



COUNTRY STUDIES

Germany - The Role of Competition Policy in Regulatory Reform 2003

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in Germany. This report was principally prepared by Mr. Michael Wise for the OECD.

Overview

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REGULATORY REFORM IN GERMANY

**THE ROLE OF COMPETITION POLICY IN
REGULATORY REFORM**



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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Germany. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Germany* published in July 2004. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 20 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Germany. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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SUMMARY

Competition law occupied a central, even quasi-constitutional position in the development of Germany's post-war economic and political institutions. The competition law and its principal enforcer, the *Bundeskartellamt*, (BKartA) are well established and widely respected. Yet competition policy is not closely integrated today into the general policy framework for regulation. In part because of the evident strength and success of the competition law system in dealing with the kinds of problems for which it is well suited, it may have been more difficult for Germany to deal with other, related issues, such as network access and pricing, for which the competition law system may not be the best regulatory instrument.

The competition law was intended to guarantee freedom of competition and to prevent the emergence of economic power, to protect opportunities and relationships as well as to promote efficiency. The focus on structure, relationship, and freedom of action is consistent with the long-standing political support for competition law from industry, and particularly from the small-business sector. Distinctive features of Germany's law, which contrast with the EC approach, include its system of classifying horizontal agreements, separate treatment of vertical agreements, reliance on specific rules as well as a general prohibition to control abusive conduct, and extension of that prohibition to firms with relative market power. Germany was among the first in Europe to adopt and apply vigorous merger control, as well as to develop the concept of abuse of economic dependence to protect smaller firms in their dealing with large customers and suppliers.

Substantial fines have recently been imposed on unauthorized horizontal cartels, which should make the new leniency program more effective. Special attention is paid to protecting smaller firms against dominance in a bargaining relationship, and to sales below cost as an abuse of superior market power in relation to small and medium sized businesses. The enforcement record against abuse of dominance has been limited and mixed, perhaps because the BKartA has concentrated more on the "cartel" issues that defined its original mission. A high priority now is network utility monopolies, as recent amendments eliminated exemptions and added a specific rule about access to essential facilities. In electric power, there have been dozens of investigations about network access charges. But enforcement against typical abuses in these industries has proved difficult. Methods developed for *ex post* enforcement through a quasi-judicial process against particular misconduct are not adapted for continuous administration based on detailed cost analysis in order to change sector-wide practices and conditions.

The effort to prevent future problems by preventing mergers reveals differences in the policies applied by the BKartA and the government. The Minister of Economy and Labour may authorise a merger that the BKartA has rejected, if the restraint of competition is outweighed by advantages to the economy as a whole or if the concentration is "justified by an overriding public interest." In 2002, the BKartA rejected a large concentration in the gas and electricity sectors, but the Ministry nonetheless approved it, concluding that improving national supply security outweighed the BKartA's concerns about increased market power in Germany. Although the Ministry shares a commitment to competition policy, its rationale here undercuts the logic of restructuring to promote competition.

Perhaps the defining feature of German competition policy is the independent institutional culture of the BKartA. Offices in the *Länder* also enforce the national competition law. The Ministry may give general instructions about decisions, but this power has rarely been used. The Ministry's more important role affecting enforcement is its power to authorise a cartel or merger for reasons other than competition policy. The independent Monopolies Commission, comprised of economics and law professors as well as business people, produces regular reports on competitive conditions, as well as special reports on particular topics and mergers. The Monopolies Commission has become the principal source of analysis and advocacy about regulation and competition, as the BKartA has concentrated on its enforcement role.

Recent reports by the Monopolies Commission have called attention to the need to reform the system of qualification that discourages entry into many service and craft industries, and to restraints on competition in the self-regulation of the professions. Laws that limit sales and discounts and that prevent retail-level price competition for some products still constrain competition unnecessarily, although the Parliament has eased some of these constraints. After the disappointing experience of trying to apply the competition law to problems of ensuring competitive access to network monopolies, the Monopolies Commission recommended moving to a single-regulator model, and the government has recently announced its intention to follow that advice.

The most interesting competition law issues in Germany today arise from the changes in EC competition law and enforcement. Increasing co-ordination of EU competition policy will challenge Germany to protect the historic strengths of its mature and successful system.

BOX 3.1: COMPETITION POLICY'S ROLES IN REGULATORY REFORM

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.
- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise that had supported regulation, namely that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that policies which had appeared similar may have led to different outcomes.
- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

COMPETITION POLICY FOUNDATIONS

Germany's early experience with cartels established the model for European competition policy in the 20th century. In the 1920s Germany created Europe's first laws and institutions to protect competition and control abuse. Germany then fundamentally reformed its conception of competition law in its post-war reconstruction and re-constitution. The "social market economy" deliberately linked competition policy with political responsibility. There are several distinctive, characteristic features of Germany's competition law system: a clear prohibition against horizontal cartels, moderated by rules that accommodate efficient co-operation, applied through legal analysis rather than administrative discretion, coupled with strong merger control and protection of small business interests. This well-established and respected system is now challenged by the increasing integration of European institutions, because the rest of Europe took a different approach to competition law and policy, one which resembles Germany's first experiments.

Germany's large and diversified economy has been particularly strong in industry and technology, although services now dominate. Within that large-scale environment, the small and medium sized enterprise movement, the *Mittelstand*, is unusually important. Germany's national government must respect local autonomy through the constitutional complexity of a federal structure. These characteristics were also present when Germany began to create a competition law, during the period of industrial development that followed the creation of a united Germany in the late 19th century. German law about competition is "cartel" law, because it was a public-policy response to the co-ordination of large-scale industry through that era's *Kartell* agreements. At the outset, the term was understood somewhat more broadly than it is today, when "cartel" refers generally to any kind of agreement between competitors about production or distribution that involves or affects competition.

The cartels were a product of ambivalent experience with industrial competition. Free market policies accompanied industrialisation and unification in the 1860s and 1870s, when competition was understood to be the engine of the liberal concept of the economy and the economy grew vigorously. But as the business cycle turned from boom to bust, enthusiasm for liberal policies foundered in depression and uncertainty. Competition became something that needed to be controlled, managed, and organised. In response to crisis, firms entered agreements about allocating production and capacity. This co-ordination was particularly valuable for capital-intensive, vertically integrated heavy industries. Their banks also welcomed it because it protected their investments. Government did not fundamentally object, as the bureaucracies preserved their controlling roles while political leaders saw control over co-ordinated business structures as one element of the extension of control over the newly integrated German state. The characteristic form of industry co-operation and control was the cartel. In Germany at the end of the 19th century, cartels were bigger, more numerous, and more durable than anywhere else. By 1900, there were 400, many of them including industry leaders. Most were no longer crisis responses to the depression of the 1880s, but instead they had apparently become permanent features of the political economy.

Economic learning in Germany tended to support the cartel movement. The “historical” school of German academic economics emphasised the importance of institutions and of cultural context and supported government intervention to combat the harms of industrialisation, which in turn were traced to excesses of *laissez-faire*. The German historicists disagreed sharply with doctrines of the Austrian and “Manchester” schools, contending that they were too theoretical and abstract. (Legal scholarship in Germany, by contrast, was more theoretical than empirical, stressing logically ordered rules more than evidence and experiment). Although the German economists understood how limiting competition can harm consumers, they were also concerned about the effects of market processes on producers. They tended to see cartels as a natural and necessary institutional response to the unprecedented phenomenon of industrialisation. Cartels could dampen cycles and prevent wasteful overinvestment and overproduction. And cartels were promoted as consistent with an ethic of co-operation.

When cartel co-operation failed and the members took each other to court, the judges’ decisions shaped policy. Three principles were at stake: freedom to enter contracts, freedom to enter businesses, and judicial power to invalidate contract terms that contravened the community’s moral sense. Germany’s highest court synthesised these principles in the famous *Saxon Wood Pulp* decision of 1897, which set the course for German, and European, cartel policy for much of the next century. In upholding a cartel’s restraints on one of its members, the court found that cartels were generally beneficial, by preserving firms from ruin and maintaining adequate prices. The decision appealed to the public interest, understood in terms of historicist economics, and thus “the Court made resolution of the legal issue turn on its own evaluation of the economic literature on the subject.” (Gerber, 1998, p. 92) On this authority, the basic legal rule was established that cartel agreements were valid and enforceable, although a cartel to establish an actual monopoly or exploit consumers might be struck down. The law would not prevent cartels, but instead would try to control abuse.

Despite the apparent blessing from the judiciary, there was increasing concern about cartels’ harmful effects. Popular opinion assumed that something should be done to control them, while elite opinion maintained that any intervention should be limited and administrative because cartels were basically positive institutions. At economists’ conferences in 1894 and 1905, proposals for control ranged from reducing tariffs to encouraging countervailing powers such as consumer co-operatives. Some called for establishing an administrative office to supervise cartels or at least gather information about them. Political pressure for legislation was diffused. The party of the workers, the SPD, did not support a law to control capitalists because its leaders considered the cartel movement to be an inevitable step on the path to full socialism. The Centre Party, emphasising the need to protect small and medium sized businesses, called for an official investigation. Several such requests from the Reichstag met indifferent responses from the bureaucracy before war intervened in 1914. During the war, the cartels enjoyed public support for

their role in the military effort; after the war, though, public support vanished, as the cartels were charged with organising to protect themselves against the effects of inflation by passing all of the pain on to consumers.

In this era of anxiety and instability, the government under the Weimar constitution enacted the first general legislation in Europe aimed specifically at protecting the competitive process. The 1923 Regulation against Abuse of Economic Power Positions was part of a set of emergency measures to control inflation, and thus its terms were not debated or approved by the Reichstag. It had been prepared, though. Small business and consumer interests had been demanding legislation since 1920, a cartel advisory committee had been set up in 1922, and the new chancellor who promulgated this regulation, Gustav Stresemann, had been a pre-war advocate of controls on large-firm cartels in order to protect small businesses. The government explained the Cartel Regulation in liberal terms, claiming that removing cartel-imposed restraints would increase production and reduce inflation by ensuring market freedom. The economic argument was matched by an ethical, contextual one, that the regulation would correct abuse and force firms to face their social responsibilities.

A Cartel Court was created to decide cases. Despite its name, this was actually an administrative body, with representative structure that included members from the judiciary, the Economic Court, independent experts (to represent the public), and the parties to a dispute. The Cartel Regulation contained 2 approaches to controlling cartels. The first was general, based on a direct appeal to the public interest. The second was specific, targeting particular abusive and coercive practices such as exclusive dealing and boycotts. Enforcement was up to the minister, especially for cases brought under the general approach, which could lead to invalidating a cartel or requiring it to report. Those cases were rare, though, because the ministry preferred to maintain control through informal measures. Most of the Cartel Court's decisions were in privately-initiated disputes about the application of the specific rules. Its decisions did not expound the Cartel Regulation's general policy direction, but concentrated on technical issues such as defining cartels and characterising coercion.

The Cartel Regulation was a subject of controversy until it was eclipsed in the 1930s by depression and National Socialism. The Cartel Court tended to interpret it narrowly, consistent with a generally positive view of cartels. Lawyers complained that it was poorly drafted and lacked parliamentary authority, and they criticised the Cartel Court for not being and acting like a true court. A series of commissions to investigate aspects of the economy, staged by the bureaucracy, criticised the Regulation and praised the system of cartels. On the other hand, the SPD now called for stronger legislation and independent enforcement, and some academic economists supported stronger policy with arguments from liberal theory and with appeals to equality and social concerns. The Cartel Regulation was nonetheless a fundamental, historic step. This effort to protect competition in the interests of consumers and the public was a democratic, political response to social and economic concerns. Cartel regulation through administrative supervision and control of abuse became the common model for competition policy across Europe. But in Germany itself, this system was seen as a failure by 1930, and when Germany returned to serious competition policy after WWII, it designed a different system.

**BOX 3.2: COMPETITION POLICY AS THE ECONOMIC CONSTITUTION:
THE ORDO-LIBERAL FOUNDATION OF THE SOCIAL-MARKET ECONOMY**

Germany's post-war conception of the "social market" political economy is a distinctive, comprehensive approach to corporate management, industrial relations, social welfare, and government policies, including notably competition policy. Companies are held to social as well as economic account, being responsible to stakeholders in the community as well as to shareholders, employees, customers, and suppliers.

The intellectual energy for this system and for post-war German competition law came from Freiburg, where a group of professors of economics and law rebuilt liberalism during the inter-war period in a way that bridged public and private responsibilities. One of these professors was a veteran of the Ministry of Economy cartel office and thus brought a particularly relevant experience to the project. They held that a competitive economic system was necessary for prosperity and freedom, but that achieving these results required setting the market in a constitutional framework.

The Freiburg liberals believed that the Weimar republic had collapsed because its legal system could not constrain private economic power from undermining political and social institutions.¹ They faulted both classical economic theories and traditional legal positivism for excessive attention to matters of form. Economic formalism was oblivious to social impacts, while legal formalism had become a willing tool of entrenched interests. But they acknowledged that the "historical" approach to economics needed theory in order to be useful.

The "ordo-liberal" viewpoint accepted tenets of classical economic theory and some traditional liberal principles, notably the importance of competition to economic success and the link between economic freedom and political freedom. Seeing how private economic power had subverted government, the Freiburg school called for breaking up monopolies. They argued that the economy could integrate society on democratic principles, but only if it functioned fairly to provide equal opportunities for participation.

Their conception was "constitutional," in that it set out legal principles that would constrain the government. This economic constitution would be constructed through legal and political decisions. Indeed, ordo-liberalism reversed the presumption of conventional liberalism: rather than divorce the economy from law and politics, it supposed that the economy's success depends on its organic relationship with law and politics.

Economics would set out the conditions for "complete" competition, in which no firm has the power to coerce others in the market. Those conditions would then become the standards for legal decisions. Officials could intervene only on those terms, and in doing so they could not exercise discretion. Administrative control was rejected, because it could be captured by the interests being regulated. Yet legislation about detail was disfavoured too, because the constitutional principle and general competition rules would provide a sufficient framework.

Enforcement would be entrusted to a strongly independent and autonomous body, outside and above politics just like a court. Like a court, it was imagined as applying objective law-based standards, without discretion to favour parties or outcomes. It should eliminate monopolies where possible and force firms to act as though they faced effective competition. Firms would be encouraged to compete in performance, but not in measures to hinder their rivals.

The ordo-liberal viewpoint became the basis for Germany's post-war economic reconstruction, in which some of its proponents played key roles. A professor associated with the Freiburg school's ideas, Ludwig Erhard, headed the self-government (under occupation) that eliminated rationing and price controls in 1948, then served as minister of economy until 1963 and as chancellor until 1966. The social market economy, built on ordo-liberal principles, was part of his party's platform from 1949. In that conception, competition policy assumed a leading, constitutional status and role, promoting basic values, protecting fundamental rights, and operating on juridical principles.

