

Independent competition authorities in the EU

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1. Introduction

An important issue regarding the implementation of competition law is the position of the body entrusted with this implementation task. The national legislature of the Member States of the EU usually assigns a specialized authority to apply and enforce (general) competition rules. In most Member States competition authorities have been granted a more or less independent status from the political sphere. An important advantage of an independent competition authority is that the application and enforcement of competition rules are not influenced by political and volatile considerations. By delegating competition law powers to an independent body, the legislature tries to guarantee that the application and interpretation of competition rules is mainly based upon economic and legal arguments alone, and is not shaped by political pressure.

In this contribution the point of departure is that an independent status of competition authorities is considered good practice (although this is sometimes questioned in literature).² But some recent cases, most notably in the field of merger control,³ show that political considerations can creep into the decision-making process in competition law. Hence, the question is what independence actually means, *i.e.* to what extent the political actors, such as the responsible Minister, can still influence the implementation of competition law. In this article, therefore, we examine how the independence of competition authorities *vis-à-vis* the political system has been regulated in several competition law systems in the EU. In addition, we also study the extent to which the national competition law systems have responded to developments in EC competition law (notably the modernization process), and in particular what influence these developments have had on the institutional structure of the national competition authorities.

In this article we focus on the competition law systems of Germany, the United Kingdom, the Netherlands and the EU. German competition law has a good reputation and is one of the oldest systems in Europe. The United Kingdom has recently changed its competition laws in a far-reaching way. In the Netherlands, a cartel prohibition system similar to the EC system has operated only since 1998. The comparison of the different features of these systems could lead to interesting conclusions. It is quite obvious that the Community competition law system should

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2 S. Wilks and I. Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies', 2002 *West European Politics*, no. 1, pp. 148-150.

3 See for instance the *Endesa* case (the Order of the President of the CFI of 1 February 2006 in Case T-417/05 R, *Endesa*, not yet reported). See also *NRC Handelsblad*, 7 March 2006, p. 13.

play an important role in the analysis, as this system has supremacy over the national competition rules of the Member States. Furthermore, the recent modernization process in European competition law (decentralization of the application of the EC competition rules as brought about by Regulation 1/2003, which entered into force on 1 May 2004)⁴ has had a considerable impact upon the national competition systems of the Member States.

2. The Commission in European competition law

This section opens with a brief overview of the main principles of EC competition law. Thereafter the role of the Commission in the field of competition law will be discussed.

2.1. Main lines of EC competition law

The European Commission plays a central role in the enforcement of the EC competition rules, in particular Article 81 EC (cartel prohibition), Article 82 EC (abuse of a dominant position) and the Merger Regulation, which form the three pillars of Community competition law. Apart from these rules directed at companies, there are also competition rules involving state action: Article 87 EC (State aids), Article 86 EC (exclusive and special rights) and the useful effect or state action doctrine of Article 10 EC in conjunction with Articles 81 or 82 EC. In the following a brief discussion will be given of only those rules directed at companies.

2.1.1. Article 81 EC: the cartel prohibition

Article 81 EC relates to multilateral behaviour of undertakings.⁵ According to Article 81(1) EC agreements, decisions by associations of undertakings and concerted practices having the object or effect to restrict competition are prohibited. Furthermore, Article 81 (1) EC will only be applicable if intra-Community trade is affected by the agreement concerned.⁶ Pursuant to Article 81(2) EC, any agreement or decision violating the cartel prohibition is void.

If an agreement is considered to restrict trade and competition within the meaning of Article 81(1) EC, it may still be exempted on the basis of Article 81(3) EC, but only if the four cumulative conditions mentioned in this provision are fulfilled (- improvement of production, distribution or promotion of technical or economic progress, - fair share of the resulting benefit for consumers, - indispensability of the restriction of competition, - no elimination of competition). The application of Article 81(3) EC is subject to a decentralization process with the result that, according to Article 1 of Regulation 1/2003, the Commission is not exclusively competent anymore to grant an exemption on the basis of Article 81(3) EC. This process is known as the modernization of EC competition law and implies that, besides the Commission, the national competition authorities (NCAs) and the national courts are entitled to apply this Treaty provision. Article 81 (3) EC has been transformed into a legal exception.

In its guidelines on the application of Article 81 (3) EC the Commission points out in which cases the conditions of Article 81 (3) EC will be met.⁷ In these guidelines the Commission contends that the objective of the cartel prohibition is to protect competition as a means of enhancing

4 Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* 2003 L1/1.

5 According to the Court of Justice's judgment in *Höfner* and subsequent cases the concept of an undertaking encompasses 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed': Case C-41/90, *Höfner and Elser/Macrotron*, Para. 21, [1991] *ECR* I-1979.

6 See also Commission Notice on the effect on trade concept, *OJ* 2004 C 101/81.

7 *OJ* 2004 C 101/97.

consumer welfare and of ensuring an efficient allocation of resources.⁸ Consequently, the goal of consumer welfare plays a major role in modern EC competition law.

Furthermore, block exemption regulations, which are directly applicable by the national competition authorities, have been adopted for certain categories of horizontal and vertical agreements. For example, according to the Block Exemption on vertical restraints⁹ the majority of vertical agreements are exempted from the cartel prohibition, provided that the supplier does not have market power and the agreements concerned do not contain hardcore restrictions.

2.1.2. Article 82 EC: abuse of a dominant position

Article 82 EC prohibits the abuse of a dominant position by one or more undertakings within the common market or a substantial part of it insofar as it may affect trade between Member States. Hence, the two conditions of dominance and abuse have to be fulfilled for Article 82 EC to be applicable.

The concept of dominance has been defined in the case law of the Court.¹⁰ In order to determine whether an undertaking has a dominant position the relevant product and geographic market needs to be defined.¹¹ Undertakings having a market share of 50% or more are generally presumed to have a dominant position.¹²

Article 82 EC as such does not prohibit a dominant position. The abuse of a dominant position results in a violation of Article 82 EC. The concept of abuse is, according to the Court in *Hoffman La Roche*, an objective concept relating to the behaviour of the undertaking in a dominant position.¹³ Generally a distinction is made between conduct that is exploitative of the dominant position, which is unfair or unreasonable towards those persons who depend on the dominant firm for the supply or acquisition of the relevant goods or services, and exclusionary conduct, which economic effect is further to reduce or to impede effective competition by excluding actual or potential competitors.¹⁴

An exemption similar to Article 81(3) EC does not exist for violations of Article 82 EC. Only where the anti-competitive effects are normally kept to the minimum necessary for the attainment of some economic advantage will behaviour be considered objectively justifiable.¹⁵ Furthermore, Article 86(2) EC, which applies to undertakings entrusted with tasks of general economic interest, could justify an infringement of Article 82 EC. However, it should be kept in mind that this exception applies to cartels as well.

Following the modernization of Article 81 EC and the Merger Regulation (see hereafter), Article 82 EC is the next subject due for modernization. With a view to this DG Competition of the Commission has recently published a discussion paper ‘on the application of Article 82 of the Treaty to exclusionary abuses’.¹⁶ In this paper the Commission argues that, like Article 81 EC,

8 See the guidelines on the application of Article 81(3) EC, Para. 13.

9 Commission Regulation (EC) no. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, *OJ* 1999 L 336/21.

10 ‘A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers’: Case C-85/76, *Hoffman La Roche/Commission*, [1979] *ECR* p. 461, Para. 38.

11 Commission Notice on the definition of the relevant market for the purposes of Community competition law, *OJ* 1997, C 372/5.

12 Alison Jones and Brenda Sufirin, *EC Competition Law*, Oxford, 2004, p. 342.

13 Case C-85/76, *Hoffman La Roche/Commission*, [1979] *ECR* p. 461, Para. 91.

14 Bellamy & Child (edited by P.M. Roth QC), *Common Market Law of Competition*, London 2001, p. 721.

15 J. Faull and A. Nikpay, *The EC Law of Competition*, Oxford 1999, p. 163.

16 To be found at: <http://www.europa.eu.int/comm/competition/anti-trust/others/discpaper2005.pdf>

Article 82 EC aims at enhancing consumer welfare and ensuring an efficient allocation of resources.¹⁷

2.1.3. Merger Regulation 139/2004

Merger Regulation 139/2004¹⁸ has replaced Regulation 4064/89¹⁹ and introduced a ‘new’ test for the appraisal of concentrations in Article 2 of the Regulation. This Regulation was the result of the changes proposed by the Commission in its Green Paper of 2001 to procedural, substantive and jurisdictional matters of the Regulation. The new Merger Regulation is also illustrative for the modernization process in the field of EC competition policy.

According to Article 2(2) and (3) a concentration is compatible with the common market if it ‘would significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position’. Whether a concentration will be considered incompatible with the common market will in the first place be decided upon the basis of various competition considerations, whereby the definition of a dominant position plays a crucial,²⁰ but not only role.²¹

It is also important to mention that the Merger Regulation explicitly refers to efficiencies in recital 29, which, together with Article 2(1) sub b of the Merger Regulation stipulating that technical and economic progress can be taken into account in assessing mergers, has reinforced the efficiency defence. Nevertheless, the extent to which efficiencies can really offset the emergence of a dominant position within the framework of merger control policy remains unclear.²²

The Merger Regulation only applies to concentrations with a Community dimension, which will be assessed according to the criteria mentioned in Article 1 of the Merger Regulation. Relevant is the aggregate turnover of the undertakings involved in the concentration. If a certain threshold mentioned in Article 1 is exceeded, the concentration will have a Community dimension, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. This ‘two-thirds rule’ relieves the Commission from its sole jurisdiction based on Article 21(2) of the Regulation to assess mergers with a Community dimension, which are large and may have serious effects on trade and competition.²³ For instance, the merger between *Eon* and *Ruhrgas* in Germany was, as a result of this rule, dealt with by the German authorities (see hereafter, Section 3.2). A current example is the *Endesa* case: the EC merger regulation is not applicable to the merger between the Spanish public utilities companies *Gas Natural* and *Endesa* because of the two-thirds rule.²⁴ It remains

17 See the Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Para. 4.

18 Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), *OJ* 2004 L 24/1.

19 Council Regulation (EEC) no. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJ* 1989 L 395/1.

20 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *OJ* 2004 C 31/5.

21 Jones and Sufrin, *supra* note 12, p. 916.

22 S. Voigt and A. Schmidt, ‘The Commission’s guidelines on horizontal mergers: Improvement of deterioration?’, 2004 *CMLRev.*, pp. 1592-1593. See also more in general regarding the role of efficiency claims in merger control policy: D. Gerard, ‘Merger control policy: How to give meaningful consideration to efficiency claims?’, 2003 *CMLRev.*, pp. 1571-1572.

23 This was also recognized by the Commission in its Green Paper on the Review of Council Regulation (EEC) no. 4064/89, preceding the adoption of Council Regulation (EC) no. 139/2004, COM (2001), 745/6 final, points 24-28. This, however, has not led to an amendment of Article 1: see also Jones and Sufrin, *supra* note 12, p. 878.

24 See the Order of the President of the CFJ of 1 February 2006 in Case T-417/05 R, *Endesa* (not yet reported).

to be seen if this will also be the case with regard to the recently announced merger between *Suez* and *Gaz de France*.²⁵

The exclusive competence of the Commission to assess mergers with a Community dimension means, according to Article 21(3), that Member States may not apply their own national legislation to these mergers, as, according to the Commission, Poland did in preventing the merger between the Italian bank *Unicredit* and the German-Polish bank *BPH/HVB*.²⁶ The Commission had approved this merger under the regime of the (new) Merger Control Regulation.

But there are exceptions to the exclusive jurisdiction of the Commission. Firstly, Article 9 gives the possibility for the Commission to refer a case to the competent authorities of the Member State, where a concentration has significant effects on a national market, the so-called ‘German clause’, and secondly Article 21(4) provides the possibility for Member States to apply their own legislation to protect legitimate interests other than those mentioned in the Merger Regulation, like public security or the protection of plurality of the media.²⁷ Furthermore, one or more Member States may refer a concentration without a Community dimension to the Commission subject to the conditions mentioned in Article 22.

2.2. Powers and position of the European Commission in the field of EC competition law

Below the powers of the Commission are discussed. Also the status of the Commission under Community law, the role of the national competition authorities within the framework of Regulation 1/2003 and the European competition network are touched upon.

2.2.1. Regulation 1/2003

With the exception of the Merger Control Regulation, Regulation 1/2003 is the most important instrument for the powers of the Commission. After all Article 4 of the Regulation stipulates that the Commission shall have the powers provided for by this Regulation to apply Articles 81 and 82 EC. The Regulation grants the Commission broad powers to apply and enforce Articles 81 and 82 EC.²⁸ The procedures used by the Commission here are largely similar to the procedures within the field of merger control. The Commission may start an investigation into an infringement of the EC competition rules upon its own initiative or upon a complaint.²⁹ As a result of the modernization of European competition law (decentralization process), the NCAs and the national courts play an increasingly important role in the application and enforcement of the EC competition rules. Together with the NCAs the Commission forms a network of competition authorities having the task to ‘detect and punish violations of Articles 81 and 82 EC’.³⁰ Nonetheless, the role of the Commission remains vital, particularly where it must provide the parties with the necessary legal certainty as to how the Community rules must be applied and a coherent competition policy must be developed in a decentralized system.

Under Regulation 1/2003 the Commission has far-reaching investigating powers for infringements of the competition rules, and it has decision-making powers. ‘In competition cases the Commission plays the part of law-maker, policeman, investigator, prosecutor, judge and jury.’³¹ The investigating powers, *i.e.* the powers to obtain information from the companies, for example,

25 The Commissioner for Competition, Neelie Kroes, presumes that the merger has to be notified to the Commission: see Press Release, MEMO/06/131, 20 March 2006.

