] If the national competition authority seeks to withdraw the benefit of a block exemption according to sec. 32d GWB (see below under B. II. 2.), it is on the authority to show that the agreement does not meet the conditions of sec. 2 para. 1 GWB. This shift in the burden of proof also applies in procedures according to Art. 29 Regulation No. 1, see ANDREAS KLEES, EUROPÄISCHES KARTELLVERFAHRENSRECHT 57 (2005).

[21] See the Statement by the German Delegation on Article 2 of the Regulation No. 1, 25 November 2002, available at: http://www.bmwi.de/Redaktion/Inhalte/Pdf/Wettbewerbspolitik/protokollerklaerung-bundesreg-kvo,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf; BR-Drs. No. 441/04, 39, 76.

[22] See *e.g.* the Commission Notice Guidelines on Vertical Restraints, 2000 O.J. (C 291) 01.

[23] BR-Drs. 441/04, 76.

had been started in 1999 with Regulation (EC) No. 2790/1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices[24] finally resulted in the adoption of Regulation (EC) No. 772/2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements in April 2004.[25]

Sec. 2 para. 2 GWB ensures an optimal and lasting synchronism between the European and the national competition law in the field of anti-competitive agreements. Objections to a "dynamic link" to European regulations exist neither in light of European law nor in light of German constitutional law.[26]

Two exceptions from the prohibition stipulated in sec. 1 GWB have been maintained: sec. 28 GWB (which is essentially consistent with Regulation No. 26/62[27]) in view of agriculture and sec. 30 GWB (previously sec. 15) in view of resale price maintenance for newspapers and magazines.[28] By contrast, other special provisions certain sectors of the economy, notably credit and insurance (previously sec. 29), copyright collection (previously sec. 30) and sports (previously sec. 31) were abolished.

2. Unilateral Conduct

Compared to these changes, the amendments to secs. 19 to 21 GWB (now part 1, chapter II: Market Dominance, Restrictive Practices) have been negligible. The few modifications brought about by the 7th Amendment were not triggered by the "modernization" of the European competition law since the Member States are not precluded from adopting and applying in their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings (*supra* B. I.)[29] This important exception to the general priority of European competition law can largely be attributed to the claims of the German delegation during the negotiations about the adoption of Regulation No. 1

[24] See *supra* note 8.

[25] 2004 O.J (L 123) 11.

[26] See Ulrich Ehricke & Holger Blask, *Dynamischer Verweis auf Gruppenfreistellungsverordnungen im neuen GWB?*, 58 JURISTENZEITUNG [JZ] 722 (2003).

[27] Regulation No 26 applying certain rules of competition to production of and trade in agricultural products, 1962 O.J. 993.

[28] See Rainer Bechtold & Martin Buntscheck, *Die 7. GWB-Novelle und die Entwicklung des deutschen Kartellrechts*, 58 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2966 (2005).

[29] See recital 8 of Regulation No. 1.

(thus it is called the "German clause").[30] Hence, Regulation No. 1 admits in principle the application of sec. 19 GWB (Abuse of a Dominant Position) and sec. 20 GWB (Prohibition of Discrimination and Unfair Hindrance) in addition to Art. 82 EC Treaty even if they are different from (particularly stricter than) European law.[31] Against this background, it is no surprise that sec. 19 to 21 GWB have largely been retained.

The German legislator has retained several characteristics of German competition law which have no direct counterparts at the European level in all respects. The most noteworthy are the following: the presumption of being dominant in sec. 19 para. 3 GWB, sec. 19 para. 4 No. 4 GWB which is of particular importance for the net industries; sec. 20 para. 2 GWB as a specific rule relating to unilateral conduct towards small and medium-sized enterprises, and; sec. 20 para. 4 GWB with a specific prohibition of unfair hindrance for undertakings with superior market power, *e.g.* in terms of offering goods and services below its cost price.[32] However, a new sentence was added to sec. 19 para. 2 GWB by the 7th Amendment which clarifies that the relevant geographic market can be wider than the scope of application of the German Competition Act (in other words, can extend beyond the territory of the Federal Republic of Germany).[33] As a result, the relevant geographic market has to be determined under economic aspects and is not limited by law to the federal territory.[34] This is stipulated as a general principle which applies not only to the abuse of a dominant position but also to other parts of the competition law and particularly to merger control in Germany.[35] Furthermore, sec. 20 para. 3 GWB has been tightened by prohibiting dominant undertakings the use of their market position not only *to cause* but also *to request* other undertakings to provide them preferential terms without any objective justification.[36]

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[30] See KLEES *supra* note 20, at 73.