Source: (Gerber, 1998)

Administration during the occupation period supported development of a new competition policy. De-cartelisation laws in the US and British sectors were intended to dismantle the political-economy structure more than to regulate competitive practices. These remained in place as transitional legislation until 1958. These occupation measures were not the source of the modern German competition law, though. Political interests in Germany were agreed that a law about competition was needed regardless of the interests of the occupying powers, and the law they developed was built on German experiences and models. The debate echoed the debate from the previous post-war era. Business preferred administrative regulation of abuse, while some socialists did not care about strong enforcement because they still saw

industrial concentration as a step on the road to socialism. The new element was the ordo-liberals' conclusion that there must be a law clearly prohibiting cartels. A pure ordo-liberal draft from 1949 was never actually introduced, though. The government submitted a less doctrinaire draft in 1952. A series of compromises and exemptions, notably the elimination of merger control, softened opposition from business. After 10 years of contentious debate and 20 redrafts, a compromise text was enacted in 1957, to become effective 1 January 1958 as the Act against Restraints on Competition (ARC).²

The long legislative gestation, and the deep roots in Germany's political experience and academic tradition, produced a system that has shown enduring strength. The statutory text provided substantial guidance, in a comprehensible structure, about what was expected. Rather than rely principally on generalities such as an appeal to the public interest, which would require discretion in application, the law set out specific rules to follow. Those specific rules were motivated by concern about competitive effects, though, not by legal formalisms such as the definition of a cartel. Perhaps most importantly, the enforcement structure followed the ordo-liberal prescription of a strongly independent, court-like expert body. The *Bundeskartellamt* (BKartA) came into existence with the ARC. Confirming the political commitment to independence, the BKartA's first president, Eberhard Günther, held the post for 18 years. The BKartA developed a bureaucratic culture that countered the traditional dominance of lawyers in the German civil service. The BKartA staff had a sense of mission, believing that they symbolised rejection of the failure of the past and embodied the belief in the democratic alternative. Courts and academics were supportive. And the BKartA did not court controversy by aggressive attacks, but proceeded judiciously, even cautiously, while working through the inevitable legal controversies about the scope of the cartel prohibition and the relationship to principles of private contract law and interpretation. Some of these technical issues required resolution in the legislature.

The first significant changes to the system followed the changes in government in the 1960s. Economic success had buoyed the CDU and its policies, of which competition policy was a key component. With the coalition government in 1966 came calls for changes in competition policy, in order to respond to increasing concentration, incorporate concepts of dynamic competition, and recognize the reality, even inevitability, of oligopoly in modern economies. When the SPD finally became the dominant partner in the government in 1969, it called for stronger competition law to benefit consumers and workers. The ARC was amended in 1973 to add merger control, sharpen the provisions for controlling abuse, prohibit resale price maintenance, and permit more co-operation among smaller firms. The 1973 amendments also introduced a new institution, the Monopolies Commission, to oversee and report on competitive conditions and to play an occasional role in merger review (and to report on the clearance decisions of the BKartA, which were not published at that time). Merger control was supported by an anti-capitalist trend among some opinion leaders, and it soon became the BKartA's most important function. Amendments became more frequent, and they frequently benefited small and medium sized businesses. The national registry of cartels, one of the BKartA's original responsibilities, was discontinued in 1985 pursuant to a law about "unnecessary economic regulations." (Sturm, 1996)

The most recent amendments to the ARC, which became effective in 1999, deal with the increasingly important context of European competition law and enforcement. The ARC now includes substantive principles about restrictive agreements and dominance that track those of the EC treaty, along with Germany's traditional rules. The merger review process was revised to be more efficient and more consistent with the practices of the EC and other European jurisdictions. The BKartA was given new responsibilities over competitive tendering in public procurement. Most importantly for the process of regulatory reform, elimination of exemptions and addition of a new standard example, about access to network facilities, in the prohibition against abuse by dominant firms made it possible to apply the ARC more effectively to infrastructure monopolies. Further amendments are now in preparation to adapt Germany's law to the latest developments in EU competition law and procedure, notably the changes in the application of Art. 81 of the Treaty.

The ARC itself contains no formal statement of purpose. But the absence does not mean that the law is protean, susceptible of following shifting policy fashions. Rather, it reflects the fact that Germany's legal system relies more upon the analysis and application of rules than upon direct appeal to expressions of legislative purpose. Nonetheless, statements describing the policy motivation of the law may help to explain the direction of policy. Statements accompanying the original legislation in 1957 show concerns about both process and efficiency. The ARC was intended by its supporters to guarantee freedom of competition and to prevent the emergence of economic power where it might impair the effectiveness of competition. One of the desired results of effective competition, which was to be protected against restraint, was its inherent tendency to increase economic efficiency (BKartA, 2002).

Descriptions of the role of German competition policy today combine these same elements. Along with the virtues of competitive markets in allocating resources, responding to consumer demand, promoting productive efficiency, and disciplining management, one finds reference to the importance of maintaining effective competition among a large number of competitors in order to prevent companies from becoming too influential in society and politics. The law that prevents privately-motivated distortion of the process protects economic outcomes. In addition, it affords enterprises the freedom to make decisions, provided that competitive structures and individual freedom of action are also maintained. In these descriptions of the law's policy goals from the public information brochures on the BKartA's website,³ the economic motivations come first. But the political and process values are not far behind.

The focus on protecting the structures within which firms operate and compete—more than on assessing the net economic effect of particular conduct—follows from the *ordo-liberal* conception of the relationship between the state and the market. The law is to protect relationships within which it is presumed that desirable economic outcomes will be encouraged. The focus on structure, relationship, and freedom of action is also consistent with the long-standing political support for competition law from the small-business sector. The amendments to the ARC since 1973 reinforce the legislature's instruction to use competition law to protect small and medium sized businesses against aggressive competition by larger firms. In that respect, Germany's approach to competition policy is consistent with other policies, ranging from retail regulations to the master-crafts qualification system, that protect the interests of small and medium sized operators. These are also defended in terms of preserving structures, relationships, and freedoms.

By contrast, in dealing with reform of network monopolies and related sectoral issues, the link between competition policy and reform is stronger. The sectoral regulator for telecoms and postal services operates under a mandate to support competition in close co-operation with the BKartA. And Germany demonstrates its faith in competition as an instrument of reform most powerfully in its habit of relying on the BKartA for reform-related tasks such as overseeing the liberalisation of the electric power market. The BKartA accepts these responsibilities and performs them diligently. But competition law enforcement against past misconduct is an awkward tool for overseeing network monopoly problems. Recognising that an administrative approach could be more efficient, Germany is now planning to shift this function to a regulator.

Because the BKartA concentrates on enforcing the ARC, issues of competition policy, including supporting competition through structural reforms, are the chiefly the responsibility of the Ministry of Economics and Labour (and to some extent of the Monopolies Commission). Separating the institutional roles tends to weaken the link between competition law, as embodied in the long-established and respected BKartA, and competition policy in regulatory reform. Moreover, the relative weight of competition as a principle, when challenged by other policy interests, has been called into question by the Ministry's recent action in a prominent case involving a regulated industry. In the first such intervention in nearly a decade, in 2002 the Ministry authorised a combination of the major gas firm with a major electricity firm, overriding the BKartA's order to prohibit the merger because it would be anti-competitive and disregarding the Monopolies Commission's finding that claims about its public interest benefits were unsupported.

Reforms in competition law enforcement at the EC also challenge Germany's traditional institutions. The regulation implementing the EC's modernisation program, adopted in January 2003 and effective in 2004, shifts responsibilities to member states. Other changes in EC competition rules have tended to reduce the importance of notification and clearance and to increase the importance of economic analysis. Germany has been concerned that changes at the European level, especially those that reduce the role of notification and clearance, will reduce legal certainty and transparency and will thus undermine what it considers to be the strengths of Germany's system.

Substantive issues: content of the competition law

Several features of Germany's law make it distinctive. It classifies horizontal agreements in terms of their function and hence their likely effect, rather than provide general grounds for exemption from a general prohibition. It clearly distinguishes vertical agreements from horizontal ones, and thus avoids the apparatus of block exemptions to regulate their content. It has dealt with conduct by dominant firms principally through specific rules about exclusive dealing and discrimination, rather than through a general prohibition against abuse. Germany was among the first in Europe to use merger control to try to prevent the creation of dominant firms. Germany was also first to develop doctrines of abuse of economic dependence as part of competition law.

BOX 3.3. THE COMPETITION POLICY TOOLKIT

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some jurisdictions, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

Horizontal agreements

The first and most fundamental provision of the ARC prohibits horizontal agreements in general terms (Sec. 1).⁴ The general prohibition is not limited to formal agreements among competitors, but also applies to decisions by associations of competitors and to concerted practices that have the object or effect of preventing, restraining, or distorting competition. An agreement that violates Sec. 1 is null and void under the Civil Code (Sec. 1; Civil Code Sec. 134). The sections that follow provide for several kinds of exception from the prohibition. There are two classes of exceptions, the “unopposed” cartels and the “authorised” cartels. Cartels in the “unopposed” class are permitted unless the BKartA objects, while those in the “authorised” class require prior BKartA approval. All must be notified to the BKartA, in the first case to give the BKartA an opportunity to step in if the cartel raises a competition problem, and in the second case to initiate the process of determining whether the cartel qualifies to be authorised.

The classification corresponds to a sound presumption about likely effects. The 3 types of unopposed cartels are agreements about standards and terms of doing business (Sec. 2), specialisation cartels (Sec. 3) (which are permitted if they do not lead to a dominant position), and agreements among SMEs (Sec. 4). Joint purchasing arrangements to improve the competitiveness of SMEs are specifically permitted (Sec. 4(2)). In its 1980 *de minimis* notice, the BKartA committed not to apply the prohibition to agreements among SMEs whose collective market share is negligible, that is, below 5%, in order to permit co-operation about such matters as research and development; however, it does not permit hard-core violations even among SMEs. (BKartA, 2002) About half of the approximately 300 cartels that are now effective (excluding, of course, clandestine, illegal agreements) are “unopposed” cartels involving small businesses. (OECD (Germany), 2002) Standard terms can facilitate transactions, while specialisation and joint action by small businesses can improve efficiency and increase bargaining power without leading to market power. By placing the procedural responsibility on the BKartA to raise objections to them, the structure of the ARC takes account of these likely efficiencies.

Prior BKartA authorisation is required for rationalisation cartels (Sec. 5) and structural crisis cartels (Sec. 6). Each of these sections sets out criteria that must be met to qualify. A rationalisation cartel must be a suitable means of substantially increasing the participants’ productivity or efficiency and thereby improving their ability to meet market demand. Those benefits must be significant, compared to the loss of competition (but they need not, evidently, clearly outweigh that loss). The restraint must not create or

strengthen a dominant position, and if there are price agreements or joint purchasing or selling agreements involved, there must not be any other means of achieving the rationalisation (Sec. 5). The requirements for a structural crisis cartel are less stringent: an agreement that is necessary to systematically adjust capacity to a lasting change in demand may be authorised if it “takes into account the conditions of competition in the economic sectors concerned” (Sec. 6). An example of a rationalisation cartel is the BKartA’s decision to permit construction firms in Berlin to co-ordinate logistics around Potsdamer Platz, to reduce congestion and improve efficiency. An example of a structural crisis cartel is the BKartA’s 1983 decision to permit makers of welded steel mesh to adjust to reduced demand by reducing capacity 40%. The prospect that poor performance might be rescued through rationalisation or “crisis” agreements with competitors could prevent the competitive process from disciplining inefficiency. Thus, requiring prior BKartA approval, albeit according to potentially generous standards, guards against that risk.

In addition, horizontal agreements that meet criteria for exemption similar to those of EU competition law may also be authorised and hence exempted from the Sec. 1 prohibition (Sec. 7). These criteria, added by the 1999 amendments in order to support closer harmonisation with the European approach, were not intended to expand exemptions, that is, to exempt agreements that could not qualify for exemption under Secs. 2-6. They do not follow the EC model precisely. The ARC sets out more specific options about what the exempted conduct can deal with (such as distribution, procurement, return, and disposal). Tightening the focus to issues directly related to competition, the ARC omits the EU criterion of “promoting technical or economic progress,” calls for a more explicit balancing of the importance to the parties’ objective against the extent of the restraint, and provides explicitly that the restraint must not lead to a dominant position. In applying the new Sec. 7, the BKartA has declined to exempt an agreement under in the absence of tangible benefits. In one such case, the BKartA was concerned that a proposal by several newspapers to set up a joint nation-wide job advertising system would concentrate power too much even though another firm, which was not a party to it, already had a dominant position. (OECD (Germany), 2001, p. 23) An exemption under the ARC’s Sec. 7 standards requires prior authorisation; however, the EC has now made exemption under its similar criteria self-operative. Consistency of process would argue in favour of shifting the Sec. 7 criteria to the “unopposed” category, but that would be a difficult step for German competition jurisprudence. Even where the ARC is substantively permissive, as for the unopposed cartels, it is premised on a general rule of prohibition, and thus its application has required prior notice and formal approval for any exception. Amendments to the ARC are being prepared to deal with these inconsistencies with the new EU approach.

A cartel may be authorised for policy reasons that do not appear in the ARC criteria for exemption. The minister, not the BKartA, would make that decision. The Minister may not reject the BKartA’s decision under the ARC, but the Minister may exempt a cartel that fails to meet any of the criteria for exemption under Secs. 2-7 if the restraint “is necessary for prevailing reasons concerning the economy as a whole and the public interest.” In addition, Ministerial authorisation is possible in “especially serious individual cases,” where there is an “immediate danger to the existence” of most of the firms in a sector, and other measures cannot be taken in time (Sec. 8). The Minister’s power to intervene has been used in the cartel context 4 times since 1958. (OECD (Germany), 2002)

Self-regulation by professional and trade associations is subject to special oversight, where it is not exempted from the ARC entirely. Particularly for professional groups, collective restraints on price and advertising competition may be authorised by the terms of other legislation. Otherwise, trade and industry associations may adopt rules to control unfair competition and ensure “effective competition based on performance,” but they must apply for “recognition” of their rules to ensure that the rules do not prevent all competition (Sec. 24). An opportunity to comment must be provided to competitors, associations of suppliers, and purchasers that would be affected by the rules, at the federal and *Land* levels (Sec. 25). The proposed rules may be exempted from the prohibitions against horizontal cartels or recommendations, but not from any other provisions of the ARC (Sec. 26).

