Control of Mergers
Between Newspaper Enterprises
Under South African and German Competition Law

by

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I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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Abstract

This thesis compares South African and German Competition Law. The focus is the control of mergers between newspaper enterprises. It has to be asked whether special rules should apply to transactions in this field, considering the importance of an unconcentrated, competitive press from an economic and political point of view. It will be shown that South African and German Competition Law are similar in many respects. Both legal systems follow a flexible, primarily economic approach to the consideration of proposed transactions, taking into account a plurality of factors to determine potential detrimental effects of mergers on competition. Moreover, pro-competitive gains and public interest issues are recognised under South African and German law. When it comes to the control of mergers between newspaper enterprises, though, the two legal systems diverge. Only under German Competition Law, are there specific provisions for press mergers. In view of a recently proposed amendment of the German Competition Law, the appropriate form of regulation that is likely to guarantee a free press, will be investigated. It will also be analysed, whether there is a specific need for press regulation in the South African context. Even though there are no special provisions under South African Competition Law, the South African Constitution leaves space for a broader understanding of the freedom of the press. Hence, it will be examined if the South African Constitution obliges the state to enact particular laws to protect press-plurality. Moreover, it will be analysed if the South African Competition Act should be interpreted in a manner that would promote plurality of the press. In the view of the eminent role of the press for a democratic society, it will be argued in this thesis, that there is a particular need for media regulation. Notably the significant levels of concentration in both German and South African press markets raise concerns as regards the protection of a free and pluralistic press. It will be shown that there are different foreign approaches to maintaining and promoting freedom of the press and it will be suggested that South Africa recognises a need for more press-specific regulation in the future.

Opsomming

Hierdie verhandeling vergelyk Suid-Afrikaanse en Duitse mededingingsreg. Dit is gefokus op beheer oor persondernemings. Die vraag word gevra of spesiale reëls van toepassing behoort te wees op transaksies in hierdie sektor, indien die politieke en ekonomiese belang van 'n ongekonsentreerde en mededingende pers in ag geneem word. Dit word uitgewys dat Suid-Afrikaanse en Duitse mededingsreg in vele opsigte soortgelyk is, wat die regulering van samesmeltings betref. Beide regsstelsels volg 'n buigsame, hoofsaaklik ekonomiese benadering tot die oorweging van 'n transaksie. Beide neem 'n veelheid van faktore in ag om te bepaal of 'n transaksie moontlik negatiewe gevolge vir mededinging het. Verder word pro-mededingende en publieke belangsaspekte in beide die Suid-Afrikaanse en Duitse reg in ag geneem. In die geval van 'n samesmelting tussen koerantondernemings verskil die twee sisteme egter. Die Duitse reg het spesiale reëls vir samesmelting van sulke ondernemings. In die lig van wysigings wat onlangs aan die Duitse mededingsreg voorgestel is, word geskikte vlakke van regulering van die pers, wat nodig is om 'n vrye pers te waarborg, ondersoek. Aandag word geskenk aan die vraag of daar 'n behoefte is aan regulering van die pers in die Suid-Afrikaanse omgewing. Alhoewel die Suid-Afrikaanse Grondwet nie spesiaal daarvoor voorsiening maak nie, laat die Grondwet plek vir 'n wyer begrip van persvryeid. Dus word vasgestel of daar 'n plig op die staat is om wetgewing in te voer wat die staat dwing om perspluralisme te beskerm. Verder, word bepaal of die Suid-Afrikaanse Mededingingswet op so 'n wyse interpreteer kan word dat dit perspluralisme sal bevorder. In die lig van die sentrale rol vir 'n vrye pers in 'n demokratiese samelewing, word geargumenteer dat, daar 'n spesiale behoefte aan regulering van die media is. Die hoë vlakke van konsentrasie in beide die Duitse en Suid-Afrikaanse persmarkte skep besorgheid oor die beskerming van 'n vrye en pluralistiese pers in hierdie lande. Dit word aangetoon dat daar verskillende benaderings tot die beskerming en bevordering van 'n vrye pers in ander lande is en daar word voorgestel dat Suid-Afrika 'n behoefte aan meer spesifieke reëls vir regulering van die pers erken.

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Abbreviations

ABC	Audit Bureau of Circulations of South Africa
AfP	Archiv für Presserecht (Archive for Law of the Press)
AG	Aktiengesellschaft (joint-stock company)
ANC	African National Congress
Art.	Artikel
AS	Axel Springer AG
BB	Betriebs-Berater
BCLR	Butterworths Constitutional Law Reports
BDZV	Bundesverband Deutscher Zeitungsverleger (Federal Association of German Newspaper Publishers)
BEE	Black Economic Empowerment
BGBl.	Bundesgesetzblatt (German Federal Government Gazette)
BGH	Bundesgerichtshof (German Federal Court)
BKartA	Bundeskartellamt (German Federal Cartel Office)
BLLR	Butterworths Labour Law Reports
BR-Drs.	Bundesrats-Drucksache (Official Journal of the Bundesrat (Federal Upper House of Parliament))

BT-Drs.	Bundestags-Drucksache (Official Journal of the Bundestag (Federal Lower House of Parliament))
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts, Amtliche Sammlung (Decisions of the German Federal Constitutional Court, Official Journal)
CAC	Competition Appeal Court
cf	compare
CPLR	Butterworths Competition Law Reports
CT	Competition Tribunal
DJV	Deutscher Journalisten-Verband (German journalists' association)
EC	Treaty Establishing the European Community
ECJ	European Court of Justice
ECR	European Court reports
E.L.Rev.	European Law Review
EU	European Union
EuZW	Europäische Zeitschrift für Wettbewerbsrecht
f.	following (page, section etc.)

FCC	Federal Communications Commission
ff.	following (pages, sections etc.)
FTC	Federal Trade Commission
FXI	Freedom of Expression Institute
GDR	German Democratic Republic
GG	Grundgesetz (German Constitution) or Government Gazette
G+J	Gruner + Jahr AG & Co. KG Druck- und Verlagshaus, Hamburg
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Act against Restraints of Competition)
HHI	Herfindahl-Hirschmann Index
IBA	Independent Broadcasting Authority
ICASA	Independent Communications Authority of South Africa
INSEAD	Institut Européen et Administration des Affaires
IVW	Informationsgemeinschaft zur Feststellung der Verbreitung von Werbeträgern e.V.
JSE	Johannesburg Securities Exchange

KEK	Kommission zur Ermittlung der Konzentration im Medienbereich (Commission for the Assessment of Concentration in the Media Sector)
KG	Kammergericht (Higher Regional Court of Berlin)
MDDA	Media Development and Diversity Agency
Minn. L. Rev.	Minnesota Law Review
MISA	Media Institute of Southern Africa
MMR	Multimedia Recht (Journal for Multimedia Law)
NPA	Newspaper Preservation Act
OECD	Organisation for Economic Co-operation and Development
Ofcom	Office of Communications (UK)
OJEC	Official Journal of the European Communities
OJEU	Official Journal of the European Union
OLG	Oberlandesgericht (Higher Regional Court)
p.	page
par	paragraph
PlPr	Plenarprotokoll
R	South African Rand (ZAR)

RegTP	Regulierungsbehörde für Telekommunikation und Post
RfStV	Rundfunkstaatsvertrag (German Broadcasting Treaty)
Rn.	Randnote (marginal note)
s	section(s)
S.	Seite (page) or Satz (sentence)
SA	The South African Law Reports
SAJE	The South African Journal of Economics
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SATRA	South African Telecommunications Regulatory Authority
SCA	Supreme Court of Appeal
SME	small and medium-sized enterprise
SPD	Sozialdemokratische Partei Deutschland (Social Democratic Party Germany)
StGB	Strafgesetzbuch (German Criminal Code)
StPO	Strafprozessordnung (German Criminal Procedure Code)
TKG	Telekommunikationsgesetz (German Telecommunication Act)

UK	United Kingdom
UPALR	University of Pennsylvania Law Review
US	United States of America
VDZ	Verband Deutscher Zeitschriftenverleger (Association of German Magazine Publishers)
WAZ	Westdeutsche Allgemeine Zeitung
wbl	wirtschaftsrechtliche blätter
WuW	Wirtschaft und Wettbewerb (Journal for Economy and Competition)
WuW/E	Wirtschaft und Wettbewerb / Entscheidungssammlung (Journal for Economy and Competition / Collection of Decisions)
ZUM	Zeitschrift für Urheber- und Medienrecht (Journal for Intellectual Property Law and Media Law)

Introduction

Competition law is that branch of the law that deals with the regulation and supervision of market conduct and market structure. It imposes legal rules in form of an interventionist mechanism to correct unwanted anti-competitive conduct or changes in market structure notably via mergers[1] that result in a substantial prevention or lessening of competition in a relevant market or lead to market-dominant positions.
Conversely, media law consists of rules, which concern the media, especially media behaviour and media structure. This thesis focuses on the interface between competition and media law; in this case, especially on the provisions for and judgements concerning mergers between newspaper enterprises, because media law is one of the branches of the law in which competition law plays an ambiguous role. On the one hand, the media industry is a proper industrial sector, in which publishers try in the same way as enterprises in any other market, to maximize their profits. On the other hand, the media – and especially newspaper enterprises – act as an intermediary between the government and the people, and a free press is crucial to a democratic society. Thus, the maintenance and promotion of a plurality of opinions has to be taken into account in this area. Hence, regulating the media via competition law has always been a delicate matter, which makes it particularly interesting to investigate how different nations approach this problem.

In essence, this thesis shall analyse the legal framework of merger control in South Africa and compare it to the German law. The focus will be on mergers between (newspaper) publishing houses. This branch of competition law that deals with the structure of the media market itself is particularly problematic. It should be asked if special rules should apply to mergers between these firms, considering the importance of an unconcentrated, competitive press not only from an economic point of view. Under German Competition Law, such an approach exists; the law prescribes special provisions for the media market sector.

[1] The term 'merger' will consistently be used in this thesis instead of 'concentration' (as used in European Competition Law).

In the first chapter of this thesis, South African Competition Law will be described. An attempt will be made to give answers to following questions:

- What rules apply to firms that plan to merge?
- How do merger proceedings work?
- What do competition authorities have to consider, regarding a proposed merger?
- Do any special provisions or principles apply to media mergers?
- Which role does the South African Constitution play for the regulation of such mergers?

The second chapter is dedicated to the German regulatory framework of the control of mergers. The specific provisions for media regulation under German Competition Law, as far as merger control is concerned, will be explained. In particular, constitutional problems with the recently proposed amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB)) will be discussed. As far as necessary, a certain cursory overview of the European approach to merger control will be given at the beginning of this chapter.

In the third chapter of this thesis, both legal systems will be compared. Differences and similarities of the South African and German approaches will be examined.

Finally, the last chapter will be dedicated to the question whether South Africa should adopt a specific approach to competition problems in the media sector. The need for regulating the press will be analysed in detail.

Competition law is based upon economic doctrine. The law has to use economic principles as a base for judicial decisions. Hence, a detailed analysis of market processes and market structure is imperative for the understanding of merger proceedings and the competition authorities' consideration of mergers. However, it is beyond the scope of this thesis to describe economic theory thoroughly. There is a vast literature on this subject and it is not intended and simply impossible to discuss this subject and its controversial doctrines comprehensively. Nevertheless, it will be overviewed in so far as it is necessary.

As far as German law is referred to in this thesis, the respective provisions will be quoted in the customary German way. For instance, § 37 III 2 Nr. 1 GWB refers to section 37, paragraph 3, second sentence, number 1 of the GWB.

German jurisdiction will also be quoted in the common German method, to facilitate eventual research to the reader. It is also intentionally avoided to use an English translation for German laws and authorities. Nevertheless, a translation will be given as far as it is helpful.

Chapter 1
South African Competition Law

1 1 Introduction

At least nominally, South Africa has a fairly long experience of antitrust enforcement.[2] Antimonopoly legislation already existed since 1955.[3] In 1979, the Maintenance and Promotion of Competition Act[4] was passed and put into effect on the 1st of January 1980.[5] Nevertheless, it turned out that competition authorities lacked administrative power to enforce competition matters effectively. Quite recently, in 1998, the legal framework was totally renewed by the South African government – in order to provide a modern system of competition law for South Africa's economy on the global market – by passing the Competition Act 89 of 1998,[6] which has been in force since September 1999. The Act has already been revised several times. First, the Competition Act will be examined, focussing notably on mergers between newspaper enterprises. Thereafter, the South African Constitution will be scrutinized to see, whether its provisions have any impact on the understanding and interpretation of the Act.

1 2 Purposes of the Act

As in other jurisdictions around the world, the principal goal of South African Competition Law is to ensure that the trade remains free and the markets are kept open.[7] The preamble to the Act outlines the general principles upon which South African Competition Law shall be based. The Act was established to

> 'provide all South Africans equal opportunity to participate fairly in the national economy;

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[2] See for the development of competition law in South Africa in detail: Sutherland *Competition Law of South Africa* (2004) chapter 3.

[3] See the Regulation of Monopolistic Conditions Act 24 of 1955. Sutherland describes this Act as 'the first comprehensive legislation in South Africa that was dedicated to competition law.' (Sutherland *Competition Law of South Africa* (2004) 3-27). *Cf* also Theron 'The Economics of Competition Policy: Merger Analysis in South Africa' (2001) *SAJE, vol. 69: 4,* 614.

[4] Maintenance and Promotion of Competition Act 96 of 1979, available at: http://www.compcom.co.za/thelaw/act96of1979.doc.

[5] See Sutherland *Competition Law of South Africa* (2004) 3-32 for details.

[6] Later on designated as 'the Act'; full text available at: http://www.compcom.co.za/thelaw/thelaw_act_competition_acts.asp?level=1&child=1; all sections without specific designation referred to in this thesis are sections of the Act.

[7] Brassey in Brassey et al *Competition Law* (2002) 2.

achieve a more effective and efficient economy in South Africa;
provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
create greater capability and an environment for South Africans to compete effectively in international markets;
restrain particular trade practices which undermine a competitive economy;
regulate the transfer of economic ownership in keeping with the public interest;
establish independent institutions to monitor economic competition; and
give effect to the international law obligations of the Republic.'

Indeed, South African Competition Law has a plurality of objectives. South African competition policy accommodates divergent ideals, like the promotion of efficiency, the development of the economy, to provide consumers with competitive prices and product choice, to promote employment and advance social and economic welfare, to ensure that small and medium-sized enterprises have equitable participation in the economy, just to name the main objectives. The maximisation of consumer welfare[8] is of crucial interest, although it is mentioned only as one objective among others.[9]

The Act itself sets out the different objectives, enumerated in section 2 as 'purpose of the Act':

'The purpose of this Act is to promote and maintain competition in the Republic in order –

(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
(c) to promote employment and advance the social and economic welfare of South Africans;
(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.'

[8] See on this point Areeda & Hovenkamp *Antitrust Law I* Second Edition (2000) 4.
[9] Also see Brassey in Brassey et al *Competition Law* (2002) 19-20.

The Act prescribes in section 1(2)(a) that it must be interpreted in a manner that is consistent with the South African Constitution[10] and by giving effect to the purposes set out in section 2. Therefore, these purposes as well as the history and the social political and economic context of the Act must be borne in mind whenever it is applied.[11] Thus, in each single decision made by the competition authorities, these objectives should theoretically play an important role from a 'formal-legal' point of view. However, section 2 and its approach of multiple goals is criticised. It is argued that the objectives of the Competition Act are too wide and that competition law cannot guarantee, for example, the promotion of social and economic welfare as set out in paragraph (c) of section 2. It is especially questioned, if competition policy is the appropriate instrument for the redistribution of wealth and income, promotion of employment and the provision of equitable opportunity for participation in the economy for small and medium-sized enterprises. In Reekie's opinion for instance 'the promotion of employment [...] is a matter for macroeconomics, not competition policy,'[12] and the desire to 'expand opportunities' for export performance (section 2(d)) would generally be a matter of macroeconomic concern (for instance international trade or exchange rate policy).[13]

In fact, it is more than uncertain, if *competition law* is appropriate to promote all these goals.[14]

Competition authorities have to assess the detrimental impact, a merger is or is not likely to have on competition. Hence, the evaluation is based on competition grounds, but the impact of the transaction on employment and on advancing the ownership stakes of black entrepreneurs has to be taken into account as well. The Act demands the assessment of multiple factors, but does not provide any guidelines for weighting them.[15] Sutherland remarks that it may be difficult for competition law to 'assist in redressing the injustices of South Africa's past racial policies [...] without any cost to efficiency, especially in the short term.'[16] Reekie also foresees the occurrence of conflicts between other objectives and the goal to promote the efficiency, adaptability, and development of economy as regulated in section 2 paragraph (a). Tough political choices often will have to be made between these

[10] For the consequences of this rule see 1 7 3 *infra*.
[11] *Cf* Sutherland *Competition Law of South Africa* (2004) 4-12.
[12] Reekie 'The Competition Act, 1998: An Economic Perspective' (1999) SAJE, Vol. 67 :2 1999 June, 258.
[13] Reekie 'The Competition Act, 1998: An Economic Perspective' (1999) SAJE, Vol. 67 :2 1999 June, 258.
[14] On this problem *cf* also Areeda & Hovenkamp *Antitrust Law I* Second Edition (2000) 6.
[15] Lewis 'Competition Regulation: The South African Experience', paper presented to: ISCCO Conference 2000 – Taipei: June 21, 2000, available at: http://www.comptrib.co.za/Publications/Speeches/Teipei%20Conference%20Speech.htm.
[16] Sutherland *Competition Law of South Africa* (2004) 4-4.

objectives, because they often will conflict. 'Competition policy authorities, however, should not have to make them.'[17]

Furthermore, South Africa's economy competes with other countries in the global market. It could be a disadvantage for South African enterprises to be regulated under the enumerated objectives. Therefore, some authors agree with the Chicago school doctrine[18] and take a purely economic point of view, which focuses on allocative efficiency as primary – and only – goal of competition law.