26 Press Release IP/06/277, 8 March 2006.

27 See with regard to Article 21(4), for example, Case No. IV/M.423, *Newspaper Publishing*.

28 Council Regulation (EC) 1/2003, *supra* note 4.

29 Jones and Sufrin, *supra* note 12, p. 1055.

30 W.P.J. Wils, ‘Powers and Investigation and Procedural Rights and Guarantees in EU Anti-trust Enforcement’, 2006 *World Competition*, p. 3.

31 Jones and Sufrin, *supra* note 12, p. 1055.

by carrying out inspections, can be found in Articles 18 to 21 of Regulation 1/2003, with even the possibility to conduct inspections at private premises provided by Article 21. Either on request of the NCA or of the Commission the officials of the NCA may, according to Article 20(5) assist the Commission in its inspections. If the company refuses to cooperate the Member State must, according to Article 20(6) provide the necessary assistance. If national law requires authorization from a judicial authority, it must, according to Article 20(7), be applied for; the role of the national courts is spelled out in Article 20(8), which codifies the case law of the Court of Justice.³²

The Commission can, pursuant to Article 23, impose fines of up to 10% of the total turnover of each company participating in the infringement. Furthermore, the Commission operates a leniency programme.³³

2.2.2. The European Commission acting as a body

One can distinguish between (i) the position of the Commission as Institution in relation to the other Institutions, like the Council, and to the Member States and (ii) the position of DG Competition and the other DGs of the Commission. Regarding (i) according to Article 213(2) EC the point of departure for the Commission as Institution of the European Union is that the Commission ‘shall, in the general interest of the Community, be completely independent in the performance of their duties. In the performance of these duties, they shall neither seek, nor take instructions from any government or from any other body.’ Irrespective of this independent position of the Commission there are still indirect links to the national governments of the Member States and to the Community’s political institutions. The Member State governments, for example, will agree upon the nominees for the 25 Commissioners, one from each Member State. They have to be approved by the European Parliament.³⁴

Regarding (ii) although the Commission is divided into several directorate-generals and the Directorate General for Competition is in principle entrusted with competition policy and enforcement, it acts as a body, meeting weekly, taking policy initiatives and handling cases. Hence, the decisions are collegiate acts of the whole Commission. The fact that Commission decisions are collegiate acts has been confirmed by the Court of First Instance in the *Cimenteries CBR SA* case. In this case two parties submitted, *inter alia*, that the principle of impartiality was violated on the ground that the same official carried out the investigations, acted as rapporteur, drew up the Statement of the Objections and prepared the draft decision. That argument could not, according to the CFI, be upheld: ‘the contested decision was not taken by the official to whom the parties refer, but by the college of Commissioners. What is more, the procedural guarantees provided for by Community law do not require the Commission to adopt an internal organization precluding the same official from acting as investigator and rapporteur in the same case.’³⁵

Other Commission services may be consulted by DG Competition. An example is the *Sammelrevers* case on the German-Austrian agreement on fixed book prices, where the Commissioner for Competition at the time, Monti, maintained regular contacts with at that time the responsible Commissioner for Culture and Education, Vivian Reding.³⁶ A similar situation may

32 Case C-94/00, *Roquette Frères SA*, [2002] ECR I-9011.

33 Commission Notice on immunity from fines or reduction of fines in cartel cases, OJ 2002 C 45/3.

34 See OECD report on Competition Law and Policy of the EU, 2005 (OECD EU), p. 36.

35 Case T-25/95, *Cimenteries CBR SA/Commission*, [2000] ECR II-491, Para. 721; see also Jones and Sufrin, *supra* note 12, p. 1110.

36 Press Release IP/00/183, 23 February 2000; see also S.A. de Vries, *Tensions within the Internal Market. The functioning of the Internal Market and the Development of Horizontal and Flanking Policies*, Groningen 2006, p. 361.

have occurred in respect of the former cartel on fixed book prices in the Netherlands. At first the Commission expressed strong objections against the Dutch system, but after the requirement to fix a price for imported books was repealed, the Commission considered the new system not to fall under the cartel prohibition of Article 81(1) EC.³⁷

It has been submitted, however, that the Commissioner holding the competition portfolio dominates EC competition policy.³⁸ That competition cases may be increasingly dealt with independently from other policy considerations can be enhanced by the following two developments. Since September 2003 a Chief Economist has been appointed providing economic input into the cases and policy discussions in DG Competition, as well as economics training for the staff of DG Competition. He provides independent economic advice to the Director General of Competition.³⁹ The setting-up of a new specialized cartel directorate in DG Competition may increase the effectiveness and independence of DG Competition as well.⁴⁰

2.3. The powers and duties of the national competition authorities (NCAs)

The modernization process has had the result that the NCAs (as well as the national courts) play a more significant role in the enforcement of the EC competition rules, in particular Articles 81 and 82 EC. Furthermore, in applying *national* competition law, the NCAs have to respect EC (competition) law. After all, according to the classic case law of the Court of Justice – the *Van Gend & Loos*⁴¹ and *Costa/Enel*⁴² cases – Community law has created its own legal order and provisions of Community law take precedence over provisions of national law.

2.3.1. The power to apply EC competition law

According to Article 5 of Regulation 1/2003 the national competition authorities (NCAs) have the power to apply Articles 81 and 82 EC in individual cases. Article 5 states that the NCAs may upon their own initiative or after a complaint take the following decisions:

- requiring that an infringement be brought to an end;
- ordering interim measures;
- accepting commitments;
- imposing fines, periodic penalty payments or any other penalty provided for in their own legislation.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Contrary to, for example, the Framework Directive for Electronic Communications Networks and Services,⁴³ Regulation 1/2003 does not prescribe which type of national body will enforce the EC competition rules. It leaves it entirely up to the Member States to organize the mechanisms for investigating infringements and enforcing decisions, so long as the Member State, according to Article 35 of the Regulation, designates an authority, which can effectively comply with the

37 Statement of Objections of 24 April 1998; see also J. Langer, 'Einde boekenkartel? Of nog niet?', 1999 *NTER*, p. 272.

38 OECD EU, *supra* note 34, p. 37.

39 http://www.europa.eu.int/comm/dgs/competition/cce_en.htm.

40 See also Speech by Neelie Kroes, 10 March 2005, SPEECH/05/157.

41 Case 26/62, *Van Gend & Loos*, [1963] *ECR* I.

42 Case 6/64, *Costa/Enel*, [1964] *ECR* 585.

43 According to Article 3 of this Directive Member States shall *inter alia* ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing electronic communications networks, equipment or services. Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently: Directive 2002/21/EC, *OJ* 2002 L 108/33.

provisions of the Regulation.⁴⁴ The designated authorities may, according to Article 35 of the Regulation, include courts. Furthermore, the rather general text of Article 5 can be explained by the fact that the Regulation does not intend to harmonize national competition rules; hence, the powers of the NCAs mentioned by Article 5 need to be further specified in national law.

2.3.2. The power and duty to apply EC competition law and disapply national law: 'Costanzo' and 'CIF'

The primacy of Community law requires that any national law contravening a rule of Community law must be disapplied, regardless of whether it was adopted before or after that rule.⁴⁵ In the *Fratelli Costanzo* case, the Court held that the duty to disapply national law contravening a rule of Community law applies to all organs of the Member State, including administrative authorities.⁴⁶ In the *CIF*⁴⁷ judgment the Court makes clear that these include the NCAs, which must declare inapplicable national law that violates the useful effect rule, *i.e.* Article 10 EC in conjunction with Articles 81 and 82 EC.⁴⁸ Here the national competition authorities do not only have the *duty* to disapply national law violating the useful effect doctrine, they are in fact empowered to do so, which the Commission itself is not. The judgment may therefore provide a further incentive to decentralize EC competition law.⁴⁹

2.3.3. The power to apply national competition law

The NCAs are of course empowered to apply and enforce national competition law, as well as EC competition law. The point of departure has always been that the national rules on competition can be applied concurrently with the EC rules on competition.⁵⁰ The applicability of Articles 81 and 82 EC has not precluded the application of national provisions of competition law, according to the Court's judgment in *Walt Wilhelm*.⁵¹ With a view to the decentralization process and the consequential danger that EC competition would not be uniformly applied by the NCAs, Regulation 1/2003 has changed this doctrine. Article 3 now provides that the NCAs and the national courts are obliged, in applying their national competition laws to restrictive practices, to also apply Articles 81 and 82 EC whenever trade between Member States may be affected.⁵² According to Article 3(2) of Regulation 1/2003, in applying national competition law and Articles 81 EC alongside, the NCAs may not prohibit agreements or restrictive practices that are tolerable in the light of Article 81(1) EC or which fulfil the conditions of Article 81(3) EC, or are covered by a block exemption regulation. In respect of Article 82 EC, on their national territory the NCAs may apply stricter national laws prohibiting and sanctioning unilateral behaviour. Article 3(3) stipulates that Paragraphs 1 and 2 of Article 3 do not apply when the NCAs and national courts apply national merger control rules.

44 Jones and Sufrin, *supra* note 12, p. 1161.

45 Case C-198/01, *Consorzio Industrie Fiammiferi (CIF)*, [2003] ECR I-8055, Para. 48.

46 Case 103/88, *Fratelli Costanzo/Comune di Milano*, [1989] ECR 1839, Para. 31.

47 Case C-198/01, *Consorzio Industrie Fiammiferi (CIF)*, [2003] ECR, I-8055 (see hereafter).

48 On the basis of this doctrine, Member States may not take away the useful effect of the cartel prohibition or the prohibition not to abuse a dominant position, *e.g.* by declaring a cartel generally binding.

49 Annotation P. Nebbia, 2004 *CMLRev.*, p. 846: The problem is, however, that, contrary to the national courts, the national competition authorities do not have the competence to ask the Court of Justice for a preliminary ruling. See Case C-53/03, *Syfait e.a.*, [2005] ECR I-4609.

50 This is different in the case of merger control: see *supra*, Section 2.1.3.

51 Case 14/68, *Walt Wilhelm*, [1969] ECR 1.

52 See for the effect on trade concept: Commission Notice, OJ 2004 C 101/81.

2.4. Cooperation between the European Commission and the national competition authorities (NCAs)

A big challenge for the decentralization process is to prevent that different and diverse interpretations of EC competition rules co-exist and that as a consequence the uniform application of Articles 81 and 82 EC is being jeopardized. It is therefore essential that the Commission and the NCAs work together with a view to the coherent application of Articles 81 and 82 EC.

2.4.1. Cooperation in general

Regulation 1/2003 includes a chapter on cooperation between the Commission and the competition authorities of the Member States (Chapter IV, Articles 11 to 14). In this chapter, a cooperation mechanism, the European Competition Network (ECN), is introduced, which, according to the Commission, forms the basis for the creation and maintenance of a common competition culture in Europe.⁵³

The point of departure is, according to Article 11(1) of Regulation 1/2003, that the Commission and the NCAs shall apply the Community competition rules in close cooperation. The provisions on cooperation, Articles 11 to 14, are further specified in a Commission Notice on cooperation within the Network of Competition Authorities, which forms part of the modernization package.⁵⁴ Within the cooperation mechanism the important role of the Advisory Committee, established as the forum where experts from the various competition authorities discuss individual cases and general issues of Community competition law, must be stressed.⁵⁵ Important cases, for example, on the interpretation of Article 81(3) EC, can be discussed in the Advisory Committee.

Article 11(6) states that the initiation by the Commission of proceedings relieves the NCAs of their competence to apply Articles 81 and 82 EC. On the one hand, this may be considered a powerful weapon in the hands of the Commission giving considerable leverage over the NCAs,⁵⁶ on the other hand, it may be considered a means for the NCAs to induce the Commission to take action with a view to developing a coherent competition policy in certain policy fields.⁵⁷ The Commission will, however, only rarely use this possibility,⁵⁸ as appears from its Notice on cooperation, for example, where a competition authority envisages conflicting decisions in the same case. It will not simply initiate proceedings after it has received a complaint.⁵⁹ The possibility for the Commission to initiate proceedings relieving the NCAs of their competence to apply Articles 81 and 82 EC does not exist in respect of parallel application of EC competition law by the Commission and the *national courts*. The national courts may apply EC competition law at the same time as the Commission with the risk of conflicting decisions being adopted.⁶⁰ According to Article 16 of Regulation 1/2003, however, the national courts cannot take decisions which run counter to a decision adopted by the Commission, or give decisions which would conflict with decisions contemplated by the Commission.⁶¹ The national court must always seek

53 See Commission Notice on cooperation within the Network of Competition Authorities, *OJ* 2004 C 101/43. According to H. Gilliams 'the Commission's hope is that the network will function as a well-oiled machine, all national authorities carrying out the policy set by the Commission in a loyal fashion', in: 'Modernisation: From policy to practice', 2003 *ELRev.*, p. 465.

54 *OJ* 2004 C 101/43.

55 Article 14 of Council Regulation (EC) no. 1/2003, *supra* note 4; see Section 4 of the Commission Notice on cooperation within the Network of Competition Authorities, *OJ* 2004 C 101/43.

56 Jones and Sufrin, *supra* note 12, p. 1169.

57 For example in fields of horizontal and flanking policies: De Vries, *supra* note 36, p. 362.

58 Gilliams, *supra* note 53, p. 467; Jones and Sufrin, *supra* note 12, p. 1169.

59 Commission Notice on cooperation within the Network of Competition Authorities, *OJ* 2004 C 101/43, Paras. 52-56.

60 Jones and Sufrin, *supra* note 12, p. 1196.

61 A Notice of the Commission as part of the modernization package further specifies the cooperation mechanism: Commission Notice on cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, *OJ* 2004 C 101/54.

to prevent the adoption of a conflicting decision, for example, by staying the proceedings after the Commission has initiated the proceedings.⁶²

The Regulation and the Notice on cooperation lay down the principles that govern cooperation within the framework of the European Competition Network (ECN). Within this framework more specific rules dealing with case allocation, the exchange of information and leniency policy are essential.