The cartel rules have been applied principally through the process of notification and authorisation (or denial). Enforcement against unauthorised, and hence prohibited, cartels has stepped up. The highest fines ever, totalling €660M, were imposed in early 2003 against a cement cartel. An earlier series of cases against price fixing and market division agreements in the concrete industry resulted in fines totalling over €150M against more than 20 firms and their executives. (OECD (Germany), 2001; ABA Section of Antitrust Law, 2001) Fines against a cartel of power cable manufacturers totalled about €120M. In addition, the general prohibition of Sec. 1 was backed up in 1997 by a criminal law against bid-rigging (Criminal Code, Section 298). The public prosecutor has brought a number of cases and even obtained some jail sentences. This record of substantial penalties will improve the effectiveness of the BKartA's leniency program, set out in its guidelines about computation of administrative fines issued in 2000. The terms are intended to give participants in prohibited cartels a strong incentive to come forward and provide evidence about them. The BKartA recognises that the risk of a co-conspirator's future defection, which this program invites, could discourage the formation of prohibited cartels in the first place.

BOX 3.4: THE EU COMPETITION LAW TOOLKIT

The law of Germany retains many distinctive features, but it also now includes some of the elements of competition law that have developed under the Treaty of Rome (now the Treaty of Amsterdam):

- **Agreements:** Article 81 (formerly Article 85) prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 81's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.
- **Exemptions:** An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable "block" exemption regulations, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the "white lists" and "black lists"). Any agreement that meets those conditions is exempt, without need for particular application.
- **Abuse of dominance:** Article 82 (formerly Article 86) prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50 percent, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.
- **Reforms in administration:** Recent reforms of EU competition policy reduce the scope of the prohibition against vertical agreements and will eliminate the process of applying for exemptions for particular agreements. Instead, exemption criteria will apply directly in decisions applying the law, and these decisions will increasingly become the responsibility of national competition authorities.

Vertical agreements

Vertical agreements are covered in a separate chapter of the ARC. The only type of agreement that is prohibited is resale price maintenance (Sec. 14). The prohibition makes no distinction between agreements on maximum prices or on minimum prices. In addition, it bans “most favoured buyer” clauses, that is, constraints on the freedom of the original seller as well as on resellers. (ABA Section of Antitrust Law, 2001) The prohibition is subject to a major exemption for newspapers, magazines, books, sheet music, and maps. That exemption is now supplemented by legislation that does not just permit, but that requires publishers to set the retail price (for books, sheet music, and maps). The prohibition is also subject to a qualification, which permits suppliers to recommend resale prices for branded products as long as the recommendation is clearly non-binding (Sec. 23).⁵

Other types of vertical agreements are not prohibited, unless they involve a dominant firm and are thus covered by the ARC’s prohibition against abuse of dominance. Instead, they are subject to *ex post* control for abuse. Agreements for exclusive dealing, exclusive supply, or tying may be voided and prohibited in the future (Sec. 16). A “competitive effects” test is applied. That is, these agreements may be prohibited only if they substantially impair competition, either for the goods or services subject to the agreement or for others. Agreements about intellectual property licensing that go beyond the scope of the protected right may be prohibited, but restrictions on the nature, extent, technical application, quantity, territory, or time of exercise are permitted, as are mutual commitments about licence improvements, challenges, minimum use, minimum fee, and labelling (Sec. 17, 18).

Although the ARC appears to employ a tolerant, rule-of-reason approach to most vertical restraints, it may actually be demanding. Determining whether an agreement substantially impairs competition does not depend on a market power test or market share threshold. Competition is conceived in terms of process and the freedom of choice of entrepreneurs and customers, rather than in terms of the economic efficiency of the market outcome. There are concerns in Germany that the EC’s market-share tests could permit conduct that German law would reject on the grounds that it substantially impairs competition. The ARC does not provide for ministerial intervention to permit vertical restraints that the BKartA forbids. But the “abuse” approach probably permits context-sensitive flexibility, as well as strict control where that is thought necessary.

Abuse of dominance

German law traditionally controlled single-firm misconduct through specific rules. Making the rule against “abusive exploitation of a dominant position” a general prohibition is a recent innovation (Sec. 19(1)). This treatment and the definition of dominance that follows it echo the jurisprudence of the EU. The general prohibition can be applied for practices such as tying that are not clearly covered by the specific types of abuse described in the other subsections. (ABA Section of Antitrust Law, 2001) The first of these specifics is impairing the ability of others to compete without objective justification (Sec. 19(4)(1)). This abuse aimed at competitors can include loyalty rebate schemes and predatory pricing. The second is exploitation aimed at consumers, by demanding prices or terms that would not prevail in a competitive market (Sec. 19(4)(2)). To demonstrate exploitation, the BKartA may compare the prices or conditions to those prevailing in a comparable, but competitive, market. Identifying that comparable market can be contentious and controversial. The third is discrimination that harms customers, by demanding terms that are less favourable than the dominant firm demands from similar purchasers in comparable markets (Sec. 19(4)(3)). The last, which is also a recent addition, is denying access to a network or infrastructure facility (Sec. 19(4)(4)). A predicate for these prohibitions is that the firm have a dominant or paramount position. In addition, other sections in this part of the ARC prohibit some conduct, such as boycotts, solicitation of refusal to deal with the intention of harming other businesses unfairly, and other coercive tactics, even in the absence of dominance (Sec. 21). There is no provision for ministerial intervention to invoke other policies and thus authorise conduct that the BKartA has found to be an abuse of dominance or other violation of this chapter.

Dominance is defined in several ways. A firm that has no competitors (or that is not exposed to substantial competition) is considered dominant (Sec. 19(2)(1)). The reference to exposure to substantial competition implies that entry barriers or lack of potential competition would be relevant to finding a dominant position. A firm that faces some competition would nonetheless be treated as dominant if it has a “paramount market position.” This status depends on its market share, financial power, access to suppliers and markets, links to other firms, barriers to entry, potential competition, flexibility, and market responsiveness. Several firms together could be considered dominant to the extent there is no substantial competition between them. Market share thresholds for presuming dominance are low: for a single firm, a share of 1/3; for 3 firms, a combined share of 1/2; for 5 firms, a combined share of 2/3 (Sec. 19(3)). The thresholds for several firms taken together are consistent with HHIs below 1000, that is, with market structures that are often considered unconcentrated. The market share tests are not conclusive, of course, and the presumption of dominance may be overcome by showing that conditions may be expected to maintain substantial competition or that the group with the collective market share over the threshold does not in fact have a paramount market position in relation to the remaining competitors.

Special attention is paid to protecting smaller firms against dominance in a bargaining relationship. Making it relatively easy to find dominance already tends to protect smaller businesses. More importantly, though, one section of the ARC deals specifically with relationships of economic dependence (Sec. 20). It controls discrimination and “unfair hindrance” by dominant firms, associations, and cartels, which may not use their market position to demand preferential terms “without objective justification.” This section applies particularly to their dealings with small or medium-sized enterprises, as suppliers or purchasers, who depend upon them and lack reasonable opportunities to resort to other outlets or sources. A firm can be surprisingly large yet still qualify as a small or medium sized enterprise in this context. A 1999 BKartA ruling defined it as sales below DM500M (€250M) and more than 7.5% of those to the larger firm. (ABA Section of Antitrust Law, 2001) Dependence on a purchaser is presumed if the supplier gives it special benefits. Trade and industry associations and quality-mark associations must have non-discriminatory membership policies (Sec. 20(6)).

An important new subsection specifically defines sales below the seller’s cost price as an abuse of superior market power in relation to small and medium sized businesses (Sec. 20(4)). There are provisos: the sale must be on other than an occasional basis and without an objective justification. Based upon applications so far, 2 months is evidently too long, and an “objective justification” could include meeting competition. The complainant or the enforcer need not get inside the company’s books to prove the violation. Rather, once there is a prima facie showing of a sale below cost based on industry practice and available facts, the seller has the burden to show that its cost price was lower than its sales price (Sec. 20(5)). In Germany as elsewhere, these claims about sales below cost are concentrated in the food retailing sector, and they are aimed mostly at the use of “loss leaders” by large, high-volume marketers. In the BKartA’s consultations to develop principles of interpretation, the food sector was most interested. The first enforcement action was against 3 supermarket groups (Wal-Mart, Aldi Nord, and Lidl) for below-cost sales of products such as milk, butter, sugar, flour, rice and vegetable shortening. The BKartA’s finding of liability was largely upheld on appeal in 2002.

The enforcement record against abuse of dominance has been limited and mixed, perhaps because until recently the BKartA concentrated more on the “cartel” issues that defined its original mission. (OECD, 1997) Most of the BKartA’s formal challenges in the 1990s were rejected by the courts or overruled by the legislature. The BKartA tried to require a firm to continue supplying an intermediate product to a customer that competed with it in the final product market. The court disagreed, though, finding that the supplier was justified in preventing unfair competition from its customer. A BKartA intervention prevented German wholesalers from boycotting a parallel importer of pharmaceuticals. Although the courts affirmed this decision, the legislature later effectively overruled it. (OECD (Germany), 1999) A BKartA effort to control allegedly high prices for a patented drug failed because the BKartA did

not find a sufficiently comparable market to support its conclusions. The BKartA did succeed in forcing a maker of a popular branded product (skis) to continue supplying a price-cutting retailer. (OECD CLP, 1996) And the BKartA has been more successful in some recent actions against price cutting in airlines and retail sales.

The ARC's provisions about dominant firm behaviour are being applied increasingly to network utility monopolies. The recent amendments supported this by eliminating exemptions for most of these industries and adding a specific rule about access to essential network facilities. In telecoms, the BKartA has been involved in about 100 matters, including many at the sectoral regulator, RegTP. In electric power, there have been dozens of investigations under the ARC into network access charges. But ARC enforcement against typical abuses in these industries has proved difficult. Methods developed for *ex post* enforcement through a quasi-judicial process against particular misconduct are not adapted for continuous administration based on detailed cost analysis in order to change sector-wide practices and conditions. The environment of liberalisation creates a problem of analysis and proof. Exploitation has usually been shown by comparing prices in the market being examined to those in a similar but competitive market. But no such comparison is available when competition is still a novelty everywhere. A 2002 court decision approved making this showing by comparing prices to costs rather than to a comparable market. This added flexibility is welcome, but regulating abusive pricing through competition law enforcement will still be difficult and uncertain. Determining and evaluating the relevant costs, in the face of stiff company resistance to disclosure and analytic complexities like those of traditional utility rate-making, may be little easier than identifying a comparable market.

Delays in the courts hamper enforcement against refusal to deal, or, in the network context, denial of access. An order to correct in the future, which is a common form of relief in competition law enforcement, would be adequate if it could be applied quickly enough. Investigating and proving violations of law is rarely quick, though, and rapidity founders on disputes about arguably distinctive details. Even after a decision applying the ARC is reached, the usual practice has been to suspend the decision pending appeal.⁶ That rule is being changed for cases in the energy sector so access orders would remain in place pending appeal, but it remains to be seen how effective that change will be. Courts will retain the discretion to suspend an order during appeal. They may use that authority to return matters to the familiar status quo.

Mergers

For many years, Germany had the most active program of merger control in Europe. The substantive standard is whether the transaction is expected to create or strengthen a dominant position. This test resembles the test that was later adopted in the EC's merger regulation. The concepts of dominance that are used in merger control, including the market share presumptions about single-firm and joint dominance, are taken from other parts of the ARC's that deal with dominance (Sec. 19). The concept that is most often relevant in merger cases is the firms' "paramount position." The BKartA will be concerned if an already paramount position is likely to become even stronger. (BKartA, 2002) The likely effects of a transaction are assessed from 2 perspectives, first on the position of the parties and the market structure, and second on the development of competition in the future. A merger that creates or strengthens a dominant position may nonetheless be permitted if the parties can show that it will improve the conditions of competition in a different market⁷ and that the improvements will outweigh the effects of the dominant position (Sec. 36).⁸ On the other hand, a merger involving low market shares — in one case, only 12% — may be rejected where other factors, such as financial strength, vertical integration, and lack of a close competitor imply long-term adverse effects. (ABA Section of Antitrust Law, 2001)

The merger control standard does not depend explicitly on economic criteria. The role of economic analysis is in market definition and identifying market-dominant positions. Market definitions are based broadly on substitutability in use, but may also use on economics-motivated tools such as price cross-elasticity. Defined markets reportedly tend to be narrow, making it more likely that the BKartA will find dominant positions. Issues of market structure and legal analysis appear to dominate the review process, and the presentation of expert economic opinion is relatively uncommon. (ABA Section of Antitrust Law, 2001) The BKartA is dubious about an efficiency “defence,” believing that merger-specific gains would not usually benefit consumers in conditions of market dominance because in those conditions by definition there is no discipline on the dominant firm’s conduct. (BKartA, 2002)

Whether a merger is subject to control is determined principally by the size of the parties. A merger must be notified and approved if the parties’ aggregate annual worldwide turnover exceeds €500M and the domestic turnover of at least one party exceeds €25M. Two clauses eliminate minor matters. They exempt *de minimis* parties (with worldwide turnover under €10M) and mergers in minor markets (with total sale volume of all market participants under €15M). German merger control law does not apply to a merger that is subject to the EC merger regulation, and it would only apply to a transaction that has an effect within Germany (Sec. 130(2)). Special rules about computing turnover have the effect of contracting or expanding the coverage in particular sectors. For trade in goods, only 3/4 of turnover is considered, but for media and publishing, turnover is multiplied by 20. For an asset acquisition, determination of turnover (and market shares, in the notification material) is limited to what is attributable to the assets being sold (Sec. 38).

To ensure broad coverage, both technical and functional concepts are included in the legal characterisations of a concentration that is subject to merger control. One is acquisition of all the assets or a “substantial part” of them (Sec. 37(1)). Acquisition of shares is subject to notification and control at 2 thresholds, 25% and 50% (Sec. 37(3)). Acquisition of control, direct or indirect, constitutes a concentration that must be reported. Control is defined in general and functional terms rather than formal ones, using concepts that are similar to those that apply in the EC merger regulation (Sec. 37(2)). Finally, there is a catchall, extending oversight to “any other combination” that enables the exercise of a “competitively significant” influence (Sec. 37(4)). This would not catch transactions that were below the size thresholds, but it could be used to control arrangements or to legal constructions that try to evade the ARC’s other conceptions of a “concentration.”