In practice, however, the core objective of the Act is regarded as maintenance and promotion of competition[19] and hence economic considerations are the primary criteria for the control of competitive behaviour, so that these problems play an inferior role.[20] In particular, the objective in paragraph (f) to promote greater spread of ownership, notably to increase the ownership stakes of historically disadvantaged persons – another South African peculiarity – does not seem to have played a decisive role in any merger case so far.[21] Moreover, the plurality of differing legal goals is not unknown in other areas of law. The weighing of disparate goals in every case is the 'judge's daily business'. Most judges are comfortable with this. Furthermore, in other jurisdictions competition law has a plurality of goals as well. The European Community's Treaty (EC Treaty)[22] for example follows in Article 81 and 82[23] – besides the prevention of restriction or distortion of competition within the common market – the idea of European unification and the maintenance of a European market and the free trade between Member States.[24] Therefore, the European Court of Justice lays stress on the necessity of price competition to encourage the movement of goods between the member states of the European Union[25] and judges competitive con-

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[17] Reekie 'The Competition Act, 1998: An Economic Perspective' (1999) SAJE, Vol. 67 :2 1999 June, 259.
[18] On this approach see 4 2 2 *infra*.
[19] Lewis 'Competition Policy in South Africa – Where has it come from and where is it going?' (2002), speech to Investment Analysts' Society of South Africa, 16th May 2002, Johannesburg, available at: http://www.comptrib.co.za/Publications/Speeches/IAS%20speech.htm.
[20] See for the influence of section 2 on the interpretation of the Competition Act in detail: Sutherland *Competition Law of South Africa* (2004) section 4.2.
[21] Only under public interest grounds the issue of BEE is discussed in detail, see 1 5 1 2 6 *infra*.
[22] Consolidated Version of the Treaty Establishing the European Community, OJEC C 325/33 of 24.12.2002, also available at: http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf.
[23] See Appendix I of this thesis.
[24] *Cf* especially Article 3 and 4 of the EC Treaty, which outline the importance of European unification.
[25] See for instance *Imperial Chemical Industries Ltd v Commission of the European Communities*, Judgment of the European Court of Justice of 14 July 1972, (1972) ECR 619 (Case No. 48-69), par 115.

duct according to its consistency with the objectives laid down in Article 2 to 4 of the EC Treaty.

1 3 Structure of the Act

In essence, South African Competition Law controls two elementary branches of market behaviour. It deals with prohibited practices and the control of mergers. The former consists of anti-competitive conduct, in form of prohibited coordinated conduct (restrictive practices, regulated in sections 4 to 5) or in form of unlawful unilateral conduct (abuse of a dominant position, regulated in sections 6 to 9). The discussion of the prevention of prohibited practices, which may affect the market by diminishing competition through certain conduct, will not be a substantial part of this thesis, since the control of mergers is the focus of attention. Hence, neither the legal problems concerning the prohibition of these practices (in particular the debate about the necessity of outlawing certain practices and, *inter alia*, the distinction between 'agreement' and 'concerted practice') nor the similarities and differences in approach between the South African Competition Act and the antitrust laws of the United States of America and Europe will be discussed here.[26]
Nevertheless, a short overview of the South African approach towards prohibited practices will be given in the form of a graph on the next page:

[26] See the specific literature: Sutherland *Competition Law of South Africa* (2004) chapter 5-7; Campbell in Brassey et al *Competition Law* (2002) chapter 5 – Restrictive Horizontal Practices; Unterhalter in Brassey et al *Competition Law* (2002) chapter 6 – Restrictive Vertical Practices; Unterhalter in Brassey et al *Competition Law* (2002) chapter 7 – The Abuse of Dominance; for the United States see Areeda & Hovenkamp *Antitrust Law I-XIV* Second Edition (2002-2005).

Graph 1: **Prohibited Practices**

Restrictive Practices		**Abuse of a dominant position**	
Horizontal	**Vertical**	**Exclusionary Conduct**	**Price Discrimination**
= Agreement[27] between, or concerted practice[28] by, firms[29], or a decision by an association of firms in a horizontal relationship[30] (section 4(1))	= Agreement between parties	• Application, see s 6 • Dominance of a firm in a market in terms of section 7: - market share of 45% or above; or - market share between 35% and 45 % and firm cannot show that it does not have market power; or - market share of less than 35% but firm has market power	• Application, see s 6 • Dominance of a firm in a market in terms of section 7: - market share of 45% or above; or - market share between 35% and 45 % and firm cannot show that it does not have market power; or - market share of less than 35% but firm has market power
→ Practice is prohibited	→ Agreement is prohibited	→ Exclusionary conduct of the dominant firm is prohibited, notably in the cases of:	→ Price discrimination of the dominant firm is prohibited, if it is likely to have the effect of substantially preventing or lessening competition
per se[31] (section 4(1)(b)) in case of:	*per se* (section 5(2)) in case of:	• charging an excessive price to the detriment of consumers • refusing to give a competitor access to an essential facility when it is economically feasible to do so • refusal to deal	• different forms of discrimination, such as in terms of price charged, discounts or payment • exceptions in section 9(2)
• price-fixing[32] • market allocation[33] • collusive tendering	• minimum resale price maintenance[34]	→ See section 8 for details[35]	→ see section 9 for details
otherwise only if not justifiable by the *'rule of reason'* (section 4(1)(a)):	otherwise only if not justifiable by the *'rule of reason'* (section 5(1)):		
• Practice is (only) prohibited if it has the effect of substantially preventing, or lessening, competition in a market, and • none of the parties to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect	• Agreement is (only) prohibited if it has the effect of substantially preventing or lessening competition in a market and • none of the parties to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect		
No exemption granted by the Commission (section 10)		No exemption granted by the Commission (section 10)	

[27] 'Agreement' includes a contract, arrangement or understanding, whether or not legally enforceable (s 1(1)(ii)). See also the (confutable) presumption for the existence of an agreement in section 4(2) and (3).
[28] 'Concerted practice' means co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement (s 1(1)(vi)).
[29] 'Firm' includes a person, partnership or a trust (s 1(1)(xi)).
[30] Due to the definition of 'horizontal relationship' in s 1(1)(xiii) of the Act, the prohibitions of horizontal concerted practices only apply to agreements between competitors and to concerted practices committed by competitors and decisions by associations of firms that are competing on the market. The competitive relationship must already exist before the prohibition comes into operation, see *SA Defence and Aid Fund and another v Minister of Justice* 1967 (1) SA 31 (C) at 34H-35D.
[31] This means that the conduct is prohibited outright without determining whether it has produced or may produce anti-competitive consequences in the particular situation. Hence, this conduct is prohibited without recourse to arguments of justification.
[32] 'Directly or indirectly fixing a purchase or selling price or any other trading conditions' (s 4(1)(b)(i)).
[33] 'Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services' (s 4(1)(b)(ii)).
[34] Not including the recommendation of a minimum resale price by a supplier or producer, see s 5(3).

[35] *Cf* also on this problem Areeda & Hovenkamp *Antitrust Law XIII* Second Edition (2005) chapter 22.

1 4 Competition authorities

Contrary to the Maintenance and Promotion of Competition Act, the Competition Act 89 of 1998 established a system of powerful and independent bodies, which prosecute prohibited anti-competitive practices and control mergers between enterprises. This 'most significant change'[36] in South African Competition Law led to the following bodies, regulated in chapter 4 of the Act: the Competition Commission,[37] the Competition Tribunal[38] and the Competition Appeal Court,[39] replacing the former Competition Board.[40]

1 4 1 The Competition Commission

The Competition Commission is in charge of the investigation and prosecution of unlawful competitive behaviour and the control of mergers.[41] The Competition Commission may grant or deny exemptions from anti-competitive practices prohibited in chapter 2 of the Competition Act.

The Act empowers the Commission with wide investigative powers and the right of seizure. Moreover, the Competition Commission may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of important material.[42] Its resources and its extended powers are considered as evidence of the new regard that South Africa has for antitrust enforcement.[43]

According to section 20(1)(a), the Commission is independent and subject only to the South African Constitution and the law. Like the Competition Tribunal and the Competition Appeal Court, its decisions cannot be reversed by governmental act. Thus, the Commis-

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[36] Lewis 'Competition Regulation: The South African Experience', paper presented to: ISCCO Conference 2000 – Taipei: June 21, 2000, available at: http://www.comptrib.co.za/Publications/Speeches/Teipei%20Conference%20Speech.htm.
[37] See at: www.compcom.co.za.
[38] See at: www.comptrib.co.za.
[39] See at: www.comptrib.co.za/CAC/appeal_court.htm.
[40] See also Sutherland *Competition Law of South Africa* (2004) chapter 9 for details about the competition authorities.
[41] See s 21 and 1 5 *infra.*
[42] See s 46 to 49A.
[43] Lewis 'Competition Regulation: The South African Experience', paper presented to: ISCCO Conference 2000 – Taipei: June 21, 2000, available at: http://www.comptrib.co.za/Publications/Speeches/Teipei%20Conference%20Speech.htm.

sion can be regarded as a specialized body, which is free of ministerial and political interference.

In merger proceedings, the Competition Commission plays a crucial role. In respect of all mergers, the Commission has an investigative function. The Competition Commission refers large mergers to the Competition Tribunal and recommends that the proposed merger be either approved unconditionally, approved subject to conditions, or prohibited. In case of small and intermediate mergers, the Commission can even decide on its own, whether to approve or prohibit the merger.[44] Thus, the Commission acts as an advisory body to the Tribunal and in case of small and intermediate mergers effectively as an adjudicative body. Parties may appeal adverse decisions of the Commission on intermediate mergers and exemptions from anti-competitive practices to the Competition Tribunal.

In section 53(1)(c)(ii) the Act grants a right to the Commission to participate in merger hearings before the Tribunal. Nevertheless, the Competition Appeal Court concluded that this does not include a right of appeal against decisions of the Tribunal approving a merger. The Court stated that the Act does not recognise such a right. The Commission would not be 'affected' in terms of section 61(1) of the Act, which should be given a limited interpretation:[45]

> 'The Commission is not 'proximately affected' by a Tribunal decision approving a merger. The Commission's task in merger proceedings is to investigate and adjudicate upon small and intermediate mergers, to advise the Tribunal on large mergers, and to participate in merger hearings before the Tribunal. Once the Commission has discharged these duties, it is *functus officio*. Unlike in complaint proceedings, the Commission is not a party to such proceedings in the ordinary sense of the word. It is merely a participant whose participation ends with the Tribunal hearing. The Commission has no direct or substantial interest in the decision reached by the Tribunal.'

The question, whether the Commission has a right to *participate* in merger proceedings before the Competition Appeal Court, has not yet come up for decision. In the case *Mondi*

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[44] See for the distinction between these different merger types and for the necessity of notification 1 5 1 2 3 *infra*.

[45] *The Competition Commission v Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Limited* (31/CAC/Sep03) par 6.

v Kohler[46] the Commission sought to participate in an appeal by parties to a large merger against a Tribunal decision prohibiting such merger. However, this question remained unanswered, because the Appeal Court was not forced, in view of the conclusion it reached, to adjudicate upon this issue.[47]

1 4 2 The Competition Tribunal

The Competition Tribunal is effectively the court of first instance, being competent for the review of decisions made by the Competition Commission and for the hearing of appeals from the Commission.[48]

The Competition Tribunal adjudicates all matters regulated by the Competition Act, that is prohibited practices and mergers.[49] It has the authority to issue compliance orders or interdicts, levy fines and to impose structural remedies. If a merger is implemented in contravention of chapter 3, the Tribunal can order divestiture. It can order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger, or of declaring void any provision of an agreement to which the merger was subject.[50]

The Tribunal may also grant an order for interim relief if there is evidence that a prohibited practice has occurred; it is reasonably necessary to prevent serious, irreparable damage or to prevent the purposes of the Act being frustrated; the respondent has been given a reasonable opportunity to be heard, with regard to the urgency of the proceedings and the balance of convenience favours the granting of the order.[51]

The independence of the Tribunal is guaranteed by section 29(5)(b). A member of the Competition Tribunal can only be removed by the President of the Tribunal, on the recommendation of the Minister of Trade and Industry, when that person becomes subject to certain disqualifications enumerated in section 28(3). Such a removal from office might happen, when a competent court holds that a member of the Tribunal is 'mentally unfit or disordered' or the member is convicted of an offence and 'sentenced to imprisonment

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[46] *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02).
[47] *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02) par 85.
[48] See s 27(1)(c).
[49] See s 27(1)(a) and (b).
[50] *Cf* s 60(1) and s 58(1)(a)(iv) for prohibited practices.
[51] See s 49C(2)(b).

without the option of a fine'. Moreover, serious misconduct, permanent incapacity, or engaging in any activity that may undermine the integrity of the Competition Tribunal, may lead to a removal.[52]

The Act also aims at a high standard of qualification of its members, prescribing that the Tribunal's members 'must represent a broad cross-section of the population' of South Africa,[53] while each member must have 'suitable qualifications and experience in economics, law, commerce, industry or public affairs'.[54]

The decisions of the Competition Tribunal can only be appealed to the Competition Appeal Court.

1 4 3 Competition Appeal Court

The Competition Appeal Court is a special division of the High Court of South Africa, staffed by judges with specialized knowledge about competition law.[55] The Court is competent to hear appeals on decisions of the Competition Tribunal. It may confirm,[56] amend[57] or set aside[58] a decision or order of the Competition Tribunal or remit a matter to the Competition Tribunal for a further hearing on any appropriate terms. If the Competition Appeal Court sets aside a decision of the Competition Tribunal, the Court itself must decide on the merger by approving it with or without conditions, or by prohibiting the implementation of the merger.[59]

The Competition Appeal Court[60] dismissed about half of its published appeals so far.[61] In

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[52] See s 29(5)(a) and (b).
[53] S 28(1)(a).
[54] S 28(2)(b).
[55] For details see s 36 to 39.
[56] S 17(2)(c).
[57] The CAC may amend the decision by ordering or removing restrictions, or by including or deleting conditions, s 17(2)(b).
[58] S 17(2)(a).
[59] See s 17(3).
[60] Decisions published at: http://www.comptrib.co.za/CAC/appeal_judgments.htm.
[61] All appeals published by 30 June 2005 have been taken into account. See *Telkom SA Limited v Orion Cellular (Pty) Ltd and Standard Bank of South Africa and Edgars Consolidated Stores Ltd* (38/CAC/Jan04); *The Competition Commission v Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Limited* (31/CAC/Sep03); *American Natural Soda Ash Corporation and CHC Global (Pty) Ltd v Competition Commission of South Africa and Botswana Ash (Pty) Ltd and Chemserve Technical Products and The Minister of Trade and Industry* (12/CAC/Dec01), in this case, also the application for leave to appeal to

the rest of the cases, the matter was postponed,[62] or the appeal was upheld,[63] and the orders of the Competition Tribunal were amended or (partially) set aside, such as the ap-

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the Supreme Court of Appeal was dismissed; *Patensie Sitrus Beherend Beperk v The Competition Commission and Jakobus Johannes Pietrus Bezuidenhout and Jan Daniel du Preez* (16/CAC/Apr02); *Anglo South Africa Capital (Pty) Ltd and Anglovaal Mining Ltd and Anglo American Holdings Ltd and Kumba Resources Ltd v Industrial Development Corporation of South Africa and The Competition Commission South Africa* (26/CAC/Dec02); *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02); *Schering (Pty) Ltd and MSD (Pty) Ltd and Novartis SA (Pty) Ltd and Roche Products (Pty) Ltd and Boehringer-Ingelheim Pharmaceuticals (Pty) Ltd and Bristol Myers Squibb (Pty) Ltd and Abbott Laboratories SA (Pty) Ltd and Bayer (Pty) Ltd and Eli Lilly SA (Pty) Ltd and Wyeth SA (Pty) Ltd and Aventis Pharma (Pty) Ltd and International Healthcare Distributors (Pty) Ltd and Sanofi-Synthelobo (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd [Formerly Mainstreet 2 (Pty) Ltd] and Natal Wholesale Chemists (Pty) t/a Alpha Pharm Durban and Midlands Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Pietermaritzburg and East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape and Free State Buying Association Ltd t/a Alpha Pharm Bloemfontein and [Kemco] and Pharmed Pharmaceuticals Ltd and AGM Pharmaceuticals Ltd t/a Docmed and L'Etangs Wholesale Chemists t/a L'Etangs and Resepkor (Pty) Ltd t/a Reskor Pharmaceutical Wholesalers and The Competition Commission* (11/CAC/Aug01); *Distillers Corporation (SA) Ltd and Stellenbosch Farmers' Winery Group Ltd v Bulmer (SA) (Pty) Ltd and Seagram Africa (Pty) Ltd* (08/CAC/May01); *York Timbers Ltd v South African Forestry Ltd* (09/CAC/May01); *Novartis SA (Pty) Ltd and Roche Products (Pty) Ltd and Boehringer Ingelheim (Pty) Ltd and Bristolmyers Squibb (Pty) Ltd and Shering-Berlin (Pty) Ltd t/a Berlimed and Bayer (Pty) Ltd and Rolab (Pty) Ltd and Hoechst Marion Roussel Ltd and International Healthcare Distributors (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd (UPD) (formerly Mainstreet 2 (Pty) Ltd) and Natal Wholesale Chemists (Pty) t/a Alpha Pharm Durban and Midlands Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Pietermaritzburg and East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape and Free State Buying Association Ltd t/a Alpha Pharm Bloemfontein (Kemco) and Pharmed Pharmaceuticals Ltd and L'Etangs Wholesale Chemist CC t/a L'Etangs and Resepkor (Pty) Ltd t/a Reskor* (07/CAC/Dec00); *Glaxo Wellcome (Pty) Ltd and Pfizer Laboratories (Pty) Ltd and Pharmacare Ltd and Smithkline Beecham Pharmaceuticals (Pty) Ltd and Warner Lambert SA (Pty) Ltd and Synergistic Alliance Investments (Pty) Ltd and Druggist Distributors (Pty) Ltd v Terblanche, Diane, N.O. and Fourie, Frederick, N.O. and Holden, Merle, N.O. and The Competition Tribunal and National Association Of Pharmaceutical Wholesalers and National Wholesale Chemists (Pty) Ltd and Midlands Wholesale Chemists (Pty) Ltd t/a Pharm Pietermaritzburg and East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape and Free State Buying Association Ltd t/a Alpha Pharm Bloemfontein (Kemco) and Pharmed Pharmaceuticals Ltd and L'Etangs Wholesale Chemist CC t/a L'Etangs and Resepkor (Pty) Ltd t/a Reskor and Pharmaceutical Wholesalers Mainstreet 2 (Pty) Ltd t/a New United Pharmaceutical Distributors* (02/CAC/Sept00): In this case, the application to suspend the operation in execution of the Tribunal's order was dismissed.

[62] *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v The Competition Commission* (33/CAC/Sep03).

