

# ICN Unilateral Conduct Working Group Questionnaire

Response by the Bundeskartellamt (16 November 2006)

## A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (*e.g.*, guidelines, speeches)
- e. Case law
- f. Other (please identify)

### a) General Remarks

Both, German and European law contain unilateral conduct rules. Under Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003), since 1 May 2004 the German courts and competition authorities are obliged to apply not only German but also European abuse provisions where trade between member states is affected (cf. Article 3 (1) Regulation 1/2003).

The relationship between German and European law is laid down in Article 3 (2) sentence 2 Regulation 1/2003. Accordingly, under the Regulation member states are not precluded from adopting or applying on their territory stricter national laws which prohibit or punish unilateral conduct by companies.

### b) Domestic unilateral conduct rules

#### aa) Overview of the unilateral conduct rules

The German rules on the abuse of a dominant position have been in force, with some modifications, since the introduction of the Act against Restraints of Competition (ARC) in 1958 and date back to a provision in the German Cartel Regulation of 1923. Section 19 (1) ARC constitutes a general prohibition of abuse of market power by dominant companies as a blanket clause and is similar to Art. 82 sentence 1 EC. Similar to Article 82 sentence 2 EC, Section 19 (4) ARC sets out four non-exhaustive examples of forbidden abusive behaviour. The first and fourth example relate to **exclusionary**, the second and third to **exploitative abuses**. Even though the examples in Section 19 (4) ARC are not conclusive, in practice they cover almost all abuse cases.

Besides Section 19 ARC, Section 20 ARC also addresses abusive behaviour. It prohibits some abusive practices not covered by Section 19 ARC (*e.g.* prohibiting “unjustified unequal treatment”) and contains some special national prohibition rules that are not covered by Art. 82 EC (*e.g.* sales below cost price and abusive practices by relatively

strong market participants). Some rules (e.g. “unfair hindrance”) overlap with Section 19 (4) ARC.

## **bb) Objectives**

### **(1) Historical context – purpose of the legislator**

The objective of the unilateral conduct rules is not laid down in the German Constitution or the ARC itself. It can be deduced from the historical background of their making, their context and their functioning.

The introduction of the German ARC in 1958 was influenced by the advocates of ordoliberalism from the Freiburg School (Walter Eucken, Franz Böhm, Alfred Müller-Armack) who believed in the freedom of the market and the market players who are private, not state-related actors. They advocated against state intervention and thus defined the role of the state as that of merely setting the regulatory framework. To ensure that the framework functioned and the rules were followed, the Freiburg School favoured a rather strong and independent institutional setting for competition law enforcement. This ordoliberal line of thought is the basis of the free and fair social market economy in Germany. From this perspective, the ARC is often referred to as the constitution of the German market economy.

According to the legislative intent of the ARC (BT-Drucks. 1158, second legislative period, appendix 1, page 21f.) the law is based on “the insight supported by economic science that a competitive economy is the most economic and democratic type of economic system and [that] the state should only intervene in market processes where this is necessary for maintaining market mechanisms or for monitoring those markets where unmitigated competition cannot be achieved.”

According to the legislator’s intent the ARC therefore serves to protect **free competition as an institution**. Case examination focuses on the competitive process as such. This objective also applies to unilateral conduct rules.

Protecting competition as an institution means keeping market processes open. The guiding principle applied here is economic freedom for the market participants so that they are able to decide what they think is best. According to the underlying theoretical background, competition should primarily serve economic purposes such as fair distribution of income, consumer sovereignty and economic prosperity (optimal factor allocation, adaptability and technical progress). At the same time competition also fulfils meta-economic functions, such as to control economic power and to safeguard the freedom of action of economic actors, which derives from guaranteed constitutional rights and freedoms and the principle of equality laid down in the German Constitution (Article 2 (1) and Article 3 of the Constitution).

### **(2) Jurisprudence**

The German courts have acknowledged that the purpose of abuse control is to eliminate economic power where it impairs the effectiveness of competition and its inherent tendency to increase economic efficiency and thus threatens the best possible supply of consumers (Berlin Court of Appeals WuW/E OLG, 995, 999 – Handpreisauszeichner; Berlin Court of Appeals WuW/E OLG 1429, 1434 – DFB; Düsseldorf Higher Regional

Court, decision of 21.2.2001, WuW/E DE-R 880, 883). Where a dominant company has a scope of action that is not effectively controlled by competition, abuse provisions are meant to prevent it from using this scope of action to the detriment of third parties in that it engages in a conduct which leads to a deterioration of competitive structures and makes it harder for new competitors to enter the market or which leads to uncompetitive results (Düsseldorf Higher Regional Court WuW/E DE-R 867, 870 Germania; Berlin Court of Appeals WuW/E OLG 1983, 1985 – Rama-Mädchen; Berlin Court of Appeals WuW/E OLG 1599, 1606f – Vitamin B 12). Control of the conduct of dominant companies is meant to ensure that conduct which would be impossible if substantial competition existed is prevented (Berlin Court of Appeals WuW/W OLG 1599, 1606 f. – Vitamin B 12).

### **(3) Implications for case assessment**

The protection of competition as an institution implicates that **in case assessment** only the likely effects of a certain conduct on competition are examined and that it is exclusively aimed at keeping competition open and safeguarding the free play of market participants. Other objectives such as creating efficiencies, safeguarding consumer protection or jobs and limiting strong market power are intended effects, but are not directly considered in individual cases.

This is especially true for **consumer protection**. The rationale behind this approach is that the protection of competition and consumer protection are normally not conflicting objectives. It is assumed that consumers benefit from the protection of competition at least in the long run (legislative intent of the ARC BT-Drucks. 1158, second legislative period, appendix 1, page 21 f.; supported by Berlin Court of Appeals WuW/E OLG 995, 999 Handpreisauszeichner).

The same is true with respect to the **protection of individuals** (customers and competitors), although the ARC grants individuals a right of action if they are affected by any behaviour that violates the provisions of the Act. The statutory examples of abusive behaviour are aimed at protecting competitors against impediments (Section 19 (4) No.1 and 4, Section 21 (1) ARC) or customers against exploitation. This is supplemented by protection against discrimination (Section 20 (1), (2) ARC) which is a typical manifestation of the objective of ensuring equal opportunities for all market participants. Specific protection against unilateral conduct is also granted in vertical relationships (cf. Section 20 (3), (4) ARC). Through the right of action mentioned above individuals, in particular competitors and customers, are also protected by the unilateral conduct rules of the ARC. This is also intended by the ARC. It has been stressed in the case law that the underlying purpose of this protection of individuals is to keep markets open in which dominant companies are active and to protect their customers, competitors or suppliers against damages. The objective is not to protect companies from competition, but to protect competition as an institution (Düsseldorf Higher Regional Court, decision of 21.1.2001, WuW/E DE-R 880, 883). The protection of individuals is therefore only possible where there is a need to protect competition as well. Consequently, only behaviour which harms competition can entitle an individual to a claim. Therefore, the protection of individuals cannot be pursued independently of the protection of competition. Due to this dependency of protection of individuals on the protection of competition there is no need to balance the two against one another.