Covered mergers must be notified and approved in advance. Expiration of the examination period, of 4 months, without BKartA action constitutes clearance. (That deadline can be extended with the consent of the parties). In most cases, effective action comes much earlier. The BKartA must inform the companies within a month if it has initiated a “main examination.” If it has not (as is the case in over 90% of filings), it issues an informal notice of clearance. The notification material from the parties must include some basic information for the BKartA’s analysis: their turnover (in Germany, the EU, and worldwide) and their market shares (and the bases for their calculations or estimates), if the aggregate share of the parties exceeds 20%. The BKartA may request further information about these subjects (Sec. 39(3), (5)). The BKartA’s general investigation powers may also be used to obtain information from the notifying parties and from third parties. Deadlines run from the submission of the complete notification with its statements about turnover and market share. That is, the deadline would not be tolled because of disputes over compliance with requests for further information. In a “main examination” proceeding, the BKartA publishes a formal decision with its reasoning regardless of the outcome. The decision may impose conditions on clearance. (BKartA 2002) If the BKartA proposes to prohibit a transaction, the authorities in the *Länder* where the parties are headquartered must have a chance to comment (Sec. 40). Mergers that are implemented without authorisation are legally void, and those than implemented despite the BKartA’s prohibition⁹ may be dissolved. The parties’ violation of the ARC prohibitions would also subject them to the ARC’s usual penalty for substantive violations, a fine of €500,000 or more, up to 3 times the additional proceeds from violation (Sec. 81). Non-compliance with a request for information may result in a fine up to €25,000 (BKartA, 2002).

Intervention to apply other policies, although infrequent, can be important. The Minister of Economy and Labour may authorise a concentration that the BKartA has rejected, if the restraint of competition is outweighed by advantages to the economy as a whole or if the concentration is “justified by an overriding public interest.” International competitiveness of the parties may be taken into account. There is some constraint on the scope of the Minister’s discretion: authorisation may be granted only if the restraint on competition that results does not jeopardise the market economy system. Parties can apply to the minister within a month after the BKartA’s prohibition.¹⁰ The process is subject to an admonition about expedition and some requirements about transparency. The Minister “should” decide within 4 months. Before deciding, the minister must obtain a report from the Monopolies Commission and solicit comments from the governments of the *Länder* where the firms are registered (Sec. 42). The Monopolies Commission’s report is not an appeal of the BKartA’s views about the competition merits. Rather, it examines the claims about the non-competition policy interests and evaluates them against the BKartA’s findings about the effects on competition. Until the recent *Ruhrigas* case, the Minister had not disagreed with the Monopolies Commission’s recommendation about such a matter since 1989. Since 1973, out of 140 mergers that the BKartA disapproved or approved subject to conditions, the parties took 17 to the Minister, who approved the disputed merger 7 times. Since 1994, there have been only 2 such applications, and the Minister approved 1 of them.

The BKartA has tried to use merger control to support development of competition in the process of reforming infrastructure monopolies. In telecoms, the BKartA intended to require divestiture of the incumbent’s cable holdings as a condition for permitting a merger; in the end, it rejected the deal because the buyer was too involved in providing content. In gas, the BKartA has examined a combination of neighbouring regional companies. But the BKartA’s efforts may have reached a political limit in 2002. The BKartA rejected the combination of the largest pipeline operator, Ruhrigas, and a combined gas-electric firm, E.ON, but the Ministry nonetheless approved it. The Ministry concluded that creating a national champion, with increased market power in Germany, could improve supply security.¹¹ This rationale, counter to the conclusions and positions of the BKartA, the Monopolies Commission, customers, competitors, and consumers, undercuts the logic of restructuring to promote competition. The Ministry is of course committed also to the goals of competition policy, and it required some divestitures, evidently to forestall particularly serious problems in local markets. But its commitment to the national champion concept is underlined by insistence on what amount to “poison pill” conditions that discourage change in ownership or control of the acquiring firm.

Under the so-called “German clause” of the EC merger regulation, a transaction that meets the jurisdictional requirements for EC review may be handled by a national agency if its effects are concentrated in that member state. Reassignment to the national agency is discretionary, and the national government, that is, the Ministry, must request it. (The clause was included in the regulation at Germany’s insistence, but despite—or perhaps because of—that fact, Germany’s requests for referral were usually denied until recently). The BKartA may believe that it should review such a merger, but it is the Ministry that makes the decision whether to request referral from Brussels. The BKartA may communicate its concerns to the EC competition directorate in any event.

Related topics: procurement, unfair competition, and consumer protection

Oversight of competition in public procurement was added to the ARC in the 1999 amendments. The principles and jurisdictional thresholds are based on EC procurement rules. The public procurement tribunals for federal contracts are in the BKartA (Sec. 105(2)), and the *Länder* also have procurement tribunals that apply the same principles (Sec. 106(2)).¹² The procurement units in the FCA are organised much like its other decision divisions. Including this responsibility in the competition law is consistent with the conception of the BKartA as a law enforcer and of the goal of the ARC to preserve competitive structures and relationships. By contrast, state aids and subsidies are not part of the jurisdiction of the

German competition enforcers, although EC competition enforcement has jurisdiction over this issue. The government recognises that long-term subsidies can misallocate resources and lead to distorted, unfair competition. But the subject is conceived as one of policy, not application of law, and thus the monitoring agency is the Ministry, not the BKartA.

Germany's laws about unfair competition have probably tended to impair competition more than they have promoted it. Some protectionist rules are now being eliminated or corrected. The Discounts Act, which dated from 1933, and the Gifts Ordinance, from 1932, were abolished in 2001. Change was inevitable after the EC electronic commerce directive permitted non-German suppliers to use the more liberal discount laws applicable in their own countries. (OECD (Germany), 2002) But laws controlling advertising claims, for food and ordinary household items and for medical treatment, still dampen these forms of competition. The general Unfair Competition Act (UCA)¹³ is enforced through private civil litigation, principally brought by or on behalf of competitors. National groups, such as the Centre for Combating Unfair Competition, an association of companies, chambers of commerce, and other associations, manage this self-regulatory process. Consumers as well as businesses can bring their complaints to it. In addition to policing false advertising and other misrepresentations, the UCA also limits discounting outside official sales seasons. Thus competitors can resort to the UCA in order to prevent price competition. For example, the UCA was used to prevent a retailer from offering a discount on credit or debit card purchases in order to speed up transactions during the change-over to the euro. The UCA is likely to be revised, as the EC develops rules about unfair competition. In that process, Germany is seeking to preserve the ARC's rule against sales below cost (Sec. 20(4)). The Ministry of Justice is preparing a draft revision of the UCA, in consultation with SME interests and others. A goal of reform is to give more weight to the interests of consumers. Thus, the ban on "special sales" is likely to be changed or removed.

Competition policy recognises how consumers benefit from it, but consumer policy is not closely linked and there is no strong national consumer protection authority. Consumer protection policy concentrates on market transparency, product standards, and quality. Consumer issues are assigned to the ministry that also deals with agriculture, food, and fisheries, in part because of concerns about food safety in the wake of the BSE problem. No government administrator or enforcer enforces rules about unfair practices or misleading advertising, though. Enforcement is left to private litigation by competitors or consumers, who can seek court orders against inaccurate advertising or unfair marketing practices.¹⁴ Despite the procedural difficulties of private enforcement, Germany appears reluctant to set up stronger enforcement institutions. In the consideration of the EU Green Paper on consumer protection, Germany has argued against requiring a new structure of consumer protection agencies, because governments in Germany already have the power, indeed the duty, to call the citizens' attention to improper practices and unsafe products in the marketplace. That position implies faith in the power of the informed consumer and the competitive market. Germany also does not support mutual recognition, because it would threaten what it believes to be its higher-level protections.

INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES

Federal structure and separation of roles produce a complex set of institutions. Perhaps the defining feature of German competition policy is the independent institutional culture of the BKartA. Offices in the *Länder* also enforce the ARC, though. The Ministry and the Monopolies Commission deal with policy. They might be involved in enforcement matters only when there is occasion to consider whether decisions under the ARC should be modified or rejected because of other policy considerations.

Competition policy institutions

The BKartA is the principal enforcement institution. It is an “independent higher federal authority,” responsible to the Federal Ministry of Economics and Labour (formerly the Ministry of Economics and Technology). It is now located in Bonn; when the government was in Bonn, the BKartA was located in Berlin. Geographic separation from the rest of government reinforces its image of independence. That independence results from political choice and support, not from statutory guarantees or protections. The president of the BKartA does not serve a fixed term. The post is not like that of a “political civil servant,” who might be removed by the minister without cause, though, as it is politically inconceivable that the BKartA president would be removed over a difference in policy. The BKartA operates autonomously. As a federal agency, it is subject to generally applicable rules about employment, financial control, and administration. It is responsible for most of its own personnel decisions. Its budget is a separate item in the Ministry’s budget plan that is submitted to Parliament for approval. The enforcement staff is divided into 11 sections, each of which concentrates on particular sectors. A few of these sections specialise by substantive issue as well as sector, in part because these issues tend to be concentrated in a few sectors of the economy. These issues are terms and conditions agreements, licensing, buying power of public authorities, and buying power of trade and industry. There are also 2 divisions acting as procurement tribunals and a special unit for combating cartels.¹⁵

The Ministry may give general instructions about decisions, but this power has rarely been used. (BKartA, 2002) The Ministry’s more important role affecting enforcement is its power to authorise a cartel or merger for reasons other than competition policy. The substantive grounds that permit this action are that the restraint of competition is outweighed by advantages to the economy as a whole (or, for a merger, that it is justified by an overriding public interest). Typical justifications offered to claim this Ministerial authorisation are industry rationalisation, job preservation, or supply security. The Minister may ultimately decide that other policies require a different outcome, but the Minister cannot alter the decision about the application of the ARC. Ministerial interventions are rare, and they are usually controversial.

BKartA independence is embodied most clearly in its decision-making structure. Actions in particular cases are taken by panels of three members of a decision divisions, which is organised and functions somewhat like a court of law. The panel will include the head of the relevant section and two associates. The decision units can (and usually do) include both economists and lawyers. Under the old *Beamter* tradition, only lawyers could serve in such a decision-making office, but that system has been changed generally, so a wider range of professional expertise can be used. The decision-makers are independent in fact, and their independence is protected by their status. All are career civil servants with lifetime tenure. The stability of this quasi-judicial system, coupled with the divisions’ specialisation by sector, facilitates efficient dealings between the BKartA and industry, at least concerning mergers and the cartel notification and approval process. Because of the sections’ specialisation, BKartA staff becomes familiar with their industries’ conditions and problems and with their legal representatives too. Familiarity can make foster trust and open communication. (To avoid over-familiarity, individuals are rotated periodically among divisions). There is no appeal from the decision divisions to the president of the BKartA, either as a practical matter or a legal matter. Unless the parties seek ministerial authorisation on other policy grounds, their only recourse is to the courts.

The BKartA’s decisions are reasonably transparent and the procedure is efficient. The ARC requires public notice for many kinds of proceedings and actions. Decisions rejecting or authorising exemptions or prohibiting abuse are to be published in the Federal Gazette. Many decisions are published only in condensed form, though. Merger decisions and applications for ministerial approval are also published there. Applications for exemption and for recognition of associations’ “competition rules” must be published, to provide opportunity for comment. The BKartA must publish a formal report every 2 years, which the government forwards to the Bundestag along with a response. If the Ministry issues general

instructions, these must be published in the Federal Gazette (and included in the BKartA's biennial report). The BKartA posts its principal decisions and notices on its website, along with other explanatory information. Merger notifications can be found there, for example. Expedition is encouraged by formal deadlines for some matters. Merger review is subject to strict, self-enforcing deadlines: BKartA inaction by the deadline constitutes consent. Similarly, applications for the "unopposed cartels" are deemed approved if the BKartA has not acted within 3 months. (For amendments to existing, approved cartels, the period is 1 month). Agreements about intellectual property licensing are subject to a similar 3-month "silence is consent" process. There is no formal deadline for action about other kinds of cartels though; the BKartA must only act within a "reasonable" period.

BOX 3.5: FEDERAL STRUCTURE AND COMPETITION ENFORCEMENT

Because Germany is a federal state, there is another set of enforcement bodies at the regional level. For conduct (other than mergers) whose effect is limited to a single *Land*, the competent enforcement body is not the BKartA, but the authority designated by the local law. (Sec. 48) Each of the *Länder* has a competition office. All of these offices together comprise about 80 staff, of which about 30-35 are lawyers. The competition office in Bavaria is the largest, with a total staff of about 10, about half of whom are lawyers. The head of that office is a graduate in economics and law, and the office works with experts, including economists, from the Bavarian Ministry for Economic Affairs. Some of the offices also do procurement matters, as the BKartA does. Only the BKartA decides about mergers, but the governments of the *Länder* must be consulted in a merger matter, if the FCO proposed to prohibit it or if the parties apply for intervention by the Minister.

The BKartA and the offices in the *Länder* all apply the same federal law, because there are no *Land*-level competition statutes. But the *Länder* offices are not responsible to the BKartA. Their decisions applying the ARC are independent and final. They often work together with the BKartA, and by law the BKartA is always a party to their enforcement matters. But they may respond to local policy priorities. Bavaria, for example, has traditionally supported small business. Bavaria has issued its own guidelines about ARC compliance for small businesses, and some features of the ARC that protect small business interests represent Bavarian initiatives.

Typical objects of local responsibility are retail trade, construction and construction materials, and services. In the last few years, several have concentrated on the electric power sector. In Bavaria alone, there are 270 grid operators, and the Bavarian competition office has already handled about 25 cases about the cost of access to distribution. Taxicab service is another common source of problems, ranging from boycotts of taxi stands and dispatch services to claims of exclusion and evasion of local price regulation.

The other independent federal body, the Monopolies Commission, was set up in 1973 to be a politically neutral source of analysis and guidance, analogous to the council of economic advisors. (Sturm, 1996) The Monopolies Commission has 5 members, appointed for 4 year terms by the Federal President on the nomination of the federal government. The Monopolies Commission operates independently and chooses its own chairman. Its members may not be members of the federal or *Land* governments or public services, except as professors or researchers, and they may not be connected to industry or labour organisations. The membership often includes economics or law professors as well as lawyers and business people. Its official tasks are to monitor concentration, report on mergers for which the parties have applied for Ministerial authorisation, and produce reports. Its main, biennial report assesses conditions and likely trends in industry concentration, appraises the application of merger control, and offers analytic comments on other economic issues. The Federal Government responds to the report and the Monopolies Commission's proposals in a statement that it submits to parliament. The Monopolies Commission can also issue special reports on particular topics or problems, at the request of the Federal Government or on its own initiative. The government need not submit these special reports to parliament with a response. Topics in recent reports include the implications of the internet for competition and the use of sectoral regulation for network access.

The BKartA and the Monopolies Commission do not have a regular, formal role in the policy process, outside of their reporting responsibilities. The BKartA has working relationships with regulatory bodies where their interests overlap, and the BKartA is consulted regularly about legislation that would directly affect the ARC and its enforcement. Less frequently, the BKartA may express views about the competitive effects of other legislative or regulatory proposals. The Monopolies Commission's reports often touch directly on the competitive effects of other regulatory programs, although it too does not necessarily comment formally in the process of consulting about changes to them. The Ministry has the principal responsibility for monitoring the competitive effects of other regulations and legislative proposals. The Ministry also has the primary responsibility about amendments to Germany's competition legislation and its relations with the EC competition directorate.