[31] See Rainer Bechtold & Ingo Brinker & Wolfgang Bosch & Simon Hirsbrunner, EG-Kartellrecht Art. 3 VO 1/2003 no 21 (2005); ERNST-JOACHIM MESTMÄCKER & HEIKE SCHWEITZER, EUROPÄISCHES WETTBEWERBSRECHT 149 (2nd ed. 2004).

[32] BR-Drs. No. 441/04

[33] This has already been certain – at least in the question of whether a merger creates or reinforces a dominant position on the market – since the judgment of the *Bundesgerichtshof* (Federal Court of Justice – BGH) in the case "*Staubsaugermarkt*" in 2004, 57 NJW 3711 (2004). The BGH abandoned in this judgment his former opinion whereas the relevant market had been limited to the scope of the GWB.

[34] Id. 3711; LANGE, *supra* note 12, at 105.

[35] BR-Drs. No. 441/04, 78.

[36] BT-Drs. No. 15/3640, 73.

The new German competition law no longer provides for rules relating to the prohibition of recommendations (previously sec. 22 GWB) and the non-binding price recommendations for branded goods (previously sec. 23 GWB).[37] Therefore, it has to be verified whether the recommendation is covered by sec. 1 GWB (and, where applicable, by Art. 81 EC Treaty) and, if this is the case, whether the conditions of sec. 2 para. 1 GWB (or rather Art. 81 (3) EC Treaty) are fulfilled.[38]

II. Antitrust Procedure

In addition to the amendments relating to substantive law Regulation No. 1 required the German legislator to modify the procedural framework of antitrust cases. Most importantly, it required the replacement of the former notification system with a directly applicable exemption system mirroring the system implemented by Art. 1 Regulation No. 1 (see below under 1.). As a consequence of the abolition of the notification system, the German legislator was anxious to tighten the existing enforcement system to enhance the deterrent effect.[39] In this context, the competences of the national competition authorities were reviewed and brought in line with Art. 5 Regulation No. 1 which stipulates the competences of the national competition authorities in terms of the application of Art. 81 and 82 EC Treaty (see below under 2.). Furthermore, the administrative fines for infringements of competition law were drastically increased (see below under 3.). Finally, several amendments ensure participation of the *Bundeskartellamt* (Federal Cartel Office) in the "European Competition Network" (ECN) and regulate cooperation between national courts and the Commission in proceedings for application of Art. 81, 82 EC Treaty (see below under 4.).

1. Exemption System instead of Notification System

After the German government had finally given up the resistance against the abolition of the notification system at the European level[40] the way for a directly applicable exemption system was paved even at the national level. It is no longer necessary, nor possible for the undertakings to notify their intended agreements in advance to the competition authorities. As a consequence, secs. 9 to 13 GWB were

[37] Critical Florian Wagner-von Papp, *Empfiehlt sich das Empfehlungsverbot?* 55 WIRTSCHAFT UND WETTBEWERB [WuW] 379 (2005).

[38] Kahlenberg & Haellmigk, *supra* note 18, at 1511.

[39] Even the reform of the rules regarding the private antitrust enforcement (see below under C.) aims at this.

[40] KLEES, *supra* note 20, at 12.

deleted. Agreements which were previously notified and allowed are exempt from the new provisions at most until the end of 2007 (sec. 131 GWB).

Already the wording of sec. 2 para. 1 GWB makes clear that agreements which fulfill the requirements of this paragraph are automatically indemnified from the general prohibition provided for in sec. 1 GWB. However, from the wording used in Art. 81 (3) EC Treaty it is not that clear and Art. 1 Regulation No. 1 has reinterpreted Art. 81 (3) EC Treaty as directly applicable rule. Nevertheless, it is unlikely that the European Court of Justice (ECJ) will take offence at giving this completely different interpretation to Art. 81 (3) EC Treaty.[41]

As a consequence of introducing a directly applicable exemption system, each undertaking has to assess whether the conditions of sec. 2 para. 1 GWB are fulfilled or not. The directly applicable exemption system may lead in some respects to less legal certainty on the one hand but it definitely requires a higher personal accountability for the undertakings on the other hand. This also pertains, in principle, to small and medium-sized enterprises even though they are entitled to claim for a decision referring to sec. 32c GWB (see below 2.). Nonetheless, the so called "self-assessment" does not mean a weakening or a restraint of (or a turning away from) the prohibition principle stipulated in sec. 1 GWB and it especially does not create any margin of discretion for the enterprises in view of the conditions laid down in sec. 2 para. 1 GWB.[42]

2. Competences of National Competition Authorities

The competences of the national competition authorities in antitrust procedures have been essentially revised based on the model of Art. 7 *et seqq.* Regulation No. 1. This takes into account that in a system of parallel competences with the possibility of case allocation[43] it is important that the members of the "ECN" have at least similar competences to deal with a case (see already Art. 5 sent. 2 Regulation No. 1). In this context, former insufficiencies have been remedied.