#### **(4) Weighing up of interests**

The relatively far-reaching provisions of Sections 19, 20 ARC are restricted by the additional requirement that the undertaking's behaviour is not justified on objective grounds. Some provisions expressly require the absence of an objective justification (e.g. Section 19 (4) no. 1 and 3; Section 20 (1) ARC), in other cases this requirement has been developed by the courts or the Bundeskartellamt. To determine whether a behaviour is justified the interests of all parties concerned are examined. In weighing up the different interests concerned, the purpose of the ARC, which is to ensure that competition between undertakings is, as much as possible, free of limitations, has to be taken into consideration at all times. All the interests of the parties directly involved must be considered. Apart from that only interests that are acknowledged by a law of equal standing are relevant. Matters of public interest (such as environment or health issues) are taken into account only under very specific circumstances when balancing the different interests (within the objective justification).

#### **(5) Special provisions for the protection of small and medium-sized enterprises**

Some of the provisions also mention in particular the protection of small and medium-sized enterprises (SMEs) that are active as customers, suppliers or competitors.

Since the fourth amendment to the ARC in 1980 special attention has been given to the protection of SMEs. A special provision was introduced to protect SMEs against unfair hindrance (concept of relative horizontal market power). The last amendment to the ARC also stresses the significance of Section 20 (2) for competition and for SMEs (Begr. RegE, Drucks. 15/3640, S. 29 f.). The German legislator has therefore decided to maintain the provisions for the protection of SMEs although this goes beyond European law.

The significance of a special protection of SMEs against hindrance by dominant competitors has been stressed in case law. Accordingly, such protection serves to maintain (or create) a diversity of enterprises on the supply side and thus prevents anti-competitive concentration processes at an early stage. Therefore, the effects of anti-competitive conduct on the competitive situation of SMEs have to be assessed to prevent them from being hindered from standing their ground in the market (Federal Supreme Court, decision of 12.11.2002, WuW/E DE-R 1042, 1044 – Walmart). The underlying concept of these provisions is that the narrowing of markets where medium-sized companies are predominantly active in principle constitutes a restraint of competition (Begr. RegE on the fifth amendment to the ARC (1989), Drucks. 11/4610, p. 23).

#### **c) Art. 82 EC**

Like the prohibition of cartels in Article 81, Article 82 reflects the objective laid down in Article 3 (1) g) of the Treaty to establish a system that protects competition within the common market from distortion.

In its decisions the European Court of Justice has stressed several times that Article 82 EC aims to protect in particular the (residual) competition in a market where, as a result of the presence of a dominant undertaking, competition has already been weakened (ECJ, decision of 13.2.1979, case 85/76 – Hoffmann-La Roche, Slg. 1979, 461, para 91, 123; decision of 9.11.1983, case 322/81 – Michelin/Kommission („Michelin I“), Slg. 1983, 3461, para 70; decision of 11.12.1980, case 31/80 – L'Oréal/De Nieuwe AMCK, Slg.

1980, 3775, para 27.). Any further weakening of the competitive structure may constitute an abuse of a dominant position (ECJ, decision of 13.2.1979, case 85/76 – Hoffmann-La Roche, Slg. 1979, para 123). Article 82 covers not only abusive practices which may directly harm consumers but also those that indirectly harm them by impairing the effective competitive structure as envisaged by Article 3 EC. This can be deduced from the examples of abusive behaviour given in Art. 82 (2) c and d EC (ECJ, decision of 21.02.1973., RS 6/72 – Europemballage und Continental Can/Kommission, Slg. 1973, 215, para 26; decision of 13.2.1979, RS 85/76 – Hoffmann-La Roche, Slg. 1979, 461, para 125).

There is ongoing discussion about the interpretation of the objectives of Art. 82 EC. The Bundeskartellamt assumes that the objectives of its domestic unilateral conduct rules and those of Art. 82 EC are – generally speaking – identical. Article 82 EC forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect competitive market structures and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected.<sup>1</sup>

**2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.**

(see also question A.1.)

The direct objective of the unilateral conduct rules is to protect the competitive process. Other influences are not taken into account in the competition law or case-by-case assessment. As far as the special rules protecting SMEs are concerned it is presumed by the legislator that protecting SMEs serves the same objective as that of protecting the competitive process (see above question A.1).

Within the legal system there are, of course, other legitimate policy objectives which are pursued by other legal acts. They do not influence the objective of competition law but may be considered within the context of the objective justification of prima facie abusive behaviour. Objective justification requires a comprehensive balance of interests in consideration of the aim of competition law to protect the freedom of competition. In balancing these interests the courts decided in some cases to also include interests that pursue objectives defined in other laws (e.g. the Energy Act).

**3. If there are multiple objectives, how are these balanced or reconciled?**

(see questions A.1 and A.2.)

**4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention)**

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<sup>1</sup> See also Advocate Kokott's opinion dated 23 February 2006 in the British Airways case, para. 68.

**with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?**

The risk of over-deterrence is rather low in Germany because the requirements for the establishment of a violation of unilateral conduct rules are high and demanding. In addition, private and public sanctions against abusive conduct are quite mild. In most cases, the Bundeskartellamt only tries to stop the abusive conduct, fines are rarely imposed.

Although the risk of under-deterrence is partly absorbed by private enforcement which is complementary to public enforcement, especially in abuse cases, it cannot be denied that there is a risk of under-deterrence because competition authorities can only investigate a limited number of cases. However, this risk does not arise from the choice of the objective, but rather from the factual complexity that is immanent to such cases and the high requirements for establishing a violation of unilateral conduct rules. If the competition law incorporated further objectives that were to be balanced and reconciled, assessment would become even more complex and exacerbate antitrust enforcement.

**5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.**

There are no formal legal exemptions or exceptions to the rules stated in Article 82 EC and Sections 19, 20 ARC.