Competition law enforcement

Application of the ARC, either by the BKartA or by a *Land* competition office, involves both administrative tasks such as reviewing notifications and requests for authorisation and investigation and enforcement against conduct that violates the prohibitions. Most of the ARC's procedural provisions deal with "objective prohibition" actions, that is, with proceedings that might result in an order controlling conduct in the future (Secs. 54-80). A separate chapter deals with conduct that might be subject to administrative fines (Secs. 81-86); for those proceedings, the rules are set by the Administrative Offences. The prosecutor might become involved when the Criminal Code's penalties for procurement fraud are applied to bid rigging.

The enforcement authorities can initiate proceedings *ex officio*. A complaint is not necessary (Sec. 54(1)). Proceedings are not formally adversarial, but there may be hearings if the parties request. There must be a public hearing in cases of abuse of dominance, unless the parties consent to do without it (Sec. 56).¹⁶ The enforcers have the power to issue a preliminary injunction to regulate conduct pending a final decision (Sec. 60).

Information is usually obtained through informal requests, backed up by formal authority that is subject to stringent due process protections. Formal requests for information (under Sec. 59(1)) must be made through a decision, for proceedings at the BKartA, or through a written order, for proceedings by a *Land* enforcement body or inquiries by the Ministry. That formality, calling for a statement of reasons and setting out advice about legal remedies available, provides a basis for the recipient to appeal to the courts. In practice, a precondition for such an enforceable formal request for information is a concrete initial suspicion of a violation. (BKartA, 2002) Enforcing compliance with investigative requests can require going to court. In theory, parties face an administrative fine of up to €25,000 for failure to comply with a BKartA request, but in practice that sanction is irrelevant. Parties that lose in court typically then turn over the information, and the court does not enforce the fine. At the BKartA, the most commonly used requests for information (under Sec. 59(1)) are issued by the decision divisions. For examination of documents on the company or association premises, consent of the BKartA president is necessary. For a search, there must be a court order. The request for information must set a reasonable deadline for response, which is usually 2 to 4 weeks. The enforcing authority may take possession of evidence (Sec. 58) and enter premises to search for evidence (Sec. 59(3)), under the supervision of the local court. The enforcing authority can act without prior judicial approval in some circumstances, notably if there is danger of delay that would jeopardise the investigation. Procedures for searches, which are particularly important in cartel enforcement, are taken from the Rules of Criminal Procedure. Criminal investigation departments of the *Länder* typically support these efforts. On-premises inspection and copying of documents, although provided, is not often used (BKartA, 2002).

Enforcement action can lead to orders and substantial financial sanctions. Liability for an administrative fine depends on subjective intent or fault, that is, the conduct must not only violate the ARC, but it also must be wilful or negligent (Sec. 81). By contrast, an order to control future conduct may be issued regardless of the parties' intent or fault (Sec. 32). Orders are typically prohibitory, to prevent repetition of the violation in the future. Mandatory orders are possible if they are the only means to eliminate a restraint, for example, by ordering a firm to deal with another on non-discriminatory terms. Structural relief such as divestiture is not authorised, except in merger cases. Administrative fines are the same for all substantive violations: up to three times the additional proceeds obtained as a result of the violation, or €500,000. The fixed sum is not a minimum or mandatory fine, but it is intended to ensure that a significant fine could be imposed even if the gain from the violation is not great. There is no cap on the fine based on the size of the violation, although the proceedings are subject to a 5 year statute of limitations (Sec. 81(3)), which may set an upper bound at 5 years' worth of excess profits. Fines may be assessed against natural persons as well as legal persons and associations. The method for computing financial sanctions is consistent with economic theories of deterrence, by making the sanction proportionate to the firms' expected benefit from violation and by multiplying that by a factor to correspond roughly to the likelihood of detection and successful challenge.

The BKartA's discretion in setting fines is broad enough to support a leniency program, to encourage members of a cartel to come forward with evidence. The BKartA published the terms of its leniency program in 2000. The BKartA generally does not impose a fine on an informer who is the first to provide information that makes a decisive contribution to uncovering a cartel before an investigation is initiated. Leniency is conditioned on the informer's full co-operation. The informer must not have played a decisive role in the cartel and must have discontinued participation by the time the investigation is started. More limited leniency, a reduction in fine of at least 50%, is offered to an informer who comes forward at a later point, after an investigation is under way.

Appeals from decisions applying the ARC may be taken to the Court of Appeal where the enforcement authority is located. For BKartA decisions, this court is in Düsseldorf; before, these appeals went to the court in Berlin. Because the BKartA's move to Bonn changed the court that tends to specialise in competition matters, the expertise that had developed in Berlin must now be developed anew in Düsseldorf, where the courts' experience with competition law was more limited. An appeal from a *Land*-level enforcement action would go to the Court of Appeal where the local enforcer is located (Sec. 63(4)). Appeal can be based on new facts or evidence, and the Court of Appeal has power to investigate facts *ex officio*. (BKartA 2002) Appeals from decisions of the Minister may be taken to the same Court of Appeal in Düsseldorf (and not to the one where the ministry is located, which is now Berlin). Although the motivation for the Minister's decision will typically involve matters of policy that judges will not question, allegations of defects in process have supported successful challenges, most recently in the *Ruhrgas* case. A further appeal on points of law is possible to the Federal Supreme Court. There are special chambers in the Courts of Appeals and an "antitrust senate" of the Federal Supreme Court that decide all competition matters. Competition cases are thus handled by a small group of judges who can develop greater expertise in the subject, which should promote consistency.¹⁷ Normally, appeal suspends the order being appealed (Sec. 64). A court may order immediate enforcement, but the requirements to obtain that relief are stringent. This makes it difficult to use competition law effectively where the problem is access or refusal to deal. This situation is due to change in part, as the upcoming energy law reform would make network access orders effective immediately. With the presumption reversed, it will be the respondents who will have to convince the court that immediate enforcement should be waived. Whether that burden will be hard to carry in practice remains to be seen.

Other enforcement methods

Private rights of suit and appeal are significant, although there are obstacles to success. Most of the Supreme Court's rulings about the ARC have been in civil lawsuits. (BKartA, 2002) Claims for private relief, either damages or an injunction, are provided for violations of "protective" provisions of ARC.¹⁸ These are usually taken to be the prohibitions against horizontal cartels and abusive practices. The protected parties are typically competitors who are excluded from the market. Associations representing the interests affected have standing to seek injunctions to protect their members, a power that is particularly significant where terms of doing business are at issue. Courts have entertained complaints by customer interests about exploitation or about agreements directed specifically against them. (BKartA, 2002) But the courts have not welcomed consumer-level complaints against horizontal cartels. The basis for private action for damages is subjective fault, that is, "wilful" or "negligent" conduct violating a provision that protects third parties. (Sec. 33, sec. 87-90) Obtaining an injunction requires a showing that further violations are likely. (BKartA 2002) The courts must alert the BKartA about disputes that involve the ARC (Sec. 90), and the BKartA frequently offers its views in private suits.

Claiming damages from a horizontal cartel has been difficult, because of the German civil code's historically stringent requirements to prove causation and the amount of damage. But recent court rulings have indicated a more open approach to these claims. Civil actions in Germany for injunctions, such as access orders, are also not attractive, because of the risk that the complainant will be liable for the defendant's losses if a preliminary injunction is not upheld in the full proceeding. The usual rule is that costs (including attorneys' fees) are paid by the losers. Even the BKartA has to pay costs if it loses an appeal. When the BKartA wins, it is not reimbursed for attorney's fees, because it does not use outside attorneys, but the other costs charged to the losing party could still be substantial, because they are set in proportion to the amount at stake.

Third parties and complainants have a limited ability to challenge BKartA action. If the BKartA issues a formal decision, that can be appealed, even by third parties. The BKartA now issues formal decisions to clear mergers, whether or not subject to conditions, that go through the second "main" investigation, and thus third-party appeal of a clearance decision is possible. But if proceedings are discontinued without reasons, no appeal is possible. A party whose application for exemption is rejected can appeal that action. But the courts have so far denied that parties have any right to compel the BKartA to exercise its powers to control abuse or challenge a merger. (BKartA, 2002)

The BKartA has authority to apply the competition provisions of the EC treaty, using the administrative powers of the ARC (Sec. 50). The upcoming modernisation of EU competition law procedures under Reg. 2003/1 will increase the responsibilities of member state authorities, and thus this part of the BKartA's activity is likely to become more important. This aspect of the modernisation program presents a particular challenge for Germany, because the German conception of competition law and enforcement approach differs from the new EU model.

BOX 3.6: THE CHALLENGES OF MODERNISATION AND HARMONISATION

The Monopolies Commission heavily criticised the draft proposed regulation that led to Reg. 2003/1. A fundamental complaint was that asserting the primacy of EU rules would disable national agencies from resisting the politicisation of EU competition policy and would undermine the clear separation of roles between the BKartA and the Minister in the German system. Its concerns illuminate the distinctive aspects of German competition law and tradition.

The Monopolies Commission called attention to variations in substantive law and to the tools in German law that are absent from EU law. For example:

- The classification of cartels is more systematic in German law than in Art. 81, leaving little room for enforcement discretion.
- Abuse control is more clearly differentiated in the ARC's Secs. 19(2) and (3) than in Art. 82.
- Relative market power, an important issue in German law, is absent from Art. 82.
- A dominant firm has a greater obligation to provide access to its essential facility under German law, because it has the burden of showing that access is impracticable (Sec. 19(4)).

Even where texts appear similar, variations in doctrine matter. For example, the Monopolies Commission pointed out that the EU treats price recommendations as a species of agreement, considering the 2 parties as equivalent. By contrast, Germany regards these recommendations as one-sided, to be supervised as a species of abuse. The Monopolies Commission feared that the EC's proposed assertion of jurisdiction, which would not depend on an international competitive effect, might promote the tendency of EU law to deny the anticompetitive significance of most vertical restraints, a result that the Monopolies Commission did not support. The German approach based on control of abuse, though seemingly more lenient than the EU approach based on prohibition, might actually produce stricter control of vertical agreements, depending on how it is applied and on the breadth of the exemption from the EU prohibition.

Pointing to decisions under German law that could not have been reached under EU law, the Monopolies Commission claimed that the new regulation would be "moving away from well-proven national law and so tolerating a reduction in the protection of competition."

Source: (Monopolies Commission, 2001).

International trade issues in competition policy and enforcement

The ARC contains a broad "effects" test, and thus it applies to conduct anywhere that affects competition in Germany (Sec. 130(2)). The converse is not true, though. Export cartels are not covered if their only effect is outside Germany. Before the 1999 amendments, export cartels were formally subject to the general prohibition, but the ARC then provided an exception for them. (BKartA 2002) That meant that export cartels had to register and create a record of their existence, which probably made it easier to monitor their potential effects on domestic markets. International trade and market factors are considered in analysis, principally as matters of fact. The potential for foreign supply can be a factor in the definition of markets and the appraisal of competitive effects. (BKartA, 2002)

Co-ordination with other enforcement bodies is extensive and mostly informal. When information must be obtained from foreign sources, the BKartA relies principally on informal co-operation and notification, working where possible through the national competition authority where the information is located. Germany has a few bilateral treaties on judicial assistance, with Austria and Yugoslavia, that the BKartA can use. A bilateral treaty about judicial assistance in criminal matters is being negotiated with the US. There are less formal bilateral administrative agreements with France and the US, focusing on mutual consultation and information. Several multilateral agreements of the European Council and EU support judicial assistance, and they have been used in a few cases. So far, use of judicial assistance has been based on Germany's law on international assistance in criminal matters, rather than bilateral agreements. The mutual, shared interests of national competition enforcers are increasingly recognized. The association of

the European Competition Authorities agree to inform each other, mutually and informally, about merger applications that could be of relevance to others. In merger cases, the BKartA has worked informally with most of the competition authorities in Europe and elsewhere. In a cartel investigation that also involved the US, the BKartA co-ordinated its own search action to coincide with the US action. (BKartA, 2002)

Agency resources, actions, and implied priorities

The resources applied to competition enforcement at the national level have been stable or even declining, although the BKartA's responsibilities and jurisdictional reach have expanded. The BKartA had over 200 staff in the 1960s and 1970s, and as many as 252 in 1992. (Sturm, 1996) In 2001, it was down to about 225; addition of the procurement tribunals increased the total (person-years) to 267 in 2002. The relocation from Berlin to Bonn is a principal reason for the reduction in staff in the late 1990s. (The costs of the relocation also explain the higher budget expenditures in 1999 and 2000). While the BKartA staff shrank by 10%, the country expanded significantly due to reunification. The staff must also deal now with procurement and with utility industry problems, which were added to the ARC in 1999. In addition to the BKartA, the *Länder* offices also contribute resources to enforcement, bringing the total up to about 300 person-years. The BKartA's own staff is somewhat smaller than the competition enforcement staff of the UK's OFT, and among the G7 countries only Italy's antitrust authority has fewer. Differences in jurisdiction that may account for some differences in staffing. The OFT and the *Autorità* both deal with advertising and consumer issues as well as competition, for example. But the BKartA still seems surprisingly small to deal with an economy as large as Germany's.

Perhaps the BKartA could be compact because its distinctive institutional culture made it unusually efficient. From the beginning, the BKartA has considered itself to be a cut above the civil service routine. At least until the move from Berlin to Bonn, there was very little exchange of personnel among the BKartA, the ministry, or academia or business. Few left the BKartA after attaining tenure (1 year for lawyers, 3 years for economists). (Sturm, 1996) Self-confidence and experience made the BKartA staff efficient and professional. The move has stirred up the BKartA's institutional culture, though, by encouraging an unprecedented amount of personnel exchange. Because the competition section of the Ministry was moving from Bonn to Berlin as the BKartA was moving the other way, many staff shifted from one to the other. People with enforcement experience at the BKartA have had to learn about the more fluid environment of policy-making in the Ministry, while former policy-makers had to learn about the detail and discipline of legal process and enforcement. Mutual adjustment may produce some healthy cross-fertilisation at each body in the long run, but in the meantime the learning process could stretch resources.

Budget support appears stable and adequate. Fees charged to applicants to cover administrative expenses provide a small source of independent funding (the BKartA may only retain fees in excess of a threshold set by the Ministry of Finance). For mergers, the fee can be as high as €50,000; for applications for certain exemptions from the cartel prohibitions, €25,000; for cartel notifications, €7,500 (Sec. 80). For particularly important, resource intensive matters, the fee may be increased by up to a factor of 2. In addition to the fee charged for notifying a merger, a fee can be charged for prohibiting it; the disappointed parties receive some consolation from the fact that their filing fee can be credited against the prohibition fee (Sec. 39(1); Sec. 36(1)).