3. The competent authorities in German competition law

The general competition rules similar to the Community rules discussed in the previous section have been laid down in the *Gesetz gegen Wettbewerbsbeschränkungen*⁶³ (*GWB*). As the *Gesetz gegen unlauteren Wettbewerb*⁶⁴ deals with the rules on fair competition, this Act will not be discussed in this article. Firstly, the main outlines of the German competition rules are touched upon in this section. Secondly, the position and powers of the competent authorities in German competition law are examined.

3.1. General overview of the German competition rules

The German competition rules consist of three regimes: the cartel prohibition, the prohibition on the abuse of a dominant position and merger control.

3.1.1. Cartel prohibition

Germany used to have different rules for horizontal and vertical agreements. The *GWB* prohibited horizontal agreements in general terms. As regards vertical agreements, pursuant to the old version of § 14 *GWB* only contracts on resale price maintenance were prohibited, and other vertical agreements were allowed, save for a few exceptions.

Recently, this German competition law system has been changed considerably by the *Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*⁶⁵ (hereafter: *7. GWB-Novelle*). The object of this amendment, which entered into force on 1 July 2005, is to adjust the *GWB* to European competition law. The present cartel prohibition has been laid down in § 1 *GWB* and is very similar to Article 81 EC. Pursuant to § 1 *GWB* agreements, decisions of associations of undertakings and concerted practices that restrict competition are prohibited. It is obvious that the wording of this provision resembles Article 81 EC, save, of course, for the criterion of the effect on intra-Community trade. The different regimes on horizontal and vertical agreements had been abolished. Both types of agreements must be assessed under the same provision: § 1 *GWB*.⁶⁶ The *GWB* contains an exception to the cartel prohibition, which mirrors Article 81 (3) EC and has been modelled as a legal exception, like the system on which Regulation 1/2003 has been based.⁶⁷

62 Case C-344/98, *Masterfoods*, [2000] ECR I-11369. By providing this framework for cooperation with a view to the consistent application of Community law, Regulation 1/2003 has in fact implemented the Community loyalty principle as laid down in Article 10 EC: see Para. 49 of Case C-344/98, *Masterfoods*.

63 In English: Act Against Restraints of Competition.

64 In English: The Act on Unfair Competition.

65 In English: 7th Amendment to the Act against Restraints of Competition. This amendment has been published on 12 July 2005, in the *Federal Gazette* I, p. 1954.

66 M. Lutz, 'Schwerpunkte der 7. GWB-Novelle', 2005 *Wirtschaft und Wettbewerb*, p. 719.

67 See § 2 (1) *GWB*.

In § 2 (2) *GWB* a system of dynamic references to the EC block exemptions has been laid down.⁶⁸ According to this provision the Community block exemptions are also directly applicable to the cartel prohibition of § 1 *GWB*, irrespective of the fact whether the agreement, the decision of an association of undertakings or concerted practice at hand does or does not affect intra-Community trade. Hence, according to present German competition law, vertical agreements must be reviewed against the same rules that are applicable to this kind of agreements in EC competition law (notably the EC Block exemption on vertical restraints).

Furthermore, it should be noted that the *GWB*⁶⁹ also contains a special regime dealing with *Mittelstandskartelle*.⁷⁰ These cartels are exempted from the cartel prohibition, provided that they do not substantially restrict competition on the market, and they enhance the competitiveness of small or medium-sized enterprises.

3.1.2. Dominant position

The prohibition on the abuse of a dominant position has been laid down in § 19 *GWB*. Pursuant to this provision abusive exploitation of a dominant position is prohibited. The *GWB* provides an explicit definition of market dominance.⁷¹ An undertaking is considered to be dominant if it has no competitor, if it is not exposed to any substantial competition or if it has a paramount market position in relation to its competitors.⁷² This status depends on, amongst other things, market shares, financial sources and – potential – entry barriers. A single firm is presumed to have a dominant position, if it possesses at least one third of the relevant market. Compared with the case law of the Court on Article 82 EC, according to which the threshold for presuming dominance is 50%,⁷³ it does not take all that much for a firm to be considered dominant in German competition law. A group of undertakings, consisting of two or three undertakings, is presumed to be dominant if the market share of the undertakings concerned is no less than 50%. If a group of firms consists of four or five firms, the threshold is two-thirds of the market share. If a dominant undertaking disproportionately harms the capacity of other undertakings to compete or detrimentally affects consumers, its conduct is considered abusive under German competition law.⁷⁴ An example of abusive behaviour is excessive pricing.

In German competition law special attention is paid to the protection of smaller undertakings against dominant firms.⁷⁵ For example, according to § 20 (1) *GWB* a dominant undertaking is not allowed to apply discriminatory business terms and conditions in its commercial relations with (relatively) small companies. As already stated above, an important tendency in EC competition law is that enhancing consumer welfare is considered to be the main goal of the competition rules. It seems, however, that in German law protecting competitors also plays an important role. In this respect it should be noted that pursuant to § 20 (4) *GWB* an undertaking that has superior market power over other competitors is not allowed to sell below cost price without objective justification. This provision especially protects small or medium-sized enterprises against dominant undertakings.

68 Lutz, *supra* note 66, p. 720.

69 See § 3 *GWB*.

70 In English: cartels of small or medium-sized enterprises.

71 See § 19 (2) *GWB*.

72 I. Sylvestre, 'Chapter 7 Germany', in: M. Holmes and L. Davey, *A Practical Guide to National Competition Rules across Europe*, The Hague 2004, p. 145.

73 See e.g. Case C-62/86, *Akzo/Commission*, ECR [1991], I-3359.

74 Sylvestre, *supra* note 72, p. 145.

75 OECD Report The Role of Competition Policy in Regulatory Reform. Regulatory Reform in Germany, 2004 (OECD Germany 2004), p. 17.

The 7. *GWB-Novelle* has barely amended the German provisos on dominance. It has been argued that according to Article 3 (2) of Regulation 1/2003 Member States are entitled to apply stricter rules than are provided for at Community level, as far as the control of abusive behaviour is concerned.⁷⁶ Therefore, the German prohibitions on discrimination and sales below costs, laid down in § 20 (1) and (4) *GWB* could be maintained, even though, unlike Article 82 EC, they protect small and medium-sized enterprises against large firms. Accordingly, German competition law has maintained its own national approach towards dominant undertakings.

3.1.3. Merger control

The rules of the *GWB* governing the substantive merger control test mirror the standard of the old EC Merger Control Regulation. In the explanatory notes on the draft of the 7. *GWB-Novelle* the German government stated that an adjustment of the German merger control rules was not necessary from a legal point of view, and that it should remain to be seen at a later stage to what extent a modification of these rules towards the new EC Merger Control Regulation is prudent.⁷⁷ As a result, in German competition law the substantive test, in the light of which mergers are assessed, is still the creation or strengthening of a dominant position.⁷⁸ However, a concentration that amounts to the creation or strengthening of a dominant position could be approved if its improvements outweigh its disadvantages. In order to successfully apply this ‘improvement defence’ the parties involved have to prove a causal link between the claimed improvements and the merger at hand.⁷⁹ Only effects on the market structure are regarded as improvements within the meaning of the German rules on merger control, and changes consisting of mere modifications of conduct are not taken into account.⁸⁰ From the outset it cannot be ruled out that in German law considerations comparable to the efficiencies that play a role in the new EC concentration regime, could be taken into account. However, practical experience is to be awaited to see to what extent both concepts overlap.

The competent German competition authority is very experienced in assessing mergers. This is not surprising as for many years Germany had the most active programme in the field of merger control compared with other countries in Europe.⁸¹

The concentration control provisions are applicable to a merger if this merger exceeds certain thresholds.⁸² Concentrations that fall within the scope of German competition law must be notified and approved in advance.⁸³

3.1.4. The relationship between German and European competition law

Pursuant to § 22 *GWB*, which has been amended by the 7. *GWB-Novelle*, Articles 81 and 82 EC must be applied to conduct influencing intra-Community trade, whereas German competition law might be applied to this conduct (no obligation to apply these national rules). It is obvious that this proviso repeats the obligations laid down in Article 3 of Regulation 1/2003, and does,

⁷⁶ Lutz, *supra* note 66., p. 722.

⁷⁷ See p. 22 of the *Regierungsentwurf einschließlich Stellungnahme Bundesrat und Gegenäußerung Bundesregierung*, BT-Drs. 15/3640 v. 12.8.2004.

⁷⁸ See § 36 *GWB*.

⁷⁹ H.-J. Bunte, *Kartellrecht*, München 2003, p. 269.

⁸⁰ E.-J. Mestmäcker and W. Veelken in: Immenga/Mestmäcker, *GWB Kommentar zum Kartellgesetz*, München 2001, § 36 Rn 290.

⁸¹ OECD Germany 2004, *supra* note 75, p. 18.

⁸² See § 35 *GWB*. The thresholds are exceeded if the parties concerned together have a combined aggregate worldwide turnover of more than 500 million euro and at least one undertaking realises more than 25 million euro of its turnover in Germany. However, § 35 (2) and (3) contain a few derogations. The most important one is that the German merger control regime is not applicable if the merger at hand is subject to the Community rules on concentration.

⁸³ OECD Germany 2004, *supra* note 75, p. 19.

therefore, not alter the Community principles regarding the parallel application of both European and national competition law. In this respect it should be pointed out that the fair chance exists that a national law changing these principles is contrary to Community law, because an EC Regulation is directly applicable⁸⁴ and has supremacy over national law. In this context it must even be recalled that according to settled case law of the Court EC regulations may not be transposed by a Member State,⁸⁵ precisely because this Community legislative measure is directly applicable in the national order of the Member States. Subsequently, it cannot be ruled out that § 22 *GWB* in the light of EC law might be questioned.

The draft of the 7. *GWB-Novelle* originally provided an obligation for the German competition authorities and courts to interpret the *GWB* provisions on cartels and dominant positions in the light of EC competition law. However, this proviso has been left out of the definitive text of this *Novelle*. Nevertheless, it has been argued that, even without such an explicit obligation, the competent national bodies have the duty to observe the principles of EC competition law, while applying German competition law, as the objective of the *Novelle* is to align with Community law.⁸⁶ In addition, in our view national competition authorities and courts are also forced by the principle of Community loyalty (Article 10 EC) to interpret their own national law in the light of EC law.⁸⁷

3.2. Powers and position of the competent authorities in German competition law

As Germany is a federal state, both central and decentralized state organs have powers in the field of competition law. Since the federal competition authority, the *Bundeskartellamt*, is the principal decision maker in German competition law, the authorities operating at non-federal level are not discussed in this contribution. Only the powers and the position of the competent federal organs are examined below. Amongst other things, attention is paid to the relationship between the competent competition authorities and the Minister for Economic Affairs and Technology.

3.2.1. The Bundeskartellamt

The *Bundeskartellamt* (hereafter: *BKartA*) is the competent competition authority at federal level. In addition, according to § 50 (1) *GWB* the *BKartA* is also the competent authority to apply Articles 81 and 82 EC, provided that the case at issue does not concern a competence of a non-federal competition authority. If the *BKartA* is the competent body, it is also entitled to cooperate with the Commission and competition authorities of other Member States in the European Competition Network.⁸⁸

Pursuant to § 51 *GWB* this body is a *selbständige Bundesoberbehörde* (independent federal authority). The tasks of this authority fall within the scope of the federal Ministry for Economic Affairs and Technology. It appears from § 51 *GWB* that the *BKartA* is declared by statute independent in deciding what cases to bring and what conduct violates the law.⁸⁹

The independent status of the *BKartA* implies that the German legislature has defined a policy field (competition) with respect to which this federal state organ has its own powers, and therefore the Minister is not allowed to take away these powers.⁹⁰ For instance, in an individual

84 See Article 249 EC.

85 See e.g. Case 39/72, *Commission/Italy*, [1973] ECR 101 and Case 94/77, *Fratelli Zerbone*, [1978] ECR 99.

86 Lutz, *supra* note 66, p. 725.

87 See e.g. Case 14/83, *Von Colson and Kamann/Land Nordrhein-Westfalen*, [1984] ECR 1891 and Case C-105/03, *Pupino* [2005] ECR I 5285.

88 See § 50a *GWB*.

89 See M.O. Wise, 'Independence of competition authorities: theory and practice', in: J.W. van de Gronden and R.J.G.M. Widdershoven, *Mededingingsautoriteiten als zelfstandig bestuursorgaan: onafhankelijk toezicht?*, Deventer 2002, p. 74.

90 S. Klauw in: Immenga/Mestmäcker, *supra* note 80, § 51 Rn. 1.

case the Minister cannot take over the position of the *BKartA* and make a decision. In this respect it should be noted that there are rules for the public accountability for the *BKartA*, as every two years this authority publishes a report, which the government submits to Parliament.⁹¹

An essential feature of the independence of the *BKartA* is its decision-making structure.⁹² The so-called *Beschlussabteilungen* (Decision Divisions) are at the heart of the decision-making process in the *BKartA*. According to § 51 (2) *GWB* these divisions take the competition law decisions, and they are regarded as *Kollegialspruchkörper* (Collegiate bodies), which make their decisions as a panel.⁹³

The *Beschlussabteilungen* are panels officially consisting of three members (one of them being the Chairman).⁹⁴ However, in practice besides these three members who have a right to vote, approximately three other persons participate in the work of such a decision division.⁹⁵ According to § 51 (5) *GWB* the members of these panels must operate in an independent way from undertakings, and as a consequence they are not allowed to be, e.g., a president of an enterprise. Actually, the *Beschlussabteilungen* are the units that take decisions on behalf of the *BKartA*, and as a consequence have a major influence on the way competition law is applied in Germany. It should be noted that even the President of the *BKartA* cannot influence the decisions taken by *Beschlussabteilungen*.⁹⁶

The Chairman of a *Beschlussabteilung* is a civil servant appointed for life and is required to be qualified for the position of a judge (he/she must have a certain law degree).⁹⁷ The other two members need not be lawyers; also economists are allowed to have a seat in a *Beschlussabteilung*.⁹⁸ By issuing a decree the President of the *BKartA* decides on the division of cases amongst the *Beschlussabteilungen*.⁹⁹ This decree must be approved by the Minister for Economic Affairs and Technology.¹⁰⁰ It appears from the organization chart of the *BKartA* that eleven *Beschlussabteilungen* are operating,¹⁰¹ whose areas of responsibilities are organized according to economic sectors (e.g. mechanical engineering and wholesale & retail) and the nature of cases (e.g. licensing agreements).¹⁰² Moreover, the *Sonderkommission Kartellbekämpfung* (Special Unit for Combating Cartels) assists the *Beschlussabteilungen* in preparing and analyzing the results of certain research operating in cartel proceedings.¹⁰³

Thus, from the foregoing it appears that in German competition law a significant characteristic of the decision-making process has a quasi-judicial structure. It is believed that this structure facilitates efficient dealings between the *BKartA* and industry, and, furthermore, that decision-making procedures are reasonably transparent and efficient in German competition law.¹⁰⁴ The quasi-judicial structure also reinforces the independent status and functioning of the *BKartA*. As regards the powers of the *BKartA*, the 7. *GWB-Novelle* has amended these with a view to facilitate the way in which the *BKartA* is operating within the European Competition Network

91 A. van Aaken, 'Independent Administrative Agencies in Germany', in: R. Caranta, M Andenas and D. Fairgrieve (eds.), *Independent Administrative Authorities*, London 2004, p. 81.