According to sec. 32 para. 1 and para. 2 GWB the authorities are not only limited to prohibit conduct anymore but also entitled to impose every remedy which is necessary to bring infringement of Art. 81 or 82 EC Treaty or the national competition law effectively to an end and which is proportionate to the infringe-

[41] KLEES, supra note 20, at 25.

[42] Id., 32.

[43] See the Commission Notice on cooperation within the Network of Competition Authorities 2004 O.J. (C 101) 43.

ment committed. In contrast to Art. 7 (2) Regulation No. 1, structural remedies are not expressly mentioned in sec. 32 GWB. Nonetheless, in the view of the German legislator structural remedies shall be available on the basis of sec. 32 GWB, presuming that there is no effective behavioral remedy.[44] The competition authorities can also find that an infringement had been committed in the past if there is a legitimate interest in doing so (sec. 32 para. 3 GWB). A legitimate interest exists when there is a need for clarification of the legal position in case of danger of recurrence.[45]

Sec. 32a GWB mirrors Art. 8 Regulation No. 1: pursuant to sec. 32a para. 1 GWB, the competition authorities may order interim measures *ex officio* in urgent cases that are due to the risk of serious and irreparable damage to competition. Such measures must be restricted to a limited period of time and can be renewed. However, the overall period shall not exceed one year. Again, interim measures on the basis of sec. 32a GWB can be ordered to enforce both Art. 81 or 82 EC Treaty and national competition law.[46]

Just as Art. 9 Regulation No. 1 at the European level, sec. 32b GWB implements the so-called "commitment-decision" into national competition law. It entitles the national competition authorities in proceedings according to sec. 32 GWB to make commitments offered by the undertakings binding, provided that these commitments are appropriate to eliminate all doubts expressed to them by the authority after a preliminary assessment. However, this kind of decision is generally not appropriate in cases where the competition authority intends to impose a fine.[47] Sec. 32b GWB provides a comparatively comfortable way to bring antitrust procedures, subject to sec. 32b para. 2 GWB, to an en. At the same time, it can be attractive both for competition authorities and for undertakings. However, the latter have to be aware that administrative fines can be imposed in case of breach of any such commitment. According to sec. 82 para. 2 No. 2a, (4) sent. 2 GWB the fine can be up to 10% of the total turnover in the preceding business year. The undertaking, and to a certain extent the competition authority which adopted the commitment decision, are bound by the decision, but other competition authorities or national courts are not.

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[44] BR-Drs. No. 441/04,76.

[45] BR-Drs. No. 441/04, 89.

[46] BR-Drs. No. 441/04, 89.

[47] See BR-Drs. No. 441/04, 57 and recital (13) of Regulation No. 1 within the scope of Article 9 Regulation No. 1.

Decisions pursuant to sec. 32b para. 1 GWB do not determine whether there is or has been an infringement of competition law.[48] Instead, the decision has to include that the competition authority will not use its competences, subject to sec. 32b para. 2 GWB, pursuant to sec. 32 and 32a GWB (sec. 32b para. 1 sent. 2 GWB). According to sec. 32b para. 2 GWB the following three reasons, which are taken from Art. 9 (2) Regulation No. 1, exist to restart the procedure after a commitment decision has been adopted by the competition authority: first, where there has been a subsequent material change in any of the facts on which the decision was based, second, where the undertakings concerned act contrary to their commitments and, third, where the decision was based on incomplete, incorrect or misleading information provided by the parties.[49] The restart of the proceeding involves the annulment of the prior commitment decision. Thus, the specific rule does not give leeway to revert to the general rules relating to the annulment of administrative acts in according with sec. 48 *et seqq*. of the Law on Administrative Proceedings (*Verwaltungsverfahrensgesetz - VwVfG*).[50] Commitment decisions may be restricted to a specified period (sec. 32b para. 1 sent. 3 GWB; see also Art. 9 (1) Regulation No. 1).