Table 3.1. Trends in Competition Policy Resources

| | Person-years | Budget €M |
|------|--------------|-----------|
| 2002 | 267 | |
| 2001 | 247 | |
| 2000 | 225 | 17.0 |
| 1999 | 232 | 15.7 |
| 1998 | 230 | 10.5 |
| 1997 | 231 | 10.5 |
| 1996 | 234 | 10.7 |

Source: (BKartA 2002)

Until recently, the BKartA concentrated almost completely on horizontal agreements and mergers. Most of the horizontal matters involving reviewing filings and applications, rather than enforcement against prohibited cartels. Some enforcement actions are notable, though. Two major cases account for the peaks in total sanctions imposed in 1997 and 1999. The number and proportion of mergers that are completely rejected declined, after the BKartA was given authority to impose conditions and hence to exercise more flexibility. Activity increased across the board in 1999, when the ARC was substantially amended and the BKartA got new leadership and a new location. The increased attention to vertical agreements and abuse of dominance are most striking. Some of this represents the new authority over network industries. Much of it probably represents closer examination of distribution issues and complaints about abuse of economic dependence, though.

Table 3.2. Trends in Competition Policy Actions

| | horizontal agreements | vertical agreements | abuse of dominance | mergers |
|------------------------------------|-----------------------|---------------------|--------------------|-------------------|
| 2001 ¹ : matters opened | 60 | 12 | 107 | 1550 ² |
| orders or sanctions imposed | 1 | | 2 | 16 ³ |
| total sanctions imposed | DM 42.6M | | | |
| 2000: matters opened | 55 | 18 | 79 | 1735 ² |
| orders or sanctions imposed | 3 | | 5 | 6 ⁴ |
| total sanctions imposed | DM 40.5M | | | |
| 1999: matters opened | 67 | 18 | 101 | 1687 ² |
| orders or sanctions imposed | 4 | 1 | | 7 ⁵ |
| total sanctions imposed | DM 287.3M | | | |
| 1998: matters opened | 36 | 3 | 49 | 2024 ⁶ |
| orders or sanctions imposed | 3 | | | 4 ⁷ |
| total sanctions imposed | DM 21.7M | | | |
| 1997: matters opened | 26 | 3 | 19 | 1736 ⁶ |
| orders or sanctions imposed | 2 | | 1 | 6 ⁷ |
| total sanctions imposed | DM 281.1M | | | |
| 1996: matters opened | 23 | 2 | 22 | 1516 ⁶ |
| orders or sanctions imposed | 4 | | 1 | 3 ⁷ |
| total sanctions imposed | DM 19.4M | | | |

1. Figures for 2001 are provisional
 2. Pre-merger notifications, pursuant to amendments effective in 1999.
 3. Prohibition, 2; conditions, 14.
 4. Prohibition, 2; conditions, 4.
 5. Prohibition, 2; conditions, 5.
 6. Control proceedings under the pre-1999 law.
 7. Prohibitions; the pre-1999 law did not authorise imposing conditions.
- Source: (BKartA 2002, item 17).

LIMITS OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES

Despite the quasi-constitutional heritage of the ARC, which might imply an unusually broad application of competition principles, the scope and nature of exceptions from general competition law in Germany are similar to those in most other Member countries. A few of the exemptions are evidence that enforcement has been serious, as the prospect of BKartA action led the legislature to enact protection against it.

As in most jurisdictions, competition law in Germany defers to the demands of other laws or regulations in the event they conflict. There is no special rule either in statute or judicial precedent for applying the ARC in these circumstances. Under the usual rules of construction, specific laws or regulations that require conduct which would be inconsistent with the ARC would govern. Some areas where this could occur are environmental regulation and the health and social welfare system, as well as the common case of professional services, where laws and regulations permit associations to set prices and control other aspects of competition. (BKartA, 2002)

Most publicly-owned enterprises must comply with the ARC (Sec. 130(1)). Two are explicitly exempted, the central bank and the Reconstruction Loan Corporation. Many other publicly-owned entities have been targets of enforcement action, notably the railway, the postal service, and many municipal utilities. If a municipality provides a service through a government department, rather than a government-owned private-law company, its pricing or other practices might still be challenged as abusive.¹⁹

Small businesses are not technically exempted, but they are a favoured class. The ARC gives SMEs tools to shield themselves against aggressive competition and hard bargaining from larger firms. And the ARC permits SMEs to combine and cooperate. Cartels among SMEs may be exempted from the general prohibition if they are intended to rationalise the members' activities and improve their competitiveness (Sec. 4(1)). A condition for this authorisation is that the cartel not substantially impair competition. Purchasing co-operatives of SMEs may also be exempted (Sec. 4(2)). The ARC's rule about recommendations by trade or industry associations has a special provision benefiting SMEs (Sec. 22(2)). An association may make a recommendation leading to uniform conduct about any subject of competition law, as long as the recommendation is issued only to the SME members, it improves their competitiveness against larger enterprises and large-scale business, it is explicitly non-binding, and no pressure or coercion is applied to ensure conformity. The BKartA's *de minimis* notice advises that, at its discretion, the BKartA will not prosecute cartels that only involve independent small and medium sized businesses, with a combined market share under 5 percent, that increase efficiency by co-ordinating functions.²⁰

Many of the sectoral exclusions avoid formalistic application of the ARC prohibitions to conduct that is probably not anti-competitive and that often is subject to other kinds of regulation. The other regulations usually are not concerned about competition policy, though. Special rules and regulators about competition for individual sectors have been disfavoured. Creating institutions and rules for the particular problems of a single sector conflicts with broad and quasi-constitutional conception of the roles of the ARC and the BKartA. In addition, there is an apparent wariness about prescriptive regulation and a preference for local authority and private initiative. Thus in principle, Germany has traditionally favoured self-regulation subject to oversight by the competition enforcement bodies. But perhaps in part because of the demands of EU directives, Germany now has an independent regulator for telecoms and postal services (RegTP). The Federal Railways Authority also performs regulatory tasks. By contrast, for electric power the BKartA and the *Länder* competition offices have been the regulators. The Monopolies Commission, which at one time shared the preference for oversight under the ARC, now supports controlling natural monopolies through a regulatory process. The Monopolies Commission called for creation of a single regulator, though, rather than one for each sector, in order to reduce the risk of capture.²¹

Box 3.7. Crafts and professions

The ARC's solicitude for small and medium sized enterprises is consistent with other policies to support and protect the *Mittelstand*, reflecting its importance and influence in Germany. Some systems of regulation that shelter smaller scale operations have been criticised for raising the costs of entry, preventing efficient business structures, and limiting consumer choices.

Master-crafts qualifications: For nearly a hundred defined services and crafts, a master's certificate is required in order to operate independently and own a company in the field. The system is the lineal descendant of the medieval guilds. It has survived several rounds of efforts at reform since the beginning of the industrial era. Like the old guilds, the chambers of these crafts and services have some self-regulatory powers. The holders of the master's certificates are active on the boards that set the rules and standards for their trade. Obtaining a master's certificate requires 1 000-1 600 hours of formal training, in both technical subjects and business administration. Fees for training may range from € 3 000 to € 7 500, depending on the trade. Preparation for the master's certificate examination takes about a year if pursued full time, in which case a candidate may need to give up a year's income in addition to bearing the expense of the training fees. Candidates preparing for the examination part-time usually do so in addition to their regular occupation, and may need from 2 ½ to 4 ½ years, depending on the trade, before taking the examination. The costs imposed by this system discourage entry.

Certification of high qualifications may provide customers with useful information and assurances, at least in some of the service areas. For many, though, restricting entry only to the most highly qualified probably leads to "gold-plating" and inhibits provision of acceptable, lower-quality, lower-priced services. The apprenticeships associated with the system are credited by some with performing a vital role in training workers for industry as well as for the crafts trades themselves. Appendices, who do not pursue the master's qualification, perhaps because they cannot afford it, often go to work in the same trade in industry. The training aspects of the system were recognised as a "best practice" in a 1998 EC study.

The master-craftsman system of training, certification, and entry control has come in for criticism. The Deregulation Commission report in 1991 explored the anomalies and recommended reforms, principally to open up new opportunities for providers who are technically capable but who cannot afford the time or expense of obtaining master's certification. The Deregulation Commission suggested this could be done by focusing on the apprenticeship system. Holders of master's certificates would continue to be the only ones who could take on and train apprentices. Removing the master-crafts qualification for doing the work would permit more providers to go into business for themselves, improve management opportunities, and increase competition.

Since then, the Monopolies Commission has repeatedly called for reform, in its regular report for 1996-97 and in a May 2001 special report. The latest report noted a decision by the European Court of Justice which in effect magnified the discrimination between master-craftsmen in Germany and competitors from other EU member states. The Monopolies Commission argued that this awkward result should support a long-overdue thorough reform in Germany. Otherwise German firms would lose business to other providers, at least for one-time, unusual, or near-the-border work. Meanwhile qualified providers in Germany, frustrated at their inability to establish a German company because they lack the master's certificate, are setting up companies in other EU member states for that purpose, even to provide services in Germany in some cases.

Germany's Constitutional Court has ruled that preventing anyone without a master's certificate from establishing a company restrains a constitutional freedom, the right to enter a business. That ruling still left it up to Parliament to regulate access, though.

Professional services have also been regulated to prevent competition and preserve small-scale, local operations. Rules of professional associations that limit the competitive freedom of their members are exempted from the ARC because they are authorised by other federal laws. Examples include schedules of maximum and minimum fees for lawyers, architects, engineers, and doctors. These rules may be contained in bylaws adopted pursuant to legislative authority. Even if they are exempt from the ARC, the rules may not be entirely beyond the reach of competition policy, because they might still be subject to European cartel law if they affect trade between EU member states. Restrictive rules may also be subject to constitutional scrutiny. Germany's courts have relied on the guarantee of the free choice of profession, in Art. 12 of Germany's Basic Law to limit constraints on providing professional services. Legislation that prevented truthful, informative advertising is being relaxed in some areas, such as accounting, engineering, and architecture, although not for doctors. Since 1994, a form of professional incorporation has enabled inter-professional co-operation that previously had been prevented, and lawyers gained the right to form limited liability companies in 1998.

Plans have recently been announced to assign network access problems in the energy sector to a “competition authority,” functioning as a regulatory institution. Cartels and agreements in the electric power and gas industries were originally exempted from the ARC prohibitions, although they remained subject to potential control against abuse.²³ In connection with the liberalisation of those markets, the exemptions were repealed. The principal basis for controlling market power is the ARC, and thus the regulatory authorities are the BKartA and the *Länder* competition offices. The BKartA and the *Länder* competition authorities issued a paper in April 2001, which described the network access terms and fees that they thought would violate the ARC. These guidelines were also intended to guide the civil courts in their interpretation of industry contracts. The BKartA set up a separate decision division to specialise in electric power network problems in summer 2001. In 2 years, the BKartA and the *Länder* opened several dozen enforcement matters, most of them about allegedly excessive fees for network access.

The terms for network access have been set by industry negotiation, rather than by regulation. The problems of this system are described in detail in ch. 5 of this study. The framework is in the “Associations’ Agreements” among the associations representing industry users and suppliers and the electricity and gas sectors. The BKartA has expressed concerns about the effects of the annex to the most recent Agreement that sets standards for computing costs, because those terms could facilitate agreement on prices. Nonetheless, transition legislation (effective in May 2003) will confer a presumption of legality to the terms of the latest agreement. Use of conditions or fees that do not conform to those terms would have to be justified, and the agreements would still be subject to the ARC. The presumption was to be a transition measure, to permit the industry to work out a better set of agreements before the end of 2003. The Ministry of Economy and Labour report to the legislature in September 2003 about how the system of negotiated access is performing. Despite the provision for continued application of the ARC, the presumption was evidently designed to forestall threatened enforcement action or regulation. Although it is not technically an exemption from the ARC, its effect may be similar.

Trying to promote competition by applying the ARC is proving difficult. None of the actions under the ARC has reached a final decision yet, although some firms changed their access terms or fees after investigations began. The Monopolies Commission concludes that the negotiated access system is not actually leading to much interconnection. Market structure is part of the problem. A series of mergers in the last few years (nearly all approved by the BKartA) has reduced the number of independent sources of power and extended the scope of vertical integration. A few large firms dominate, and they have evidently achieved *de facto* geographic market division.

In the gas sector, competition is developing even more slowly than in electric power. Here too, Germany is relying on negotiation rather than regulation to set the terms for third party access to the monopoly parts of the system. The Associations Agreement II for gas was reached in spring 2002. The industry is under pressure to reach a better arrangement by consensus before late 2003 or else have the government impose a regulatory structure. In the meantime, a transitional presumption supports access terms that follow the Associations’ Agreement. (BKartA, 2002)

*Telecoms*²⁴

In telecoms, Germany set up a regulator to deal with access problems, rather than rely on the ARC to discipline private negotiation. The Telecommunications Act (TKG), which became effective in 1996, created the Regulatory Authority for Telecommunications and Post (RegTP). Its principal task is to regulate Deutsche Telekom AG (DT), the successor to the state-run monopoly, where it is dominant. RegTP applies rules from the TKG about abusive practices, and to some extent the TKG rules displace the ARC. The BKartA could apply the corresponding provisions of the ARC only to a service by a dominant firm that is not to be used for public offering of telecoms services (TKG, Sec. 3(18), (19)). For example, the BKartA applied the ARC against DT's overcharging for the subscriber data needed for information services and telephone directories. The BKartA has merger control authority, although RegTP also has powers that affect mergers. RegTP can require that a dominant licence holder not merge with another in the same market, if the number of licences in the market is limited.

Promoting access through regulation is intended to be expeditious, but the administrative process has nonetheless been delayed by numerous challenges in court, despite "fast track" procedures and a principle that RegTP decisions are to be immediately effective. RegTP is to decide interconnection disputes within 10 weeks, in a 2 part process. Appeals can take another 6-8 months. DT has gone to court to resist RegTP's oversight efforts with some success. RegTP has issued regulations about cost accounting, but has so far failed to persuade DT to disclose costs as required under EU directives, and DT has not established separate internal cost accounts for its regulated and non-regulated services.

There are both substantive and procedural links between the sectoral regulation and the ARC. The TKG's requirements for financial transparency, rate approval, interconnection control, and access depend on a finding of dominance that is keyed to Sec. 19 of the ARC. RegTP and the BKartA must reach agreement about the definition of product and geographic markets and the existence of a dominant position. The joint findings about the product and geographic markets in which dominance has been established must be published annually (TKG, Sec. 26). Requiring agreement (by giving each body a veto) ensures that the same criteria are applied in the telecoms sector as in other markets, and it assures consistent implementation of the TKG and the ARC in this sector. The BKartA also has an opportunity to comment in RegTP proceedings about charges, network access, and abuse, and RegTP has similar rights in BKartA proceedings in the telecoms sector (TKG, Sec. 82). Co-ordination between the two is extensive, and is no doubt facilitated by the fact the both are in Bonn. The BKartA was involved in about 100 matters at the RegTP in 1999-2000.