[63] *Astral Foods Limited v The Competition Commission* (39/CAC/Feb04); *Mike's Chicken (Pty) Ltd and Daybreak Farms (Pty) Ltd and Midway Chix (Pty) Ltd v Astral Foods Limited and The Competition Commission* (32/CAC/Sep03); *JD Group Limited and Profurn Limited* (28/CAC/May03); *Glaxo Wellcome (Pty) Ltd and Pfizer Laboratories (Pty) Ltd and Pharmacare Ltd and Smithkline Beecham Pharmaceuticals (Pty) Ltd and Warner Lambert SA (Pty) Ltd and Synergistic Alliance Investments (Pty) Ltd and Druggist Distributors (Pty) Ltd v National Association Of Pharmaceutical Wholesalers and Natal Wholesale Chemist (Pty) Ltd t/a Alpha Pharm Durban and Midlands Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Pietermaritzburg and East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape* (15/CAC/Feb02); *Schumann Sasol (South Africa) (Pty) Ltd and Price's Daelite (Pty) Ltd* (10/CAC/Aug01); *The Competition Commission of South Africa v Unilever PLC and Unifoods, A Division of Unilever South Africa (Pty) Ltd and Robertsons Foods (Pty) Ltd and Robertsons Food Service (Pty) Ltd* (13/CAC/Jan02); *Glaxo Wellcome (Pty) Ltd and Pfizer Laboratories (Pty) Ltd and Pharmacare Ltd and Smithkline Beecham Pharmaceuticals (Pty) Ltd and Warner Lambert SA (Pty) Ltd and Synergistic Alliance Investments (Pty) Ltd and Druggist Distributors (Pty) Ltd v Terblanche, Diane, N.O. and Fourie, Frederick, N.O. and Holden, Merle, N.O. and The Competition Tribunal and National Association Of Pharmaceutical Wholesalers and Natal Wholesale Chemists (Pty) Ltd and Midlands Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Pietermaritzburg and East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape and Free State Buying Association Ltd t/a Alpha Pharm Bloemfontein (Kemco) and Pharmed Pharmaceuticals Ltd and L'Etangs Wholesale Chemist CC t/a L'Etangs and Resepkor (Pty) Ltd t/a Reskor and Pharmaceutical Wholesalers Mainstreet 2 (Pty) Ltd t/a New United Pharmaceutical Distributors* (03/CAC/Oct00).

proval of a merger without conditions instead of a conditional approval.[64] In some cases, the matter was remitted to the Competition Tribunal.[65] In other cases, the operation and execution of the order of the Tribunal was temporarily suspended[66] or an application for an interdict was granted.[67]

In some cases, in which the Competition Appeal Court dismissed appeals, the concerned parties applied for leave to appeal to the Supreme Court of Appeal.[68]

1 5 The control of mergers

Merger control is one of the two main branches of South African Competition Law. In essence, it deals with market supervision and regulation: an analysis of the desirability of a merger transaction is conducted by simulating the potential effects, which the transaction may have on the pertinent degree of competition in relevant markets.[69] Competition authorities scrutinize proposed transactions and approve or prohibit them depending on

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[64] This happened for instance in *JD Group Limited and Profurn Limited* (28/CAC/May03). In *Schumann Sasol (South Africa) (Pty) Ltd and Price's Daelite (Pty) Ltd* (10/CAC/Aug01) the merger was approved instead of the prohibition by the Competition Tribunal, which concluded that the conditions proposed by the Commission did not meet the competitive concerns, which had been identified.

[65] *Anglo South Africa (Pty) Ltd and Anglovaal Mining Ltd and Anglo American Holding Ltd and Kumba Resources Ltd v The Industrial Development Corporation of South Africa Ltd and Manoim N.N.O. and Frederick Fourie N.O. and The Competition Commission and Simon Roberts* (24&25/CAC/Oct02); *Glaxo Wellcome (Pty) Ltd and Pfizer Laboratories (Pty) Ltd and Pharmacare Ltd and Smithkline Beecham Pharmaceuticals (Pty) Ltd and Warner Lambert SA (Pty) Ltd and Synergistic Alliance Investments (Pty) Ltd and Druggist Distributors (Pty) Ltd v Terblanche, Diane, N.O. and Fourie, Frederick, N.O. and Holden, Merle, N.O. and The Competition Tribunal and National Association Of Pharmaceutical Wholesalers and Natal Wholesale Chemists (Pty) Ltd and Midlands Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Pietermaritzburg and East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape and Free State Buying Association Ltd t/a Alpha Pharm Bloemfontein (Kemco) and Pharmed Pharmaceuticals Ltd and L'Etangs Wholesale Chemist CC t/a L'Etangs and Resepkor (Pty) Ltd t/a Reskor and Pharmaceutical Wholesalers Mainstreet 2 (Pty) Ltd t/a New United Pharmaceutical Distributors* (03/CAC/Oct00).

[66] *Glaxo Wellcome (Pty) Ltd and Pfizer Laboratories (Pty) Ltd and Pharmacare Ltd and Smithkline Beecham Pharmaceuticals (Pty) Ltd and Warner Lambert SA (Pty) Ltd and Synergistic Alliance Investments (Pty) Ltd and Druggist Distributors (Pty) Ltd v Terblanche, Diane, N.O. and Fourie, Frederick, N.O. and Holden, Merle, N.O. and The Competition Tribunal and National Association Of Pharmaceutical Wholesalers and National Wholesale Chemists (Pty) Ltd and Midlands Wholesale Chemists (Pty) Ltd t/a Pharm Pietermaritzburg and East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape and Free State Buying Association Ltd t/a Alpha Pharm Bloemfontein (Kemco) and Pharmed Pharmaceuticals Ltd and L'Etangs Wholesale Chemist CC t/a L'Etangs and Resepkor (Pty) Ltd t/a Reskor and Pharmaceutical Wholesalers Mainstreet 2 (Pty) Ltd t/a New United Pharmaceutical Distributors* (04/CAC/Oct00).

[67] *Sappi Fine Paper (Pty) Ltd v The Competition Commission of South Africa and Papercor CC* (23/CAC/Sep02).

[68] See for instance *Harmony Gold Mining Company Ltd v Gold Fields Ltd and The Competition Commission and The Minister of Trade and Industry and The Competition Tribunal* (43/CAC/Nov04). See also *American Natural Soda Ash Corporation and CHC Global (Pty) Ltd v Competition Commission of SA and Botswana Ash (Pty) Ltd and Chemserve Technical Products (Pty) Ltd and Minister of Trade and Industry* (SCA 554/03).

[69] For the definition of the relevant market see 1 5 1 2 4 1 *infra.*

whether they would result in a substantial prevention or lessening of competition in the relevant market, and with regard also to the potential adverse consequences which are likely to occur from the exercise of market power in the relevant market by the merged undertaking.

Merger control generally deals with the danger of a sudden growth in such market power of a certain firm resulting from its merger with another firm, notably – but not necessarily – with a competitor.[70] Market power is defined in section 1(1)(xiv) of the Act as 'the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers'.[71] Hence, economists are generally suspicious of existing market power, because it can diminish competition in a market or even exclude it. If a merger creates an entity that has a large enough share of the market, removes the closest competitor, and if the other firms in the market cannot provide substantial competition, the merged firm might be able to increase prices unilaterally. Economists consider that this creates a 'dead-weight loss' to society.[72]

Some mergers create concentrated markets.[73] In such markets, only a few firms operate. On the one hand, this facilitates collusion between those enterprises,[74] especially in form

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[70] Although the Act does not define the term 'competitor' 'firms will be regarded as competitors if they compete in the same market in respect of the same or interchangeable or substitutable goods or services' (*American Soda Ash Corporation and CHC Global (Pty) Ltd v Competition Commission of South Africa and Botswana Ash (Pty) Ltd and Chemserve Technical Products (Pty) Ltd* (12/CAC/Dec01) par 24 with reference to *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul00) par 4.2).

[71] This definition is equivalent to the definition of 'dominant position' as used by the European Court of Justice in the case *United Brands Company and United Brands Continentaal BV v EC Commission* (1978) ECR 207, 1 CMLR 429 (Case No. 27/76). The Court stated that a dominant position would be 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers' (par 65).

[72] The unilateral increase in price to a supra-competitive level leads to higher expenses for consumers, which economically suffer a loss. This redistribution of wealth (transfer of revenues from consumers to producers) can be explained as follows: The monopolist is able to charge more for a product than it would be able in a competitive market. This may reduce the amount sold, but the monopolist's total profit will be higher. Hence, consumers are allocating more of their money resources to products of the monopolist and less of the society's productive resources are being channelled to these products than would be in a competitive environment. Thus, monopoly results in a misallocation of society's scarce resources. See also Reekie 'The Competition Act, 1998: An Economic Perspective' (1999) SAJE, Vol. 67 :2 1999 June, 261.

[73] For the consequences of concentration in markets see in detail 1 5 1 2 4 4 *infra*.

[74] Collusion depends on other factors as well, such as product differentiation, see Sutherland *Competition Law of South Africa* (2004) 5-57: 'Collusion is more likely in markets that are dominated by relatively few sellers, of similar size, that have a similar cost structure or are equally efficient, and where the product is a fungible or at least not differentiated. Where the market has a large number of firms, and products are differentiated, it will be difficult to achieve measures for collusion with which all firms will be happy.'

of prohibited agreements like price-fixing,[75] thus behaviours, which lead to a lessening of competition to the consumers' detriment. On the other hand, the merger may result in a level of market concentration that creates barriers to entry for other potential competitors. Such barriers to entry, in turn, facilitate collusion, because if there are no entry-barriers 'non-colluding firms will come in on the incentive of higher profits and will undermine the collusion.'[76] In such a situation, it is likely that prices are raised to anti-competitive levels, because new competitors cannot enter the market and drive prices down. Generally speaking, mergers, which create a certain level of market concentration, are thus likely to facilitate coordinated or unilateral anti-competitive conduct. In the case of the creation of monopolies, competition concerns are even higher because of their 'generally evil results or potentialities,'[77] like reduced output and higher prices, diminished incentives for innovation, and fewer alternatives for suppliers and customers.

However, competition authorities try to prevent changes in the market structure, which diverge from the economically desired market situation: from an economic point of view, there should be theoretically perfect competition in the market. In such an idealised, practically non-existent situation, none of the competing firms would have market power and no single firm would therefore be able to increase prices to the consumers' detriment. On the contrary, prices would be kept low, while firms would offer the highest quality products or services. Consumers would be able to choose easily between the competing firms, which would maintain the firms' competitive behaviour, low prices, high quality standards, and effect technological improvements.[78]

Surely, every merger between competitors[79] – a so-called horizontal merger – results in the loss of one of them. This leads to the reduction of competitive pressure and is hence likely to endanger the price competition, which is apt to keep prices down to the lowest possible level.[80] Nevertheless, it has to be borne in mind that competition law wants to pro-

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[75] See 1 3 *supra*.
[76] Sutherland *Competition Law of South Africa* (2004) 5-58.
[77] Areeda & Hovenkamp *Antitrust Law III* Second Edition (2002) 48.
[78] *Cf* Theron 'The Economics of Competition Policy: Merger Analysis in South Africa' (2001) *SAJE, vol. 69: 4,* 616.
[79] Or at least *potentially* competing firms, see *infra*.
[80] See for instance Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 24-25, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

tect competition itself, not competitors.[81] The competitiveness of a market is not the same as merely the number of market participants.[82] From an economic point of view, 'competition' refers to a situation where 'all prices are driven to marginal cost and every firm in the market is a price taker rather than a price maker – that is, no one has discretion to charge a higher price.'[83] Thus, it can be stated that competition law regulates the competitive process, not the relationship between competitors, nor does it merely intend to maintain a certain number of competitors. This economic principle is generally accepted.[84] Hence, the 'loss' of a competitor caused by a merger does not inevitably lead to the loss of competitiveness in that market. It always depends on the market and its special conditions, if the impact of a merger is likely to have a detrimental effect upon competition.[85] In fact, most mergers benefit competition and consumers by allowing firms to operate more efficiently. Competition authorities therefore recognise that many mergers are efficiency enhancing and part of the legitimate conduct of business.[86] A transaction between smaller firms may

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[81] Common sense, see for instance *Telkom SA Ltd / TPI Investments / Praysa Trade 1062 (Pty) Ltd* (CT 81/LM/Aug00) par 37; in Europe it is currently criticized that the decision of the European Court of First Instance (case number T-201/04 R) on 22 December 2004 in the case *European Commission v Microsoft* would rather protect competitors than competition itself. Microsoft was held responsible by the European Commission (COMP/C-3/37.792 – *Microsoft*) for abusing a dominant position in terms of Article 82 EC while offering 'Windows XP' only with integrated Media-Player. The Commission ordered a fine of almost € 500 million. The Court of First Instance now ruled against Microsoft's request for interim measures. The economist Kirchner called it 'alarming' as far as 'incentives to innovate' for enterprises are concerned: 'Wenn es die Aufgabe von Wettbewerbs- und Kartellrecht sein soll, den Wettbewerb, nicht aber die Wettbewerber zu schützen, verfehlt eine Handhabung des wettbewerbsrechtlichen Missbrauchsverbots, die Innovationsanreize für dynamischen Innovationswettbewerb gegenüber kurzfristig erzielbaren Erfolgen bei der Wettbewerbsintensivierung hintanstellt, das Ziel dieser Rechtsmaterie. Das ist auch ordnungspolitisch bedenklich.' (Kirchner 'Die Dynamik des Wettbewerbs – Der Fall Microsoft und die Instrumente des Zwangstechnologiezugangs sowie der Produktentbündelung / Folgen für die Innovationsanreize' Frankfurter Allgemeine Zeitung (2005-01-08) 13); also see Zimmerlich 'Der Fall Microsoft – Herausforderungen für das Wettbewerbsrecht durch die Internetökonomie' (2004) WRP-Wettbewerb in Recht und Praxis, 10/2004, 1260 (1267) and Stadler 'Microsoft-Entscheidung erleichtert Zugang zu Zwangslizenzen' Frankfurter Allgemeine Zeitung (2004-04-28) 23 with the same reservations about the decision.

[82] Areeda & Hovenkamp *Antitrust Law I* Second Edition (2000) 3 put it this way: '[T]he economist's idea of 'competition' is related to performance rather than to the mere number of rivals.'

[83] Areeda & Hovenkamp *Antitrust Law XI* Second Edition (2005) 202.

[84] See for instance *Brown Shoe Co v United States* 370 US, 294 S.Ct. 1502 where it was stated that the antitrust laws 'were enacted for the protection of competition not competitors.' *Cf* also Posner *Antitrust Law – An Economic Perspective* (1976) 101; Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 36 Rn. 5. *Cf* also Sutherland *Competition Law of South Africa* (2004) 3-13 and 3-25: 'Competition law operates globally. It is primarily concerned with the protection of the competitive process, and not the rivals in that process. The interests of particular rivals frequently will be protected by competition law but this will happen coincidentally'. This principle is also relevant in terms of restrictive vertical practices under section 5 of the Act and exclusionary acts of a dominant firm under section 8 of the Act, see Unterhalter in Brassey et al *Competition Law* (2002) 168 and 208.

[85] See in detail 1 5 1 2 4 *infra*.

[86] See for instance Federal Trade Commission 'Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws' chapter Mergers, available at: http://www.ftc.gov/bc/compguide/mergers.htm; that is also what the Competition Tribunal emphasises in *JD Group Limited / Ellerine Holdings Limited* (CT 78/LM/Jul00); for European Competition Law see Recital 29 of Council Regulation (EC) No. 139/2004 of 20

for instance create a merged entity, which will be in a stronger position to compete with the largest players in the relevant market and therefore will be regarded as 'pro-competitive.'[87] In fact, the process of merging with another firm has to be understood *a priori* as a common business practice that allows an enterprise to grow externally.[88] Nevertheless, as mentioned above, some mergers are likely to lessen competition. In a horizontal merger, the acquisition of a competitor can increase market concentration and the likelihood of collusion.[89] That, in turn, can lead to higher prices, reduced availability of goods or services, lower quality of products, and less innovation. Moreover, it has to be noted that a horizontal merger might not only raise substantive competition concerns on a horizontal level, but also can have effects on a vertical level, like leveraging the dominance of a firm in the up- or downstream market.[90] The increased buying power of a merged entity, for instance, may be likely to affect the manufacturing industry.[91]

Also mergers between enterprises on a different level of the distribution chain[92] (for example between a producer and a wholesaler)[93] – so-called vertical mergers – may have a

January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJEU L 24/1 of 29.01.2004, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf and Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 76, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf: 'Corporate reorganisations in the form of mergers may be in line with the requirements of dynamic competition and are capable of increasing the competitiveness of industry, thereby improving the conditions of growth and raising the standard of living in the Community.'

[87] So in the case *Kulungile Metals (Pty) Ltd / Abkins Steel Corporation (Pty) Ltd and Abkins Steel Services (Pty) Ltd* (CT 13/LM/Mar03).

[88] It can be noticed that the worldwide mergers & acquisitions volume has increased from over 200 billion US $ in the first quarter of 2003 to an amount exceeding 600 billion US $ in the last quarter of 2004. A recently published report shows for the year 2004 a better than 40% increase in worldwide M&A volume from 2003 levels (*cf* Thomson Financial Worldwide M&A Financial Advisory (Press Release, 03 January 2005), available at: http://thomson.com/cms/assets/pdfs/financial/league_table/mergers_and_acquisitions/4q2004/4q04_ma_pr_ww_us.pdf; also see Frankfurter Allgemeine Zeitung 'Wallstreet rechnet mit weiteren Fusionen' (2005-01-12) 19.

[89] For the latter problem see Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 39, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

[90] See for instance *Bidvest Group Limited / Voltex Holdings Limited* (CT 10/LM/Feb02) par 20.

[91] The US horizontal merger guidelines describe this phenomenon as follows: 'Market power also encompasses the ability of a single buyer (a 'monopsonist'), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ('monopsony power') has adverse effects comparable to those associated with the exercise of market power by sellers.' (1992 United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines [with April 8, 1997, Revisions to section 4 on efficiencies] Section 0.1, available at: http://www.ftc.gov/bc/docs/horizmer.htm).

[92] The Competition Act defines such 'vertical relationships' in s 1 as follows: 'the relationship between a firm and its suppliers, its customers, or both'.

heavy impact on market structure, too, although vertical mergers generally do not concern competition authorities in the same way as horizontal mergers do.[94] Hence, '[c]ompetition authorities have a permissive attitude to vertical mergers.'[95] Conversely, it is argued that anti trust law in general adopts the approach that mergers between firms in a vertical relationship hold the potential for greater efficiency than transactions among horizontal competitors do: a vertical merger is in general likely to enable a firm to produce an improved or lower priced product or service, or to distribute it through the value chain in a more efficient way. Thus, there is an argument that vertical mergers should presumptively be regarded as efficiency enhancing.[96] Nevertheless, the Competition Appeal Court pointed out that 'in assessing the effect of a proposed merger, an assumption of efficiency enhancement cannot trump nor should it prevent an enquiry into the manner in which market pricing is exercised, viewed in terms of the structure of the market.'[97]

Therefore, concerns arise, when vertical mergers impact materially on downstream customers[98] or upstream suppliers[99] or create an increase in barriers to entry[100] into a market.[101] For example, a vertical merger can make it difficult for competitors to gain access to an important component product or to an important channel of distribution.[102] The Tribunal recognises the danger of vertical mergers to 'either increase the barriers to entry into a market by requiring competitor[s] to vertically integrate as well thus raising rivals costs or

[93] This includes any other constellations in which firms in buyer-seller relationship merge, like a merger between a manufacturer and a supplier of component products, or between a manufacturer with a distributor of its products, *cf* Federal Trade Commission 'Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws' chapter Mergers, available at: http://www.ftc.gov/bc/compguide/mergers.htm).