Pursuant to Art. 5 sent. 3 Regulation No. 1, the national competition authorities may decide that there are no grounds for action on their part, where on the basis of the information in their possession the conditions for prohibition are not met. Against this background, the German legislator created sec. 32c GWB which covers both European and national competition law: where the conditions for prohibition according to secs. 1, 19 to 21 GWB, Art. 81 or 82 EC Treaty on the basis of the existing information are not met, the competition authority may decide that there are no grounds for action on its part. In the system implemented by Regulation No. 1 and the 7th Amendment it is evident, and again clarified by sec. 32b sent. 3 GWB, that such a decision does not have constitutive effects regarding an exemption. Therefore it binds neither third parties nor courts. The decision includes the express warranty that the competition authority will, subject to new information, not use its competences according to secs. 32 and 32a GWB (sec. 32b sent. 2 GWB). It is left to the discretion of the competition authority whether it issues a formal decision (see sec. 61 GWB) pursuant to sec. 32c GWB.[51] In many cases it will be adequate to declare informally that the competition authority will

[48] BR-Drs. No. 441/04, 90.

[49] KLEES, *supra* note 20, at 177.

[50] BR-Drs. No. 441/04, 90.

[51] BR-Drs. No. 441/04, 57.

not take any action.[52] In contrast to decisions pursuant to secs. 32 to 32b GWB, there is no general obligation to publish decisions pursuant to sec. 32c GWB in the Federal Bulletin (*Bundesanzeiger*) or the electronic Federal Bulletin (*elektronischer Bundesanzeiger*), sec. 62 GWB.

As a general principle, undertakings have no right to a decision pursuant to sec. 32c GWB. However, sec. 3 para. 2 GWB entitles small and medium-sized enterprises to claim for a decision provided that they demonstrate a significant legal or economic interest. The rule covers both horizontal and vertical restraints but it is provided that Art. 81 EC Treaty is not applicable.[53] This exemption had been implemented shortly before the 7th Amendment was finally adopted.[54] It takes into account the legal uncertainty within the new system and benefits small and medium-sized enterprises based on the presumption that they need more assistance in the "self-assessment" than major enterprises. However, the rule is only designed for a transition period which expires on 30 June 2009.

Since 1 May 2004 the national competition authorities already have been entitled to withdraw the benefit of an exemption regulation within their territory.[55] According to Art. 29 (2) Regulation No. 1 the withdrawal requires that an agreement, which is covered by a block exemption regulation issued by the European Commission, has effects which are incompatible with Art. 81 (3) EC Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market. Sec. 32e GWB iterates this in regard to Art. 81 (3) EC Treaty and enhances this competence to agreements which are within the sole scope of the national competition law and which are covered by the *mutatis mutandis* application of the European exemption regulations according to sec. 2 para. 2 GWB but have effects which are incompatible with sec. 2 para. 1 GWB.[56] Just as Art. 29 (2) Regulation No. 1, this rule is merely applicable to cases where the effects are limited to the territory of the Federal Republic of Germany or to a part thereof.[57]

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[52] BR-Drs. No. 441/04, 57.

[53] Kahlenberg & Haellmigk, *supra* note 18, at 1510; LANGE, *supra* note 12, at 71.

[54] BR-Drs. No. 497/05, 4.

[55] Before, the national competition authorities had such competence limited to vertical restraints, see KLEES, *supra* note 20, at 59.

[56] BR-Drs. No. 441/04, 90.

[57] BR-Drs. No. 441/04, 58. See in terms of Art. 29 Regulation No. 1, Bechtold & Bosch & Brinker & Hirsbrunner *supra* note 31, annotation 13.

The flip side of the abolition of the notification system is the increased demand for extended authorities' powers which enable them to monitor the behavior of undertakings more effectively. Of particular importance in this context is the so-called "*enquête* right" of the competition authorities pursuant to sec. 32e para. 1 GWB. It entitles the authorities to conduct investigations into either certain sectors of the economy or certain types of agreements mirroring the Commissio's power pursuant to Art. 17 Regulation No. 1. Even without an initial suspicion of infringing activity,[58] such investigations can already be started where the rigidity of prices or other circumstances suggest that competition within the Federal Republic of Germany may be restricted. According to sec. 32e para. 2 GWB the competition authorities can carry out all necessary investigations including requests for information. Secs. 57 to 62 GWB apply *mutatis mutandis* with the exception of sec. 58 GWB which provides for the right to seizure. The latter was deemed disproportional in investigations based on sec. 32e GWB.[59]