92 OECD Germany 2004, *supra* note 75, p. 22.

93 S. Klaue in: Immenga/Mestmäcker, *supra* note 80, § 51 Rn. 5.

94 See § 51 (3) *GWB*.

95 S. Klaue in: Immenga/Mestmäcker, *supra* note 80, § 51 Rn. 5.

96 *Ibid.*

97 See § 51 (4) *GWB*.

98 S. Klaue in: Immenga/Mestmäcker, *supra* note 80, § 51 Rn. 9.

99 S. Klaue in: Immenga/Mestmäcker, *supra* note 80, § 51 Rn. 8.

100 *Ibid.*

101 See the information Brochure of the *BKartA*, 'The Bundeskartellamt in Bonn. Organisation, History and Activities', Bonn May 2005, p. 6.

102 S. Klaue in: Immenga/Mestmäcker, *supra* note 80, § 51 Rn. 8.

103 See the information Brochure of the *BKartA*, 'The Bundeskartellamt in Bonn. Organisation, History and Activities', Bonn May 2005, p. 5.

104 OECD Germany 2004, *supra* note 75, p. 22.

and is applying EC competition rules.¹⁰⁵ Like the Commission under the regime of Regulation 1/2003, according to present German competition law the *BKartA* has the competence to issue not only prohibition decisions,¹⁰⁶ but also interim measures,¹⁰⁷ decisions by which commitments of undertakings are made binding,¹⁰⁸ and decisions by which the inapplicability of competition rules to certain behaviour is established.¹⁰⁹

The *BKartA* is entitled to conduct any investigations and to collect any evidence.¹¹⁰ The *BKartA* also has the power to impose fines on undertakings that have violated German and European competition law according to § 81 *GWB et seq.*¹¹¹ The 7. *GWB-Novelle* has changed this power as well. According to present German competition law the amount of the fine that is imposed in case of severe infringement can be up and to 10% of the turnover of the undertaking concerned.¹¹² Furthermore, pursuant to § 34 *GWB* the *BKartA* can skim off the revenues that are the result of the violations of German and European competition law. These sanctions fall within the scope of administrative law. In the context of its enforcement powers the *BKartA* applies a leniency programme¹¹³ (*Bonus Regelung*).¹¹⁴

In addition, Germany competition law could also be enforced by penal law, as § 298 *Strafgesetzbuch* (Code of Penal Law) contains a penal sanction. It should be noted, in this respect, however, that this Article only covers *Submissionsbetrug* (collusive tendering). Other types of infringements of competition law cannot be prosecuted under the *Strafgesetzbuch*. Furthermore, parties can invoke competition rules before civil courts. In this respect it should be noted that civil courts must alert the *BKartA* about disputes that involve both the *GWB* and EC competition law,¹¹⁵ and the *BKartA* frequently offers its views in private suits.¹¹⁶ Moreover, § 90a *GWB* implements the procedure of cooperation between the national courts, the European Commission and the national competition authority.¹¹⁷ An important feature of the 7. *GWB-Novelle* is the improvement of the civil enforcement of competition law.¹¹⁸ For instance, provided that certain conditions have been met, a collective private party may start a civil law suit with a view to skimming off the revenues that are the result of the infringements of the competition rules.¹¹⁹

The *BKartA* also has other tasks besides those in the field of competition law. Units having special powers in the field of public procurement (*Vergabekammern*) also operate within the structure of the *BKartA*. The *BKartA* therefore also has powers in the field of public procurement.¹²⁰

The President of the *BKartA* does not serve a fixed term, and furthermore the *BKartA* is responsible for its own staff policy and has a separate budget.¹²¹ Although the resources of the *BKartA* appear to be declining and are rather small to deal with an economy as large as Germany's, it

105 Lutz, *supra* note 66, p. 725.

106 See § 32 *GWB*.

107 See § 32a *GWB*.

108 See § 32b *GWB*.

109 See § 32c *GWB*.

110 Van Aaken, *supra* note 91, p. 82.

111 Bunte, *supra* note 79, p. 297.

112 See Lutz, *supra* note 66, p. 730.

113 Sylvestre, *supra* note 72, p. 147.

114 On 7 March 2006 the *BKartA* adopted a new *Bonus Regelung*: Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen in Kartellsachen – Bonusregelung.

115 See § 90 *GWB*.

116 OECD Germany 2004, *supra* note 75 p. 26.

117 See Section 2.4 with respect to this procedure.

118 Lutz, *supra* note 66, p. 727.

119 See § 34a *GWB*.

120 Sylvestre, *supra* note 72, p. 150.

121 See § 51 (2) *GWB*.

seems that this national competition authority is operating in a highly efficient way because of its institutional culture.¹²²

The *BKartA* is widely respected and the way this body fulfils its tasks is considered to be one of the successes of German competition law.¹²³ It is believed that the defining feature of German competition law is the independent institutional culture of the *BKartA*.¹²⁴ However, in this respect it should be noted that non-federal competition authorities, the *Landeskartellbehörden*, are not independent bodies but organs of German states (*Länder*). The *Wirtschaftsminister und –Senatoren* (Ministers for Economic Affairs and senators) of the German states are operating as *Landeskartellbehörden*.¹²⁵ Because the *Landeskartellbehörden* do not have an independent status, their role in enforcing competition law is rather insignificant in Germany. As has already been mentioned, in this contribution we will not elaborate on the position of these bodies in German competition law.

As regards the enforcement of the *BKartA*, it mainly focuses on the prosecution of price, quota and submission cartels.¹²⁶ In this respect the case on cement cartels setting quota and territorial agreements for many decades is illustrative, as in this case the *BKartA* imposed administrative fines amounting to a total of 702 million Euros.¹²⁷

3.2.2. *Monopolkommission*

At federal level the *Monopolkommission*¹²⁸ also fulfils a significant function in German competition law. According to § 44 *GWB* this committee has as its main task to deliver a report on the concentration developments in Germany every two years. Moreover, the *Monopolkommission* can issue special reports on particular subjects, at the request of the government or on its own initiative.¹²⁹ This *Monopolkommission* consists of five members, who are appointed by the President of the Federal Republic of Germany, after they have been nominated by the federal government.¹³⁰ They are often economic or law professors as well as lawyers and business people.¹³¹ Like the *BKartA*, this body operates in an independent way¹³² and has published important reports and recommendations on regulation and competition.¹³³ The *Monopolkommission* is not regarded as a competent competition authority (*Kartellbehörde*) within the meaning of German competition law, and as a consequence it does not have the power to issue binding decisions, like the decision to impose fines.

3.2.3. *Bundesministeriums für Wirtschaft und Technologie (BMW)*¹³⁴

The *GWB* does not contain general provisions governing the position of the *Minister für Wirtschaft und Technologie* (the Minister for Economic Affairs and Technology, hereafter: the Minister for Economic Affairs). Nevertheless, it has been acknowledged that the Minister for Economic Affairs is entitled to give instructions to the *BKartA*, but he has rarely used this

122 OECD Germany 2004, *supra* note 75, p. 28.

123 *Ibid.*, p. 38.

124 *Ibid.*, p. 21.

125 Bunte, *supra* note 79, p. 293.

126 Sylvestre, *supra* note 72, p. 144.

127 See the information Brochure of the *BKartA*, ‘The Bundeskartellamt in Bonn. Organisation, History and Activities’, Bonn May 2005, p. 7.

128 In English: Monopoly Commission.

129 E.-J. Mestmäcker and W. Veelken in: Immenga/Mestmäcker, *supra* note 80, § 46 Rn 1.

130 Sylvestre, *supra* note 72, p. 140.

131 OECD Germany 2004, *supra* note 75, p. 23.

132 *Ibid.*, p. 23.

133 *Ibid.*, pp. 5 and 23.

134 In English: Ministry for Economic Affairs and Technology.

power.¹³⁵ It is believed that these orders may cover *general* instructions.¹³⁶ General instructions must be published according to § 52 of the *GWB*.

However, there is debate on the question to what extent instructions may involve *individual* affairs as well. According to some authors such instructions are allowed.¹³⁷ It has been pointed out, however, that the power of the Minister to give individual instructions only concerns the discretionary competences of *BKartA*.¹³⁸ After all, instructions are not allowed to contradict the law and as a result could not force the *BKartA* to exercise its powers in another way than prescribed by the relevant legislative measures. In this view therefore it is not excluded that the Minister intervenes in an individual case, although he has seldom done so in the past. Other authors take the opposite point of view that the Minister is not competent to issue individual instructions, given the quasi-judicial decision-making structure of the panels of the *BKartA*.¹³⁹ Thus, it is not clear from the outset whether the Minister for Economic Affairs is competent to intervene in the decision-making process in individual cases. But it is obvious that such interventions are considered to be controversial in German competition law and should therefore not be made too often.

Until the 7 *GWB-Novelle* entered into force, the Minister was entitled to intervene in the way the cartel prohibition regarding horizontal agreements was applied, by issuing *Sondererlaubnissen* (special authorizations).¹⁴⁰ For policy reasons, he had the power to approve horizontal agreements that were contrary to German competition law. These policy reasons were not connected to competition considerations, but to the economy as a whole and the public interest.¹⁴¹ However, the 7 *GWB-Novelle*, which adjusts German competition law to Community law, has repealed the Minister's power to issue *Sondererlaubnissen*. Accordingly, the competences of a political body to intervene in the process of the application of competition rules with a view to the public interest have decreased in German law.

Conversely, pursuant to § 42 *GWB* the Minister for Economic Affairs is still entitled to authorize a concentration that has been disapproved by the *BKartA* because the concentration at hand is justified by an overriding public interest. Before the Minister takes such a decision, the *Monopolkommission* has to give advice and the non-federal competition authorities from the states where the companies concerned are registered must be given the opportunity to present their views as well.¹⁴² In most cases the Minister for Economic Affairs has followed the advice of the *Monopolkommission*.¹⁴³

In this respect it should be noted that these interventions of the Minister only take place rarely and are considered to be controversial.¹⁴⁴ Nevertheless, a decision taken by the Minister according to § 42 *GWB* might have a considerable impact on German competition policy. An important example is the *Ruhrigas* case.¹⁴⁵ In this case the Minister concluded that a concentration in the gas sector should be authorized as this would create a national 'champion' which could improve

135 OECD Germany 2004, *supra* note 75, p. 22.

136 See for instance Bunte, *supra* note 79, p. 290 and S. Klaue in: Immenga/Mestmäcker, *supra* note 80, § 51 Rn. 11.

137 See for instance R. Bechthold, *GWB. Kartellgesetz*, München 2002, p. 500.

138 S. Klaue in: Immenga/Mestmäcker, *supra* note 80, § 51 Rn. 11-15.

139 See for example Bunte, *supra* note 79, p. 291.

140 The old version of § 8 *GWB* provided such an intervention.

141 Sylvestre, *supra* note 72, p. 143.

142 See § 42 (5) *GWB*.

143 See the Report on Experience with Ministerial Approval Proceedings for Company Mergers, Supplement to Monthly Report 7 - '92 of the BMWi, p. 4.

144 OECD Germany 2004, *supra* note 75, p. 22.

145 See the *Ministererlaubnis* of the Minister for Economic Affairs of 5 July 2002 in the *Ruhrigas* case, *Gesch.-Z.*: I B 1 - 22 08 40 / 129 and the *Ministererlaubnis* of the Minister for Economic Affairs of 19 September 2002 in the *Ruhrigas* case, *Gesch.-Z.*: I B 1 - 22 08 40 / 129.

national supply security, although the *Monopolkommission* did not support the claims that the merger at hand was beneficial to the public interest.¹⁴⁶ Consequently, the *Ruhrigas* case indicates that in circumstances in which political considerations play a major role, the Minister for Economic Affairs does not shy away from not following the recommendations of this advisory body.

Accordingly, from the foregoing it appears that on the one hand the political influence was not large in German competition and has become even less. On the other hand, notably in the field of merger control, this kind of influence still exists. So, even in German competition law, where from the early days of this law the importance of an independent competition authority has been acknowledged, the need exists for a political body that is entitled to intervene with a view to the public interest, at least according to the national legislature. In addition, it should be pointed out that the *BKartA* does not like to integrate policy considerations other than competition in its decisions and is also uncomfortable with the suggestion that it should promote competition policy; promoting competition policy is seen as a task of the *Monopolkommission*.¹⁴⁷

4. The competent authorities in UK competition law

In this section, we will first touch upon the general features of UK competition law. Second, the position of the competent authorities will be discussed.