#### Regulated Sectors

Former state monopolies in network industries such as telecommunication, energy, postal services and railways have been privatized and liberalized or their privatization and liberalization is under way within the framework of the European Union. In general, the objectives of liberalization are in line with the objectives of general competition policy as stated above.

The sector-specific regulations also contain abuse control provisions which are, however, essentially similar to the ARC's general rules on abuse control.

The objectives of the more specific laws in the regulated sectors energy, telecommunication and post are – by means of regulation – to promote competition and to ensure a territory-wide provision of adequate and appropriate telecommunication and postal services (Section 1 PostG, Section 1 TKG). The objectives of this regulation are further specified (Section 2 TKG, Section 2 PostG). They include additional aspects such as ensuring safety and secrecy in the area of post and telecommunications and social concerns. With respect to the energy sector the Energy Regulation provides for further objectives including security of supply, energy efficiency, environmental protection as well as consumer protection.

As the objectives of competition law and sector-specific regulation are consistent with one another, there are hardly any areas of conflict. As far as Article 82 EC is applicable, this takes precedence over (national) sector-specific regulation. Where Article 82 does not apply, sector-specific regulation may prevent the application of Sections 19, 20 ARC under certain circumstances. More specifically, the relationship between specific laws for regulated sectors and the German general rules for unilateral conduct are as follows.

**Energy Regulation (EnWG):** According to Section 111 (1) EnWG the special provisions on unilateral conduct (Sections 19, 20 ARC) do not apply where the EnWG provides for comprehensive and final rules, meaning that – according to the purpose of the EnWG – no other provision is admissible. Such final rules are provisions on network access and tariffs (Section 111 (2) EnWG). Section 111 (3) EnWG further specifies that regulated network access tariffs are to be regarded as lawful in Section 19, 20 ARC or Art. 82 EC proceedings.

**Telecommunication and Postal Regulations (TKG, PostG):** TKG and PostG do not provide for any rules which regulate the rivalry between general and specific unilateral conduct rules. It is generally assumed that the provisions of the ARC remain applicable (Section 2 (3) TKG, Section 2 (3) PostG) in addition to the specific rules, whereas the TKG substantiates that this is only valid as long as the provisions of the TKG are not comprehensive and final. Since the PostG does not contain a respective limitation, the Bundeskartellamt concluded that it is basically not prevented from opening a proceeding. This opinion was backed by a decision of the Düsseldorf Higher Regional Court. The exact line of demarcation in this context has not yet been clarified.

#### Government entities and purchasers

The German unilateral conduct rules do not provide for an exemption for government entities and purchasers.

Under Articles 81, 82 EC, government purchasers are not considered as undertakings if they merely purchase goods without offering them or having the intention to do so (EuGH, Urt. v. 11.07.2006, RS C-205/03 P – FENIN/Commission).

#### Intellectual property rights

There is no statutory provision that defines the relation between the exercise of IPRs and unilateral conduct rules. It is thus a matter for the case-law to define this relation. German case-law takes a neutral stance vis-à-vis the exercise of IPRs. The fact that the owner of an IPR has a dominant position cannot as such cause the IPR exercise to constitute an abuse. Restraints of competition caused by IPRs are not subject to competition law as far as the conduct in question is necessary to maintain the existence or the legally protected function of the IPR (Federal Supreme Court, WuW/E BGH, 2697, 2701). Therefore, the inevitable exclusionary effect that emanates from the very essence of IPRs is basically tolerated under competition law and unilateral conduct rules in particular. Unilateral conduct rules will only take priority if circumstances arise which exceed the inevitable exclusionary effect and which reveal that the assertion of the IPRs has only been used as a pretext and serves to hinder an alleged violator of the IPRs. In their case-law the courts have placed great demands on the substantiation of such abuse accusation.

**6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-liberalized), please explain.**

Not applicable.

**7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.**

#### Revision of domestic unilateral conduct rules

The prohibition of unfair hindrance and discrimination under Section 20 (1) and (2) ARC has often been the subject of amendments to the law. Whereas the prohibition has largely remained unchanged for dominant companies, the target group of Section 20 (2) sentence 1 ARC has changed several times. This was due to changes in competition conditions as well as changes in the overall competition policy objectives and assessment.

In 1973 the 2nd amendment to the ARC extended the ban on hindrance and discrimination to powerful companies (Section 20 (2) sentence 1 ARC). The amendment was made in particular in view of the branded goods sector, parts of which enjoy a widened scope for action due to the special market presence of individual brands. By expanding the ban on discrimination the lawmaker intended to prevent the unjustified non-supply of dealers with an active pricing strategy and thus an undermining of the strict German prohibition of resale price maintenance (Report 1973, Bundestagsdrucksache 7/765, p. 4). The extension to powerful companies was not meant to alter the primary protective purpose of the prohibition of unfair hindrance and discrimination (protection of competition as an institution). In particular there was no intention to introduce any social protection for the dependent companies.

The 5th amendment to the ARC in 1989 considerably reduced the scope of protection under Section 20 (2) sentence 1 ARC so that dependent companies are only protected if they can be considered as small or medium-sized enterprises. The lawmaker's purpose in tightening the conditions for protection was to limit the obligation to supply imposed by competition law. As a particularly severe interference in the freedom of contract, this obligation which generally represented an alien element within a market economy, was to be limited to cases where this was strictly necessary. The lawmaker assumed that large companies had sufficient alternatives and therefore did not require protection under Section 20 (2).

**8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.**

No. The decisions of the Bundeskartellamt are made by the independent decision divisions. Neither the President of the authority nor the Ministry of Economics and

Technology can alter the decision (of course, the decisions can be appealed before the courts). The independence of the Bundeskartellamt on the one hand and the independence of the deciding bodies within the Bundeskartellamt on the other ensure that no political influence can be exercised and competition remains the only relevant focus.

**9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?**

The establishment of an infringement of unilateral conduct rules involves a very complex and demanding process of assessment. During the proceedings based on unilateral conduct rules, the focus on the direct objective of protecting the competitive process never caused any difficulties. On the contrary, the enforcement of unilateral conduct rules according to this objective proved highly effective. In order to keep abuse control enforceable, the Bundeskartellamt advocates for a likely effects based approach. Reasonable general rules should be used as a starting point to define abusive behaviour. However, there should be the possibility to reverse this assessment by taking into account an assessment of all the relevant interests of the parties concerned and by balancing this against the purpose to safeguard the freedom of competition. An approach that requires a consumer welfare assessment in each individual case risks to endanger the enforceability of the unilateral conduct laws.