3. Administrative Fines

Fundamental, and to some extent controversial, changes occurred within the sanctioning framework for breaches of competition law which has been strengthened significantly. Notwithstanding, some amendments were as much undisputed as inevitable: parties infringing Art. 81 and 82 EC Treaty can be fined directly by national competition authorities according to sec. 81 para. 1 No. 1 and No. 2, (4) GWB. This is consistent with the *effet-utile-principle* and takes into account that the Member States are under an obligation to set up a system that provides for sanctions for infringements of EC law which are effective, proportionate and dissuasive.[60] Especially in a system of parallel competences of the European Commission and the national competition authorities to apply Art. 81 and 82 EC Treaty as a whole it is of particular importance that infringements of European competition rules can be sanctioned effectively even by the national competition authorities. Hence, one of the conditions for being considered as "well placed" within the "ECN" to deal with a case is the possibility to sanction the infringement adequately.[61]

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[58] BR-Drs. No. 441/04, 91.

[59] BR-Drs. No. 441/04, 91. Furthermore, a few amendments took place in sec. 59 GWB (Requests for Information), *e.g.* it is clarified that this competence also applies for appellate procedures (see already before the judgment of the *Bundesgerichtshof* in the case *HABET/Lekkerland*, 49 WETTBEWERB IN RECHT UND PRAXIS [WRP] 1248 (2003).

[60] Case 68/88, *Commission v. Greece*, 1989 E.C.R. 2965, paras. 23-25.

[61] Commission Notice on cooperation within the Network of Competition Authorities 2004 O.J. (C 101) 43, 44.

However, sec. 81 para. 4 GWB, the new rule regarding the administrative fines for infringements of *e.g.* Art. 81, 82 EC Treaty or sec. 1 GWB, raises questions and is already deemed as a breach of German constitutional law by some authors.[62] To begin with, there are no objections against the increased standard fine which has been doubled from € 500,000 to € 1 million for serious infringements (sent. 1) and quadrupled from € 25,000 to € 100,000 for less serious infringements (sent. 3). However, sec. 81 para. 4 sent. 2 GWB which replaces the former "extra profit" rule (previously sec. 81 para. 2) and therefore the practical challenge to establish whether and to what extent there was an "extra profit" encounters difficulties: this rule enhances the potential amount of administrative fines for each undertaking participating in the infringement beyond the standard fine for serious infringements up to 10% of the total turnover in the preceding business year.[63] This was discussed as early as in 1998 and aims, first, at avoiding the significant uncertainties in applying the "extra profit" rule, second, at increasing the deterrent effect,[64] and, third, at assuring that the fine which can be imposed in an individual case compensates for the economic damages caused by the infringement.[65] Furthermore, the rule guarantees at least similar administrative fines within the Community since it agrees with Art. 23 (2) sent. 2 Regulation No. 1[66] and several other European jurisdictions,[67] so that the fines have to be assessed on the basis of the same criteria (the gravity and the duration of the infringement, see Art. 23 (3) Regulation No. 1 and sec. 81 para. 4 sent. 4 GWB) and undertakings – in theory – have to expect one and the same fine regardless which member of the "ECN" deals with the case. Again, this may be of particular importance for the case allocation within the "ECN" and it contributes to a "minimum harmonization" in a field where otherwise fundamental differences exist (*e.g.* in respect of criminal penalties) which

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[62] Wolfgang Deselears, *Uferlose Geldbußen bei Kartellverstößen nach der neuen 10% Umsatzregel des sec. 81 Abs. 4 GWB?* 56 WIRTSCHAFT UND WETTBEWERB (WuW) 118 (2006); Bechtold & Buntscheck, *supra* note 28, at 2970.

[63] According to sec. 81 para. 7 GWB, the *Bundeskartellamt* is currently working on guidelines on the method of setting fines.

[64] BT-Drs. No. 15/5049, 50.

[65] BT-Drs. No. 15/5049, 50.

[66] That limit seeks to ensure that the fines are not excessive or disproportionate, see Judgment of the Court, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri v. Commission* (recital 280). However, this can be an enormous amount since it is not limited to turnover in the market affected by the infringement, nor to the turnover in the EU see RICHARD WISH, COMPETITION LAW 267 (5th ed., 2003).

[67] See Deselaers, *supra* note 62, at 118.

in turn causes problems, *e.g.* for the cooperation between the competition authorities within the "ECN". Lastly, due to the adoption of the 10%-limit for breaches even of the European competition law it is evident that the requirement of "sanctions which are effective, proportionate and dissuasive" is fulfilled from the European point of view.