4.1. General overview of the UK competition rules

Like German law, the modern UK competition rules mainly echo EC competition law. Nevertheless, as will be shown below, the structure of these rules differs to some extent from the relevant German and European rules, especially in the field of ‘monopolies’. UK competition law consists of a complex set of provisions.¹⁴⁸

The UK competition rules have largely been laid down in the Competition Act 1998 and the Enterprise Act 2002. These Acts are the result of an on-going process of changing and altering national competition law in the UK. An important reform was completed in 2002. On 7 November of that year, the Enterprise Act 2002 received Royal Assent and entered into force on 20 June 2003.¹⁴⁹ Another important change in the law was the adoption of the Statutory Instrument 2004 no. 1261 (‘The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004’).¹⁵⁰ This secondary legislation adjusts UK competition law to Regulation 1/2003 of the EC and entered into force on 1 May 2004 (for almost all purposes), like Regulation 1/2003. After these changes in the law, the main structure of UK competition law is as follows.

4.1.1. The cartel prohibition

In Chapter I of the Competition Act 1998, the cartel prohibition has been laid down: it is found in Section 2(1). This provision, which is usually called the ‘Chapter I prohibition’, is very similar to Article 81 EC, save with respect to the criterion regarding trade: of course, the Chapter I prohibition is only applicable if trade within the UK might be affected (and not intra-Community trade).¹⁵¹ The other main elements of the UK version of the cartel prohibition largely reflect the

146 OECD Germany 2004, *supra* note 75, p. 20.

147 *Ibid.*, p. 39.

148 R. Whish, *Competition law*, London 2003, p. 308.

149 *Ibid.*, p. 61.

150 This piece of legislation can be found on the internet at: <http://www.opsi.gov.uk/si/si2004/20041261.htm> (last visited, 29 March 2006).

151 A. Johnston and P.J. Slot, *Introduction to Competition Law*, Oxford 2006, p. 53.

wording of Article 81(1) EC. Like EC competition law, agreements between undertakings, decisions by associations of undertakings and concerted practices are caught by the cartel prohibition in UK law. Furthermore, these forms of conduct are forbidden if they have as their object or effect the prevention, restriction or distortion of competition within the UK. Section 2(2) lays down an illustrative list of possible infringements, such as price-fixing agreements. Section 2(3) mirrors Art 81(2) by stipulating that any agreement that violates the Chapter I prohibition is void.

Up to 1 May 2004, undertakings could apply for an individual exemption from the Chapter I prohibition by notifying their agreements to the competent national competition authority. In order to re-align with Regulation 1/2003 of the EC, the UK legislature has abolished the notification system, which was modelled upon the scheme of the old EC individual exemption system. Notification has been replaced by a legal exception regime. In this respect, it should also be noted that, pursuant to Section 10 of Competition Act 1998, the Community block exemptions enshrined in EC regulations and Commission decisions in which certain agreements are declared to be in conformity with EC competition law (Article 10 of EC Regulation 1/2003) are also applicable within the context of the UK rules on the cartel prohibition (the so-called ‘parallel exemption’ system). UK competition law used to have its own system exempting vertical restraints from the cartel prohibition (under the old Section 50 of the 1998 Act). Due to the intention of the national legislature to align the UK regime with EC competition law, this system has been repealed. In the present UK regime, vertical agreements meeting the conditions of the EC block exemption on vertical restraints are also exempted from the Chapter I prohibition.

4.1.2. Dominant positions and monopolies

Section 18 of the Competition Act 1998 provides that any conduct on the part of one or more undertakings that amounts to the abuse of a dominant position is prohibited. It is obvious that this prohibition echoes Article 82 EC. As Section 18 has been laid down in Chapter 2 of the Competition Act 1998, it is known as the ‘Chapter II prohibition’. In this respect it should be pointed out that Paragraph 4 of Schedule 3 provides that the Chapter 2 prohibition does not apply to an undertaking entrusted with the operation of services of general interest or having the character of having a revenue-producing monopoly. The Chapter I prohibition does also not apply to such an undertaking. Paragraph 4 of Schedule 3 echoes Article 86(2) EC for the most part.

The Chapter II prohibition on market power parallels the EU Treaty language.

However, the new EC like prohibition system co-exists with the long-standing UK regime for dealing with ‘monopoly’ (under the old terminology, ‘complex’ and ‘scale’ monopolies). This regime already existed under the auspices of the Fair Trading Act 1973. Since the 2002 reform, the body competent for the enforcement of the ‘monopoly provisions’ – now known as the ‘market investigation’ regime – applies a competition-based test. According to the Enterprise Act 2002, which is the governing instrument now in force, the possibility exists that the competent authority can carry out market investigations if it is suspected that any feature or combination of features of a market prevent, restrict or distort competition in the UK. The most important characteristic of these investigations is that they focus upon the operation of the market as a whole, rather than upon the way a single firm or several firms operate, and, as a consequence, no blame is attached to the undertakings that are the subject of the investigations.¹⁵² Following these investigations, the competent authority involved has a wide array of competences, even the

¹⁵² M. Furse, *Competition Law of the EC and UK*, Oxford 2004, p. 294.

power to impose a structural remedy, in order to solve the market problems it has found. In the well-known *Milk Marque* case,¹⁵³ in which the Court of Justice of the EC held that national competition rules could be applied to undertakings operating within the framework of a Common Agriculture Policy, the UK regime on monopolies was at stake. In this case the Court upheld the UK approach regarding monopolies.

4.1.3. Merger control

An important outcome of the 2002 reform in UK competition law was the adoption of new merger control rules. Since this reform, the substantive test is that a ‘substantial lessening of competition’ must be shown as a result of the merger, which has been laid down in Part 3 of the Enterprise Act 2002. This test is competition-based.¹⁵⁴ Unlike EC competition law, under the UK merger control provisions no legal requirement exists to notify mergers to a competition authority, whether prior to the deal or even after its completion. It is, therefore, not surprising that the competition authorities have powers and even the duty to assess completed concentrations if the concentration at hand may result in a substantial lessening of competition.¹⁵⁵ However, in practice most mergers are notified on a voluntary basis.¹⁵⁶ In assessing whether competition has substantially been lessened, the competent competition authority must consider whether coordinated behaviour in the market will occur because of the concentration at hand, resulting in reduced competition in the market.¹⁵⁷ The test of the UK merger control regime does not mirror the central criterion of strengthening a dominant position of the old EC Merger Control Regulation, but does resemble the standard of significant impediment of competition of the new EC Merger Control Regulation. Although both tests are not identical, it is clear that there are likely strong similarities between the UK and the EC approach in practice.¹⁵⁸ Practical experience is to be awaited to see the extent to which the EC and UK merger control regime are applied in a mutually coherent way.

4.1.4. The relationship between UK competition law and EC competition law

The Competition Act 1998 contains a provision on the relationship between UK and EC competition law. Pursuant to Section 60 of this Act, so far as is possible, questions arising under UK competition rules are dealt with ‘...in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community’. Section 60 is able to provide a bridge to EC competition law.¹⁵⁹ It should be noted that the objective of consistency is not absolute,¹⁶⁰ as conformity with Community law is only required ‘so far as is possible’, and, as a consequence, any relevant differences between EC competition and UK competition may be taken into account.¹⁶¹

153 Case C-137/00, *Milk Marque and National Farmers’ Union*, [2003] ECR I-7975.

154 Furse 2004, *supra* note 152, p. 345.

155 Furse 2004, *supra* note 152, p. 346.

156 Whish, *supra* note 148, p. 892.

157 L. Davey and M. Holmes, *A practical guide to National Competition rules across Europe*, Chapter 18 United Kingdom, The Hague 2004, p. 395.

158 Johnston and Slot, *supra* note 151, p. 190.

159 M. Coleman and M. Grenfell, *The Competition Act 1998. Law and Practice*, Oxford 1999, p. 55.

160 Johnston and Slot, *supra* note 151, p. 34.

161 Whish, *supra* note 148, p. 352.

4.2. The powers and the position of the competent authorities in UK competition law

The UK competition system is based upon a tri-partite division of responsibilities among administrative institutions. In this national system, three entities play an important role: the *Office of Fair Trading*, the *Competition Commission* and the Secretary of State of the Department of Trade and Industry. These institutions and their powers will be discussed below.

4.2.1. The Office of Fair Trading

In 1973 the institutional structure of UK competition law was changed, in response to concerns about possible political influences over its operation. The *Director General of Fair Trading (DGFT)* was designated to apply competition rules with the support of the Office of Fair Trading.¹⁶² A subsequent very important development was the adoption of the Competition Act 1998, which became fully effective on 1 March 2000. This Act brought UK competition law into line with the EU's prohibition-based approach. Moreover, as a result of the 1998 Act UK competition law can now impose real penalties for infringements and the Appeal Tribunal, which has jurisdiction to review competition law decisions, was also established.¹⁶³

As already mentioned, in 2002 a further important reform in UK competition policy took place. A significant objective of this reform was to strengthen the institutional independence of the competition authorities.¹⁶⁴ Because of the political influence of the Secretary of State, some professional observers argued that the competition authorities were less independent in the UK than in other countries.¹⁶⁵ The Secretary of State had broad powers to exclude certain agreements and conduct from the prohibitions of the Competition Act. As a result of the 2002 reform, the powers of the Secretary of State have decreased substantially.

As it was felt that it was not appropriate to invest far-reaching powers in an individual office holder, the *DGFT* was abolished and replaced by the corporate entity known as *Office of Fair Trading* (hereafter: *OFT*).¹⁶⁶ Moreover, the *OFT* has become a Non-Ministerial Government Department.¹⁶⁷ According to the Enterprise Act 2002, the board of the *OFT* consists of a chairman and at least four other members. They are appointed by the Secretary of State for a term not exceeding five years. The Chairman is also the Chief Executive. The combination of these functions was the subject of a fierce debate between the government and the House of Lords, which took the point of view that it was improper to unite both functions in one appointment.¹⁶⁸ Therefore, after a transitional period a person appointed as Chief Executive may not at the same time be Chairman according to Paragraph 5 of Schedule 1 of the Enterprise Act 2002. In addition, it should be mentioned that the *OFT* may appoint such staff as it requires. The *OFT* comprises of several Divisions, such as the Competition Enforcement Division and the Legal Division. Obviously, one major task of the *OFT* is to apply and enforce the UK (and, under the modernized regime, the EC) competition rules, but it also has numerous consumer responsibilities under a wide range of consumer protection legislation.¹⁶⁹ It has been argued that the competition law functions of the *OFT* are to be understood as a complement to its task to enforce consumer law:

162 OECD Report The Role of Competition Policy in Regulatory Reform. Regulatory Reform in the United Kingdom, 2002 (OECD UK 2002), p. 9.

163 *Ibid.*, pp. 9 and 14.

164 *Ibid.* pp. 55 and 56.

165 *Ibid.*, p. 25.

166 Whish, *supra* note 148, p. 65.

167 Furse 2004, *supra* note 152, p. 39.

168 M. Furse, *Competition and the Enterprise Act 2002*, Bristol 2003, p. 33.

169 Whish, *supra* note 148, p. 67.

the collective aim of competition and consumer law is to ensure that the market works well for consumers.¹⁷⁰

There are rules for the public accountability of the *OFT*, as this body has to publish annual plans and reports that must be presented to the Secretary of State; those documents must be laid before Parliament.¹⁷¹ In a brochure, the *OFT* states that it is accountable generally for all its actions to Parliament.¹⁷² There is also mediated accountability via the Secretary of State. However, the extent to which strong accountability has ever been exercised seems minimal until now.

The *OFT* takes seriously its responsibilities as a fining organization, and operates a leniency programme.¹⁷³ It has been pointed out that the *OFT* focuses above all upon serious infringements of competition law.¹⁷⁴ Since the 2002 reform, the fines against undertakings could be in the range of GBP 20 million. Furthermore, the leniency programme of the *OFT* is now producing results.¹⁷⁵ In this respect it should be noted that the powers of the *OFT* in the field of enforcement have been extended. It has been granted powers such as entering premises,¹⁷⁶ and it can also seek to disqualify company directors, where their companies are guilty of an infringement of the cartel prohibition or the prohibition on the abuse of a dominant position.¹⁷⁷ A court eventually makes a disqualification order after the *OFT* has started a procedure. If such an order has been made, the company director concerned is disbarred from office for a period not exceeding 15 years. So, the national legislature reinforced the position of the *OFT* not only by decreasing the influence of the Secretary of State, but also by conferring upon it strong enforcement powers.

In this respect, it should be pointed out that also the enforcement of competition rules by penal law has been made possible by the 2002 reform. The threat of a prison term for engaging in hard-core horizontal collusion has been introduced (known as the ‘cartel offence’).¹⁷⁸ The penalty could constitute a term of imprisonment of up to a maximum of 5 years and a potentially unlimited fine.¹⁷⁹ Proceedings may be brought by the Director of the Serious Fraud Office (and in Scotland by the Lord Advocate).

As a result of these developments, increasingly the *OFT* is becoming the principal decision-maker in UK competition law.¹⁸⁰ It is not a surprise, therefore, that the *OFT* is, on behalf of the UK, a member of the European Competition Network.¹⁸¹ The 2004 reform has also increased the possibilities of the *OFT* to share information with other national competition authorities. This change was necessary due to the modernization process in EC competition law.¹⁸² However, it should be noted that Part 9 of the Enterprise Act 2002 lays down a complex series of provisions on disclosure of information.¹⁸³

170 *Ibid.*, p. 68.

171 *Ibid.*, p. 67.

172 A Guide to the Office of Fair Trading, p. 16. This brochure can be found on the internet at: <http://www.oft.gov.uk/NR/rdonlyres/752CCFAF-0052-4FE1-84A4-5D528B75924C/0/oft357.pdf,%20p.%2016> (last visited, 29 March 2006).