**B. Assessment of Dominance/Substantial Market Power**

**1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").**

In Germany, both Article 82 EC treaty and Section 19 of the Act against Restraints of Competition (ARC) are applicable to conduct by single-firm dominant undertakings.

**a) Section 19 ARC**

According to the definition provided in the ARC there are two different categories of single-firm market dominance. An undertaking is single-firm dominant if it (1.) has no competitors or is not exposed to any substantial competition or (2.) has a paramount market position in relation to its competitors (Section 19 (2) ARC).

An undertaking has "no competitors" if there is not a single actual competitor. This is the case in a monopoly situation with a 100% market share. An undertaking is "not exposed to any substantial competition" if it is able to determine its conduct in the relevant market irrespective of the possible reactions of its competitors, and/or to restrict the scope of action of its competitors by its market-strategic conduct. In terms of single-firm

dominance, this describes a “near monopoly” situation with very high market shares and a lack of entry.

An undertaking has a paramount market position in relation to its competitors if its scope of action is not sufficiently controlled by its competitors. Section 19 (2) no. 2 ARC provides that when assessing an undertaking’s paramount market position “*account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.*”

#### **b) Article 82 EC**

Article 82 EC treaty does not contain a statutory definition of market dominance. In the “United Brands” case the European Court of Justice defined a dominant position as “*an undertaking’s economic position of power (...) that enables it to prevent the maintenance of effective competition in the relevant market by giving it the possibility of acting to a considerable extent independently of its competitors, its buyers and ultimately the consumers*”. This definition corresponds to the paramount market position of Section 19 (2) no. 2 ARC. There is thus no substantive difference between the definitions provided in Article 82 EC treaty and Section 19 ARC.

### **2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?**

- |   |      |
|---|------|
| - If dominance/substantial market power is present                | yes  |
| - Acquisition or creation of dominance/substantial market power   | no   |
| - Attempt to acquire or create dominance/substantial market power | no   |
| - Other (please identify)   | none |

#### **Why did your jurisdiction choose these stages?**

As a general rule, in Germany the acquisition or creation of a dominant market position is not addressed by the laws governing unilateral conduct (neither through application of Art. 82 EC, nor through application of Sections 19, 20 ARC). The reason is that the creation of a dominant market position is already covered by merger control as far as “external growth” is concerned. On the other hand, companies are free to create a dominant position through “organic/internal growth” as long as this is achieved by competition on the merits. The implicit assumption is that such organic growth will not be detrimental to competition/customers, if it is achieved through competition on the merits.

However, it should be noted that the creation of a dominant position through *abusive* conduct is prohibited in Germany because abuse control according to Section 20 ARC also applies to undertakings with “superior” or “relative” market power below the dominance threshold if certain conditions are fulfilled (see B.4. for more details). Even

though the direct goal of Section 20 ARC is generally speaking not to prevent the creation of a dominant position, it may have this effect in some cases.

**3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”?** yes

(Side note: Only Section 19 (3) ARC contains an explicit presumption, not Article 82 EC. The yes/no answers below thus only refer to Section 19 ARC.)

**If so, please respond as applicable:**

- **What is the market share level of the dominance presumption?** 1/3 (33%)
- **Is the dominance presumption rebuttable?** yes
- **What is the market share level of the safe harbour?** N.A.
- **Is the safe harbour absolute (i.e., dominance/substantial market power cannot be found below the specified percentage level)?** N.A.
- **What is the legal basis of the presumption?** statute
- **What is the legal basis for the safe harbor?** N.A.

**a) Section 19 ARC**

Single firm dominance is presumed if a market share of one third is reached (Section 19 (3) ARC). In this case, there is a greater burden of proof to establish that a dominant market position does not exist. However, this does not amount to a reversal of the burden of proof in administrative or fine proceedings. Because there is a general duty to investigate all relevant facts (and to consider all relevant criteria), the presumption under Section 19 (3) ARC generally serves only as a first indication that a firm has a dominant position. Ultimately, the presumption of single-firm dominance only is decisive if a conclusive investigation establishes neither the presence nor the absence of a dominant position. In practice, this is a very rare case.

**b) Article 82 EC**

Article 82 EC does not contain an explicit presumption or a safe harbor. However, the European Courts have taken the view that the burden to prove a dominant market position is quite low where there are high market shares, e.g. above 40-50%. In practice, this case law has a similar effect like a rebuttable presumption. In addition, recital 32 of the ECMR takes the view that dominance is unlikely at market shares below 25%.

**4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ?** yes

**If so, please explain why and in which circumstances.**

According to Section 20 ARC an undertaking shall not hinder another undertaking without any objective justification, if it possesses superior market power in relation to small and medium-sized competitors. As far as the vertical relationship is concerned, the



**6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?<sup>2</sup>**

- |   |     |
|---|-----|
| - Market share of the firm and its competitors        | yes |
| - Market position and market behavior of competitors  | yes |
| - Durability of market power                          | yes |
| - Barriers to entry or expansion                      | yes |
| - Economies of scale and scope/network effects        | yes |
| - Buyer power   | yes |
| - Access to upstream markets/vertical integration     | yes |
| - Access to essential facilities                      | yes |
| - Market maturity/vitality                            | yes |
| - Financial resources of the firm and its competitors | yes |
| - Profits of the firm                                 | no  |
| - High prices (at absolute or comparative level)      | no  |

Please specify any other criteria that you use to assess single-firm dominance/substantial market power. **None**

**7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?**

The relative importance of the different criteria varies from case to case. In the case experience of the Bundeskartellamt, from the criteria listed above, the following are more often of relevance than the others:

- Market share of the firm and its competitors
- Market position and market behavior of competitors
- Barriers to entry or expansion

**8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.**

**Market shares/Actual competition**

Absolute and relative market shares are the starting point for determining market power. In most markets, an enterprise's absolute market share is an important factor that allows for initial conclusions about its scope of action. A high market share suggests that the ability of the opposite side of the market to switch to other undertakings is limited and that the enterprise concerned has an increased scope of action. The greater the difference between an enterprise's market share and that of its largest competitor and the more fragmented the market shares of its other competitors, the greater the likelihood that the market (share) leader has a scope for restrictive action. However, market shares have to

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<sup>2</sup> The answer "yes" should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer "no" should be provided if in practice you have not ever used that criterion.

be placed in perspective by other factors when making an overall assessment of the relevant competitive conditions in a particular case.