Nevertheless, this rule might be in conflict with German constitutional law (especially Art. 103 (2) GG) since the *Bundesverfassungsgericht* (Federal Constitutional Court) in 2002 overruled sec. 43a *Strafgesetzbuch* (Criminal Code) dealing with fines levied on property (*Vermögensstrafe*).[68] It remains to be seen whether the *Bundesverfassungsgericht* will have similar objections against sec. 81 para. 4 sent. 2 GWB.

From sec. 64 para. 1 GWB it follows that appeals from decisions pursuant to sec. 32 GWB in conjunction with Art. 81 EC Treaty and/or sec. 1 GWB do not have suspensive effects. The undertakings concerned can file an application to the court according to sec. 65 para. 3 sent. 3 GWB in order to avoid the immediate enforcement of these decisions. By contrast, the suspensive effect still exists in terms of appeals from decisions pursuant to sec. 32 GWB in conjunction with secs. 19 to 21 GWB (see sec. 64 para. 1 No. 1 GWB).[69]

4. Cooperation

As is generally known, the system implemented by Regulation No. 1 is affected by the network between the public authorities applying the Community competition rules.[70] Consequently, Regulation No. 1 provides for a rule relating to the "Cooperation between the Commission and the competition authorities of the Member States" (Art. 11) and an extra rule regarding the "Exchange of information" (Art. 12). Even though these rules are directly applicable, the German legislator established a section regarding the "Cooperation within the European Competition Network" (sec. 50a GWB). Considering the European context, the title of this section is confusing since sec. 50a GWB iterates (and to a certain extent specifies) Art. 12 Regulation No. 1 and thereby regulates the exchange and the use of information for the purpose of applying Art. 81 and 82 EC Treaty and, in line

[68] See 54 NJW 1779 (2002).

[69] With the exception of decisions pursuant to sec. 32 in conjunction with sec. 19 para. 4 No. 4 GWB regarding the abuse of a dominant position in the energy sector. This exception, however, seems to be obsolete due to the precedence of the *Energiewirtschaftsgesetz* (sec. 111 EnWG) BGBl. 2005, Part. I, 1970 (3621); Kahlenberg & Haellmigk, *supra* note 18, at 1513.

[70] Recital (15) and Art. 11 (1) Regulation No. 1.

with Art. 12 (2) sent. 2 Regulation No. 1, possibly the national competition law (sec. 50a para. 2 sent. 2 GWB). Furthermore, sec. 50b GWB extends these competences of the competition authorities to other cases in order to apply competition law (*e.g.* cooperation in merger control proceedings or cooperation with non-European competition authorities).[71]

Sec. 90a GWB regards the cooperation between the national courts and the European Commission in legal proceedings for the application of Art. 81 and 82 EC Treaty and "transposes"[72] Art. 15 Regulation No. 1 into national law. However, beyond Art. 15 (3) sent. 4 Regulation No. 1 the European Commission is entitled to make oral comments during the court hearing, even without permission of the court (see sec. 90a para. 2 sent. 5 GWB). Furthermore, sec. 90a para. 3 sent. 2 GWB can affect the cooperation between the European Commission and the national courts since the court must forward the reply of the European Commission to a request pursuant to Art. 15 (1) Regulation No. 1 (or pursuant to sec. 90a para. 3 sent 1 GWB) both the *Bundeskartellamt* and the parties. Nevertheless, the European Commission has to uphold the guarantees given to natural and legal persons by Art. 287 EC Treaty [73] and therefore asks the court before transmitting the information whether the court can and will guarantee protection of confidential information and business secrets.[74]

C. Private Antitrust Enforcement

For some time, the Commission's approach, initiated by the former Commissioner Mario Monti and confirmed by the judgment of the ECJ in *Courage v. Crehan* in 2001[75], aimed at strengthening the private enforcement of antitrust claims in Europe. Regulation No. 1 was extensively influenced by this new view on antitrust enforcement and Commissioner Neelie Kroes proceeded on the same path. The Commission is currently ascertaining on the basis of the Green Paper "Damages

[71] BR-Drs. No. 441/04, 109.

[72] BR-Drs. No. 441/04, 109.

[73] Case T-353/94, *Postbank v. Commission,* 1996 E.C.R. II-921, paras. 86 and 87; case 145/83, *Adams v. Commission,* 1985 E.C.R. 3539, para. 34.

[74] See Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, O.J. 2004 (C 101) 54, para. 25.

[75] Case C-453/99, *Courage and Crehan* 2001 E.C.R. I-6297.

actions for breach of the EC antitrust rules" issued in December 2005[76] which further steps could be taken to encourage private antitrust enforcement in Europe.