[94] Constant court ruling, see recently *Plaaskem (Pty) Ltd / UAP Agrochemicals KZN (Pty) Ltd and UAP Crop Care (Pty) Ltd* (CT 78/LM/Oct04) par 13 with further references.

[95] *DaimlerChrysler South Africa (Pty) Ltd / Sandown Motor Holdings (Pty) Ltd* (CT 44/LM/Jul01).

[96] See the argumentation of the applicants in *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02) par 39.

[97] *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02) par 46.

[98] So-called 'input foreclosure,' see for instance the merger in the case *Mondi Ltd / Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (CT 06/LM/Jan02) upheld by the CAC (*Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02)).

[99] So-called 'customer foreclosure,' see *Coleus Packaging (Pty) Ltd / Rheem Crown Plant, a division of Highveld Steel and Vanadium Corporation Limited* (CT 75/LM/Oct02).

[100] On this problem see Legh in Brassey et al *Competition Law* (2002) 227-228.

[101] *Cf* also Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 61, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

[102] This is called 'vertical foreclosure' or 'bottleneck' problem.

because they force them to increase their costs and thus make them less competitive in the horizontal market in which they face the integrated firm.'[103]

Moreover, the vertical transaction might promote co-ordinated conduct between competitors through facilitating an exchange of competitively sensitive information.[104] In this context, the concern about the ability of a vertically integrated firm to evade price regulation also has to be mentioned.[105] Referring to Riordan and Salop,[106] who identified these three main potential competition concerns that arise in vertical mergers,[107] the Tribunal hence assesses if any of the mentioned concerns is relevant to the merger.[108]

In cases of mergers involving a dominant firm the Competition Tribunal has pointed out its concerns in the *Schumann Sasol / Price's Daelite* case:[109]

> '[I]t is widely recognized that, under particular circumstances, vertical mergers may impact negatively on competition. Alarm bells will sound where one or both parties to the transaction dominate the markets in which they operate. [...] Suffice to note that while a vertical transaction involving a dominant firm portends a variety of potentially anti-competitive outcomes, for the purpose of the present transaction it is the prospect of increased entry barriers as well as the possibility of market foreclosure and the related ability to raise rival's costs that are of most immediate concern.'[110]

To summarize, it can be maintained that competition authorities have to assess the facts of every single case in detail to determine if a vertical merger is anti-competitive or not, especially if a dominant firm is involved. The Tribunal concluded therefore that

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[103] *Vodacom Pty Ltd and GSM / Vodacom Pty Ltd and Teljoy Holdings Ltd* (CT 10/LM/Nov99 and 13/LM/Nov99) par 6.
[104] See Sutherland *Competition Law of South Africa* (2004) 5-54 to 5-57 with further references discussing the effects of exchange of information.
[105] See *Mondi Ltd / Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (CT 06/LM/Jan02) par 28.
[106] Riordan & Salop 'Evaluating Vertical Mergers: A Post Chicago Approach' (1995), 63 Antitrust Law Journal 551.
[107] Again: 1. Raising rivals costs by means of input or customer foreclosure, 2. The ability to promote co-ordinated behaviour between competitors, and 3. The ability of a vertically integrated firm to evade price regulation.
[108] *Cf Coleus Packaging (Pty) Ltd / Rheem Crown Plant, a division of Highveld Steel and Vanadium Corporation Limited* (CT 75/LM/Oct02); *Inzuzo Furniture Manufacturers (Pty) Ltd / PG Bison Holdings (Pty) Ltd* (CT 12/LM/FEB04).
[109] *Schumann Sasol (South Africa) (Pty) Ltd / Price's Daelite (Pty)* (CT 23/LM/May01) par 11.
[110] *Cf* also *DaimlerChrysler South Africa (Pty) Ltd / Sandown Motor Holdings (Pty) Ltd* (CT 44/LM/Jul01).

> '[a]t the level of general principle, it is fair to say that vertical mergers raise fewer competition concerns and generates [sic] larger pro-competitive gains than their horizontal counterparts. On the other hand, it may be credibly claimed that vertical transactions in which one or both of the parties dominate their respective markets are liable to raise greater anti-trust concerns than those involving firms with relatively small market shares.'[111]

Besides those two types of mergers, so-called conglomerate mergers can be distinguished.[112] These are mergers between firms in unrelated businesses.[113] The Competition Tribunal stated that such mergers are unlikely to prevent or lessen competition since there is no overlap in the relevant markets of the merging parties,[114] especially where no horizontal or vertical relationship between the product markets of the merging parties can be observed.[115] Nevertheless, conglomerate mergers may have an anti-competitive effect, if one of the firms was likely to enter the market and become a competitor of the other.[116] The US Federal Trade Commission refers to those mergers as 'potential competition mergers,'[117] which would result in the loss of a potential competitor and therefore prevent the increased competition that would result from the firm's entry.[118] Moreover, such mergers can have the effect that the acquiring firm is no longer hindered to keep prices low, what it otherwise would have to do because of the 'threat of entry' of the potential competitor. South African competition authorities therefore recognise that a lessening of potential competition implies higher prices.[119]

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[111] *Schumann Sasol (South Africa) (Pty) Ltd / Price's Daelite (Pty)* (CT 23/LM/May01) par 13.
[112] See Pautke *Die kartellrechtliche Erfassung konglomerater Konzentration in der Republik Südafrika* (1998) for conglomerate mergers under the Maintenance and Promotion of Competition Act.
[113] See Areeda & Hovenkamp *Antitrust Law I* Second Edition (2000) 25.
[114] *Standard Bank of South Africa; Real Equity Trust / Stellenbosch Vineyards Limited* (CT 51/LM/Jul02); *Clidet no.485 (Pty) Ltd / Pamodzi Foods (Pty) Ltd* (CT 09/LM/Feb04); *Reunert Ltd / African Cables Ltd* (CT 59/LM/Aug04); *Investec Bank Ltd / Main Street 57 (Pty) Ltd, Corobrik (Pty) Ltd and Corovest (Pty) Ltd* (CT 15/LM/Mar05); the Tribunal comes to the same conclusion, if there is 'very little overlap' between the acquiring and target firms' products, see *Fraser Fyfe (Pty) Ltd / Anglo Operations Ltd* (CT 10/LM/Feb00).
[115] *Cf Imperial Holdings Ltd / Safair (Pty) Ltd* (CT 08/LM/Jan00).
[116] A comparable problem – as a prohibited practice – occurs when markets are allocated and a potential competitor agrees with a firm not to enter a specific market, see Sutherland *Competition Law of South Africa* (2004) 5-42 to 5-43.
[117] See Federal Trade Commission 'Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws' chapter Mergers, available at: http://www.ftc.gov/bc/compguide/mergers.htm).
[118] See also Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 58-60, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.
[119] See the definition of 'potential competition' in the Glossary of Terms published by the Competition Commission, available at: http://www.compcom.co.za/thelaw/thelaw_glossary.asp?level=3.

While prohibited practices, in the form of horizontal agreements may be easier to achieve than mergers, because they do not require full integration of firms,[120] a merger is apt to have a bigger impact on the market, because it directly and permanently changes the market structure itself and most mergers completely end competition between the merging parties in the relevant market(s). Moreover, the problem of instability of such prohibited conduct as a consequence of the 'risk of cheating'[121] does not occur. Furthermore, as indicated above, mergers can facilitate anti-competitive conduct. Therefore, self-correcting powers of the market are often not sufficient to address mergers. For that reason, South Africa – like other nations – has established a legal framework to control mergers.

1 5 1 Legal framework

First, an overview of the approach to merger control under South African Competition Law will be given. Second, the legal framework will be explained in detail.

1 5 1 1 Overview

According to South African Competition Law, merger analysis will be done by considering a number of interrelated questions:

- Does the Competition Act apply?
- Does the proposed transaction constitute a merger?
- In that event, is notification compulsory?
- If that is the case, is the merger likely to substantially prevent or lessen competition?
- In that case, is the merger likely to result in any technological, efficiency or other pro-competitive gains or can it be justified on substantial public interest grounds?
- If the merger is likely to substantially prevent or lessen competition and cannot be justified on pro-competitive gains or substantial public interest grounds, can conditions on the proposed transaction be imposed, instead of an outright prohibition? If so, are structural or behavioural remedies more appropriate?

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[120] *Cf* Sutherland *Competition Law of South Africa* (2004) 5-3.

[121] Cartels tend to be instable, because it is likely that one of the involved parties does not behave in accordance with the agreement to maximise its own profits. See in detail Sutherland *Competition Law of South Africa* (2004) 5-4 and 5-58. *Cf* also Reekie 'The Competition Act, 1998: An Economic Perspective' (1999) SAJE, Vol. 67 :2 1999 June, 263.

- If the merger is not likely to substantially prevent or lessen competition, has the merger to be prohibited on substantial public interest grounds?

1 5 1 2 The different levels of merger considerations

Chapter 3 of the Act provides the legal framework for the control of mergers. Mergers have to be considered on different levels. Each of these levels will now be considered in detail.

1 5 1 2 1 Application of the Act

The application of the Act normally does not cause a problem. The Act applies to all economic activity[122] within, or having an effect[123] within, South Africa.[124] Nevertheless, this can for instance be problematic when mergers, which take place outside of South Africa but have an effect on competition in South Africa, have to be scrutinized.[125]

1 5 1 2 2 Definition of mergers

Competition authorities have to assess, if the proposed transaction constitutes a merger as defined by the law. The Act widely defines a merger in section 12(1)(a) as follows:

> 'For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.'

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[122] For the problematic definition of this term see Sutherland *Competition Law of South Africa* (2004) 4-20 and section 4.4 with further references.

[123] On the interpretation of 'an effect' see *American Natural Soda Ash Corporation and CHC Global (Pty) Ltd v Competition Commission of SA and Botswana Ash (Pty) Ltd and Chemserve Technical Products (Pty) Ltd and Minister of Trade and Industry* (SCA 554/03) par 24-29. *Cf* also the discussion of Sutherland *Competition Law of South Africa* (2004) 4-21 to 4-26.

[124] S 3(1). The Act recognizes exceptions for collective bargaining within the meaning of s 23 of the Constitution and the Labour Relations Act 1995 (Act No. 66 of 1995) and collective agreements, as defined in section 213 of the Labour Relations Act, *cf* s 3(1) of the Competition Act. For details *cf* Sutherland *Competition Law of South Africa* (2004) section 4.7.

[125] For instance, such an effect on competition in South Africa can be observed when two international firms merge and hence the South African subsidiary of the target firm will post-merger be controlled by the acquiring firm. The Tribunal stated in *The Dow Chemical Company / Union Carbide Corporation* (CT 50/LM/Apr00) par 10 in this context: 'Our powers are somewhat limited when we deal with mergers between multinational companies that have already been approved in other jurisdictions. This is especially the case where the products concerned are merely distributed in South Africa and the merger has been approved in the countries where the products are manufactured. Even if we prohibit the merger in South Africa the parties will merge elsewhere and a single firm will control the two subsidiaries and the importation and distribution of the three product categories in South Africa.' *Cf* also Legh in Brassey et al *Competition Law* (2002) 244-245.

According to section 1(1)(xi) of the Act, a 'firm' is defined to include 'a person, partnership or a trust'. Hence, the definition of a merger is quite broad. Any direct or indirect acquisition of control over another business will be regarded as a merger. This acquisition of control can be achieved by any manner, 'including through (i) purchase or lease of the shares, an interest or assets of the other firm in question; or (ii) amalgamation or other combination with the other firm in question'.[126]

Accordingly, it is crucial to determine when control is acquired through a transaction. If a transaction can be considered a 'merger' as defined by the Act, a notification of the merger may be compulsory[127] and its omission may lead to severe penalties.[128] The Act itself follows a broad approach also in this matter. Basically, any majority in shareholding or voting rights or eminent influence on the firm's policy, depending on the nature of the firm, leads to control, as defined in section 12(2) of the Act.[129] Moreover, the South African courts seem to interpret the acquisition of control widely. Accordingly, in the *Bulmer* case[130] a change of shareholding was held to be a notifiable merger even though there had been no change in control in the enumerated categories of section 12.[131] The Tribunal postulated that 'acquisition of control' had not been defined in section 12 as an exhaustive list. The Act rather gives examples of control in form of a list of circumstances in which a person

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[126] S 12(1)(b).
[127] In case of large and intermediate mergers, s 13A(1), see in detail 1 5 1 2 3 *infra*.
[128] See 1 5 1 2 9 *infra*.
[129] Section 12(2) states that a 'person controls a firm if that person—
(a) beneficially owns more than one half of the issued share capital of the firm;
(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;
(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3) *(a)* of the Companies Act, 1973 (Act No. 61 of 1973);
(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs *(a)* to *(f)*'.
According to the Competition Tribunal in *Ethos Private Equity Fund IV / The Tsebo Outsourcing Group (Pty) Ltd* (CT 30/LM/Jun03) par 42, this subsection 'instances certain "bright lines" of when control will be assumed. When firms cross that line [...] they must notify, albeit that they have not traveled very far in crossing it.'
[130] *Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd v Distillers Corporation (SA) Ltd and Stellenbosch Farmers' Winery Group (Pty) Ltd and The Competition Commission* (CT 94/FN/Nov00 and 101/FN/Dec00).
[131] In detail on this case: Legh in Brassey et al *Competition Law* (2002) 239-244.

controls a firm. This decision was upheld by the Competition Appeal Court,[132] which confirmed that section 12(2) only 'instances circumstances of control but does not define nor limit the circumstances' in which control over a firm may be acquired or established by a person.[133] Moreover, the Appeal Court suggested that that the Act provides for the possibility of a plurality of controllers (joint control), stating that 'the wording of section 12(2), clearly contemplates a situation where more than one party simultaneously exercises control over a company.'[134] Furthermore, the Competition Tribunal decided in other cases that the change from joint control to sole control could make a transaction notifiable, when it changes the competitive environment.[135]

1 5 1 2 3 Necessity of notification

Once the transaction is labelled a merger as defined by the Act, different rules apply depending on the nature of the merger and the size of the parties involved, because not every proposed transaction is likely to be anti-competitive in the same way. Mergers between small firms normally do not concern competition authorities as much as mergers between larger firms do, because their impact on markets are generally small.[136] Hence, the Act differentiates between three categories of mergers: large, intermediate and small mergers. Different provisions are set out for these categories. In particular, a party to a small merger is generally not required to notify the Competition Commission of that merger.[137] In other words, such a merger may be implemented without first being approved by the competition authorities. At this stage, competition authorities do not consider, whether the merger raises competition concerns or not. Competition concerns are only scrutinised if transactions are notifiable, because the competition authorities only

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[132] *Distillers Corporation (SA) Ltd and Stellenbosch Farmers' Winery Group Ltd v Bulmer (SA) (Pty) Ltd and Seagram Africa (Pty) Ltd* (08/CAC/May01).

[133] Subsequently, the merger was notified. The Competition Commission recommended approving the merger subject to certain conditions (notably the sale of a number of brandy and sparkling wine brands). Finally, the Competition Tribunal endorsed the Commission's finding, approving the merger subject to conditions, *cf Distillers Corporation (SA) Limited / Stellenbosch Farmers Winery Group Ltd* (CT 08/LM/Feb02) par 41.

[134] *Distillers Corporation (SA) Ltd and Stellenbosch Farmers' Winery Group Ltd v Bulmer (SA) (Pty) Ltd and Seagram Africa (Pty) Ltd* (08/CAC/May01).

[135] *Cf Iscor Limited / Saldanha Steel (Pty) Ltd* (CT 67/LM/Dec01) par 36-49. See also *Ethos Private Equity Fund IV / The Tsebo Outsourcing Group (Pty) Ltd* (CT 30/LM/Jun03) par 25-26.

[136] This certainly depends on the respective market conditions and levels of concentration etc.

[137] See s 13(3). If the Competition Commission intervenes and requires the parties to make notifications of the merger, the Commission can approve the merger with or without conditions or prohibit it, see 1 5 1 2 3 3 *infra*. See for instance the case *Digital Healthcare Solutions (Pty) Ltd v The Competition Commission and Healthbridge (Pty) Ltd* (CT 41/AM/Jun02).

have jurisdiction to consider mergers that have been notified.[138] In contrast and unlike under the Maintenance and Promotion of Competition Act, large and intermediate mergers must be notified to the Competition Commission before the actual implementation of the proposed merger.[139] In case of a large merger, the Commission is obliged to investigate and report on the merger, although only the Competition Tribunal is competent to approve or prohibit the merger. The Commission will only forward to the Competition Tribunal and the Minister of Trade and Industry a written recommendation.[140] Conversely, the Competition Commission itself can approve an intermediate merger.

The Act defines large, intermediate, and small mergers. According to section 11(5)(a), a small merger 'means a merger or proposed merger with a value at or below the lower threshold established in terms of [section 11] subsection (1)(a)'. Conversely, all mergers or proposed mergers with a value at or above the higher threshold are regarded as 'large mergers,'[141] while all mergers with a value between the lower and higher thresholds are so-called 'intermediate mergers'.[142]

Section 11(1)(a) does not define these thresholds, though, but obliges the Minister of Trade and Industry[143] to determine – in consultation with the Competition Commission – the exact thresholds of the different categories. Accordingly, a lower and a higher threshold have been determined by ministerial notice.[144] This notice sets out certain values for the combined annual turnover(s) and/or assets of the parties to a proposed merger, as

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[138] *Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd v Distillers Corporation (SA) Ltd and Stellenbosch Farmers' Winery Group (Pty) Ltd and The Competition Commission* (CT 94/FN/Nov00 and 101/FN/Dec00) par 12; *Caxton and CTP Publishers and Printers Limited v Naspers Limited and Electronic Media Network Limited and Supersport International Holdings Limited and the Competition Commission* (CT 16/FN/Mar04) par 2.On the other hand, the Competition Commission only requests notification for small mergers if it arrives at the position that the merger may substantially prevent or lessen competition, or cannot be justified on public interest grounds, see 1 5 1 2 3 3 *infra*, what makes a certain prior assessment always necessary.

[139] Section 13A(1) in conjunction with section 13(A)(3). Even though transactions often have to be notified, because competition authorities tend to interpret section 12 quite broadly (see 1 5 1 2 2 *supra*), more than one notification of a transaction comprising several steps is not necessary: In *Ethos Private Equity Fund IV / The Tsebo Outsourcing Group (Pty) Ltd* (CT 30/LM/Jun03) par 37, the Tribunal stated that '[a] change of control is a once-off affair. Even if a firm has notified sole control at a time when that control is attenuated in some respects by other shareholders and it later acquires an unfettered right, provided that sole control has been notified and that this formed the basis of the decision, no subsequent notification is required.'