Market share assessment is more informative if, in addition to the absolute and relative market share structure, the market share development over several periods of time is determined and considered as well. The Bundeskartellamt therefore generally analyses the development of the market shares in the relevant market over a period of several years. Competition is a dynamic process consisting of initial moves by one competitor and reactions by others to catch up with the first. In a competitive situation market share fluctuations over time are more likely than in an uncompetitive market. For example, significant market share losses of the market leader make single-firm dominance unlikely. If the market leader has been able to sustain or increase its high market shares over time, this is an indication that its market position is invulnerable.

The market shares of individual suppliers in the market concerned have to be placed in perspective in particular if their supply of the relevant products or services depends on advance supplies from other competitors. Under such circumstances, the market share assessment can offer only very limited indications of the competitive potential of the enterprises operating in a particular market. In cases where products, for example durable capital goods, are purchased infrequently on the basis of long-term contracts (typically through bidding processes), only an analysis of the market shares over a considerable period of time can offer any indications of the competitive process in this market. In such markets it is typically necessary to review data of past auctions in order to assess the relative position of the competitors.

In practice, market share, in particular for heterogeneous products, is generally defined in value terms, i.e. expressed by turnover, and not in terms of quantity. In certain circumstances, however, other methods of calculation (i.e. quantities, production capacities, volume of orders, etc.), can provide more information or compensate for difficulties in determining the turnover. In-house production for own use is not to be included in the calculations of market shares. However, as part of the overall assessment, in particular of barriers to entry, in-house production may be of substantial significance as a form of potential competition.

### **Barriers to entry/Potential competition/Market phase**

Barriers to entry and potential competition are very important factors in the assessment of dominance. Just as market shares give an indication of the relationship between the firms involved and their current competitors, existing barriers to entry provide information on the significance of potential competitors for competition in the market concerned. As long as a powerful firm cannot set excessive prices or dispense with R&D, because otherwise potential competitors would be likely to enter the market, it is unlikely to have an unlimited scope of action. Conversely, if barriers to entry are high, this may be an important indication that a firm has a dominant market position as it is able to secure its market position against new entrants. In evaluating a potential competitor, it should be examined whether effective entry is possible and likely. In addition, entry must be significant and take place within a time period that is short enough to discourage the firm

concerned from exploiting its market power. The Bundeskartellamt typically also investigates (i) the relative costs of market entry and the risk of entry failure and (ii) previous attempts to enter the market, in order to assess the extent of barriers to entry.

The higher the future profit prospects are considered to be, the stronger are the incentives for new firms to enter the market. Entry or expansion are therefore more likely in new and growing markets than in stagnant or declining markets. Market entry is unlikely if there is limited time to gain a return on new investments due to a decline in the market.

Barriers to entry can be roughly divided into three categories: Statutory/legal barriers to entry are those set up by the state in the form of laws, regulations and administrative practice (e.g. trade barriers, planning laws, environmental regulations, health regulations, other safety regulations, exclusive concessions, IPRs, etc.). Structural barriers to market entry usually arise from certain industry characteristics (e.g. transport costs, supplier-customer relationships/consumer loyalty, switching costs, sunk costs, economies of scale and scope, network effects, customer preferences, etc.), but may also lie in the resources that are required to be successful in the market (e.g. minimum entry scale, technological know-how, etc.). Strategic barriers to entry are intentionally set up by incumbents in a market in order to deter potential suppliers from entry (e.g. long-term supply contracts, exclusivity contracts, demarcation and concession agreements, proprietary interfaces or standards, IPRs, branding etc.).

### **Competition from imperfect substitutes**

Especially where the market is defined rather narrowly, competition from imperfect substitutes needs to be taken into account.<sup>3</sup> The scope of powerful firms may be limited to a certain extent by firms supplying imperfect substitute goods or services which may replace those of the relevant product market to a limited extent or under certain circumstances. Goods or services may be imperfect substitutes for several reasons. For example, a shift to an (imperfect) substitute may be possible for buyers only in the long term because they would have to make investments first to be able to actually use the substitute. The choice of an imperfect substitute may imply a change in the taste or the habits of buyers. Competition from imperfect substitutes may come from a number of goods or services that belong to different product markets. The intensity of such competition may vary, depending on how well the one product substitutes the other from the buyer's point of view.

### **Buyer power**

In the assessment of buyer power the question arises of whether the factors contributing to effective competition – for example incentives to lower prices or to make technical progress – can be equivalently replaced by buyer power. A high level of concentration of firms on the buyer side of the market is not in itself sufficient evidence to disprove the market dominance of a supplier. Instead, the prerequisite for buyer power to be effective

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<sup>3</sup> Often it is analytically challenging to assess whether an “imperfect” substitute should be included in the market defined or not. As the questionnaire does not deal with market definition, we do not address this issue here.

is that a powerful buyer can award its contracts according to market-strategic considerations, so as not to become dependent on a dominant supplier. E.g. if there are competitors with adequate capacities to meet demand, a buyer's threat to switch to another supplier may have a considerable disciplinary effect on a dominant supplier that sells a major part of its production to a single buyer.

In order to successfully apply a market-strategic purchasing behavior, the buyer typically needs comprehensive knowledge about the market concerned. Indications that this is the case are e.g. high levels of internal production. Market-specific aspects may limit the significance of buyer power. For example, market-strategic purchasing behavior is impossible when the opposite side of the market does not decide on the purchase of the products concerned itself and thus has only a limited purchasing policy of its own (this may be the case in so-called “two-sided markets”).

### **Access to supply or sales markets**

The fact that a firm has easier access to the relevant supply or sales markets than its competitors may be a contributing factor for a dominant market position. This is the case in particular if a firm with high market shares can make access to such markets difficult or even impossible for its rivals on account of its own excellent access to the supply or sales markets. Such superior access can thus also constitute a special barrier to entry. According to the Bundeskartellamt's case experience this is primarily relevant under the following circumstances:

- When a firm is not only engaged in the market concerned, but also in an important upstream or downstream market (vertical integration) and occupies powerful positions in both markets.
- When a firm can supply a full line of goods or services and its competitors cannot offer such an extensive range. The same is true of the supply of complete systems, if competitors only offer system components without comparable "system compatibility".
- When resource-based competitive advantages may give a firm easy access to the supply or sales markets.