In Germany, the legal framework has already been renewed by the 7th Amendment. The most important changes in this field are as follows:[77] first, the abandonment of the *Schutzgesetzprinzip* (the former limitation to claimants falling within the scope of protection of the infringed competition law rule) by incorporating the "affected parties test" in view of the right to removal, injunctive relief and (in cases of acting intentionally or negligently) claims for damages (see sec. 33 para. 1 and 3 GWB), second, the restriction of the "passing-on-defence" regarding claims for damages (sec. 33 para. 3 sent. 2 GWB), third, the granting of prejudgment interest (sec. 33 para. 3 sent. 4 and 5 GWB), fourth, the binding effect of decisions issued by competition authorities ("follow-on-actions", sec. 33 para. 4), fifth, the suspension of the period of limitation (sec. 33 para. 5 GWB) and, ultimately, the reduction of the value in dispute pursuant to sec. 89a GWB in order to reduce the financial risk of instituting legal proceedings.

These steps may help intensify private antitrust enforcement in Germany, even if private enforcement previously had not been as "underdeveloped" as assumed by the Commission based on the so-called "Ashurst-Study".[78] However, there are still obstacles especially to "stand alone"actions, that is to say actions which do not follow from a prior finding by a competition authority of an infringement of competition law.[79] These obstacles are addressed by the above mentioned Green Paper which proposes several options to solve the existing problems.

In the context of strengthening the deterrent effect within the new system, the right of associations (see sec. 33 para. 2 GWB) to claim the infringing party`s profit pursuant to sec. 34a GWB (*Vorteilsabschöpfung*) might be important. Notwithstanding, it must be pointed out that the profit has to be delivered to the Federal Budget (*Bundeshaushalt)* (sec. 34a para. 1 GWB). Furthermore, this right is subsidiary to the equivalent competence of the competition authorities pursuant to sec. 34 GWB and to other payments rendered due to the infringement.

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[76] COM (2005) 672 final (19 December 2005).

[77] See Wurmnest, *supra* note 4, at 1180.

[78] Available at: http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html.

[79] Green Paper "Damages actions for breach of the EC antitrust rules" note 76, para. 1.3

D. Merger Control

There have been no significant amendments in the field of merger control (secs. 35 *et seqq*. GWB), especially since the controversial reform of the merger control in the newspaper sector was detached from the 7th Amendment. Merger control in Germany, therefore, is still based on the market dominance test (see sec. 36 para. 1 GWB). The German legislator refused to change the substantive examination criterion since the new test at the European level, the so-called SIEC-test ("Significant Impediment to Effective Competition"),[80] had been implemented in the Merger Regulation No. 139/2004[81] more or less as a compromise.[82] Apart from this, there is generally less pressure to adapt the European rules due to the, compared to the antitrust law, completely different allocation of jurisdictions between the Commission and the national competition authorities (see Art. 21 (3) Regulation No. 139/2004 and sec. 35 para. 3 GWB). Nevertheless, after an intensive scrutiny of the influences and the application of the SIEC-test by the European Commission and the European Courts it should be considered whether it makes sense to use the same substantive examination criterion both at the European and the national level.[83]

Next to several marginal changes in the merger control procedure there has been one significant amendment which has practical relevance: in principle, third party appeals against clearance decisions pursuant to sec. 40 para. 2 GWB do not have suspensive effects. According to sec. 65 para. 3 sent. 3 GWB the Court of Appeals in Düsseldorf (*Oberlandesgericht Düsseldorf,* see sec. 63 para. 4 GWB), can (or has to) order the suspensive effect upon request if the requirements of sec. 65 para. 3 sent. 1 No. 3 are met. In order to protect investments in terms of mergers against delays caused by third party appeals, this has been restricted by the 7th Amendment since the third party must demonstrate that its rights are violated (sec. 65 para. 3 sent. 4 GWB). However, this only applies to mergers which have been cleared by the *Bundeskartellamt* pursuant to sec. 40 para. 2 GWB and, in

[80] See Daniel Zimmer, *Significant Impediment to Effective Competition*, 2 ZEITSCHRIFT FÜR WETTBEWERBSRECHT [ZWeR] 250 (2004); Lars Hendrik Röller& Andreas Strohm, *Ökonomische Analyse des Begriffs "significant impediment to effective competition"*, available at GD Competition`s website.