[140] See s 14A(1)(b).

[141] S 11(5)(c).

[142] S 11(5)(b).

[143] The competence of this ministry follows from the definition of 'Minister' in s 1(xvi).

[144] Notice of the department of Trade and Industry, GN 254 in *GG22025* of 2 February 2001, also available at http://www.compcom.co.za/thelaw/Thresholdterms.doc.

well as for the annual turnover of the target firms or their assets.[145] The thresholds have been increased significantly since 1998, to reduce the number of transactions that are subject to mandatory notification and review.

According to the notice, a merger will fall above the lower threshold, if either

- the combined annual turnover in, into or from South Africa of the acquiring firms[146] and the target firms[147] is valued at or above R 200 million, or
- the combined assets in South Africa of the acquiring firms and the target firms are valued at or above R 200 million, or
- the annual turnover in, into or from South Africa of the acquiring firms and the assets of the target firms are valued at or above R 200 million, or
- the assets in South Africa of the acquiring firms plus the annual turnover in, into or from South Africa of the target firms are valued at or above R 200 million.

On top of this, the annual turnover of the target firms or their asset value must exceed R 30 million. Otherwise, if the merger falls below either value it will fall below the lower threshold.

A merger will fall above the higher threshold if:

- The combined annual turnover in, into or from South Africa or the combined assets in South Africa of the acquiring firms and the target firms are valued at or above R 3,5 billion, or
- the annual turnover in, into or from South Africa of the acquiring firms plus the assets in South Africa of the target firms (or *vice versa*) are valued at or above R 3,5 billion.

On top of this, the annual turnover of the target firms or their asset value has to exceed R 100 million.

Accordingly, the position can be illustrated with the following graph on the next page:

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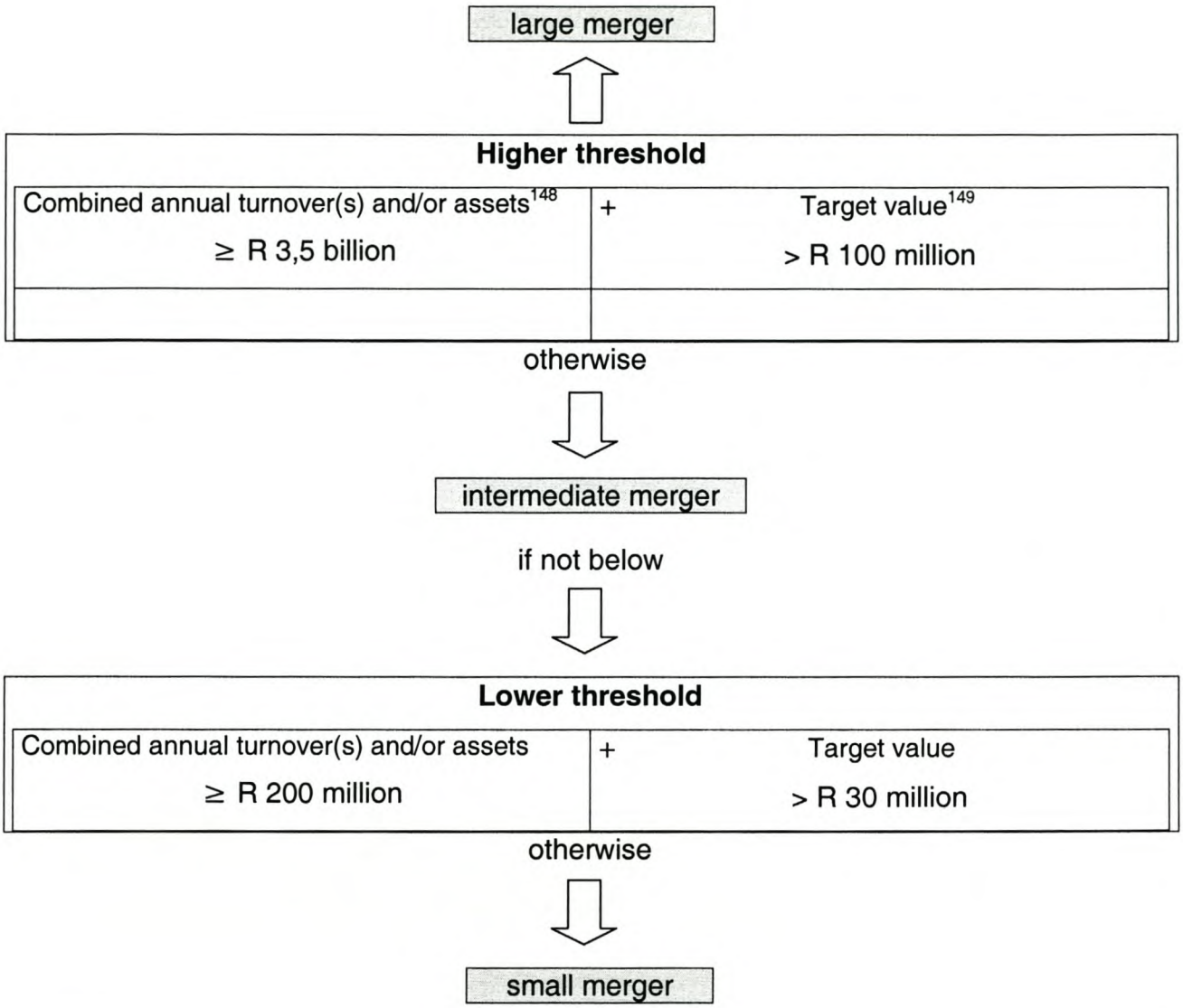
[145] The notice also prescribes the method of calculation for the assets and turnover of a firm.
[146] Due to the definition in s 1(1)(i) the term 'acquiring firm' has to be understood in a wide sense, not only including the immediate acquiring firm, but also its parent company or companies and all its fellow subsidiaries, see Legh in Brassey et al *Competition Law* (2002) 233.
[147] That is the immediate target and any firm which would – as a result of a merger – directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm, s 1(1)(xxxiii).

Graph 2: **Merger thresholds**



Beside the difference in notification duties, only intermediate and small mergers must be regarded as having been approved, if the Commission does not act within the prescribed period.[150] Such an event in large merger proceedings, conversely, leads only to the right to apply to the Tribunal to begin the consideration of the merger straightaway.[151]

[148] Annual turnover of the acquiring firms plus annual turnover of the target firms OR annual turnover of the acquiring firms plus assets of the target firms OR annual turnover of the target firms plus assets of the acquiring firms OR annual assets of the acquiring firms plus annual assets of the target firms.
[149] Annual turnover of the target firms or their asset value.
[150] See s 13(6) and s 14(2).
[151] See s 14A(3).

Moreover, there is an enormous difference as far as the merger filing fees are concerned, because the fees are based on the value of the combined annual turnover or assets involved in any transaction.[152]

According to the Act, the main procedural steps in the consideration of large, intermediate, and small mergers can be summarized as follows:[153]

1 5 1 2 3 1 The procedure of large merger considerations

- Compulsory notification by the parties to a merger[154] (filing)[155]
- Competition Commission refers the notice to the Competition Tribunal and the Minister of Trade and Industry[156]
- Investigation by the Commission[157] and consideration of the merger in terms of section 12A
- Recommendation by the Commission within 40 business days,[158] if the merger should be approved, conditionally approved or prohibited[159]
- Competition Tribunal phase (Tribunal sets a date for proceedings in respect of the merger, hearing, decision on the merger)[160]
- Appeal from that decision to the Competition Appeal Court is possible within 20 business days after notice of the decision by the Competition Tribunal[161]

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[152] There are no fees for small mergers, whereas the filing fee for intermediate mergers is R 75.000 and R 250.000 (plus VAT) for large mergers, see Rules for the Conduct of Proceedings in the Competition Commission, Rule 10(5) and (6), GG 22025 of 1 February 2001.

[153] A more detailed overview of the merger proceedings is published by the Competition Tribunal at: http://www.comptrib.co.za/Flow%20charts/Merger%20procedures.pdf.

[154] See s 13A(1). A 'party to a merger' means according to s 1(xviii) the acquiring firm or the target firm.

[155] It is also stated that any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger, s 13B(3).

[156] S 14A(1)(a).

[157] *Cf* s 13B.

[158] The Competition Tribunal may extend this period in respect of a particular merger upon an application by the Competition Commission, but the Tribunal may not grant an extension of more than 15 business days at a time, s 14A(2).

[159] See s 14A(1)(b). If the Commission fails to forward a recommendation in the prescribed time period, nor applies for an extended time, any party to the merger may apply to the Tribunal to begin the consideration of the merger straightaway, s 14A(3).

[160] For details *cf* s 16.

[161] For details *cf* s 17. See also s 61 to 63.

1 5 1 2 3 2 The procedure of intermediate merger considerations

- Compulsory notification by the parties to a merger
- Competition Commission considers the merger in terms of section 12A and decides within 20 business days whether to approve, conditionally approve or prohibit it[162]
- Request to the Competition Tribunal to consider the decision of the Commission is possible, if the Commission approves the merger only conditionally or prohibits it[163]
- Appeal from that decision to the Competition Appeal Court is possible within 20 business days after notice of the decision by the Competition Tribunal[164]

1 5 1 2 3 3 The procedure of small merger considerations

- Notification by the parties to a merger is generally not required[165] (but allowed)[166] and the merger may be implemented without approval[167]
- Exception: the Competition Commission requires the parties to notify during six months after the implementation of the merger, if the merger, in the opinion of the Commission, may substantially prevent or lessen competition, or cannot be justified on public interest grounds[168]
- In that event, the parties may not take any further steps toward the implementation until the merger has been approved or conditionally approved[169]
- Request to the Competition Tribunal to consider the decision of the Commission is possible, if the Commission approves the merger only conditionally or even prohibits it[170]

In terms of section 21(4) of the Act, the Minister of Trade and Industry, in consultation with the Competition Commission, has prescribed regulations relating to the functions of the Commission, which govern the merger proceedings.[171]

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[162] See s 14. The Competition Commission may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, must issue an extension certificate to any party who notified it of the merger, s 14(1)(a).
[163] S 16(1)(a). See for instance *Nasnuus, a division of Nasionale Media Limited v The Competition Commission of South Africa* (CT 27/AM/Mar00) and *CT Media Publications (Pty) Ltd v The Competition Commission of South Africa* (CT 34/AM/Mar00).
[164] For details *cf* s 17.
[165] See s 13(1)(a).
[166] See s 13(2).
[167] See s 13(1)(b).
[168] See s 13(3). The consideration criteria set out in s 12A equally apply for small merger considerations.
[169] See s 13(4).
[170] S 16(1).
[171] Rules for the Conduct of Proceedings in the Competition Commission, GG 22025 of 1 February 2001.

1 5 1 2 4 Consideration of the merger's effect on competition

Once competition authorities have determined that the Competition Act applies and the proposed transaction constitutes a merger, which is notifiable and indeed notified, it has to be scrutinized. It must to be determined whether the merger is 'likely to substantially prevent or lessen competition'.[172] The test refers to *likeliness.* Competition authorities do not have to consider whether the merger necessarily prevents or lessens competition.[173] Even though the Competition Tribunal may not base its decisions upon 'speculation of a kind which cannot be attributed to any evidential foundation placed before the Tribunal,'[174] section 12A(1) nevertheless 'enjoins the Tribunal to forecast a likely possibility; that is it makes a predictive judgement, based on evidence which has been placed before it.'[175]

Hence, not every single merger is prohibited. It has already been stated above that the number of competing firms in a market is not equal to the competitiveness of the market. Thus, competition authorities have to assess in every single case the merger's effect on competition, to decide, whether the merger should be approved, conditionally approved, or prohibited. The Act sets out a range of substantive factors in section 12A, including market, efficiency and public interest considerations, which have to be weighed up by the Competition Commission or Competition Tribunal to determine, whether or not the merger is likely to substantially prevent or lessen competition. However, the Tribunal made clear, that section 12A requires a causal relationship between the merger and the substantial lessening of competition in the implicated market:[176]

> 'If the loss of competition would have occurred in any event due to other factors, absent the merger, then the merger should not be enjoined because the remedy would be pointless.'

According to section 12A(2), when considering the market and determining whether or not a merger is likely to substantially prevent or lessen competition, the competition authorities

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[172] S 12A(1).
[173] *Cf Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02) par 38.
[174] *Schumann Sasol (South Africa) (Pty) Ltd and Price's Daelite (Pty) Ltd* (10/CAC/Aug01).
[175] *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02) par 38.
[176] *JD Group Limited / Profurn Limited* (CT 60/LM/Aug02) par 106. In this context the Tribunal referred to the European legislation in *France v EC Commission*, cases C-68/94 and C-90/95 [1998] ECR I - 1375, [1998] 4 CMLR 829, which follows the same approach.

must assess the strength of competition in a relevant market,[177] and the probability that the firms in the post-merger market will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market. Even though the Act does not define when a merger is likely to substantially prevent or lessen competition, the competition authorities basically seem to weigh up the facts and competitive arguments in each case as well as the advantages and disadvantages of the merger, assessing if the transaction has the potential to impact adversely upon competition. Although the Competition Tribunal emphasised that '[a]n anti-trust merger evaluation is always primarily concerned with an assessment of the impact of the transaction in question on consumers,'[178] the Act sets out a list of eight factors, which can be taken into account considering whether the merger should be (conditionally) approved, or not, namely:

- The actual and potential level of import competition in the market
- The ease of entry into the market, including tariff and regulatory barriers
- The level and trends of concentration, and history of collusion, in the market
- The degree of countervailing power in the market
- The dynamic characteristics of the market, including growth, innovation, and product differentiation
- The nature and extent of vertical integration in the market
- Whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail
- Whether the merger will result in the removal of an effective competitor

1 5 1 2 4 1 Definition of the relevant market

To determine the potential detrimental effects to competition resulting from the merger, the market firstly has to be defined.[179] This is often the most controversial aspect of a merger in court and the parties to a merger will always argue for a broad market definition.[180] The smaller a market is, the heavier will be the impact of a merger. A narrow market definition

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[177] For the definition of the relevant market see 1 5 1 2 4 1 *infra.*
[178] *JD Group Limited / Ellerine Holdings Limited* (CT 78/LM/Jul00).
[179] The problem of market definition occurs in the same way as it does for the measuring of market power in terms of section 7.
[180] See paradigmatically: *JD Group Limited / Ellerine Holdings Limited* (CT 78/LM/Jul00), where the parties argued for one 'mass market' for each of their products (product market), sold on the 'national market' instead of a large number of local markets (geographic market). *Cf* also *DaimlerChrysler South Africa (Pty) Ltd / Sandown Motor Holdings (Pty) Ltd* (CT 44/LM/Jul01) and *Unilever Plc / Robertsons Foods (Pty) Ltd* (CT 55/LM/Sep01) par 11 and 22.

naturally results in higher market shares and higher concentration levels for the parties to the merger because of a smaller pool of products and/or competitors.[181]
The Competition Tribunal only omits defining the relevant market, if it concludes that the proposed transaction will not result in any substantial lessening or prevention of competition, irrespective of the market being broadly or narrowly construed.[182]

To define the relevant market, the so-called 'hypothetical monopolist test' is used, as it is described by the 1992 United States Department of Justice and the Federal Trade Commission Guidelines:[183]

> 'A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant.'

Hence, the test is also signified as 'SSNIP-test' ('*S*mall but *S*ignificant and *N*on-transitory *I*ncrease in *P*rice'). The test assesses if a hypothetical monopolist would be in a position to exercise market power by increasing the price for its products not only for a very brief time, without consumers either switching to other products or switching to the same product

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[181] See *Unilever Plc / Robertsons Foods (Pty) Ltd* (CT 55/LM/Sep01) par 34. Accordingly, regarding the market definition of the Commission in the *OTK* case (*OTK Agri Products Trading, a division of OTK Ltd / Farm Feed Services, a division of Afribrand Trading (Pty) Ltd* (CT 11/LM/Feb02) par 9), the Tribunal stated that 'the market identified by the Commission is, for the purposes of this transaction, the narrowest market classification possible. Since the merger raises no competition concerns on this classification, it will obviously not raise any concerns on any (wider) market definition.'

[182] The Tribunal either does not define the relevant product market precisely (see for instance *Franco-Nevada Mining Corporation Ltd / Gold Fields Ltd* (CT 77/LM/Jul00); *Unilever Plc / Robertsons Foods (Pty) Ltd* (CT 55/LM/Sep01) par 28; *JD Group Limited / Profurn Limited* (CT 60/LM/Aug02) par 103; *Cool Ideas 262 (Pty) Limited / Crossroads (Pty) Ltd and others* (CT 73/LM/Dec03); *BOE Holdings Limited / Company Unique Finance (Pty) Limited* (CT 42/LM/Jun04) par 15 and recently *Sanlam Limited / Safrican Insurance Company and Newshelf 503 (Pty) Ltd* (CT 03/LM/Jan05)), or omits to define the relevant geographic market (*cf Afgri Operations Ltd / Laeveld Korporatiewe Beleggings Beperk* (CT 71/LM/Sep02); *Masstores (Pty) Limited / Hentiq 2869 (Pty) Ltd and Rivonia Produce & Hardware (Pty) Limited* (CT 53/LM/Jul04) par 18-19; *Pioneer Foods (Pty) Ltd / Accolade Trading Company (Pty) Ltd* (CT 55/LM/Aug04) par 11. See also recently *Liberty Group Limited / Wedelin Investments (Pty) Ltd* (CT 40/LM/May05) and *Kermas South Africa (Pty) Ltd / Samancor Ltd* (CT 22/LM/Mar05) par 11).

[183] 1992 United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines [with April 8, 1997, Revisions to section 4 on efficiencies] section 1.0, available at: http://www.ftc.gov/bc/docs/horizmer.htm.

produced by firms at other locations.[184] Competition authorities will tentatively assume a certain group of products to be the relevant market. If an attempt to raise prices by the hypothetical monopolist would result in a reduction of sales large enough that the price increase would not prove profitable, the identified product group will be regarded as too narrow.[185] The same reasoning can be used to determine a geographic market, for the market definition embraces different elements: a specific product or group of products and the particular geographic area, in which the product is sold.[186] Accordingly, the relevant market is the smallest product or group of products (*product market*) in the smallest geographic area (*geographic market*), where the SSNIP-test still applies.

The relevant product market is in practice determined by South African competition authorities by the test of substitutability of a product or service from the consumer's point of view. It is established, if the separate products identified are functionally interchangeable or substitutable by the consumer by reason of the products' or services' characteristics, their prices and their intended use, or if each product is used to perform a specific function, which cannot be performed by one of the other products identified, even by one falling in the same broad product category.[187]

The Competition Tribunal referred to the test set out by the US Supreme Court in the *Brown Shoe* case,[188] in which the court declared:

> 'The outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it.'[189]

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[184] The Tribunal stated: 'The relevant market is the narrowest market at a given level of the supply chain in which a hypothetical monopolist operating at that level could exert a significant degree of market power.' (*South African Raisins (Pty) Ltd and Johannes Petrus Slabber v SAD Holdings Ltd and SAD Vine Fruit (Pty) Ltd* (CT 04/IR/Oct/1999) par 3.4).