### **Assessment of resources, in particular financial strength**

Superior financial strength may provide a firm with a broader scope of action, in particular as regards the use of competition parameters such as price, investment, research and advertising. The same applies, for example, to a comprehensive production programme or range of products, or resources that are specific to a particular sector or market, in particular technological resources. Superior resources are a contributing factor to a dominant market position if they limit the alternatives available to buyers or if they have discouraging and deterrent effects on competitors. Such effects manifest themselves in existing competitors refraining from engaging in active competition and potential competitors refraining from entering the market. Competitors are only likely to be discouraged and deterred if they believe that the dominant firm would benefit from deploying its superior resources and that it is therefore likely to do so.

## **Weighing of factors**

In an overall appraisal the assessment of dominance takes into account all criteria mentioned above and any other aspects that may be relevant for the particular case. The Bundeskartellamt attaches a high importance to a broad and in-depth assessment of the firm's market power on the basis of all relevant circumstances. As a rule of thumb, the market share and position of the firm in question and its competitors as well as barriers to entry are often considered important aspects. For example, if the firm's high market share and the presence of only small competitors suggest that it has uncontrolled scope of action and if there are in addition significant barriers to entry, it is likely to have a dominant position. However, high market shares are less likely to indicate a dominant position when other factors, e.g. high-performing potential competitors and buyer power can be expected to render an uncontrolled scope of action impossible.

### **9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?**

Intellectual property rights are not generally viewed as a decisive factor in dominance assessment but may be of significance in some cases. In the Bundeskartellamt's practice they are most relevant in the assessment of barriers to entry (see also B.8.). For more details on the general role of IPRs see also Prof. Drexl's reply to this questionnaire.

**Is intellectual property presumed to create dominance/substantial market power in your jurisdiction?** **no**

### **10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves "small" economies are welcome to skip this question.]**

In the Bundeskartellamt's practice, the assessment of dominance in a small market does in principle not differ from the assessment of dominance in a large market. In both cases, the same criteria are applied. The market share level at which dominance is presumed is the same for small and large markets.

When assessing barriers to entry an important aspect is whether the market at hand is isolated or not. Therefore, trade agreements do not alter the method of assessing dominance, but may be of relevance for the assessment of barriers to entry (which is an important factor in the assessment of dominance). For most industry sectors, Germany is not an isolated economy.

**11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.**

The assessment of an abuse of dominance case consists of three core analytical steps:

- 1) Is there a dominant position?
- 2) Does the behaviour of the dominant company restrict competition?
- 3) Is there an objective justification for this behaviour?

The definition and assessment of dominance does in principle not have any normative implication. It is rather a neutral element of market analysis which can be performed completely independently of the objectives of unilateral conduct law. In the Bundeskartellamt's practice the objectives of unilateral conduct law are therefore only relevant for the latter two analytical steps.

**C. State-created Monopolies**

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN's previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms, energy, water, and railways* sectors.

**I. State-created Monopolies**

**1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned<sup>4</sup>, state-controlled<sup>5</sup>, state-enabled or facilitated<sup>6</sup>, recently privatized and/or liberalized, regional monopolies,<sup>7</sup> etc.**

Questions C.1 and C.2 are answered together (see below). Please note that only the following five important sector examples are described: Chimney sweeps, hospitals, lotteries, post and social insurances. This list is not exhaustive.

**2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a**

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<sup>4</sup> Those undertakings that are 100% owned by the State.

<sup>5</sup> The control belongs to the State, without taking into consideration the amount of the % of the State share.

<sup>6</sup> E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

<sup>7</sup> Includes public/private undertakings that are granted exclusive rights within a certain region.

**condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.<sup>8</sup>**

### **Chimney sweeps**

According to Section 2 of the German Chimney Sweepers Act the country is divided into local “chimney sweeper areas”. For each of these areas only one responsible chimney sweeper is assigned who enjoys a legal monopoly over this area (the responsible chimney sweeper may have several employees). There are more than 8000 such areas in Germany. The Chimney Sweepers Act also specifies which services the chimney sweeper has to provide and at what fixed rates the facility owner has to pay for the chimney sweeper services. Due to the legal monopoly, the facility owner cannot select the chimney sweeper nor decide on the extent of services provided or negotiate the rates.

The local chimney sweeper monopolies were for the first time fixed nationwide back in 1935. The justification for the Act was that it served to prevent fire hazard. This rationale has been increasingly criticized over the past years. The European Commission initiated infringement proceedings against the German Government in 2003 because it prevents chimney sweepers from other EU Member States from offering their services in Germany. The German Government intends to amend the Chimney Sweepers Act but progress in this regard has been slower than anticipated. In October 2006, the European Commission has decided to move to the next procedural stage of the infringement proceedings.

### **Hospitals**

Traditionally, nearly all German hospitals were either owned by state bodies (mainly local governments and universities) or by parastatal bodies (such as confessional or social welfare organizations). The regulatory framework provides for significant state-imposed restraints of competition. New entry does therefore hardly ever happen. Many local hospital markets are dominated.

In recent years hospitals have been increasingly privatized, mainly because local governments have sold their hospitals to private hospital chains. The main motivation behind these sales was the hospitals’ lack of profitability. Nowadays, approx. 8% of the German hospitals are privately owned.

### **Lotteries**

According to the German constitution, the legislative power to regulate lotteries lies with the German *Länder* (the 16 German states). The *Länder* also operate the lotteries themselves and have traditionally not granted any lottery licences to private operators. After years of diverse regulations by the different *Länder* and triggered by court decisions enlarging the scope for private lottery operators, the *Länder* decided in 2001 to conclude a State Lottery Treaty which has the status of a law. According to this treaty

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<sup>8</sup> The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

private providers may only operate a lottery if they have a licence to do so. However, a license may not be granted if (inter alia) the operator is pursuing business goals which go beyond a mere advertising campaign.

The objectives of the State Lottery Treaty are to

*“1. Control the citizens’ natural playing instinct by guiding players towards regulated gaming channels and, in particular, preventing them from participating in illegal gambling,  
2. Prevent excessive gaming incentives,  
3. Exclude exploitation of the playing instinct for private or commercial profit making purposes,  
4. Ensure that gambling is operated in a proper and comprehensive way, and  
5. Ensure that a substantial part of the revenues achieved from gambling is used for public or other purposes qualifying for tax concessions within the meaning of the German Fiscal Code.”*

The State Lottery Treaty has recently been increasingly challenged by the Bundeskartellamt, the European Commission and by private court action. The Bundeskartellamt issued a prohibition decision to the regional lottery companies in August 2006 (details of this decision are provided below, see question C.3). The *Länder* have decided in October 2006 to amend the State Lottery Treaty. With regard to the ongoing political discussions, the European Commission has announced that it will not accept any revised treaty which would be contrary to the single market concept.