The Monopolies Commission also has a statutory responsibility in this sector, to report every two years about the conditions of competition, how the implementation of regulation has affected the development of competition, and whether rate regulation is still necessary. Like other Monopolies Commission reports, these views are advisory, not controlling. The report deals with these issues for both of the sectors under RegTP's jurisdiction, telecoms and postal services. (TKG, Sec. 81(3); Postal Act, Sec. 44)

Postal services

Postal services are not formally exempted, but the monopoly authorised by the Postal Act leaves little room for application of the ARC. Express and parcel services are liberalised and thus subject to the ARC, but letter transport and delivery are still a legal monopoly. The exclusive right of Deutsche Post AG (DP) was recently extended to 2007 (it had been due to expire in 2002), as permitted by changes in the EU postal directive. Its scope is shrinking, as the upper size limit dropped to 100 grams (as of 2003) and is set to drop to 50 grams in 2006. Other firms may be licensed in this range only for higher-quality services such as guaranteed same-day delivery. The Postal Act makes RegTP responsible for approving charges for

services where the provider is dominant or was granted an exclusive right. Other aspects of the Postal Act also affect competitive conditions, such as licensing to control or encourage entry and terms for access to information about address changes and post office boxes, which could be of value to would-be competitors. (BKartA, 2002) DP has a financial advantage over potential competitors, to the extent that it is exempt from sales taxes for universal services. This exemption, ostensibly to support affordable prices, applies to all of its “universal service” operations, including the revenues generated on competitive markets for those services (which account for more than 40% of DP revenues from its original postal services, and about 10% of its total revenues). The European Commission has found fault with the use of federal transfers and cross-subsidies to support DP’s activities in competitive markets, and ordered DP to repay €572M (plus interest) to the federal government.

Passenger transport

Agreements among associations of regional and local passenger services providers are exempted from the prohibitions against cartels and price recommendations. This exception had once been found in the ARC itself. It is now in the Passenger Transportation Act (Sec. 8(3)) and the General Railway Act (Sec. 12(7)). Before the most recent amendments of the ARC, the exemption had extended to all modes of transport. The current, narrower exemption permits train and bus operators to co-operate as necessary to set up connecting services and offer services on a standard “combi-ticket” tariff within a region. The exemption thus is unlikely to have any effect on competition in fact. Competition is constrained, though, by public sector regulation of rates and conditions of service, which takes precedence over the ARC. (BKartA, 2002)

Reforms in rail service are prudently cautious. There is no formal exemption from the ARC, and as the former state monopoly is restructured, some occasions to apply the ARC are appearing. Deutsche Bahn AG (DB) has separate divisions, in a holding structure, for freight service, passenger service, and facilities. Its corporatised structure succeeded a state-enterprise structure in 1999. Although the intent was to separate facilities from operations, this has not been done by separating ownership. The parts of the DB holding structure do not publish separate accounts yet. That lack of transparency has undermined the effort to determine independently the appropriate rates and terms of access. The Federal Railways Authority oversees access and timetables in order to prevent discrimination (and despite the exemption for certain agreements, the BKartA has the power to deal with abuse too). Local transport is technically the responsibility of the *Länder*, but it is funded by the national government and provided mostly by DB. Other providers now account for about 7% of passenger service, and their share is expected to increase under a new timetable adopted at the end of 2002. Most of this competitive service is local.

Non-DB providers are a more significant factor for freight service, but track access and discriminatory practices have been a problem. Would-be entrants complained about the access terms, and the BKartA found that DB’s pricing system was discriminatory and non-transparent. Its combination of fixed and variable components tended to favour larger providers. Competitors paying for access to tracks faced charges 25% to 40% higher than DB’s own subsidiary was paying. Following the BKartA finding, DB has introduced a non-discriminatory price structure, which sets flat rates that vary with quality of the rails and the types of transport. The potential remains for discrimination in terms or access to other infrastructure. In 2001, the European Commission took action against DB for refusing to rent rolling stock to a competitor on the same conditions as it offered within the DB group.

Ensuring non-discriminatory access may depend at a minimum on making the relationships within the DB group more transparent, through strict managerial and accounting separation. An inter-ministry task force in 2001 recommended these elementary steps, as well as setting up a special unit at the Federal Railways Authority to deal with network access. The Monopolies Commission has suggested creation of a holding company structure for the network subsidiary with the participation of stakeholders, which are all service providers and purchasers of railway services. The lack of ownership separation now gives the DB group the capacity to deter new entry.

Water

Public supply of water is exempt from the ARC (Sec. 131(8)). Similar exemptions for other utility industries were removed in the 1999 revisions. The reasons offered for the exemption are public health and pollution control. Much of the service is provided by municipally-owned utilities. Rates are high, compared to others in the EU. Nonetheless, to recover all costs and avoid cross-subsidisation rates might need to be even higher. Competition in services is difficult to achieve, but there may be scope for improving efficiency through greater use of benchmarking, expanding the geographical coverage of individual water works, and competitive tendering of water contracts, subject to the rules protecting the public procurement process.

Agriculture

Agreements involving the agriculture sector are excluded from the ARC prohibitions, as long as they do not fix prices or exclude competition (Sec. 28). Horizontal agreements are permitted among producers, as are decisions of associations and federations of producers, about production, sale, and joint storage, treatment, or processing. They must be notified to the BKartA, and they might be subject to the controls against abuse under Sec. 12. Vertical agreements are permitted for sorting, labelling, and packaging. The motivation for the exemption is to account for the special conditions of agricultural production, notably the inflexibility that limits the capacity to respond to the market, and the variability that results from dependence on factors such as weather. The most recent amendments to the ARC brought this exemption more closely into line with the similar exemption from EC competition law. (BKartA, 2002)

Credit and insurance

Agreements among credit providers and insurance companies concerning individual cases or joint assumption of individual risks and loan syndication may be exempted from the cartel and resale price maintenance prohibitions (Sec. 29). Other exemptions for these sectors were eliminated in the 1999 amendments. The exemption is limited to matters that are subject to approval or supervision by the relevant financial sector regulators (the Federal Financial Supervisory Authority, or the *Länder* insurance supervisors). These agreements are treated as unopposed cartels, so they must be registered and they are subject to control for abuse.

Statutory health insurance

Statutory health insurance funds are now in effect exempted, after the 1999 revision of the health insurance program changed the nature of their legal personality. They are not considered undertakings under German law, and thus they are not subject to the ARC. The effect of this status is that their agreements with providers are not subject to the ARC, but instead are considered to be solely matters of a social character. Disputes about them are resulted in the social and administrative courts, and could not be treated as competition problems under German law. The BKartA might still be able to apply aspects of European competition law, to the extent the characterisation of their legal form under German law would

not be controlling under EU law. The BKartA warned the funds' central authority that it would invoke EU law to prohibit their planned revision of the schedule of payments for pharmaceuticals. (BKartA, 2002; OECD (Germany), 2002)

Copyright societies

Copyright collection societies and their agreements and decisions are exempt from the basic prohibitions against horizontal and vertical agreements (Sec. 30), although they would be subject to control for abuse (under Secs. 19 and 20). This exemption, which dates from 1965, permits collective action where individual members would otherwise lack the capacity to administer their rights effectively. The organisation of the societies and their actions must be reported to and under the supervision of the German Patent and Trademark Office (which transmits the notifications to the BKartA). (BKartA, 2002)

Sports broadcasting

Joint marketing of rights to TV broadcast of sports competitions is exempt from the prohibition against horizontal agreements (Sec. 31). The legislature added this exemption in the 1999 amendments to forestall enforcement action. The Federal Supreme Court had found that central marketing of rights to broadcast high-interest games (the home games of the European Football Cup and UEFA Cup) violated the Sec. 1 prohibition. There was concern that the principle of this decision, which applied to the most popular events, would be extended to the marketing of all German football league games, and that this could undermine the league's financial equalisation scheme between stronger and weaker league clubs and support for youth training. (BKartA, 2002) Political support for the exemption from the associations, based on the claims about promoting youth and amateur sports, was evidently irresistible. The exemption is subject to some provisos. The competitions and the marketing must be organised by sports associations under their bylaws, promoting youth and amateur sports must be among the associations' purposes, and an adequate share of the marketing proceeds must be allocated to those purposes.

Media

Another media-related exemption applies to areas regulated by treaties, including the "treaties" among the *Länder* about the scope of commercial television and the distribution of fees among TV stations. Television broadcasting is under *Land*-level jurisdiction. The *Länder* are responsible for licensing private radio and TV operators and assigning broadcast frequencies, a role that is explained by their legislative competence concerning cultural matters. (BKartA, 2002) Local policies thus can vary. In Bavaria, for example, the constitution provides that broadcasting must be a public service, so "commercial" broadcasting has to operate under that public framework. Media concentration and viewpoint diversity in national private broadcasting are overseen by the Commission for Investigating Concentration in the Media Sector (KEK). The ARC applies to television broadcasting except to the extent of the exemption for the "treaties."

Publications

Special treatment for the prices of books dates from long before there was a competition law. In 1888, German retail booksellers demanded that publishers impose resale prices, in order to dampen competition from the then-new distribution technology of mail order. (OECD CLP, 1998) The practice was exempted from the ARC from the beginning. At first, this was an instance of a broader exemption for resale price maintenance for branded products. When the broad exemption was dropped in 1973, a narrower one for publications was retained. The retail book industry still feared competition from large-scale distribution outlets. The BKartA examined the market effects of the exemption in the 1970s, when it found that prices in Germany were 2 to 3 times higher than in France for a category that was subject to

different treatment in the different countries.²⁵ Arguments advanced for permitting resale price maintenance for these products include promotion of cultural values, cross-subsidisation of low-demand products to encourage innovation and viewpoint diversity, and preserving an industry structure of small and medium sized firms throughout the country. (OECD CLP, 1998)

The exemption in the ARC appears to authorise “rule of reason” treatment of resale price maintenance for publications. A publisher may mandate resale prices, for consumer sale as well as intermediate levels of distribution. The BKartA may void the RPM and prohibit it in the future if the scheme is operated abusively or if the scheme, by itself or in connection with other restraints, is likely to increase the price, prevent price from decreasing, or restrict production or sale (Sec. 15). (BKartA, 2002) Another proviso tried to articulate the German exception with the EU prohibition. If price-mandating agreements affect trade with other members of the EC, then the exception only applies to the extent it is intended to prevent circumvention of the domestically-permitted agreement.

A new law in 2002 makes the protection even stronger. Now, resale price maintenance is not only permitted, but required, at least for books, sheet music, and maps. The ARC exemption continues to apply to newspapers and magazines. The legislation is an effort to reject an EC finding that resale price maintenance agreements for publications violated Art. 81, despite the provision that was inserted into the ARC exemption to avoid that result. (That proviso has since been removed). Germany’s new Law on Resale Price Maintenance for Books, effective in October 2002, applies to books, music, and maps. Publishers and importers of these products are now obliged to set the resale consumer prices for these products for 18 months after publication. Presumably, the 18 month limitation would permit the reseller to cut the price at the end of the next publishing season.

Competition advocacy and regulatory reform

The Monopolies Commission has become the principal source of analysis and advocacy about regulation and competition. Its biennial main opinion usually examines topical issues in addition to the required report about business concentration and merger control, and it now issues regular reports about the state of competition in 2 regulated sectors, telecoms and postal services. Its occasional special opinions, upon request of the federal government or at its own initiative, similarly may analyse sectoral or thematic problems of regulation or economic performance. Several reports have called attention to problems with the system of master-crafts qualifications and privileges. Recently, the Monopolies Commission has examined the experience of promoting network access through competition enforcement, and concluded that a regulatory approach would be preferred.

The BKartA’s role in policy and advocacy is limited. The BKartA is consulted routinely about legislative proposals that might affect the enforcement of the ARC. Recent examples include the legislation to reform telecoms, electric power, and the postal service. Consultation is typically initiated by the Ministry of Economy and Labour, which has the primary responsibility for attending to issues of competition in the process of developing legislation. The BKartA may participate in parliamentary committee hearings.

In the past, the BKartA’s policy comments ranged more widely. In the early 1990s, BKartA comments dealt with the media laws of the *Länder* and the inter-state broadcasting agreement, used car recycling, packaging, shop hours, the Discounts and Rebates Act, postal privatisation, databank protection, medical purchasing groups, telecoms policy, private competition with public service providers, recycling, data network cross-subsidies, and energy industry reform. (OECD, 1997) Each of these comments was submitted in connection with a legislative proposal. Since then the BKartA has concentrated on infrastructure issues and its enforcement role.

The reason for the decline in BKartA advocacy activity over the last decade is unclear. It may be that there have been no concrete legislative proposals which might call for a BKartA comment on other subjects. It may be that the most obvious legal and regulatory constraints on competition and entry have been corrected, leaving fewer opportunities for reform. Or it may be that the BKartA has decided to lower its policy profile in order to preserve its resources, as well as its credibility and ultimately its independence, for enforcement. Isolating the BKartA from general debate about competition policy at first appears surprising. In the *ordo-liberal* tradition, the structure and effect of laws that constrain or promote the competitive process are of paramount importance, so agencies with responsibility for competition policy ought to be at the centre of debates over them. But another aspect of that tradition supports a division of labour. The constitutional conception of the competition law requires that the body applying it be clearly independent of political deal-making. That independence could make the enforcer an even more effective advocate. A strong ethos of impartiality can give the comments of an independent body considerable weight and authority. But that capital is a valuable resource, and there may be a concern that spending it too freely in contentious policy debates could undermine enforcement credibility.

Conclusions and policy options

Germany's competition law is an important heritage. The ARC was enacted after long public debate — building on similarly extended debate and experience from a generation before — to be a foundation of the reformed post-war political economy. The *ordo-liberal* conception integrated private enterprise and public responsibility in the social-market economy. Embedded in the political and economic order, competition law and institutions could honestly take some credit for the success that followed. But with the passage of time, the motivating ideas have become diffuse. Legislative fine-tuning of the rules, and the special-interest character of some of those changes, diverge from the original conception of competition law as a matter of constitutional principle. Respect for the tradition could become a ceremonial gesture, as pride in the success of the ARC and the BKartA within their defined sphere obscures the weak implementation of competition policy principles in a wider sense.