[185] *Cf* European Commission Notice on the definition of relevant market for the purposes of Community competition law, OJEC C 372 of 09.12.1997, par 16-17, also available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31997Y1209(01)&model=guichett.

[186] Sometimes also the element of time is of importance.

[187] *Cf Boart Longyear (a division of Anglo Operations Limited) / Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd* (CT 41/LM/Aug03). See also *Massmart Holdings Ltd / Jumbo Cash and Carry (Pty) Ltd; Massmart Holdings Ltd / Picardi Liquors (Pty) Ltd - Sip 'n Save division* (CT 39/LM/Jul01 and 47LM/Aug01) par 8.

[188] *Brown Shoe Co v United States* 370 US, 294 S.Ct. 1502 at 325.

[189] See for instance *Nestlé (SA) (Pty) Ltd / Pets Products (Pty) Ltd / Heinz South Africa (Pty) Ltd / Tiger Foods Ltd* (CT 21/LM/Apr01) par 21. The European Commission defines the relevant product market as follows: 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and

Nevertheless, in some cases mere functional interchangeability of products does not suffice as only criterion for determining the relevant market. The Competition Tribunal pointed out that '[t]here are a range of factors at play in this determination [of the relevant market] of which functional interchangeability is but one, albeit important, consideration.'[190] In this context, the Tribunal recognises the existence of distinguishable market segments and 'well defined sub-markets' within a broad product market.[191] Such sub-markets are indicated by several factors, which the Supreme Court in the *Brown Shoe* case determined and of which the Tribunal makes use in analysing the market delineation in some cases. According to the Supreme Court, such factors include 'industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.' Hence, the Tribunal for instance also takes into account, the way products are sold, especially the different channels of distribution and 'store types' to determine the relevant market.[192]

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their intended use.' See European Commission Notice on the definition of relevant market for the purposes of Community competition law, OJEC C 372 of 09.12.1997, par 7, also available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31997Y1209(01)&model=guichett.

[190] *Boart Longyear (a division of Anglo Operations Limited) / Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd* (CT 41/LM/Aug03). See also the European practice in defining the relevant market, European Commission Notice on the definition of relevant market for the purposes of Community competition law, OJEC C 372 of 09.12.1997, part III., also available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31997Y1209(01)&model=guichett.

[191] See *JD Group Limited / Ellerine Holdings Limited* (CT 78/LM/Jul00) referring to US and European jurisdiction (namely to *Brown Shoe Co v United States* 370 US, 294 S.Ct. 1502); confirmed by *JD Group Limited / Profurn Limited* (CT 60/LM/Aug02) par 88. See also *Boart Longyear (a division of Anglo Operations Limited) / Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd* (CT 41/LM/Aug03), where the Tribunal used broader market definitions: '[I]n analyzing the retail furniture market we have not distinguished a market for lounge suites from a market for bedroom suites even though the respective products are clearly not functionally interchangeable. We have rather acknowledged that, for the most part, the market is served by retailers, and to a somewhat lesser extent, manufacturers who produce and/or supply the full range of furniture or grocery or clothing products. This coincides, for the most part, with the demands of their customers whose requirements generally cover the full range of furniture or grocery products.'

[192] See *JD Group Limited / Ellerine Holdings Limited* (CT 78/LM/Jul00); consequently, in *Nestlé (SA) (Pty) Ltd / Pets Products (Pty) Ltd / Heinz South Africa (Pty) Ltd / Tiger Foods Ltd* (CT 21/LM/Apr01) par 27 the Tribunal distinguished between separate markets of the sale of pet food through the retail channel and the non-retail channel.

The geographic market is also defined by determining the cross-elasticity of demand[193] and supply. It is the area to which customers can 'reasonably turn for sources of supply'[194] or 'where competitors face competition.'[195] In other words, in such a market the hypothetical monopolist can increase the price for his product while reducing the quantity of production without customers switching to sources outside this certain area and without competitors from other territories entering the monopolist's territory to compete with substitute products.[196] Hence, the exercise of market definition consists of identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.[197] The geographic market can be local,[198] regional,[199] national,[200] or even international.[201]

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[193] Economists define cross-elasticity of demand as follows: 'The effect of a change in the *price* of one product on the sales *volume* of some other product. Thus, if an increase in the price of butter causes a significant increase in the volume of oleomargarine sold, then there is significant cross-elasticity of demand between those two products.' (Glossary of Terms published by the Competition Commission, available at: http://www.compcom.co.za/thelaw/thelaw_glossary.asp?level=3). Cross-elasticities of demand provide a useful measure of the relationship between goods. For instance, a high positive or negative cross-elasticity indicates a close relationship between goods, see Black et al *ECONOMICS Principles and Practices – A South African Perspective* Second Edition (1997) 51-52.

[194] *Trident Steel (Pty) Ltd / Dorbyl Ltd* (CT 89/LM/Oct00) par 28 quoting American Bar Association Antitrust Law Developments, 4th (Chicago: American Bar Association) 1997 p 60.

[195] *Liberty Group Limited / Investec Employee Benefits Limited* (CT 32/LM/Jun03) par 37. *Cf* also *JD Group Limited / Ellerine Holdings Limited* (CT 78/LM/Jul00) and *The Tongaat-Hulett Group Ltd / Transvaal Suiker Beperk and Middenen Ontwikkeling (Pty) Ltd and Senteeko (Edms) Bpk and New Komati Sugar Miller's Partnership and TSB Bestuursdienste* (CT 83/LM/Jul00) par 43: The 'area over which merged firms and its rivals currently supply, or could supply, the relevant product and to which consumers can practically turn.' The European Commission defines the geographic market as follows: "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.' See European Commission Notice on the definition of relevant market for the purposes of Community competition law, OJEC C 372 of 09.12.1997, par 8, also available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31997Y1209(01)&model=guichett.

[196] See for instance *Murray & Roberts Ltd / The Cementation Company (Africa) Ltd* (CT 02/LM/Jan04) par 26.

[197] European Commission Notice on the definition of relevant market for the purposes of Community competition law, OJEC C 372 of 09.12.1997, par 13, also available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31997Y1209(01)&model=guichett.

[198] *Cf Pick 'n Pay Retailers (Pty) Ltd / Boxer Holdings (Pty) Ltd* (CT 52/LM/Jul02).

[199] See for instance *Highveld Steel and Vanadium Corporation Ltd / Van Leer South Africa* (CT 06/LM/Oct99) par 8.

[200] See as an example *Distillers Corporation (SA) Limited / Stellenbosch Farmers Winery Group Ltd* (CT 08/LM/Feb02). *Cf* also *JD Group Limited / Ellerine Holdings Limited* (CT 78/LM/Jul00), where the Tribunal defined a national market due to the national setting of prices and key trading conditions.

[201] *Cf Framatome Societe Anonyme / Siemens AG* (CT 04/LM/Jan01) par 16. However, the Tribunal postulated in the case *Trident Steel (Pty) Ltd / Dorbyl Ltd* (CT 89/LM/Oct00) par 27, that '[t]he mere presence of imports does not necessarily indicate conclusively that a market is international.'

As far as media markets are concerned, the South African competition authorities made certain important statements, which will be referred to later on.[202]

1 5 1 2 4 2 The actual and potential level of import competition in the market

Competition authorities have to take into account, if products can be imported into South Africa at prices competitive with those of the merged firm.[203] If this is the case, it is unlikely that the merged entity has market power to increase prices unilaterally, because customers can switch to competing imports.[204] A plurality of factors can reduce such a competitive import effect, like regulatory obstacles (import quotas or permit requirements) or actual hindrances for foreign competitors (high transport costs, exchange rate fluctuations,[205] and domestic labelling).[206]

1 5 1 2 4 3 The ease of entry into the market, including tariff and regulatory barriers

This factor overlaps with 'level of import competition' to some extent, but it also has to be assessed whether there are barriers to entry into the relevant market on a national level and 'to what extent new entrants would be encouraged to enter the market and thus constrain a possible exercise of any market power by the merged entity.'[207] Such barriers can be the concentration of power in the downstream market, for instance where major retail chain stores control a retail channel,[208] or the large expenditures which a new entrant will have to expend in order to establish a new brand in a concen-

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[202] See 1 5 3 5 6 *infra*.
[203] See for instance *Pioneer Foods (Pty) Ltd / John Moir's, a division of Bromor Foods (Pty) Ltd* (CT 46/LM/Jun04).
[204] Legh in Brassey et al *Competition Law* (2002) 270.
[205] In the *Mondi and Kohler* case, the Commission argued for instance that imports were 'possible but not economically viable due to the exchange rate', see argumentation of the Commission in *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02) par 77. *Cf* also *Murray & Roberts Ltd / The Cementation Company (Africa) Ltd* (CT 02/LM/Jan04) par 53.
[206] In detail Legh in Brassey et al *Competition Law* (2002) 270 referring to the Canadian Merger Enforcement Guidelines. *Cf* also the examples given by the European Guidelines (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 71, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf).
[207] *Xstrata South Africa (Pty) Ltd / Egalite (Pty) Ltd and International Carbon Holdings (Pty) Ltd* (CT 54/LM/Jul04).
[208] *Cf Nestlé (SA) (Pty) Ltd / Pets Products (Pty) Ltd / Heinz South Africa (Pty) Ltd / Tiger Foods Ltd* (CT 21/LM/Apr01) par 55.

trated market, in which other well-known solid brands already exist.[209] The Competition Tribunal[210] has referred to US antitrust policy, according to which the ease of market entry is one of the most important factors indicating that the merger might not have anti-competitive effects.[211]

1 5 1 2 4 4 The level and trends of concentration, and history of collusion, in the market

The mere fact that the markets are highly concentrated does not mean that a merger is likely to be anticompetitive,[212] and '[i]t is trite that mere increases in concentration do not necessarily give rise to competition concerns.'[213] Nevertheless, a merger's effect on market concentration is an important factor in the assessment of the likelihood of the merged firm having market power and hence the potential to raise prices post merger to a supra-competitive level. Market concentration is a function of the number of firms in a market and their respective market shares.[214] The assessment of market concentration is crucial for determining the potential detrimental effects of a proposed merger. To determine the concentration of a market, economists use certain calculation methods, expressed by different indices, which indicate 'the scarcity or lack of firms and the inequality in the size of the

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[209] *Cf Bromor Foods (Pty) Ltd / National Brands Ltd* (CT 19/LM/Feb00) par 17-22 with further references. See also *Nestlé (SA) (Pty) Ltd / Pets Products (Pty) Ltd / Heinz South Africa (Pty) Ltd / Tiger Foods Ltd* (CT 21/LM/Apr01) par 56-59.

[210] *Cf Xstrata South Africa (Pty) Ltd / Egalite (Pty) Ltd and International Carbon Holdings (Pty) Ltd* (CT 54/LM/Jul04).

[211] According to the 'Entry Analysis' in the 1992 United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines [with April 8, 1997, Revisions to section 4 on efficiencies] Section 3.0, available at: http://www.ftc.gov/bc/docs/horizmer.htm, the FTC assesses whether entry would be 'timely, likely and sufficient [...] to deter or to counteract the competitive effects of concern' to determine whether entry is 'easy'. The Guidelines further postulate that '[i]n markets where entry is that easy (i.e., where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis.' Also the European Merger Guidelines recognise that 'a merger is unlikely to pose any significant anti-competitive risk' when entering a market is 'sufficiently easy'. The same test applies and hence the entry must be 'likely, timely and sufficient' (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 68, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf). See also Theron 'The Economics of Competition Policy: Merger Analysis in South Africa' (2001) *SAJE, vol. 69: 4,* 646-649.

[212] *Nestlé (SA) (Pty) Ltd / Pets Products (Pty) Ltd / Heinz South Africa (Pty) Ltd / Tiger Foods Ltd* (CT 21/LM/Apr01) par 44.

[213] *The Tiso Consortium (comprising of Investec Bank Ltd, Multi-Direct Investments 180 (Pty) Ltd, Capricorn Capital Partners Holding Co (Pty) Ltd, Mineworkers Investments Co (Pty) Ltd ('MIC') and Safika Holdings (Pty) Ltd) / New Africa Investments Limited ('NAIL')* (CT 59/LM/Oct03) par 31.

[214] A firm's market share reflects the amount of economic activity for which it is responsible in the relevant market (see *JD Group Limited / Ellerine Holdings Limited* (CT 78/LM/Jul00)). For the different approaches of determining the market shares, see *Bidvest Group Limited / Paragon Business Communications Limited* (CT 56/LM/Oct01) par 46.

firms in the market.'[215] One of the indices is the Herfindahl-Hirschmann Index (HHI). The HHI of market concentration is calculated by summing the squares of the individual market shares of all the participants.[216] The spectrum of market concentration as measured by the HHI is divided into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800).[217] A merger that results in an increase in the HHI of more than 100 points is likely to raise competition concerns.[218] The Competition Tribunal uses the HHI as a screening mechanism, even though this index alone is not apt to constitute the basis for a merger consideration.[219] The Tribunal pointed out, that it does not 'believe that the HHI, even when a relatively straightforward calculation, should, on its own, constitute the basis for deciding on the outcome of a merger investigation.'[220] HHIs are '*indicative* statistical measures; they are not determinant. They must always be bolstered [by] a deeper, qualitative enquiry in order to arrive at a realistic assessment of the impact of the transaction on competition in the relevant market.'[221] For instance, the Tribunal recognised in certain cases that the increase in concentration post-merger might not always be assessed by simply summing the market shares of the merging firms, because sometimes a decline in market share due to the transaction itself can be observed (so-called 'run-

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[215] Theron 'The Economics of Competition Policy: Merger Analysis in South Africa' (2001) *SAJE, vol. 69: 4,* 636-637.

[216] See for instance Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 16, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

[217] The Competition Tribunal refers to the 1992 United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines [with April 8, 1997, Revisions to section 4 on efficiencies], available at: http://www.ftc.gov/bc/docs/horizmer.htm. *Cf The Bidvest Group Ltd / Island View Storage Ltd* (CT 17/LM/Dec99).

[218] In highly concentrated markets the FTC considers an increase in the HHI of more than 100 points likely to create or enhance market power or facilitate its exercise, unless other factors are shown to make it unlikely that the merger will have this effect. Moreover, the US Merger Guidelines consider an HHI increase of more than 100 points in a merger that leads to a moderate level of concentration as a relatively large increase in concentration. This potentially raises significantly competitive concerns, what demands for further scrutiny.

[219] Also the FTC uses the HHI only 'as an aid to the interpretation of market data' and states that 'although the resulting regions [of market concentration] provide a useful framework for merger analysis, the numerical divisions suggest greater precision than is possible with the available economic tools and information', *cf* 1992 United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines [with April 8, 1997, Revisions to section 4 on efficiencies] Section 1.5, available at: http://www.ftc.gov/bc/docs/horizmer.htm. Also in the European merger guidelines it is pointed out clearly that each of the 'HHI levels [...] may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns.' (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 21, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf).

[220] *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00).

[221] *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00).

off').[222] Furthermore, the use of the HHI analysis is controversial in economics and the competition authorities use other concentration tests as well, like the four-firm concentration ratio (so-called 'CR4 test'). This test measures the portion of the market accounted for by the four leading firms. Competition authorities are, as a rule, very sceptical of a merger where the combined share of the four largest firms will exceed 75% and the merged firm will supply at least 15% of the relevant market.[223]

Mostly, the structure and the level of concentration of a certain market are not held to be decisive. However, the structure of an industry allows certain conclusions to be made about the possible conduct after a merger. The Competition Commission postulated:[224]

> 'In the case of a merger a Competition Authority has to make a certain 'guesstimate' of what the conduct of the merged entity post-merger will be. Relying on structural characteristics of markets (market shares, concentration levels, *etc.*) to make certain conclusions about future market behaviour has become common practice.'

History of collusion in the market, in which the proposed merger would take place, is also of interest. It has to be assessed, whether the structure of the market is susceptible to collusion prior to the merger. If the competition authorities conclude that a merger is anti-competitive because collusion is likely to occur following the merger, that merger will be more likely to be prohibited. If a transaction will facilitate tacit or express coordinated conduct by facilitating the exchange of pricing and other competitively sensitive information, it will be regarded as being likely to substantially lessen competition in terms of section 12A.[225] Conversely, the specifics of the products sold on the relevant market, like their pricing structures, and the particular form of distribution can lead to the assessment that collusive strategies are unlikely to occur despite high concentration.[226]

1 5 1 2 4 5 The degree of countervailing power in the market

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[222] See *Santam Limited / Guardian National Insurance Company Limited* (CT 14/LM/Feb00) par 20.
[223] *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00).
[224] Competition Commission Report to the South African Reserve Bank – The proposed merger between NEDCOR and STANBIC Pretoria (2000) 12, quoted from: Theron 'The Economics of Competition Policy: Merger Analysis in South Africa' (2001) *SAJE, vol. 69: 4,* 622.
[225] See for instance *Mondi Ltd / Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (CT 06/LM/Jan02) par 85-99.
[226] See for instance *Pioneer Foods (Pty) Ltd / SAD Holdings Limited* (CT 23/LM/Apr02) par 28.

Competition authorities also discern whether there is compensating market power, exercised by strong competitors, customers, or suppliers.[227] Competition authorities may consider this factor as a counterbalance for the effect that the proposed merger will have on competition.[228] Especially if there are many large competitors in the market, a merger is, generally speaking, unlikely to affect competition adversely, because it is unlikely that the merging parties will acquire market power as a result of the transaction.[229] The same argumentation applies, if a merger 'involve[s] firms producing arcane intermediate products with the final consumer located several links lower in the production chain. In these instances the consumers directly affected is often themselves well resourced downstream producers capable of mounting a sophisticated response to a merger that it deems threatening to their commercial interests.'[230]

Hence, parties to a merger often argue that the market power that might accrue to them because of the merger is blunted by the countervailing strength of their customers, suggesting that large, well-resourced buyers are better placed to resist an exercise of market power on the part of a monopolistic supplier than less well-resourced and more atomised consumers.[231]

In view of detrimental effects for customers in downstream markets, especially the end consumer, the Tribunal seems to be sceptical of this argument, though, stating that 'a powerful buyer, because it often has power in its own market, will, if faced with supra-competitive pricing by key suppliers, generally be able to pass on any increase in the cost of its inputs to its customers.'[232] Hence, the Competition Tribunal concluded that 'counter-

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[227] See Legh in Brassey et al *Competition Law* (2002) 271.