## **Post**

In Germany, the state post monopoly dates back to the 19<sup>th</sup> century. Since then, the lack of competition in the postal sector has mainly been a result of state-imposed restraints of competition. Since the 1980s, the European Commission and the German government have been the driving force behind liberalization and privatization. The postal sector has been substantially opened to competition since 1997. Deutsche Post AG had its IPO in 2000. Currently, approx. 35% of the shares are still state-owned. According to statistics provided by the German Federal Network Agency, more than 70% of the turnover achieved with postal services in Germany is currently open to competition. The remaining exclusive licences of Deutsche Post AG for certain postal services expire on 31 December 2007.

## **Social insurances**

Since their introduction, all major German statutory social insurances have been compulsory and under state ownership. The five pillars of the statutory social insurances are: pension insurance, health insurance, unemployment insurance, nursing care insurance and accident insurance. The objective of the social insurances is to provide insurance protection also for persons who would not obtain it under free-market conditions. In order to achieve this objective there is largely an insurance obligation. The statutory health insurance has been gradually opened up to competition. According to a recent decision by the German government the health care sector will now be further liberalized.

The statutory accident insurance has been challenged in several court proceedings in the past years. The accident insurance is compulsory for employers in order to cover for work accidents of their employees. The same applies to universities, schools, kindergartens etc. So far, the German courts have ruled that the statutory accident insurance is compatible with the German constitution and European law. However, the European courts have not yet made a decision on this fundamental question.

Also some aspects of the German statutory health insurance have been challenged in court proceedings during the last years. In particular, there were doubts whether the decisions of groups of statutory health insurance funds to pay only a certain maximum amount for certain pharmaceuticals violated Articles 81 and/or 82 EC. However, the European Court of Justice decided in March 2004 that the activities of bodies such as the German sickness funds are not economic in nature, and that therefore those bodies do not constitute undertakings within the meaning of Articles 81 EC and 82 EC (cases C-264/01, C-306/01, C-354/01 and C-355/01).

**3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:**

- **Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?**

Since the September 2003 landmark decision of the European Court of Justice in the "Conorzio Industrie Fiammiferi" case, it is clear that in the European Union general competition law takes precedence over anti-competitive regulation. The ECJ decided in this ruling that there is a general duty to disapply national legislation where it is contrary to Article 10 of the EC Treaty, read in conjunction with Article 81.

The reasoning of the ECJ also applies to Article 82 in relation to national or regional legislation or other state action. The scope of a possible "state action defence" is therefore quite narrow in Germany. It could only apply where a conduct does not effect trade between EU member states, so that Article 82 is not applicable. However, practice shows that in all major German cases trade between EU member states is affected. Two recent important cases where a state-action defence was rejected are reported below.

### **Bundeskartellamt prohibits anti-competitive behaviour by lottery companies**

In August 2006 the Bundeskartellamt prohibited the regional lottery companies and the German Lotto and Toto Block from violating German and European competition law in several instances. Each of the 16 German *Länder* has its own lottery company. The Bundeskartellamt prohibited the companies from hindering commercial lottery agents from establishing stationary lottery collection points, e.g. in supermarkets and petrol stations, agreeing on dividing up the market geographically between the 16 *Länder* lottery companies and registering the stakes collected through commercial lottery agents

with the aim of distributing them in a competitively neutral manner among the German *Länder*.

The Bundeskartellamt did not address the issue of whether the state monopoly on lotteries and betting is justified vis-a-vis private providers. The authority's investigation exclusively concerned the sale and distribution of the lottery companies' "state" products as well as geographic market sharing among these companies.

In its decision the Bundeskartellamt firstly objected to the lottery companies' conduct towards the so-called "commercial lottery agents". Commercial lottery agents act as intermediaries between customers and lottery companies against payment of a commission. However, they do not themselves enter into any agreement with the customers. The commercial lottery agents originally confined their activities to the acquisition of customers via the internet, by telephone or mail. Now they also intend to acquire customers through stationary lottery collection points, e.g. in supermarkets and petrol stations. The lottery companies have agreed not to accept any stakes collected through commercial lottery agents at these stationary collection points. The Bundeskartellamt's decision prohibits the lottery companies from continuing this boycott. Under German and European competition law the lottery companies' conduct constitutes an anti-competitive agreement, an illegal call for a boycott and an abuse of a dominant position.

In addition the Bundeskartellamt prohibited the lottery companies from restricting their activities by mutual agreement to the federal state in which they are registered. This geographic market sharing also constitutes a violation of German and European law and is therefore inadmissible. The regulation laid down in the State Lottery Treaty represented a classic allocation of territory between the lottery companies and constituted a particularly severe competition restraint. The Bundeskartellamt's decision intends to stimulate competition among the lottery companies. This will be of benefit for the consumers who will be able to choose between the often diverging offers of the different lottery companies.

Finally the Bundeskartellamt prohibited the lottery companies from using a comprehensive information system by which the *Länder* are informed in detail of the commercial lottery agents' revenues with the aim of distributing these in a competitively neutral manner in proportion to the volume of other lottery revenue. Thus, ultimately, the stakes were allocated to the *Land* of which the lottery player is a resident. This restricted the incentive for lottery companies to conclude lottery agreements with customers across *Länder* borders and also consolidated the geographic market sharing among the lottery companies.

### **Bundeskartellamt takes action against Deutsche Post for abusive market hindrance**

In February 2005, the Bundeskartellamt forbade Deutsche Post AG from hindering or discriminating against rival providers of postal services, so-called "mail consolidators", which carry out "mail preparation services." The mail preparation services concerned include in particular the collection and pre-sorting of letters and the feeding of mail items weighing under 100 grammes into Deutsche Post AG's sorting centres. Deutsche Post

AG awarded discounts of 3 to 21 per cent for these services only to its own major customers but not to the mail consolidators concerned. Small and medium-sized customers generally do not reach the minimum volumes of letters required by Deutsche Post AG to qualify for such discounts. They can only reduce their postage costs through the activities of the consolidators.

In its examination of the case the Bundeskartellamt came to the conclusion that the practice of Deutsche Post AG violated German and European competition law. As a dominant company it may not treat providers of mail services feeding in letters from only one large customer and mail consolidators feeding in letters from various customers differently without justification. Furthermore Deutsche Post AG may not hinder consolidators by refusing them access to the partial services of letter conveyance and delivery (without collection, presorting and feeding-in) without any objective justification. The sender's address on the letters is of no significance whatsoever as regards the provision of conveyance and delivery services.