The post-war institutional structure has indeed been notably successful, within that defined sphere. The well-balanced basic substantive law can now draw on nearly 50 years of precedent and experience. Its basic rules about horizontal cartels send a clear message about the importance of competition while permitting efficient co-operation. Its methods tend toward legal formalism, which is inevitable in the context of German administrative practice, but its classifications are consistent with economic policy goals, while their implied presumptions make application more efficient. The ARC has been tested and proven in the task of controlling private anti-competitive conduct. It is not well suited, though, to be a vehicle for implementing competition policy principles in regulatory settings.

The principal enforcement institution, the BKartA, is widely respected. From the beginning, it has had a strong sense of its mission, motivated by belief that the law it applies is “synonymous with the very principle of Germany's economic order.” (Sturm, 1996, p. 185) The confidence of its stable, self-reinforcing organisational culture may have been shaken up some by the recent move, which led to an unusually large amount of staff turnover. The move also left the BKartA with its smallest staff in years. Perhaps the BKartA can do more with less because its process has been unusually efficient. Maintaining that efficiency depends on maintaining the traditional *esprit* in the new location in Bonn and instilling it a large number of new people. Enforcement against the high-priority problem of horizontal price fixing produced fines large enough — now reaching €660M in a single case — to make its new leniency program work. The BKartA's increased focus on issues of distribution, such as pricing below cost and economic dependence, represents a shift toward protection, though.

Protection of market relationships and structures is an important goal of German competition policy. This process-based conception and attention to small business concerns could be consistent with the ordoliberal link between political and economic institutions. But that approach should be tested against economic standards of market performance and encouragement of innovation, to be sure that preservation of relationships and protection of processes does not equal preservation of the status quo and prevention of competition itself. The tendency and the risk appear in a number of laws and regulations, such as the unfair competition rules which discourage discounts that give consumers too little credit for being able to look out for themselves in the marketplace.

Integrating competition into regulation is awkward, because the legal approach of the enforcement culture and method are not well adapted to regulatory problems. The BKartA does not typically base enforcement decisions on economic criteria. In applying the ARC, the role of economics is to analyze evidence and context, notably in defining markets, more than to provide the reasons for outcomes. The disconnection between the somewhat formalistic conception of competition law and the more economics-driven subject of competition policy is partly responsible for the slow pace of reform in traditionally monopolised infrastructure services. After 3 years of experimenting with promoting competition in electricity and gas through self-directed industry co-ordination subject only to antitrust oversight, Germany is turning now toward a regulatory solution. To be sure, the experience demonstrates a virtue of an incremental approach to reform: when the experiment founders, the way are cleared for other measures.

The BKartA is also uncomfortable with the suggestion that it should rely on policies other than competition in its decisions. The ARC assigns that responsibility to the Minister, and the BKartA believes that the responsibility should stay there, because separating the responsibilities insulates it from pressure to reach non-transparent politically-motivated decisions. Limiting its attention to the terms of the ARC is also fully consistent with the BKartA's conception as an expert body applying law dispassionately. Its prestige in that role imposes some costs on politicians who disagree with it publicly.

As the BKartA confines itself to applying the ARC, the task of promoting competition policy in a wider context is left to the Monopolies Commission and the Ministry. The division of labour and specialisation of functions is understandable. But the Monopolies Commission, though at least as formally independent as the BKartA, does not speak with the same authority and credibility. The Ministry's capacity to advocate competitive reform is compromised by its role in countermanding competition law enforcement in order to promote other policies. The recent action in the gas-electric industry merger signalled a retreat from reform. The notoriety of the dispute may have increased awareness of the competition issues at stake, but the outcome shows that the government gives competition considerations lower priority, even in sectors undergoing reform and restructuring ostensibly to improve competition. The contradiction inevitably undermines the clarity of the message, but the harm might be self-limiting. The Ministry may be reluctant to repeat a "once in a decade" intervention very often. Recourse to the Minister has been rare, but 2 major mergers have been taken there within the past year. This process was not intended to be routine. If disappointed parties resort to it too often, it may be necessary to devise more stringent standards to discourage what may appear to be an effort to second-guess the BKartA's judgment.

Regulatory issues are not directly implicated in the most interesting competition law problems in Germany today, which are the challenges of dealing with the changes in EC competition law and enforcement. Not only has EC competition law become much more important than it was 20 years ago, but also the rest of Europe is tending toward the EC substantive model and approach. The BKartA, as a proponent of a different system, could become an anomaly in Europe. German adaptation toward the EC model is complicated by its own federal structure. The BKartA can apply both German law and EC law (depending on meeting the relevant jurisdictional requirements), but the *Länder* offices can only apply the ARC. An extended process of experiment and co-evolution is likely, in substantive law and in procedures.

German law already has moved toward the EC common practice by adding a prohibition against abuse of dominance and exemption criteria like those of Art. 81(3). And developments at the EC can be seen as moves away from what looked like a license for administrative discretion. But important technical and conceptual differences remain to be bridged. Self-operative criteria for exemption are fundamentally at odds with the German jurisprudence and its administrative approach, which still calls for all cartels to be notified even if most are cleared as unopposed. That difference could matter even if the results are likely to be much the same — and they probably would not diverge much, because the criteria that define an unopposed cartel resemble those that would qualify for an Art. 81(3) exemption, while the authorised cartels would often raise enough concerns to fall short.

Policy options for consideration

Empower consumers by encouraging entry and competition in craft services and professions

The high costs of qualification and the limitations on offering services increase the cost of entry and inhibit innovation. Moreover, they undermine the process goals of German competition policy, by reducing opportunities for producers and denying consumers the choice of different combinations of price and product quality. To be sure, in some of these fields — but not all of them by any means — there are information asymmetries that support maintaining standards, especially to protect uninformed or vulnerable consumers. But experience in other countries shows that less intrusive regulation can maintain sufficient protection while improving market outcomes. The pending ministry draft of a new Act Regulating the Craft Sector would respond to some of the criticisms of the current system, by limiting the master-craft qualification requirement to services that could endanger health and life, and by permitting others with sufficient experience to offer services in the field.²⁶

Reform protectionist marketing rules for the modern economy of informed consumers

Regulations have protected incumbent producers and retailers against marketing innovations, while giving consumers too little credit for being able to protect themselves. Some of these constraints are already changing, as 2 of the more restrictive old laws were repealed in 2001. The trend is thus in the right direction, but the pace of change is slow. Changing shop hours did not revolutionise the schedule of daily family life; people continue to shop mostly during the times that they have been used to. Thus fears that change would rip apart the fabric of society were unfounded. A similar muted response is likely to follow relaxing the constraints on discounts and sales, which is promised in the upcoming reform of the unfair competition law. That reform should go further, and eliminate the formalistic prohibition of sales below “cost price” in the absence of any risk of predation or monopoly. That prohibition, which probably tends to sustain higher price levels along the distribution chain, ignores the reality of modern merchandising by requiring that market offerings be decomposed into individual “things.” Consumers who respond to discount offerings and patronise mass merchandisers may find they prefer the corner store. Or they may not—and if they do not, it is because they have concluded that the alternative makes them better off.

End the anomalous special treatment for the publishing industry

Mandating conduct that would be prohibited *per se* in every other sector of the economy is difficult to justify. To be sure, the sector has unusual characteristics, including very low marginal costs and highly variable prospects for success. Most items are losers, a few are big winners, and it is hard to tell in advance which will be which. Some means of spreading risk and sharing the windfall is inevitable. But doing so through an explicit exemption undermines the consistency of competition law. More importantly, it is unnecessary, because the goals, including supporting experimentation and viewpoint diversity, can be achieved by less disruptive means. In older distribution systems, these might take the form of sales through consignment or generous return policies, putting the risk on the publisher. In modern distribution

environments, they might be sophisticated inventory control, overnight delivery, and distributed, just-in-time manufacturing of slower-selling items. In each setting, a recommended retail price, which could be permitted under the ARC, probably would achieve all of the legitimate purposes of the complete exemption. Even in small language markets, such as Sweden, experience has shown that allowing competition about retail prices need not reduce consumer choices, although it could lead to different systems of distribution.

Reassign disputes over the terms of network industry access to a single regulator

Recognising the difficulties that have already been experienced in trying to promote reform through antitrust enforcement, the government has announced its intention to shift this function to a regulator in 2004. Details remain to be worked out. One important one is the institutional form and location, whether it will be connected to the BKartA or built on the existing network regulator for telecoms.

Raise the profile of competition advocacy and policy analysis

This function has been left to the Monopolies Commission, except for matters that directly concern competition law enforcement. That body has the necessary technical expertise, professional stature, and political independence. But it does not have many resources. It is wasting some of the resources it has in obeying the statutory command to generate meaningless reports about industry concentration. The results are not useful for enforcement and not relevant to policy. The function is a relic of the political temper of the era when merger control was added to the law in order to challenge monopoly capital. Eliminating this reporting obligation would make time and resources available to deal with modern problems. In addition, the BKartA should reconsider its currently limited level of engagement in policy analysis and advocacy, other than concerning the content and application of the ARC itself. Although the Monopolies Commission is now a well-established institution, its purely advisory role might make its advice easier to ignore. To be sure, involvements in policy controversies can use up political capital and expose the enforcement body to some risks. Those potential costs counsel a judicious choice of opportunities for BKartA advocacy, perhaps concentrating on matters that implicate conduct which, but for the regulatory scheme or proposal at issue, would be covered by the ARC. Clearer formal authorisation should be considered, if that would facilitate the BKartA's performance of a wider advocacy role.

Consider enlarging the BKartA's staff resources

The staff of the BKartA is about the same size it was a decade ago, with recent additions attributable only to its new responsibilities for procurement disputes. Differences in jurisdiction, powers, and processes make exact comparisons with other competition agencies imperfect. Even so, the BKartA looks surprisingly small compared to the agencies in many other countries—no larger than the competition staff of the UK's OFT, and well below France, Canada, and the Netherlands—and the addition of the *Länder* offices would not make up all of the difference. Professionalism and experience may mean BKartA can do more with less. Some pressure will be relieved when electric power matters are transferred to a network regulator. But the likely increase in activity as EC modernisation is implemented will likely demand a larger staff.

Improve tools for dealing with network industry relationships and decisions

Efforts to apply the ARC to network industry access situations have exposed some potential problems, in information gathering methods and in rules for addressing vertical relationships. The urgency of resolving these problems depends upon how quickly these cases are transferred to a network regulator. Pending that transfer, they may require some attention. Problems of getting information stemmed principally from controversies about what kind of information would be relevant. Now that the Court of Appeal has decided that enforcement of the ARC can be based upon costs as well as comparative prices, that grounds for resistance to information requests should not be raised again, at least not so broadly. Controversies about details will probably recur. Increasing the sanctions for non-compliance with information requests or changing the procedure for obtaining information are not likely to be either necessary or feasible. The level of sanction is not relevant, because the courts do not in fact impose it. A process that exposes a party to sanctions without a hearing in court would not be acceptable. Obtaining information appears to be an increasing problem for German agencies. RegTP has had difficulty getting basic cost data from DT. The BKartA has not complained that its investigative tools are inadequate, as its practice extends to more foreign firms that do not have a history of co-operation with the BKartA, it may find more coercive methods to be necessary, though.

NOTES

1. Their early criticism of corporatist arrangements under the Weimar constitution, and advocacy of a strong state that would be independent of economic interest groups, may also have prepared the ground for the authoritarian alternative that appeared after 1933.
2. The German acronym is “GWB.”
3. See <http://www.bundeskartellamt.de/tasks.html>.
4. All citations by section number are to the ARC, unless otherwise noted.
5. This proviso is in the chapter dealing with dominance, although its application does not appear to depend on whether the firms do or do not have a dominant position.
6. In special circumstances, the BKartA may order immediate effect even during appeal, but that rarely happens, and the court retains the power to suspend the order itself (Sec. 65).
7. That the improvement must be in a different market is not clear from the text of the statute; the BKartA interprets it this way, to avoid a conceptual contradiction in identifying the harm to competition.
8. When merger control was added to the ARC in 1973, one feature was a presumption that mergers of large firms were anticompetitive. (The presumption applied if the firms’ combined turnover was over DM 12M, and over DM 1M for at least 2 participants). The presumption could be rebutted, and it usually was. It was dropped in the 1999 amendments. (OECD CLP, 2002)
9. Or withdrawal of clearance, which amounts to the same thing.
10. If the prohibition is appealed to the courts, the parties have a month after the prohibition becomes final to appeal to the Minister.
11. The industry conditions and the contentious process are described in more detail in the chapter of this study dealing with the electricity and gas markets.
12. Matters that fall below the thresholds for the federal legislation may be governed by the varying budgetary laws and procedures of individual *Länder*.
13. The German acronym is “UWG.”
14. There are risks in this privately-directed process. If the defendant prevails, the complainant must not only pay the defendant’s costs, but also it must indemnify the defendant’s damages from being restrained in the interim. That risk to the complainants might be offset if the defendants ultimately faced a commensurate sanction, such as skimming off improper profits from their violation. The government supports the idea of punishing unfair practices by skimming off improper profits. Equalising the risk exposure might at least equalise the balance of settlement pressure.
15. Other staff sections deal with litigation support, legal issues, European and international law, and policy.
16. The same requirement applies to applications for ministerial authorisation.
17. This kind of specialisation is evidently the norm: the Federal Supreme Court has 8 special senates, in addition to its 12 civil and 5 criminal senates. (ABA Section of Antitrust Law, 2001)

18. The German Civil Code, Sec. 823 para. 2, makes a party liable for damages if it infringes a law. Such a “law” can also include Art. 81 of the EC Treaty. Sec. 1004 of the German Civil Code requires parties to cease infringement and thus authorises private suits for injunctions.
19. The FCO has tried to deal with actions of government bodies directly. In 1997, the FCO prohibited Berlin (the *Land*) from limiting competition for road construction contracts (by accepting bids only from firms that would pay local union wage rates). While the decision was on appeal, the *Land* enacted a law about public procurement that incorporated the same preference. The Federal Supreme Court rejected that law, but on grounds of constitutional principle, not competition policy. (OECD (Germany) 2001)
20. Notice no. 57/80, 8 July 1980.
21. Because the staff of this body would inevitably specialise by sector, the Commission recommends rotating the staff occasionally, again to avoid excessive familiarity. The *ex ante* approach of a sectoral regulator would likely conflict with the *ex post* law enforcement perspective that the FCO has developed in applying the ARC; thus, the Commission proposes that its recommended single regulator be a separate institution rather than part of the FCO. (Mission interview 2002)
22. Competition issues in the electric power and gas sectors are discussed in more detail in Ch. 5 of this study.
23. Sections 103, 103(a), and 105 (previous law).
24. Competition issues in the telecoms sector are discussed in more detail in Ch. 6 of this study.
25. The study compared prices for hotel and travel guides and maps.
26. See <http://www.bmwi.de/textonly/Homepage/Politikfelder/Branchenfokus/Handwerk/handwerk.jsp#hwo>.

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