173 OECD UK 2002, *supra* note 162 p. 16.

174 Johnston and Slot, *supra* note 151, p. 208.

175 OECD Report United Kingdom, Competition law and Institutions (OECD UK 2004), p. 7.

176 *Ibid.*

177 Whish, *supra* note 148, pp. 389 and 395-397.

178 OECD UK 2004, *supra* note 175, p. 2.

179 Furse 2004, *supra* note 152, p. 134.

180 OECD UK 2004, *supra* note 175, p. 5.

181 Whish, *supra* note 148, p. 68.

182 OECD UK 2004, *supra* note 175 p. 9.

183 Johnston and Slot, *supra* note 151, p. 219.

4.2.2. *The Competition Commission*

The 2002 reform has also guaranteed the independent functioning of the *Competition Commission*. Before this reform the *Competition Commission* was a body that mainly issued reports and recommendations in the field of merger control and the regime for dealing with ‘monopoly’. It was up to the Secretary of State to take binding decisions. A key feature of the change in the UK merger control rules is that the influence of the Secretary of State has been reduced. Like the *OFT*, the *Competition Commission* is a Non-Ministerial Government Department. Under present UK competition law the *Competition Commission* has decisive power in merger review process. However, this process begins with the *OFT*. If the initial investigations of this authority indicate that the merger may result in a substantial lessening of competition, the *OFT* is to refer the merger to the *Competition Commission*. Then again, this referral will not take place, if the *OFT* can negotiate binding undertakings with the parties concerned in order to solve the competition problems.¹⁸⁴ This referral can also be obviated if the market is too unimportant or the benefits to consumers outweigh the threat to competition.¹⁸⁵

In the (typically British) ‘market investigation regime’ the *Competition Commission* has the lead since the 2002 Reform. Under the old regime of the Enterprise Act 1973, the Secretary of State had the decisive powers, as he both decided whether or not to make a reference for investigation and decided on the application of any remedies,¹⁸⁶ whereas now the application of the remedies rests with the *Competition Commission*. Pursuant to Section 131 of the Enterprise Act 2002, the *OFT* may make a reference to the *Competition Commission* if it has reasonable grounds for suspecting that any feature or combination of features of a market prevents, restricts or distorts competition in the UK. References could also be made by the Secretary of State for Trade and Industry (possibly jointly acting with another Secretary of State) under certain (very limited) circumstances. As a result of a reference the *Competition Commission* carries out a market investigation. If the *Competition Commission* finds that there is an adverse effect upon competition or any other detrimental effect upon consumers, it is obliged to determine which actions should be taken.¹⁸⁷ As already mentioned, the test to be applied is based upon competition considerations. It has also previously been pointed out that this competition authority has a wide range of powers in order to address any market problems that it discovers as a result of its investigation.

To conclude this sub-section, it should be noted that the *Competition Commission* also has functions that are not related to the application of the general competition rules. For instance, it has tasks related to privatized utilities: see, e.g., the provisions of the Telecommunications Act 1984 and the Transport Act 2000.¹⁸⁸

4.2.3. *The Secretary of State of the Department of Trade and Industry*

In UK competition law, there is a complex institutional interplay between the Secretary of State of the Department of Trade and Industry, the *OFT* and the *Competition Commission*. In this sub-section, the role of the Secretary of State is discussed.

First of all, the Secretary of State and his Department are responsible for drafting and amending legislation. Furthermore, many senior appointments to positions in the structure of the application

184 OECD UK 2004, *supra* note 175, p. 5.

185 *Ibid.*

186 OECD UK 2002, *supra* note 162, p. 21

187 Furse 2004, *supra* note 152, p. 299.

188 Whish, *supra* note 148, pp. 71 and 72.

of competition law are made by him (for instance the Chairman and other members of the board of the *OFT*, as well the members of the *Competition Commission Council*).¹⁸⁹

The Secretary of State can also be involved in individual competition cases. Under the old system, the Secretary of State had remarkably extensive powers, as he had, for instance, the decisive power to approve a merger, and both the *Competition Commission* and the *OFT* had mainly an advisory role.¹⁹⁰ As a result, the general policy approach of the person who was Secretary of State could be crucial in some cases.¹⁹¹ Conversely, it should be pointed out that under the old UK merger control regime the so-called ‘Tebbitt doctrine’ was adopted by successive Secretaries of State from the mid-1980s, concentrating purely upon competition issues under the old test for merger control.¹⁹² It could be argued that this doctrine removed much of the ‘politicization’ of the process of merger review. In any event, a significant aspect of the 2002 reform was the reduction of the involvement of the Secretary of State.¹⁹³ Yet, this entity is still capable of exerting some influence over the process of decision-making in UK competition law. As regards the way in which the Chapter I prohibition (the cartel prohibition) is applied, it should be noted that Paragraph 6 of Schedule 3 gives the Secretary of State the power to exclude the application of the cartel prohibition in order to avoid conflict with international obligations. Moreover, the Secretary of State has similar powers with respect to public policy according to Paragraph 7 of Schedule 3. However, agreements may only be excluded from the Chapter I prohibition for ‘exceptional and compelling reasons of public policy’. In addition, the Secretary of State may also exclude conduct from the Chapter II prohibition (the prohibition on abuse of a dominant position) under the same conditions. So, in the UK an authority having political powers is entitled to intervene in the way the cartel prohibition and the prohibition on the abuse of a dominant position is applied with a view to safeguarding the ‘public interest’. However, it is highly questionable how much the Secretary of State will make use of these powers under Paragraph 7 of Schedule 3, as the concept of ‘reasons of public policy’ is rather vague and the words ‘exceptional and compelling’ clearly impose a heavy burden on him.¹⁹⁴ In the operation of the Competition Act 1998 since its entry into force, the Secretary of State has never used his power to intervene in an individual case; he has only used this powers to adopt general rules or to deal with specific circumstances.¹⁹⁵ Consequently, it could be argued that political actors, such as the Secretary of State, are willing to contribute to the establishment of a competition law institutional regime that is as free as possible from any such political intervention.

The powers held by the Secretary of State in the context of the ‘market investigation’ must also be mentioned. As already discussed, the *Competition Commission* has decisive powers in this procedure. Nonetheless, the Secretary of State is entitled to intervene in cases in which the public interest is involved.¹⁹⁶ However, this situation can only occur if a public interest specified by Section 153 of the Enterprise Act 2002 is at issue. This Section only refers to public security at present. However, the Secretary of State may by order add other public interest considerations to the list of Section 153.¹⁹⁷ Even if the relevant public interest consideration is not already listed

189 *Ibid.*, p. 65.

190 OECD UK 2002, *supra* note 162, p. 25.

191 *Ibid.*

192 Johnston and Slot, *supra* note 151, p. 176.

193 Furse 2004, *supra* note 152, p. 42.

194 Whish, *supra* note 148, p. 330.

195 See, e.g., the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, SI 2001 no. 319.

196 Furse 2004, *supra* note 152, p. 304.

197 Sections 139-148 of Chapter 2 of Part 4 of the EA 2002 lay down the mechanism by which the Secretary of State may intervene on public interest grounds.

in this section, the Secretary of State is entitled to intervene, provided that he takes rapid steps to add the public interest consideration concerned to the list of Section 153. Although stringent rules regarding the competences of the Secretary of State are applicable, it cannot be denied that a political authority has possibilities to influence the application of the UK rules on monopolies and market investigations with a view to the public interest. However, under the new regime the Secretary of State has never used his powers under Section 153 of the Enterprise Act 2002. Accordingly, when compared with the old regime of the Enterprise Act 1973, the influence of the Secretary of State has been considerably reduced.

According to the present UK merger review rules, the Secretary of State is only involved in the merger review process in exceptional circumstances, if issues that have been listed by the national legislature are involved. According to UK law, only issues related to media, newspapers and national security could amount to a ground for public interest intervention in the merger control process.¹⁹⁸ It should, however, be noted that, like under the regime for dealing with ‘market investigations’, the Secretary of State is given power to add new public interest considerations to the Enterprise Act, provided that these additions have been approved by Parliament. Also under the present UK merger rules a political body therefore has certain possibilities to influence the merger review process with a view to public interest, although the competences of this body are restricted.¹⁹⁹ In a merger case, in which a public interest consideration is at stake, the Secretary of State may issue an intervention notice requiring the *OFT* to report to him on the competition and public interest aspects of the merger at hand.²⁰⁰ Subsequently, the Secretary of State is entitled to refer the merger concerned to the *Competition Commission*, which must consider which remedies (if any) are appropriate.²⁰¹ However, it is ultimately the Secretary of State who decides whether or not enforcement action should be taken, but in practice he has never used these powers in the operation of the Enterprise Act 2002.²⁰²

As regards the relationship between the Secretary of State on the one hand and the *OFT* and the *Competition Commission* on the other hand, the developments that have taken place in UK competition law are of great significance. A central feature of the reform of this regime is the shifting of the responsibility of making decisions from the Secretary of State to the competition authorities.²⁰³ It has been argued that the 2002 reform is probably not the end for politically-inspired cases, as in practice it is difficult for the *OFT* not to investigate matters raised by political entities such as the Secretary of State.²⁰⁴ Nevertheless, the UK legislature has designed the powers in UK competition law in such a way that the independence of both the *OFT* and the *Competition Commission* has considerably increased, and, in practice to date, this independence seems scrupulously to have been respected.

5. The competent authorities in Dutch competition law

In this section the powers of the competent competition authority in the Netherlands will be discussed after a general overview of Dutch competition law has been given.

198 See Johnston and Slot, *supra* note 151, p. 188.

199 *Ibid.*, pp. 188 and 189.

200 *Ibid.*, p. 195.

201 *Ibid.*

202 *Ibid.*

203 Whish, *supra* note 148, p. 881.

204 C. Miller, ‘U.K. Competition Reform: Impact of the Latest Proposals on Process and Influences’, 2002 *European Competition Law Review*, p. 69.

5.1. General overview of the Dutch competition rules

The *Mededingingswet*²⁰⁵ (Competition Act, hereafter *Mw*), effective from 1 January 1998, is the successor to the Dutch Act on Economic Competition (*Wet Economische Mededinging*). Before this date the Netherlands was often referred to as a ‘cartel paradise’, since under the old Act cartels were condoned unless explicitly prohibited, in addition to which general bans applied to hard-core cartel constructions. The old Act was based on an ‘abuse system’, which was generally considered as weakening the Dutch economy and restraining consumer choice and benefits.

The *Mw*, however, is aimed at promoting the dynamics of the economy by imposing bans on competition-restricting arrangements and conduct, and includes a prohibition system to that purpose. The new Act has hereby brought Dutch legislation into line with the competition rules of the EC Treaty. The *Mw* is based on the principles of EC competition law. The *Mw* has been amended several times. It was amended on 1 August 2004 due to the entry into force of Regulation 1/2003.²⁰⁶ This led, *inter alia*, to the inclusion of a directly applicable exception to the cartel prohibition in Article 6(3) *Mw*, thereby repealing Article 17 *Mw*, which contained the possibility for the competent competition authority to exempt restrictive agreements. Another important amendment took place on 1 July 2005, when the competent competition authority became an autonomous administrative authority, which means that it can act independently from the Ministry of Economic Affairs.²⁰⁷

A new amendment is on its way now that the Minister of Economic Affairs has proposed to amend the *Mw* with a view to increasing the effectiveness and efficiency of the enforcement of the Act and to further align the Act with EC competition law.²⁰⁸ One of the important features of the legislative proposal is that the national rules on merger control will be changed in accordance with the EC rules, which are now laid down in Regulation 139/2004 (see hereafter).

5.1.1. The cartel prohibition

Article 6(1) *Mw* prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices by undertakings, which have as their object or effect the prevention, restriction or distortion of competition within the Dutch market, or a part thereof. Such agreements are legally null and void (Article 6(2) *Mw*). The national court will issue this sanction.

Article 6 *Mw* has a similarly broad scope of application as Article 81 EC and applies to both horizontal and vertical agreements.²⁰⁹ Article 7 *Mw* contains a *de minimis* rule, which refers to the combined turnover of the undertakings party to an agreement instead of to market shares, which are used in the *de minimis* notice of the European Commission.

Like the system that Regulation 1/2003 has introduced, Article 6(3) *Mw* has been modelled as a legal exception and mirrors Article 81 (3) EC. Apart from the exception provided by Article 6(3) *Mw* and similarly to UK competition law, the EC block exemption regulations are relevant, which, as is confirmed in Articles 12 and 13 *Mw*, also apply in the Netherlands. Apart from these

205 *Staatsblad* 1997, 242.

206 ‘Wet modernisering EG-mededingingsrecht’, Law concerning the modernization of EC competition law, *Staatsblad* 2004, 345.

207 See also Speech by Pieter Kalbfleisch for the International Conference on ‘The Modernisation Reform of EC Anti-trust enforcement and its effects in the National Legal Order’, 2 December 2005, Stockholm, to be found at: http://www.nmanet.nl/Images/speech%20pieter%20stockholm_tcm16-85034.pdf.

208 Proposal to amend the *Mededingingswet* as a result of the evaluation of this Act, *Kamerstukken II* 2004-2005, 30 071.

209 O. Jansen, ‘Country Analysis – The Netherlands’, in: G. Dannecker and O. Jansen, *Competition Law Sanctioning in the European Union*, The Hague, London, New York 2004, p. 672.

EC block exemptions, the national legislator has adopted block exemptions with regard to the activities of medium-sized and small enterprises.²¹⁰

Furthermore, Article 11 *Mw* contains a specific exception for agreements and restrictive practices as referred to in Article 6 *Mw*, involving at least one undertaking entrusted with the provision of services in the public economic interest, similarly to Article 86(2) of the EC Treaty.

5.1.2. *The abuse of a dominant position*

Article 24 *Mw* prohibits the abuse of an economic dominant position by one or more undertakings. Article 1(i) *Mw* defines an economic dominant position as a ‘position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users’. This definition is clearly derived from the *United Brands* case²¹¹ of the Court of Justice, which means that the concept of dominant position in the *Mw* must be interpreted in accordance with EC competition law.²¹²

The same goes for establishing whether an undertaking abuses its economic dominant position (see above, Section 2.1.2), whereby a distinction is made between exploitative and behavioural abuse.²¹³ Contrary to Article 82 EC and similarly to Article 6 *Mw*, Article 24 *Mw* does not contain a list of examples of prohibited practices. The prohibition of abuse of an economic dominant position does not apply to concentrations.