[228] European authorities assess for instance the ease with which customers are able to switch to other suppliers as an indicator for the likeliness of price increase post-merger, see Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 31, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

[229] *Cf* for instance recently *Growthpoint Properties Limited / Tresso 119 (Pty) Ltd* (CT 27/LM/Apr05) par 10.

[230] *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00).

[231] See for instance *Nestlé (SA) (Pty) Ltd / Pets Products (Pty) Ltd / Heinz South Africa (Pty) Ltd / Tiger Foods Ltd* (CT 21/LM/Apr01) par 46-49, where the parties to the merger (manufacturers of pet food) claimed that the retailers would possess 'a degree of countervailing power sufficient to restrain any anticompetitive pricing by the merged entity.' *Cf* also *Pioneer Foods (Pty) Ltd / SAD Holdings Limited* (CT 23/LM/Apr02) par 26-27, where the parties maintained that the retailers would have 'huge negotiating power'.

[232] *Daun et Cie AG / Kolosus Holdings Limited* (CT 10/LM/Mar03) par 115. See also *Nestlé (SA) (Pty) Ltd / Pets Products (Pty) Ltd / Heinz South Africa (Pty) Ltd / Tiger Foods Ltd* (CT 21/LM/Apr01) par 48, *Pioneer Foods (Pty) Ltd / SAD Holdings Limited* (CT 23/LM/Apr02) par 27 and *Allied Technologies (Pty) Ltd / NamITech Holdings Limited* (CT 37/LM/Jul03) par 83.

vailing power, understood as a large well resourced purchaser dealing with a monopoly supplier, may well provide comfort to the buyer but it does not necessarily avail the final consumer any.'[233]

Moreover, the lack of countervailing power can be used as an argument against a proposed merger. The Tribunal pointed out in the *JD Group / Ellerine* case,[234] that 'the parties to the transaction are the final link with the consumers.' In this case, consumers were 'the poorest, least powerful of South African consumers [...] millions of atomized, disorganized individuals incapable of defending their economic interests except to the extent that they are able to exercise a preference for one retail outlet over another.'

1 5 1 2 4 6 The dynamic characteristics of the market

If a market is rapidly growing and characterised by a high level of innovation, it is more likely that new competitors are encouraged to enter into the market, expecting profits. Mergers taking place in such markets are less likely to raise competition concerns than mergers in stable or stagnant markets. A high level of product differentiation also has to be taken into account by the competition authorities, because a merger, taking place in a market with a wide range of product differentiation, is less likely to be contentious than in markets for generic products, for there will be less significant product overlaps and therefore less of an increase in market power as an effect of the merger.[235]

1 5 1 2 4 7 The nature and extent of vertical integration in the market

The higher the level of vertical integration in an industry, the more difficult it will be for such customers or suppliers to compete with those parts of the integrated businesses with which they previously competed on an independent basis, especially if exclusive arrangements are the consequence of the vertical integration process.[236] The Competition Appeal Court pointed out this danger for instance in a case of a vertically integrated manufacturer.

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[233] *Daun et Cie AG / Kolosus Holdings Limited* (CT 10/LM/Mar03) par 115. *Cf* also *Murray & Roberts Ltd / The Cementation Company (Africa) Ltd* (CT 02/LM/Jan04) par 34. The same concerns are outlined in the European Merger Guidelines (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 67, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf referring to European case law).
[234] *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00).
[235] *Cf* Legh in Brassey et al *Competition Law* (2002) 272.
[236] Legh in Brassey et al *Competition Law* (2002) 272.

In the Court's opinion there was a high probability that in the post merger market the manufacturer would 'continue to receive priority in supplies over other [non-integrated] manufactures.'[237]

A factor of the assessment of vertical mergers can be the actual level of intra-brand competition.[238] The Tribunal pointed out that strong inter-brand competition[239] diminishes the requirement to regulate the vertical relationship between a supplier and his distributor, which primarily affects only intra-brand competition.[240]

1 5 1 2 4 8 (Potential) failure of the business of a party to the merger

This provision encapsulates the so-called 'failing-firm defence'. According to it, one of the party's business (or part of it) effectively no longer competes in the market and the merger thus does not have any anti-competitive effects and, on the contrary, may even be pro-competitive.[241] Nevertheless, the Competition Tribunal asserted that – unlike in other jurisdictions[242] – the failing firm doctrine is not a real 'defence' to a merger that has been found on an initial market analysis to be anticompetitive.[243] Consequently, the Tribunal does not determine at first whether a merger is anti-competitive and then only if it is, consider the 'failing firm doctrine' as a defence. It rather takes the failing firm argumentation already into account as a factor amongst others while assessing if the merger is 'likely to substantially

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[237] *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02) par 68.
[238] That is the competition among retailers or distributors of the same brand.
[239] That is the competition between different brands of the same product.
[240] See on this subject *DaimlerChrysler South Africa (Pty) Ltd / Sandown Motor Holdings (Pty) Ltd* (CT 44/LM/Jul01) with references to the EU Commission Guidelines on Vertical Restraints.
[241] *Cf* the case *JD Group Limited / Profurn Limited* (CT 60/LM/Aug02) par 108, where the parties alleged that the target firm was a failing firm, what would sanitise the merger.
[242] See for instance for the 1992 United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines [with April 8, 1997, Revisions to section 4 on efficiencies] Section 5.1, available at: http://www.ftc.gov/bc/docs/horizmer.htm: 'A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met: 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of the failing firm would exit the relevant market.' Europe also knows this doctrine, albeit with differences, *cf* in detail Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004, par 89-91, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf. See also 2 3 4 4 2 *infra*.
[243] *Iscor Limited / Saldanha Steel (Pty) Ltd* (CT 67/LM/Dec01) par 101.

prevent or lessen competition' in terms of section 12A(1).[244] The consequence of this approach is, as the Tribunal pointed out, that an anti-competitive merger does not have to be approved, if all the elements of this 'defence' can be established. Even if the conditions of the failing firm doctrine are found to be satisfied, 'one might nevertheless still find a merger to be anti-competitive [and hence prohibit it] because of the way one balances this failing firm factor in relation to all the others.'[245]

1 5 1 2 4 9 Removal of an effective competitor

The removal of an effective competitor can be a strong argument for prohibiting a merger, especially if the market basically consists only of a few leading competing firms. Here, the level of concentration is also of importance.[246] On the other hand, the fact that an effective competitor will not exit the market due to the merger points to the approval of the transaction.[247]

1 5 1 2 4 10 Other factors

Nevertheless, the enumerated factors constitute a non-exhaustive list of factors.[248] This is indicated by the word 'including' in section 12A(2). Furthermore, there is no hierarchy of factors that orders their significance, and not all factors are necessarily relevant in every case.[249] The uncertainties resulting from such an approach must be regarded as inevitable and as a sacrifice to the flexibility, competition authorities need to allow them to make just decisions.

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[244] In this point, the South African and Canadian approach are identical, see *Iscor Limited / Saldanha Steel (Pty) Ltd* (CT 67/LM/Dec01) par 85. *Cf* also *Schumann Sasol (South Africa) (Pty) Ltd / Price's Daelite (Pty)* (CT 23/LM/May01) par 58 footnote 26.

[245] *Iscor Limited / Saldanha Steel (Pty) Ltd* (CT 67/LM/Dec01) par 104. The Tribunal continued in the case: 'Conversely, where the competitive loss is low, then one may be less exacting in requiring a showing of all the elements of the traditional failing firm defence. If the failing firm concept was a defence, in the sense that the efficiency defence is, then this type of flexibility would be impermissible and one would have to satisfy all the elements of a test that the legislature had provided before it could be invoked. Whilst this approach may risk making the concept more nebulous, it does allow the adjudicator the flexibility to achieve real interest balancing, as opposed to the application of rigid formulas.' (par 105-106).

[246] *Cf* for instance the *JD Group / Ellerine* case (CT 78/LM/Jul/00), where the four leading firms had 84% of all market shares, the parties to the proposed merger 38,3% in a post-merger scenario.

[247] *Cf Secotrade 72 (Pty) Ltd and Imperial Holdings Ltd / Hyundai Motor Distributors (Pty) Ltd* (CT 46/LM/Apr00); *Edgars Consolidated Stores Limited / Retail Apparel Group (Pty) Ltd* (CT 53/LM/Aug02).

[248] Constant court ruling, see for instance *Massmart Holdings Ltd / Jumbo Cash and Carry (Pty) Ltd; Massmart Holdings Ltd / Picardi Liquors (Pty) Ltd - Sip 'n Save division* (CT 39/LM/Jul01 and 47LM/Aug01) par 28; *Bidvest Group Limited / Paragon Business Communications Limited* (CT 56/LM/Oct01) par 43.

[249] Legh in Brassey et al *Competition Law* (2002) 269.

However, the Competition Tribunal has already clarified in some cases, how the Act should be interpreted. For instance, the Tribunal indicated that it is sufficient that *potential* competition is 'substantially lessened'.[250]

1 5 1 2 5 Pro-competitive gains

If the Commission, Tribunal, or Appeal Court concludes that a merger is likely to prevent or lessen competition substantially, the merger still can be approved in terms of section 12A. The relevant authority has to determine in that case 'whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented'.[251] Accordingly, mergers can still be approved because of pro-competitive gains in the relevant market resulting from it.[252] Nevertheless, such efficiency gains must be 'merger-specific' and genuine consequence of the merger to be cognisable.[253] The onus of establishing efficiency gains rests on the merging parties,[254] making it – in contrast to the failing firm doctrine[255] – a real 'efficiency defence'. In the *Tongaat-Hulett Group / Transvaal Suiker Beperk* case,[256] the Tribunal gave examples of such defences although it accepted that there is no exhaustive list of possible countervailing efficiency gains:[257]

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[250] *The Tongaat-Hulett Group Ltd / Transvaal Suiker Beperk and Middenen Ontwikkeling (Pty) Ltd and Senteeko (Edms) Bpk and New Komati Sugar Miller's Partnership and TSB Bestuursdienste* (CT 83/LM/Jul00) par 61-67 and 85. See also Legh in Brassey et al *Competition Law* (2002) 260 agreeing with the decision.

[251] S 12A(1)(a)(i).

[252] See as an example the *Trident* case, where a merger was approved, although the Tribunal concluded that the merger would lead to a substantial lessening of competition in the steel products market: *Trident Steel (Pty) Ltd / Dorbyl Ltd* (CT 89/LM/Oct00) par 91.

[253] Consequently, in *Trident Steel (Pty) Ltd / Dorbyl Ltd* (CT 89/LM/Oct00) par 76 the Tribunal stated: 'If the efficiencies could come about through some other legal arrangement or organizational form that is not a merger, or if one of the firms could achieve a claimed efficiency on its own, the efficiency defence fails.' This is consistent with the European approach, see Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004, par 85 also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

[254] *The Tongaat-Hulett Group Ltd / Transvaal Suiker Beperk and Middenen Ontwikkeling (Pty) Ltd and Senteeko (Edms) Bpk and New Komati Sugar Miller's Partnership and TSB Bestuursdienste* (CT 83/LM/Jul00) par 100. The Tribunal held in this case that 'it is for the Commission to establish a lessening of competition; it is for the parties to establish that the efficiencies sacrificed by an anti-competitive merger are countervailed by efficiency gains.'. See also *Trident Steel (Pty) Ltd / Dorbyl Ltd* (CT 89/LM/Oct00) par 51.

[255] See 1 5 1 2 4 8 *supra*.

[256] *The Tongaat-Hulett Group Ltd / Transvaal Suiker Beperk and Middenen Ontwikkeling (Pty) Ltd and Senteeko (Edms) Bpk and New Komati Sugar Miller's Partnership and TSB Bestuursdienste* (CT 83/LM/Jul00).

[257] Par 104.

> 'An efficiency gain contemplated in the Act, one that may compensate for the anti-competitive consequences of a merger that otherwise falls foul of the act, is one that, for example, evidences new products or processes that will flow from the merger of the two companies, or that identifies new markets that will be penetrated in consequence of the merger, markets that neither firm on their own would have been capable of entering, or that significantly enhances the intensity with which productive capacity is utilised.'

Competition authorities, though, seem to be very reluctant to accept a merger based on a 'pro-competitive gain' argument.[258] The Tribunal declared on this matter 'that an accurate reading of the Act requires us to set a high standard for establishing possible countervailing efficiency gains.'[259]

1 5 1 2 6 Public interest grounds

Besides those economic considerations, the competition authorities always have to assess the public-interest aspects of mergers and consider 'whether the merger can or cannot be justified on substantial public interest grounds,'[260] 'regardless of the outcome of the section 12A(2) "competition" analysis.'[261] Thus, on the one hand, a merger, which is likely to substantially prevent or lessen competition, may be approved, whereas, on the other hand, a merger, even if it does not have an anti-competitive effect, can be prohibited or at least approved only subject to conditions, if public interest issues militate against the (unconditional) approval of this merger.[262] Again, the Act enumerates the factors, which have to be assessed when considering justification on public interest grounds:[263]

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[258] See Legh in Brassey et al *Competition Law* (2002) 264-269 on this problem.
[259] *The Tongaat-Hulett Group Ltd / Transvaal Suiker Beperk and Middenen Ontwikkeling (Pty) Ltd and Senteeko (Edms) Bpk and New Komati Sugar Miller's Partnership and TSB Bestuursdienste* (CT 83/LM/Jul00) par 98 also referring to (the 'effectively identical') subsection 96(1) of the Canadian Competition Act and Canadian jurisdiction.
[260] S 12A(1)(a)(ii).
[261] *Anglo American Holdings Ltd / Kumba Resources Ltd with the Industrial Development Corporation intervening* (CT 46/LM/Jun02) par 138.
[262] *Cf Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* (CT 66/LM/Oct01) par 37; *Distillers Corporation (SA) Limited / Stellenbosch Farmers Winery Group Ltd* (CT 08/LM/Feb02) par 214; *Anglo American Holdings Ltd / Kumba Resources Ltd with the Industrial Development Corporation intervening* (CT 46/LM/Jun02) par 138: '[T]he public interest can operate either to sanitise an anticompetitive merger or to impugn a merger found not be anticompetitive.'
[263] S 12A(3).

The Competition authorities must consider the effect that the merger will have on

- a particular industrial sector or region
- employment
- the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive and
- the ability of national industries to compete in international markets

to decide whether a positive impact on public interest outweighs[264] the negative impact on competition, or *vice versa*.[265]

The Competition Tribunal seems particularly to lay stress on the adverse impact on employment occasioned as a result of the merger (potential job losses), or whether rights of employees under the merger will be adequately safeguarded.[266] Improvements regarding enterprises controlled or owned by historically disadvantaged persons are also positively mentioned and in some cases discussed in detail, even though this aspect has not been decisive so far.[267] Although these factors enable the competition authorities to use merger

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[264] The Competition Tribunal emphasises that 'that the mere existence of a public interest ground is not enough in itself. The Act requires the public interest ground to be substantial.' (*JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00)).

[265] See *Harmony Gold Mining Company Ltd / Gold Fields Ltd* (CT 93/LM/NOV04) par 45.

[266] See for instance *Randfontein Estates Ltd / Anglogold Ltd* (CT 03/LM/Jan01). *Cf* also the actual discussion about the potential effects of the proposed merger between Gold Fields and Harmony, Business Report (2005-05-04) 17.

[267] In *Anglo American Holdings Ltd / Kumba Resources Ltd with the Industrial Development Corporation intervening* (CT 46/LM/Jun02) par 137-170 this issue was discussed broadly, but the Tribunal was not willing to prohibit the merger on this public interest ground, stating: 'We deem it imprudent to make a decision on so difficult an issue when the outcome of such a debate would be academic given our conclusions on the evidence.' In *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* (CT 66/LM/Oct01) the Competition Commission had recommended to impose conditions on the transaction because it would have 'a negative impact on the competitive position of a firm controlled by historically disadvantaged persons.' (*cf* par 39) – The Tribunal rejected that argumentation stating that '[e]mpowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine.' (par 42) and summarised that the Commission's argumentation on this issue 'should be advanced with considerable caution when the competition authorities use public interest as a basis for their intervention, particularly when competition is unimpaired and when the only historically disadvantaged investors whose interests are directly affected expressly reject the Commission's interventions. The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments – in this case the Employment Equity Act, the Skills Development Act and the *Charter* itself immediately spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect.' (par 58). In the cases *Main Street No 188 (Pty) Ltd / Mondi Limited's Newsprint Business* (CT 22/LM/Apr04) and *Tsebo Outsourcing Group (Pty) Ltd / Drake & Scull FM (SA) (Pty) Ltd* (CT 25/LM/Apr04) par 13, the Tribunal only positively remarked under public interest aspects that the transaction 'increases the ownership stakes of historically disadvantaged persons'. See also *Crown Gold Recoveries (Pty) Ltd / Industrial Development Corporation of South Africa Limited / Khumo Bathong Holdings (Pty) Ltd* (CT 31/LM/May02) and *Harmony Gold Mining Company Ltd / African Rainbow Minerals Gold Ltd* (CT 25/LM/May03) with the same argumentation. In *Lonmin Plc / Eastern Platinum Limited and Western Platinum Limited* (CT 45/LM/Jun04) par 14, the Tribunal laid particularly stress on the 'strong empowerment credentials' of the merger.

control to promote statutory policies of general interest, the Tribunal nevertheless seems to handle public interest issues very cautiously. It emphasised in the *Daun et Cie / Kolosus* case[268] that it is 'incumbent on an un-elected, administrative tribunal, principally charged with defending and promoting competition, to approach its public interest mandate with great circumspection' and that the Tribunal's role would only be 'ancillary' and 'supportive' to legislation and institutions specifically designed for the purpose of protection and promotion of each of the elements of public interest and 'should, by and large, not be employed as a substitute for, and in order to second-guess, these other interventions.'[269] Nevertheless, the Tribunal has already imposed conditions to merger approvals in several cases in order to safeguard public interest issues such as employment.[270]

The South African approach of acknowledging public interest grounds resembles the United Kingdom public interest test. In that country, however, the Secretary of State for Trade and Industry can issue an intervention note based on public interest grounds, when a merger is being considered. In particular, the Office of Communications (Ofcom) set out a guideline on the public interest test that applies to media mergers in the event of the issuing of such an intervention note.[271] This approach will be discussed later on.[272]
The South African Competition Act only recognises such intervention in the banking sector. The Minister of Finance may remove a banking merger from the jurisdiction of the Competition Act if he deems it to be in the public interest that the merger is subject only to the jurisdiction of the Banks Act.[273]

1 5 1 2 7 Conditional approval

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[268] *Daun et Cie AG / Kolosus Holdings Limited* (CT 10/LM/Mar03) par 124.
[269] See also *Distillers Corporation (SA) Limited / Stellenbosch Farmers Winery Group Ltd* (CT 08/LM/Feb02) par 232-238; *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* (CT 66/LM/Oct01) par 58.
[270] See *Telkom SA Ltd / TPI Investments / Praysa Trade 1062 (Pty) Ltd* (CT 81/LM/Aug00) par 44; *Multichoice Subscriber Management (Pty) Ltd / Tiscali (Pty) Ltd* (CT 72/LM/Sep04) par 82. *Cf* the clearance for Harmony Gold's hostile bid for Gold Fields under the condition of limited dismissals: Bailey 'Takeover gets the nod, but with fewer lay-offs' Business Report (2005-05-11) 17; case now published (*Harmony Gold Mining Company Ltd / Gold Fields Ltd* (CT 93/LM/NOV04)). See also 1 5 1 2 7 *infra* with further references.
[271] See *Ofcom guidance for the public interest test for media mergers,* available at: http://www.ofcom.org.uk/codes_guidelines/broadcasting/media_mergers/?a=87101.
[272] See 3 2 *infra*.
[273] Act No. 94 of 1990. See s 18 of the Competition Act. The public interest is not defined, but it was understood that the Minister would use this section only to facilitate urgent regulatory approval where the acquisition of a failing bank was necessary to prevent systemic risk, *cf* Competition Law and Policy in South Africa – OECD Global Forum on Competition Peer Review: Paris, 11 February 2003, p. 32, available at: http://www.comptrib.co.za/Publications/South%20Africa% 20Peer%20Review.PDF.