Deutsche Post AG cannot invoke its limited exclusive licence under the German Postal Act to justify its behaviour. According to a decision issued by the European Commission in proceedings against the Federal Republic of Germany, the German Postal Act violates European provisions to open up the postal sector insofar as it reserves mail preparation services for letters under 100 grammes exclusively for Deutsche Post AG. The obstruction or unequal treatment of other companies cannot be justified by invoking a national provision which is in violation of European law. In the run-up to this decision the Bundeskartellamt and the EC's Directorate General for Competition agreed that these violations of Deutsche Post AG against German and European competition law will be acted upon by the Bundeskartellamt.

According to the Bundeskartellamt's decision Deutsche Post AG now has to grant discounts for the feeding-in of pre-sorted bulk mailings into its mail sorting centres even where competitors collect and sort letters from different senders to ultimately hand these over to Deutsche Post AG bundled ("consolidated").

- **Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.**

In Germany, the independence of the Bundeskartellamt has a long and strong tradition. This is based on the belief that the political process is susceptible to vested interests and that the danger of such influence is particularly relevant for competition law enforcement. External observers have described the independent institutional culture of the Bundeskartellamt as perhaps "the defining feature of German competition policy" (cp. OECD, Germany Regulatory Reform Country Review, 2003). The Bundeskartellamt is organized in sector-specific Decision Divisions. Similar to the practice of German courts, each case is investigated by a case handler and decided by a collegiate body composed of the chairman and of two other members of the responsible Decision Division. The Decision Divisions operate free from external influences and hierarchical orders. In order

to avoid direct sector-specific influence (“regulatory capture”), a regular exchange of staff takes place between the different Decision Divisions. The decisions reported above show that the Bundeskartellamt takes vigorous enforcement action also in sectors where there are strong contrary political interests.

**4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?**

The Bundeskartellamt applies the same method of analysis as laid out in question B.8. Therefore the analysis does not differ in principle. In practice, the dominant market position of a state-created monopoly is often quite obvious due to very high market shares and/or state-induced barriers to entry.

**II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies**

**5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law) ?**

There is no specific general privatization law in Germany. Where state-owned companies are privatized this is implemented by specific state acts tailored to the individual privatization. Similarly, liberalization is accomplished through sector-specific acts. The liberalization process has gained significant momentum since the early 1980s. In many sectors liberalization was initiated and driven by the European Commission through liberalization directives. Important sectors include telecoms, energy and posts as well as the sector examples provided in C.1 and C.2.

**6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?**

Generally speaking, liberalization has been aimed at increasing competition, ultimately to the benefit of consumers and the economy as a whole. Liberalization has often been accompanied by privatization. Privatization as such had mixed objectives: Sometimes its objective was to increase competition, in other cases it was aimed at reducing the burden on public budgets and/or generating revenues from the sale. For specific sector examples see question C.1 and C.2.

**7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?**

Yes. German competition law does not contain any exceptions for such transactions.

**8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:**

- **What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?**
- **To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.**

In Germany, competition advocacy is entrusted to the Bundeskartellamt and the independent Monopolies Commission. The Monopolies Commission regularly compiles reports on competition policy issues. Additionally it provides further expert opinions both at the request of the Federal Government and at its own discretion. The Monopolies Commission has repeatedly argued in favor of comprehensive market liberalization.

The Bundeskartellamt does not have any formalized rights or duties to comment on the general legislative process. However, in individual cases the Federal Ministry of Economics and Technology as well as other ministries now and then informally ask the Bundeskartellamt to comment on competition aspects of legislative processes. In its general public relations work the Bundeskartellamt regularly comments on general competition issues supporting liberalization.

Several examples of advocacy work are cited below (see D.2).

#### **D. General**

- 1. From among the following, how would you characterize your jurisdiction:**  
**developed**
- 2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.**

Note: Only relevant material since the year 2002 is cited below. Where available, the links refer to the English version of the relevant source. Where no English version is available, the links refer to the German version.

#### **Act against Restraints of Competition:**

[http://www.bundeskartellamt.de/wEnglisch/download/pdf/06\\_GWB\\_7\\_Nouvelle\\_e.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7_Nouvelle_e.pdf)

#### **Bundeskartellamt cases:**

Bundeskartellamt prohibits anti-competitive behaviour by lottery companies: 23.8.2006

Press release: [http://www.bundeskartellamt.de/wEnglisch/News/press/2006\\_08\\_28.shtml](http://www.bundeskartellamt.de/wEnglisch/News/press/2006_08_28.shtml)

Decision: <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B10-148-05.pdf>

Bundeskartellamt prohibits Praktiker's price squeeze: 8.5.2006

Decision: <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B9-149-04.pdf>

Settlement: Private gas customers now able to switch providers: 14.2.2006

Press release: [http://www.bundeskartellamt.de/wEnglisch/News/press/2006\\_02\\_14.shtml](http://www.bundeskartellamt.de/wEnglisch/News/press/2006_02_14.shtml)

Decision: <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B9-149-04.pdf>

Soda Club: 9.2.2006

Decision: <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B3-39-03.pdf>

Bundeskartellamt prohibits E.ON Ruhrgas' long-term gas supply contracts with distributors: 13.1.2006

Press release: [http://www.bundeskartellamt.de/wEnglisch/News/press/2006\\_01\\_17.shtml](http://www.bundeskartellamt.de/wEnglisch/News/press/2006_01_17.shtml)

Decision: <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B8-113-03.pdf>

Bundeskartellamt imposes fines against Schlecker: 1.9.2005

Press release:

[http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005\\_09\\_01.shtml](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_09_01.shtml)

Bundeskartellamt achieves further concessions in gas price proceedings: 28.4.2005

Press release:

[http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005\\_04\\_28.shtml](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_04_28.shtml)

Bundeskartellamt takes action against Deutsche Post for abusive market hindrance: 11.2.2005

Press release:

[http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005\\_02\\_14.shtml](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_02_14.shtml)

Decision: <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell05/B9-55-03.pdf>

Bundeskartellamt welcomes opening-up of DSD to more competition: 12.10.2004

Press release:

[http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004\\_10\\_12.shtml](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004_10_12.shtml)

No prohibition proceedings against Lufthansa's cancellation of travel agencies' commission: 26.7.2004

Press release:

[http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004\\_07\\_26.shtml](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004_07_26.shtml)

Bundeskartellamt prohibits Mainova AG from denying connection to its network: 8.10.2003

Press release:

[http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003\\_10\\_09.shtml](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_10_09.shtml)

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