There is no exception similar to Article 6(3) EC in respect of violations of Article 24 *Mw*. However, Article 25 *Mw* gives an exception in relation to the performance of special tasks similar to Article 86(2) of the EC Treaty.

5.1.3. *Merger control*

The rules on merger control are laid down in Chapter V of the *Mw*. They apply to concentrations, whereby the combined turnover of the participating undertakings exceed a certain threshold as laid down in Article 29 *Mw*. Concentrations with a Community dimension fall, of course, under the EC rules on merger control, which are laid down in Regulation 139/2004. The competent competition authority may decide on concentrations with a Community dimension, but only if the Commission has empowered them to do so on the basis of Articles 4(4) and 9(1) of Regulation 139/2004 (see above, Section 2.1.3).

Before concentrations can be implemented, they have to be notified to the competent competition authority (Article 34 *Mw*); then a licence will have to be obtained, which will be refused by the competent competition authority if it appears that as a result of the concentration a dominant position could arise or be strengthened that appreciably restricts actual competition on the Dutch market or a part thereof (Article 41 *Mw*). However, according to the current legislative proposal (see above) the ‘dominant position test’ will be changed and replaced by the ‘significant impediment of competition’ test, which has been included in Articles 2(2) and 2(3) of Regulation

210 ‘Besluit vrijstelling combinatieovereenkomsten’ (combination agreements in the field of procurement), *Staatsblad* 1997, 592; ‘Besluit vrijstelling branchebeschermingsovereenkomsten’ (sector protection agreements in new shopping centres), *Staatsblad* 1997, 596; ‘Besluit vrijstellingen samenwerkingsovereenkomsten detailhandel’ (cooperation agreements in the field of retail trade), *Staatsblad* 1997, 704; see also Bart L.P. van Reeken and Steven B. Noë, ‘Competition Law in the Netherlands’, in: Vogelaar, Stuyck and Van Reeken (eds.), *Competition Law in the EU, its Member States and Switzerland*, The Hague, Deventer 2000, pp. 436-440.

211 Case 27/76, *United Brands/Commission*, [1978] ECR 207.

212 See also Jansen, *supra* note 209, p. 672; Case 27/76, *United Brands/Commission*, [1978] ECR 207.

213 See also the explanation of the proposal for the adoption of a Competition Act provided by the Dutch government: *Kamerstukken II* 1995-1996, 24 707, no. 3, p. 26.

139/2004. This shows how closely the Dutch legislator follows developments in EC competition law.

5.1.4. The relationship between Dutch competition law and EC competition law

There is no provision in the *Mw* expressly stating that questions arising under Dutch competition law are dealt with in a manner, which is consistent with the treatment of corresponding questions arising in Community law, like in UK competition law (see above, Section 4.1.4). Nonetheless, according to the explanatory memorandum, the provisions in the *Mw* are oriented towards the EC competition rules and refer to and include definitions of EC competition law.²¹⁴ The term undertaking, for example, is defined in Article 1(f) *Mw* as ‘an undertaking, as referred to in Article 81(1) of the Treaty’. Furthermore, the point of departure, as explained in the Explanatory Memorandum, is that the *Mw* will neither be more stringently, nor more flexibly applied than EC competition law.²¹⁵ Consequently, although the *Mw* does not contain explicit provisions on the relationship between national competition law and Community competition law, it appears from the Explanatory Memorandum that the substantive competition rules of the *Mw* must be interpreted in the light of EC competition law.

5.2. The powers and the position of the competent authorities in Dutch competition law

The *Nederlandse Mededingingsautoriteit* (Netherlands Competition Authority, hereafter: *NMa*) has the task of implementing and enforcing the *Mw*. According to Article 5 *Mw* ‘the task of the board shall be to perform activities for the implementation of this Act as well as for the implementation of the other Acts, in so far as this is stipulated in the respective Acts’. The Dutch legislator has preferred administrative enforcement of the *Mw* to criminal enforcement. One of the arguments for this choice was that the body responsible for the investigation and sanctioning of infringements, *i.e.* the *NMa*, should remain in contact with the European Commission for the necessary harmonization of competition policy.²¹⁶

5.2.1. The NMa

For the exercise of its powers the *NMa* is subdivided into several departments, such as the Anti-trust Department, Concentration Department and the Legal Department. The *NMa* is administered by a board, which consists of three members including a President (Article 3 *Mw*). The President of the governing board is appointed for a maximum period of 6 years, whereas the other members are appointed for a maximum period of 4 years.²¹⁷ Since the *NMa* enjoys no separate legal personality, it is entirely dependent on the Minister of Economic Affairs for its budget.²¹⁸ Nevertheless, the *NMa* has so far functioned rather independently in practice.²¹⁹

A striking feature of the organization of the *NMa* is the choice for the ‘all-in-one hand system’ (*alles in één hand stelsel*), which is a centralized system, whereby almost no formal or physical distinction between investigating and decision-making services is made. The idea was that in order to make competition policy effective and efficient all exercising powers should remain within one and the same organization, within one hand.²²⁰

214 *Kamerstukken II* 1995-1996, 24 707, no. 3, p. 10; see also Jansen, *supra* note 209, p. 690.

215 *Kamerstukken II* 1995-1996, 24 707, no. 3, p. 10.

216 See Explanatory Memorandum, *Kamerstukken II* 1995-1996, 24 707, no. 3, p. 43, quoted from: Jansen, *supra* note 209, p. 696.

217 A.F. Brenninkmeijer and S. Lavrijssen, ‘Independent Administrative Authorities in the Netherlands’, in: R. Caranta, M Andenas and D. Fairgrieve (eds.), *Independent Administrative Authorities*, London 2004, p. 151.

218 Brenninkmeijer and Lavrijssen, *supra* note 217, p. 152.

219 *Ibid.*

220 Explanatory Memorandum, *Kamerstukken II* 1995-1996, 24 707, no. 3, p. 50.

However, a factual, or internal, distinction between the different tasks – through the establishment of what are known as ‘Chinese Walls’ – was considered desirable. This factual distinction was recognized by the former Article 3(2) *Mw* stipulating that the persons involved in the decision-making procedure shall not be involved in the preparation of reports and in the preceding investigation. But this provision has been withdrawn as a result of the latest amendment of the Act. The new provisions on the tasks of the board further emphasize the organizational unity of the *NMa*, whereby the board, and previously the Director-General, gives instructions to both the Anti-trust Department, which is responsible for investigation, and the Legal Department, which is, *inter alia*, responsible for imposing sanctions.²²¹

Even though this system, whereby all tasks remain within one and the same organization, has been disputed, there are for the moment no plans to change it, mainly due to the presumed effectiveness and efficiency of the present system. In this respect it should be noted that there are rules for the public accountability for the *NMa*, as it must publish an annual report every year.²²²

The powers of the *NMa* can be divided into investigating powers and decision-making powers. The possibility to impose administrative sanctions and orders subject to a penalty can be found in Chapter 7 of the *Mw*. The *NMa* has also adopted Leniency Guidelines with a view to simplifying regulation and investigation, as well as Guidelines for the setting of fines.²²³ Furthermore, in the recent legislative proposal to amend the *Mw* the Minister, *inter alia*, proposes to give the *NMa* the power to impose fines on individual managers of undertakings, which have infringed competition law.²²⁴ Article 88 *Mw*, furthermore, provides that the *NMa* is the authorized authority to apply Articles 81 and 82 EC.

In addition to the *NMa*'s tasks under the *Mw*, the *Directie Toezicht Energie* (Office of Energy Regulation) has been included within the *NMa* as a chamber. The *Directie Toezicht Energie* is responsible for the implementation and supervision of the Electricity Act of 1998 and the Gas Act of 2000. The *Vervoerkamer* (The Office of Transport Regulation) is also a part of the Netherlands Competition Authority. This chamber, which was officially set up in 2004, exercises sector-specific supervision of (competition in) the railway sector and other public transport, such as trams, metros and bus transport, and Schiphol Airport.²²⁵

5.2.2. *Adviescommissie Bezwaarschriften Mededingingswet*

Unlike German and UK competition law, there is no other organization responsible for the implementation of Dutch competition law. However, pursuant to Article 92 *Mw* and within the framework of the *NMa* an ‘independent’ advisory commission, the *Adviescommissie Bezwaarschriften Mededingingswet* (Advisory Committee on Administrative Appeals under the Competition Act, hereafter: *BAC*), which must not consist of employees of the Ministry of Economic Affairs or of members of the board of the *NMa*, shall be consulted, if parties decide to appeal against a decision with the *NMa*.²²⁶

221 See also the critical remarks made by members of the Dutch parliament (of the Christian Democrats) during the discussions on the legislative proposal for amending the Competition Act as a result of the evaluation of that Act: *Kamerstukken II* 2005-2006, 30 071, no. 8, p. 2.

222 Brenninkmeijer and Lavrijssen, *supra* note 217, p. 151.

223 Leniency Guidelines of 28 June 2002, to be found at: http://www.nmanet.nl/Images/14_8180_tcm16-24907.pdf; Guidelines for the Setting of Fines, to be found at: http://www.nmanet.nl/Images/14_10518_tcm16-75169.pdf.

224 See Article 59 *Mw* of the legislative proposal for amending the *Mw* as a result of the evaluation of that Act, *Kamerstukken II* 2005-2006, 30 071, no. 2.

225 See also: <http://www.nmanet.nl/engels/home/Index.asp>.

226 Since 1 September 2004 it is possible to leave out the administrative procedure and directly appeal to the Court of Rotterdam, but only if certain requirements have been met: *Wet rechtstreeks beroep*, *Staatsblad* 2004, 220.

The competences of the *BAC* do not cover other decisions taken by the *NMa*, than those decisions, by which a sanction (fine or penalty) has been imposed on one or more undertakings. After the *NMa* has imposed a fine, the parties concerned can put forward objections. The *BAC* is empowered to give an advisory opinion, including recommendations on how the *NMa* should deal with the objections raised by the parties involved. Subsequently, the *NMa* takes a final decision regarding these objections. It must take into account the advisory opinion of the *BAC*. But the *NMa* may deviate from the advisory opinion, provided that it states the reasons for this deviation.

5.2.3. The Minister of Economic Affairs

The *NMa* falls under the responsibility of the Minister of Economic Affairs. The relationship between the Minister and the *NMa* has recently been altered. Below the situation both before and after this change is discussed.

The position of the NMa before 1 July 2005: the NMa as a directorate-general of the Ministry of Economic Affairs

In setting up the organization for the implementation and enforcement of the *Mw* the government chose an internal autonomized service, the *NMa*, as a non-autonomous directorate-general of the Ministry of Economic Affairs.²²⁷ At the time of the drafting of the *Mw* the Minister of Economic Affairs considered it desirable to maintain full ministerial responsibility for the implementation of the *Mw*. Essentially two reasons were given for this: First, the fact that decisions involving starting an infringement procedure, imposing sanctions or, for example, granting or refusing licences may be politically sensitive decisions. Second, the *NMa* would have to come up with a completely new Act, which may require a certain degree of direction by the Minister.²²⁸

The result was that the former Article 2 *Mw* stipulated the following: ‘A Netherlands Competition Authority shall operate under the responsibility of our Minister’. Furthermore, in Article 4 *Mw* it was included that the Minister, apart from issuing general instructions to the Director-General regarding the performance of the tasks assigned to the Director-General in this Act, could issue instructions regarding the exercise of powers of the Director-General in *individual* cases.

Nonetheless, the Minister had made clear that, although the *NMa* would be subordinate to the powers of the Ministry of Economic Affairs, it would only become involved in exceptional circumstances.²²⁹

Situation after 1 July 2005: the NMa as an autonomous administrative authority

As a result of the latest amendment of the *Mw*, the *NMa* has now become an autonomous administrative authority. The consequence is that the provision stipulating that the *NMa* falls under the responsibility of the Minister has been withdrawn. The Minister of Economic Affairs no longer has the formal power to issue instructions in relation to individual cases during proceedings, but pursuant to Article 5b *Mw*, can issue general instructions as to how the *Mw* must be implemented. The instructions to the board of the *NMa* as to how it must exercise its powers under the *Mw* can, according to Article 5d *Mw*, include how other interests than economic ones are taken into account by the board. So far, the Minister of Economic Affairs has never issued

²²⁷ See also Jansen, *supra* note 209, pp. 684-685.

²²⁸ See Explanatory Memorandum, *Kamerstukken II 1995-1996*, 24 707, no. 3, pp. 48-49; see also Jansen, *supra* note 209, pp. 684-685.

²²⁹ Jansen, *supra* note 209, p. 685.

– general or individual – instructions to the *NMa*. The rather quick change in political opinion concerning the position of the *NMa* since the entry into force of the *Mw* has been criticized in legal literature.²³⁰

According to the Minister in the Explanatory Memorandum to the original legislative proposal, if the Minister is no longer allowed the authority to instruct the Director-General of the *NMa* concerning decisions in individual cases, the undesired aspect of political influencing will be avoided. Political influencing is considered undesirable because, according to the Minister, all kinds of sub-interests could harm the Dutch economy.²³¹ Eventually, the transformation of the *NMa* into an autonomous administrative authority led to the introduction of an independent board replacing the Director-General, which was hierarchically subordinate to the Minister of Economic Affairs.

Interestingly, the possibility for the Minister in *concentration* cases to decide, contrary to the opinion of the board of the *NMa*, to grant a licence for the implementation of a concentration for important reasons in the public interest, which outweigh the expected restriction of competition, continues to exist pursuant to Article 47(1) *Mw*.