[81] Council Regulation (EC) No 139/2004 of 20 January 2004 On the Control of Concentrations Between Undertakings (the EC Merger Regulation) 2004 O.J. (L 24) 1. Critical to the new substantive test Ulf Böge, *Reform der europäischen Fusionskontrolle*, 54 WUW 138 (2004).

[82] See Röller & Strohm, *supra* note 80.

[83] See the preliminary assessment of the Chief Competition Economist Lars-Hendrik Röller, *The Impact of the New Substantive Test in European Merger Control*, 22 January 2006, available at: http://europe.eu.int/comm/dgs/competition/new_substantive_test.pdf

contrast, this does not apply to mergers which are authorized by the Federal Minister of Economics and Technology pursuant to sec. 42 para. 1 GWB (*Ministererlaubnis*).[84] For these (few) cases it is still sufficient that the third party is affected in its competitive interests.[85]

E. Future of German Competition Law

Two particular proceedings of the *Bundeskartellamt* have aroused the public interest. First, the antitrust procedure against E.ON Ruhrgas AG, the largest gas supplier in Germany, in terms of long-term gas supply contracts with distributors, second, the intended merger between Axel Springer AG and Pro SiebenSat.1 Media AG.

In January 2006, both proceedings were brought to an end: the *Bundeskartellamt* prohibited long-term gas supply contracts due to infringements of Art. 81, 82 EC Treaty and sec. 1 GWB and required E.ON Ruhrgas based on sec. 32 GWB to bring the infringements to an end by 30 September 2006.[86] E.ON Ruhrgas is appealing against the immediate enforcement of this decision and it remains to be seen how the *Oberlandesgericht Düsseldorf* will decide this case. Even the merger "Springer/ProSiebenSat.1" had been finally prohibited since this merger would lead, in the view of the *Bundeskartellamt*, to a unacceptable degree of market power on the TV advertising market, reader market for over-the-counter newspapers and the national advertising market for newspapers.[87] As a result, the Springer AG abandoned the plan to take over ProSiebenSat.1 AG and recently decided not to request a ministerial authorization (*Ministererlaubnis*) pursuant to sec. 42 GWB.[88] Nevertheless, it filed an appeal against the decision in order to obtain legal clarity for future mergers.[89] This case has launched even a political debate among the governing parties about the role of the *Bundeskartellamt* and about a more liberal competition law which would leave larger leeway to German enterprises in merger

[84] BT-Drs. No.15/5049, 50.

[85] Bechtold & Buntscheck, *supra* note 28, at 2970.

[86] B 8 – 113/03 – 1, 13 January 2006, available at:
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B8-113-03.pdf.

[87] B 6 - 92202 - Fa – 103/05, 19 January 2006, available at:
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion06/B6-103-05.pdf.

[88] Financial Times Deutschland, 1 February 2006.

[89] Frankfurter Allgemeine Zeitung [FAZ], 24 February 2006.

cases.[90] In contrast, there have been attempts initiated by *Bündnis 90/ DIE GRÜNEN*[91] and *DIE LINKE*[92] to abolish the ministerial authorization all together. However, the chances of success are rather little.. Last but not least, due to the latest meat scandal in Germany and the ruinous price-competition in the food market the coalition agreement between the *SPD* and the *CDU/CSU* provides for a general prohibition of offering groceries below cost price.[93]

F. Conclusion

The 7th Amendment is the milestone in the history of competition law in Germany. In light of Regulation No. 1, the German legislator drew the right consequences from the "modernization" of the European competition law. However, it is well-known that identical rules applied by different authorities can result in different decisions. Thus, even more important than having the same rules is the coherent application of these rules. Regarding the European competition rules, the Commission has the ultimate (but not the sole) responsibility for developing policy and safeguarding consistency and can therefore decide to deal with a case (Art. 11 (6) Regulation No. 1).[94] Nevertheless, it is not guaranteed that the national competition authorities will adapt the Commission's interpretation for local or regional cases. Hence, close cooperation is essential for ensuring a lasting synchronism between European and German competition law.

[90] Critical on this the Chairman of the Monopoly Commission (*Monopolkommission*), Jürgen Basedow, FAZ, 4 March 2006 and the President of the *Bundeskartellamt*, Ulf Böge, FAZ, 8 February 2006.

[91] BT-Drs. No. 16/365.

[92] BT-Drs. No. 16/236.

[93] Available at: http://www.bundesregierung.de/Anlage920135/Koalitionsvertrag.pdf, (page 112).

[94] See Commission Notice on cooperation within the Network of Competition Authorities, 2004 O.J. (C 101) 43, 49.