So far the Minister of Economic Affairs has only once adopted a decision on the basis of Article 47 *Mw*, which concerned the *RAI/Jaarbeurs* case,²³² where the *NMa* had refused to grant a licence for a merger between the two large congress centres in the Netherlands, *RAI* and *Jaarbeurs*.²³³ The parties to the merger had asked the Minister of Economic Affairs to overrule the decision of the *NMa*, which the Minister did not do. From this decision it appears that the Minister will make a purely political evaluation and will rely on political and policy grounds, which could not properly have been taken into account by the *NMa*.²³⁴ The review by the Minister is rather strict and primarily economic arguments brought forward by the parties cannot be considered as important reasons in the public interest. After all, the *NMa* reviews such economic arguments and competition issues.²³⁵

6. Concluding remarks

In the light of the foregoing two types of conclusions can be drawn. The first set of conclusions covers the position of the national competition authorities we examined in this contribution. The second set of conclusions concerns the relationship between these authorities on the one hand and EC competition law and the Commission on the other hand.

6.1. The position of the national competition authorities in Germany, the UK and the Netherlands

6.1.1. Internal design of a competition authority

From the national competition systems that we examined in our article it appears that the independent functioning of the national competition authorities is not only guaranteed *vis-à-vis* political actors, such as the Minister, but also by the method, in which their internal design has

230 W.T. Algera, 'Is de ZBO-status voor de NMa nu al wenselijk? – Een institutionele en materiële onderbouwing over 'verborgen kamers' in het mededingingsrecht', in: J.W. van de Gronden and R.G.J.M. Widdershoven (eds.), *Mededingsautoriteiten als zelfstandig bestuursorgaan: onafhankelijk toezicht?*, Deventer 2002, pp. 93-143.

231 *Kamerstukken II* 2000/2001, 27 639, no. 3, pp. 3-4; see also Jansen, *supra* note 209, p. 686.

232 D-G NMa, Case 47, *RAI-Jaarbeurs*, 31 July 1998.

233 See also M.R. Mok, *Kartelrecht I*, Deventer 2004, p. 406.

234 Van Reeken and Noë, *supra* note 210., p. 470.

235 See M.R. Mok, 'Actualiteiten – Toepassing Mededingingswet', 1999 *Ondernemingsrecht*, no. 12, pp. 332-334.

been shaped. In this regard it should be pointed out that the transformation from ‘one-headed management’ to a board (consisting of several persons) took place both in the UK and in the Netherlands. In the view of the national legislatures of both countries it was not appropriate to invest far-reaching powers in an individual office holder. This development reinforces the independent operating of the competition authorities in the UK and the Netherlands, as the policy approach of these authorities is no longer dependent on the views of just one person.

Furthermore, in the UK a person appointed as Chairman of the *OFT* may not at the same time hold the position of Chief Executive of this authority. As a result, the chance that powers are arbitrarily used, has been remarkably reduced. In our view, the fact that under UK competition law two bodies with substantial powers (the *OFT* and the *Competition Commission*) operate, is even more important. This characteristic of UK competition law amounts to a system based on checks and balances and to a balanced implementation of competition policy.

In this respect, the most notable feature of the internal design of a national competition authority is the role that *Beschlussabteilungen* (Decision Divisions) of the *BKartA* play in German competition law. As already mentioned, these divisions make their decisions in a panel and the outcome of the decision-making process of a *Beschlussabteilung* cannot be influenced by the President of the *BKartA*. Accordingly, in German competition law the decisions are not only taken independently from the political sphere, but also from the management board of the competent competition authority itself. Without a doubt the central role of the *Beschlussabteilungen* strengthens the independent application of competition law in Germany.

In subsection 5.2.1 of this article it has been pointed out that the ‘all-in-one hand system’ (in which one competition authority has considerably far-reaching power) has been disputed in the Netherlands. In such a system the management board of a competition authority is granted considerable powers. In countries like the Netherlands, the legislature could consider which lessons could be learned from the competition law systems of other national legal orders. In Germany the feature of the independent decision divisions takes the edge off the drawbacks of an ‘all-in-one hand system’. In the UK the national legislature has opted for a system, in which the powers are divided between two independent competition authorities.

6.1.2. The independent position from the political sphere

As regards the relationship between a national competition authority and the political sphere, it should be put forward that none of the national legislators has opted for total independence of such an authority. This is not a surprise: Although the application of competition law must be insulated from short-term political influences, long-term political considerations must be accommodated in how competition policy is implemented.²³⁶

How did the national legislatures of the three countries that we examined in this article shape the delicate balance between the competition authority and the (responsible) Minister? In Germany and the Netherlands a distinction has been made between general and individual instructions in anti-trust cases (cartel prohibition and the prohibition on the abuse of a dominant position). The Minister is allowed to issue general instructions towards the competent competition authority in German and Dutch law. By contrast, according to Dutch competition law individual instructions issued by the Minister, *i.e.* instructions covering individual cases, are unlawful. In Germany, the competence of the Minister to give such instruction is open to doubt. As a result individual instructions are considered to be controversial in German competition law. In the UK, however,

236 See Wise, *supra* note 89, p. 90.

the Secretary of State is allowed to intervene in individual cases with a view to certain public interests. But such an intervention may only be taken in limited circumstances and is lawful only if a public interest explicitly mentioned in the laws is at stake. New public interests could be added to the list of these laws, but the procedure to attach such interests to this list is subject to stringent provisions. Consequently, the 'UK intervention system' has been based on a model of strict procedures.

Important recent developments that took place in German, UK and Dutch competition law are the result of the modernization process of EC competition law. In this regard it should be noted that under the old German competition law regime the responsible Minister had special powers to intervene in the way competition authorities granted individual exemptions from the cartel prohibition. Due to the entry into force of Regulation 1/2003, the national individual exemption regimes have been abolished and, as a consequence, an important intervention instrument of the Minister has also been eliminated in Germany. National competition legislation has thus been adjusted to Community law and the system of 'legal exception' introduced by Regulation 1/2003. A remarkable side effect of this process is the reinforcement of the independent status of national competition authorities.

In this respect it should be pointed out that the main reason for interventions by the Minister in the decision-making process in competition law is the realization of a public interest. Especially in the field of merger control the Minister has powers to intervene in the decision-making process in German, UK and Dutch competition law. Remarkably, under present German and Dutch competition law the Minister even has powers to intervene in individual merger control cases in contrast with anti-trust cases. In this respect it should be noted that other values than competition goals could play a role in how competition law is applied. Consequently, it makes sense that the Minister is entitled to intervene with a view to the public interest. Conversely, the Minister might be tempted to make improper use of his intervention powers. Although these powers are only used in exceptional cases, the impact of a political intervention must not be underestimated. As already stated, in Germany the Minister for Economic Affairs applied the theory of national champions (also called 'economic patriotism') in the *Ruhrigas* case, and the merger involved, which was originally blocked by the *BkartA*, was permitted by this political authority. In this case it cannot be ruled out that protectionism played an important role.

Current developments in competition law in Europe seem to support the view that especially in merger control proceedings political bodies intervene in order to protect national industry interests. For instance, it is believed that the Spanish government is taking measures in order to prevent a foreign undertaking (the German electricity company *Eon*) to take over the Spanish power company *Endesa*²³⁷ (and is encouraging the Spanish undertaking *Gas Natural* to acquire *Endesa*). The Commission is not entitled to apply the Community merger control regime to this concentration, as the majority of the turnover is realized on the territory of one Member State, Spain (two-thirds rule). (After the completion of our paper it was made known that eventually *Endesa* was acquired by *EON*. See the press release of the Commission of 25 April 2005, IP/06/528). It has also been suggested that the French government is supporting merger plans of *Suez* and *Gas de France* in order to prevent a take-over of *Suez* by the Italian power/electricity company *Enel*.²³⁸ Moreover, in Section 2.1.3 it has already been put forward that in the *Unicredit/HVB* case the Commission has launched a procedure against Poland. The Polish

237 See for instance *NRC Handelsblad*, 7 March 2006, p. 13.

238 See for instance *NRC Handelsblad*, 9 March 2006, p. 13.

government pointed out that the main reason for its intervention in this case was the ‘protection of competition on the Polish market of financial and banking services’.

Protectionism harms the proper functioning of the internal market of the EU. At this point of our analysis, EC competition law and the position of the Commission come into play.

6.2. EC competition law and the position of the Commission

In order to prevent the functioning of the internal market being undermined by national interventions in the field of merger control it should be considered to extend the powers of the Commission. Such an extension could be realized by abolishing the two-thirds rule. After all, the two-thirds rule is capable of preventing the Commission from applying the Community merger control rules in significant and politically sensitive cases, like the *Ruhrigas* case and the *Endesa* case, in which, *inter alia*, the proper functioning of the internal market is at stake. Another suggestion would be to grant the Commission the power to relieve the national authorities from their competence to apply national merger control rules whenever there is a significantly appreciable effect on trade. A similar possibility for the Commission to intervene in cases dealt with by the national authorities exists in respect of cartels and abusive practices as laid down in Article 11(6) of Regulation 1/2003 (see above, Section 2.4).

The proper functioning of the internal market as a core aim of Community law at least partly explains the position of the Commission and the institutional structure of Community law. This position appears to be twofold. Firstly, the Commission is independent *vis-à-vis* the national governments of the Member States, although indirect links between the States and the Commission, for example through the procedure for the appointment of Commissioners, continue to exist. Secondly, the Commission acts as a body meaning that decisions, also in the field of competition law, are collegiate acts of the whole Commission. Hence, the Commissioner for competition does not act independently from the other Commissioners and other Commission services may be consulted by DG Competition.

This implies that there is a considerable imbalance between the status of the national competition authorities and the status of the Commission. At national level these authorities are confronted with less political control than they were used to in the past because of the tendency in national legal systems to further enhance the independent status of a competition authority. In our view also Article 3 of Regulation 1/2003 and the *CIF* judgment (see above, Section 2.3) both increase the independent position of national competition authorities, as they can reject instructions given by Ministers or other political actors by claiming that they have to apply Community law, which has supremacy over national law. As a consequence, an important aspect of the independent status of national competition authorities in Community law is their independence *vis-à-vis* the government of the Member States.²³⁹ In addition, the cooperation within the framework of the ECN (see above, Section 2.4) largely falls outside the scope of national democratic control. On top of this structure the Commission, which happens to be *not* independent from political influences, carries out its competition tasks.

Nonetheless, as stated before, the Commissioner holding the competition portfolio dominates EC competition policy.²⁴⁰ There are several possibilities to further enhance this practice of decisions in competition cases being adopted more independently from other Commissioners. The most drastic solution is to set up an independent EC Competition Agency, which in our view is a

239 E. Chiti, ‘A Model of Independent Community Functions’, in: R. Caranta, M. Andenas and D. Fairgrieve (eds.), *Independent Administrative Authorities*, London 2004, p. 214.

240 See *supra*, Section 2.2 and OECD EU, *supra* note 34, p. 37.

'bridge too far'.²⁴¹ Not only the political problem of the Commission strongly opposes this suggestion,²⁴² legal arguments also argue against the setting up of such an independent Agency. As stated before, the aim of establishing an internal market explains the institutional structure of Community law. Competition law is an integral part of EU law and fulfils similar functions as e.g. the free movement rules, harmonization measures and the rules on state aid do. For reasons of coherence, the application of EC competition law should therefore not be separated from other areas of Community law. Furthermore, under the present institutional structure the European Parliament can control the Commission with respect to its task to enforce Community law, including the EC competition rules.²⁴³ This means that although the cooperation between national competition authorities falls outside the scope of national democratic control, the Commission is accountable to the European Parliament, insofar as, besides its general duty to enforce EC competition law, its task to administer the ECN is concerned. Lastly, according to the *Meroni* judgment²⁴⁴ and the *Alliance for Natural Health* judgment²⁴⁵ the Community legislature is not allowed to delegate discretionary powers to bodies other than those that have been established by the Treaty.²⁴⁶

6.2.1. A new advisory agency in EC competition law?

Another and in our view preferable way to solve the imbalance between the status of national competition authorities and the status of the Commission would be to set up an advisory agency.²⁴⁷ Its main task would be to advise the Commission on competition law matters, like the *Monopolkommission* does in German competition law. It appears from the competition law systems that besides the principal decision-making authorities (*BKartA*, *OFT* and the *NMa*) other bodies are also involved in the application and enforcement of competition rules (*Monopolkommission*, *Competition Commission* and the *BAC*). The Community legislature could create an advisory agency that is competent to give advisory opinions on important competition cases and issues. Next to this assignment, it could also be entrusted with tasks related to cooperation within the ECN. Unlike the *Competition Commission* in UK law, this new EU agency should not have the power to make binding decisions. The Commission must remain the principal decision-making authority in competition law at EU level. However, the new EU agency can issue recommendations that are based on competition law considerations. If the Commission does not follow such recommendations in certain cases, it is at least clear from the outset that the decisions taken in these cases are politically inspired. Consequently, the creation of an advisory agency at EU level might enhance the transparency and accountability of European competition law.

241 In 1996 the German government proposed to create an agency that would be charged with the application of the competition rules *vis-à-vis* private undertakings (Article 81 & 82 EC and the Merger Regulation). See K. van Miert, 'The proposal for a European competition agency', 1996 *EC Competition Policy Newsletter*, no. 2.

242 See D. Geradin and N. Petit, *The Development of Agencies at EU and National Levels*, *Yearbook of European Law* 2004, Oxford 2005, p. 147.

243 See in this respect Article 201 EC.

244 Case 9/56, *Meroni/ECSC High Authority*, [1957-1958] *ECR* 133.

245 Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, 12 July 2005, (not yet reported).

246 See R. van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in: D.M. Curtin and R.A. Wessel, *Good Governance and the European Union Reflections on Concepts, Institutions and Substance*, Antwerp 2005, p. 149.

247 See for a typology of Agencies operating at EU level: E. Vos, 'Agencies in the European Union', in: T. Zwart and L. Verhey (eds.), *Agencies in European and Comparative Law*, Antwerp 2003, p. 119 *et seq.* Some EU agencies provide specific information and expertise, and facilitate cooperation.