Having taken into account all these factors, the competition authorities decide, whether the proposed merger can be approved. In that event, a so-called Merger Clearance Certificate will be issued. If the merger is likely to substantially prevent or lessen competition, no pro-competitive gains can be observed and the transaction cannot be justified on substantial public interest grounds, the competition authorities have to discern, whether conditions on the proposed transaction can be imposed, instead of an outright prohibition to remedy the potential anti-competitive effects of the merger. The creation of such conditions aims both at the subsistence of actual competition and at the emergence of potential competition.[274] In some cases, such a conditional approval can dispel concerns, so there is no need to prohibit the merger. The Competition Tribunal recognises, that mergers generally increase efficiency and are part of the legitimate conduct of business. Thus, it pointed out 'if an anti-competitive merger can be "rescued" by excising those aspects that generate concern, then the Commission and the parties are encouraged to seek out these solutions.'[275] Hence, competition authorities would rather approve a proposed transaction conditionally than to prohibit it straightaway if an unconditional approval is not possible.[276]

The most common form of condition would be to oblige the parties to dispose of part of the operations of the merged entity[277] and sell assets to a buyer being an independent third party or parties approved by the Commission[278] in order to minimize a lessening of competition.[279] Nevertheless, competition authorities have to assess in every case, if structural or behavioural remedies are more appropriate,[280] although the Competition Tribunal held in

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[274] *Boart Longyear (a division of Anglo Operations Limited) / Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd* (CT 41/LM/Aug03).

[275] *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00).

[276] See for instance the case *Schumann Sasol (South Africa) (Pty) Ltd / Price's Daelite (Pty)* (CT 23/LM/May01), where the Competition Commission recommended a conditional approval. The Competition Tribunal concluded, though, that the conditions proposed by the Commission did not meet the competitive concerns that had been identified and prohibited the merger. Finally, the CAC approved the merger, upholding the parties' appeal (*Schumann Sasol (South Africa) (Pty) Ltd and Price's Daelite (Pty) Ltd* (10/CAC/Aug01)).

[277] See for instance *Coleus Packaging (Pty) Ltd / Rheem Crown Plant, a division of Highveld Steel and Vanadium Corporation Limited* (CT 75/LM/Oct02); *Nestlé (SA) (Pty) Ltd / Pets Products (Pty) Ltd / Heinz South Africa (Pty) Ltd / Tiger Foods Ltd* (CT 21/LM/Apr01) par 67.

[278] *Cf Unilever Plc / Robertsons Foods (Pty) Ltd* (CT 55/LM/Sep01).

[279] *Cf* also Legh in: Brassey et al *Competition Law* (2002) 282. Even though the Competition Tribunal finally declined to approve the merger in the *JD Group Limited / Ellerine Holdings Limited* case, the Commission would have accepted the transaction subject to the condition that 150 stores of the merged entity were sold to a purchaser approved by the Commission (preferably a BEE Group).

[280] See for instance the imposed prohibition of retrenchment in *Telkom SA Ltd / TPI Investments / Praysa Trade 1062 (Pty) Ltd* (CT 81/LM/Aug00) par 44 (prohibition for a certain period of time); *Food and Allied Workers Union v The Competition Commission and McCain Foods (SA) (Pty) Ltd and Heinz Frozen Foods (Pty) Ltd represented by Heinz SA (Pty) Ltd* (CT 17/AM/Mar01); *Harmony Gold Mining Company Ltd / Gold*

this context that 'a structural solution such as divestiture, is generally to be preferred to a behavioural condition that requires constant monitoring by the competition authorities or, expressed otherwise, ongoing regulatory intervention in the affairs of the merged entity.'[281] Yet, divestiture can be inappropriate 'in circumstances where a buyer has not been identified and where there are solid reasons for questioning the post-merger viability of the divested business.'[282] In the event of vertical mergers, however, the Tribunal imposes specific conditions on the merging parties to alleviate the above-mentioned concerns arising from such transactions, for instance the obligation to contract with competing downstream customers for a certain period in the case of the concern of input foreclosure.[283]

Notably in the case of a conditionally approved small or intermediate merger, the Competition Commission may revoke its own decision,[284] if a firm concerned did not comply with an imposed condition.[285] In that event, the Competition Commission may prohibit the merger even though any time limit set out in chapter 3 of the Act may have elapsed.[286]

1 5 1 2 8 Single specialties

It is a specialty of South African proceedings that the Act grants special rights for trade unions and employees. In particular, the South African merger control process gives labour interests an explicit role. Any registered trade union[287] that represents a substantial

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Fields Ltd (CT 93/LM/NOV04); sometimes, a combination of both forms of conditions are imposed, *cf Boart Longyear (a division of Anglo Operations Limited) / Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd* (CT 41/LM/Aug03).

[281] *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00). On this problem see also *Distillers Corporation (SA) Limited / Stellenbosch Farmers Winery Group Ltd* (CT 08/LM/Feb02 (Reasons for Decision)).

[282] *Boart Longyear (a division of Anglo Operations Limited) / Huddy (Pty) Ltd and Huddy Rock Tools (Pty) Ltd* (CT 41/LM/Aug03) referring to *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00) par 4.8. In *Unilever Plc / Robertsons Foods (Pty) Ltd* (CT 55/LM/Sep01) the merging parties were obliged to submit the name of the proposed buyer to the Commission for its prior approval 'in order that the Commission can assess whether the proposed buyer would be able to effectively utilise the divested assets so as to be a viable competitor to the merging parties.'

[283] See *Inzuzo Furniture Manufacturers (Pty) Ltd / PG Bison Holdings (Pty) Ltd* (CT 12/LM/FEB04). See also *Coleus Packaging (Pty) Ltd / Rheem Crown Plant, a division of Highveld Steel and Vanadium Corporation Limited* (CT 75/LM/Oct02), where a bundle of conditions was imposed by the Tribunal. *Cf* also the condition imposed in the case *Anglo American Holdings Ltd / Kumba Resources Ltd with the Industrial Development Corporation intervening* (CT 46/LM/Jun02) par 134 to dispel the concerns on information sharing to facilitate collusion.

[284] The Competition Commission may also revoke an unconditional approval, see s 15 for details.

[285] S 15(1)(c).

[286] S 15(2).

[287] This is according to s 1(1)(xxvi) 'a trade union registered in terms of section 96 of the Labour Relations Act, 1995 (Act No. 66 of 1995)'.

number of its employees[288] must be notified of proposed intermediate and large mergers, so they can decide whether to participate in the review.[289]

The Competition Act provides a list of persons that are entitled to participate in merger hearings.[290] The parties to the merger,[291] the Competition Commission,[292] the Minister of Trade and Industry[293] and the above-mentioned trade unions or employees[294] may participate in such hearings as of right. Moreover, any other person may be recognized by the Competition Tribunal as a participant.[295]

Registered trade unions are allowed, like the parties to the merger concerned, to appeal the decisions of the Competition Tribunal to the Competition Appeal Court within 20 business days, regardless whether the Tribunal approved, conditionally approved or prohibited the merger.[296] Conversely, competitors and consumers lack this privilege and are not allowed to appeal the decisions of the Tribunal, even if they participated in the proceedings of the Tribunal. It seems to be unfair to exclude those persons who would ordinarily be prejudiced by a merger. Moreover, trade unions or employees may appeal decisions approving a merger even if it is commercially acceptable to the parties to the merger and of no concern to competitors, consumers, suppliers, and customers. Hence, this privilege is criticized as being too broad.[297]

1 5 1 2 9 Penalties

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[288] Or the employees concerned or representatives of the employees concerned, if there are no such registered trade unions, s 13A(2)(b).
[289] See s 13A(2). Unions participate in about 20% of the merger proceedings, and about 20% of the unions that are notified decide to participate, see Competition Law and Policy in South Africa – OECD Global Forum on Competition Peer Review: Paris, 11 February 2003, p. 18, available at: http://www.comptrib.co.za/Publications/South%20Africa% 20Peer%20Review.PDF.
[290] S 53(1)(c).
[291] S 53(1)(c)(i).
[292] S 53(1)(c)(ii).
[293] If the Minister has indicated an intention to participate, s 53(1)(c)(iv) in conjunction with s 1(1)(xvi). See also the right of the Minister to participate as a party in any intermediate or large merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in order to make representations on public interest grounds, s 18(1).
[294] If there are no such registered trade unions and only if one these person was entitled to receive a notice in terms of section 13A(2) and who indicated to the Commission an intention to participate, s 53(1)(c)(iii) in conjunction with s 13A(2).
[295] For the latter group see *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings Ltd* (CT 45/LM/Jun02 and 46/LM/Jun02 – Application to participate).
[296] S 17(1)(b) referring to s 13A(2).
[297] See Legh in Brassey et al *Competition Law* (2002) 258-259.

As mentioned above, the Act places duties on the parties to a proposed merger. Large and intermediate mergers have to be compulsorily notified before being implemented and parties to a small merger may take no further steps to implement that merger until the merger has been approved or conditionally approved, if the Commission requires notification.[298]
In the case of a violation of the law, the Competition Tribunal may impose an administrative penalty, albeit only in the events enumerated in section 59. That is, in merger cases, according to section 59(1)(d), if the parties to a merger have

- failed to give notice of the merger, although the notification was required;[299]
- proceeded to implement the merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;
- proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission, or the Competition Tribunal
- proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by the Act.

The Tribunal can impose severe fines, taking into account the special circumstances and factors like the nature, duration, gravity and extent of the contravention, if any loss or damage was suffered as a result of the contravention and if any profit derived from the contravention.[300] The penalty has to be appropriate and may not exceed 10% of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year.[301]

In the special event of unlawful implementation of a merger, the Competition Tribunal may not only order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger, it can also declare void any provision of an agreement to which the merger was subject.[302]

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[298] See s 13(4) and 1 5 1 2 3 *supra*.
[299] See for instance the cases *The Competition Commission v Structa Technology (Pty) Ltd and Dorbyl Engineering Management Company (Pty) Ltd and Fastpulse Trading 26 (Pty) Ltd* (CT 83/LM/Nov02) and *The Competition Commission v Edgars Consolidated Stores Limited and Retail Apparel (Pty) Ltd* (95/FN/Dec02).
[300] *Cf* s 59(3).
[301] S 59(2).
[302] S 60(1).

1 5 2 Practice of merger control

Actually, the South African competition authorities approve most of the proposed mergers. The Competition Tribunal has prohibited only four[303] of 278 large mergers over which it has adjudicated since its inception in 1999.[304] The last prohibition of a transaction was in 2002. Of all transactions, the Competition Tribunal approved 247 without conditions and 27[305] were approved conditionally. In some large merger cases, the Tribunal had to adjudicate upon the obligation to notify a transaction[306] or a fine was imposed for the omission of notification prior to the implementation of the merger,[307] and in one case the Tribunal decided on the right to participate in a merger hearing.[308] During the report period 2003/2004, the Tribunal made decisions on 60 large mergers, of which 51 were approved unconditionally and nine were approved subject to conditions.[309]

Hence, in total the Tribunal has approved more than 98,5% of all large merger cases, which it had to decide since 1999.[310] This 'evidently permissive'[311] tendency can be no-

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[303] *JD Group Ltd / Ellerine Holdings Ltd* (CT 78/LM/Jul/00); *Schumann Sasol (South Africa) (Pty) Ltd / Price's Daelite (Pty)* (CT 23/LM/May01); *The Tongaat-Hulett Group Ltd / Transvaal Suiker Beperk and Middenen Ontwikkeling (Pty) Ltd and Senteeko (Edms) Bpk and New Komati Sugar Miller's Partnership and TSB Bestuursdienste* (CT 83/LM/Jul00) and *Mondi Ltd / Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (CT 06/LM/Jan02).

[304] All mergers published until 30 June 2005 have been taken into account.

[305] The case *Imperial Holdings Limited / The Cold Chain (Pty) Ltd* (CT 41/LM/Mar00) has been counted as a case of conditional approval, since the Tribunal stated that it approved the transaction 'with conditions', even though this cannot clearly be concluded from the reasons for the decision.

[306] See for instance *Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd v Distillers Corporation (SA) Ltd and Stellenbosch Farmers' Winery Group (Pty) Ltd and The Competition Commission* (CT 94/FN/Nov00 and 101/FN/Dec00); *Caxton and CTP Publishers and Printers Limited v Naspers Limited and Electronic Media Network Limited and Supersport International Holdings Limited and the Competition Commission* (CT 16/FN/Mar04).

[307] See for instance *The Competition Commission v Structa Technology (Pty) Ltd and Dorbyl Engineering Management Company (Pty) Ltd and Fastpulse Trading 26 (Pty) Ltd* (CT 83/LM/Nov02) (symbolic fine); *The Competition Commission v Edgars Consolidated Stores Limited and Retail Apparel (Pty) Ltd* (95/FN/Dec02); *The Competition Commission v The Tiso Consortium and New Africa Investments Limited and Investec Bank Limited and Safika Holdings (Pty) Ltd and Capricorn Capital Partners Holding and Company (Pty) Ltd and Multidirect Investments 180 (Pty) Ltd and Mineworkers Investment Company (Pty) Ltd* (CT 82/FN/Oct04).

[308] *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings Ltd* (CT 45/LM/Jun02 and 46/LM/Jun02 – Application to participate), *cf* 1 5 1 2 8 *supra*.

[309] See Competition Tribunal South Africa, Annual Report 2003/2004, RP No 103/2004, available at: http://www.comptrib.co.za/Publications/Annual%20Report/Annual%20report%202003%202004.pdf.

[310] Several merger notifications have been withdrawn, see for instance Competition Tribunal South Africa, Annual Report 2001/2002, RP No 205/2002, p. 8, available at: http://www.comptrib.co.za/Publications/Annual%20Report/Annual%20report%202001%202002.pdf.

[311] Competition Law and Policy in South Africa – OECD Global Forum on Competition Peer Review: Paris, 11 February 2003, p. 14, available at: http://www.comptrib.co.za/Publications/South%20Africa%20Peer%20Review.PDF.

ticed around the world, also in Germany.[312] An international benchmark study conducted in 1998 shows, that at least 95% of all mergers notified to regulatory authorities were approved.[313]

In practice, the control of mergers can be described as efficient. A high number of mergers are adjudicated in a very short period of time.[314] The amendment of the Act in 2000 reduced the scope of mandatory filing, and the Commission issued a 'fast track' policy in 2001 to focus effort on the most significant transactions. Hence, it is not surprising that the OECD Peer Review[315] gives South African merger control very good marks:

> 'The decisions to date show that, in terms of substantive economic analysis and sensitivity to policy context, merger review in South Africa is done at a high level of sophistication.'

1 5 3 Mergers between publishing houses

There are no specific provisions regulating mergers between newspaper enterprises or any other media. Nevertheless, a number of cases has concerned the newspaper sector, and these cases will be examined. Firstly, the newspaper and magazine market situation in South Africa will be scrutinised.

1 5 3 1 The newspaper and magazines market situation

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[312] See 2 3 4 5 *infra*.

[313] See Global Forum for Competition and Trade Policy 'Policy Directions for Global Merger Review' (September 1999) *Global Competition Review*, quoted from Legh in Brassey et al *Competition Law* (2002) 231 footnote 18.

[314] See for instance Competition Tribunal South Africa, Annual Report 2003/2004, RP No 103/2004, p. 19, available at: http://www.comptrib.co.za/Publications/Annual%20Report/Annual%20report%202003%202004.pdf, which stated: 'In terms of Tribunal Rule 35 (1), when a merger referral has been filed, the registrar must set down the matter to be heard within 10 business days of the filing date. In the period under review, 76% of the total merger referrals received were set down within 10 days of receiving the Competition Commission's recommendations. In the remaining cases, a pre-hearing meeting with the parties determined the time-frames for the proceedings. The average set-down time for large mergers, however, was within 9 days of receiving the case. Of the 60 orders on large mergers released in the period under review, 49 (82%) were released on the same day as the hearing, 9 (15%) were released within 10 days and 2 (3%) were released beyond 10 days of the hearing. In terms of Tribunal Rule 35(5), the Tribunal must within 20 days of issuing an order, provide written reasons for its decision. The average time taken for issuing written reasons is 14 days. Of the 58 mergers in which reasons were released within the review period, 42 (72%) were released within 20 days of the order, and 16 (18%) were released beyond 20 days of the order.'

[315] Competition Law and Policy in South Africa – OECD Global Forum on Competition Peer Review: Paris, 11 February 2003, p. 20, available at: http://www.comptrib.co.za/Publications/South%20Africa%20Peer%20Review.PDF.

South Africa has a long tradition of print media. In 1800, the first issue of a government newspaper, the *Cape Town Gazette and African Advertiser/Kaapsche Stads Courant en Afrikaansche Berigter* saw the light.[316] In 1824, the first independent publication, *The South African Commercial Advertiser*, was published.

Nowadays, there is a variety of daily and weekly newspapers, as shown by following graph on the next page:

Graph 3: **Daily and weekly newspapers**[317]

Name	Publisher	Frequency	Language	Audited circulation Jul-Dec 2003
Beeld (Daily)	Media24[318]	MD, M-F	A	101.367
Beeld (Saturday)	Media24	W, Sat	A	83.718
Burger, Die (Daily)	Media24	MD, M-F	A	102.902
Burger, Die (Saturday)	Media24	W, Sat	A	114.587
Business Day	Business Day Financial Mail Publishers (Pty) Ltd (BDFM)[319]	MD, M-F	E	42.057
Cape Argus, The	Independent Newspapers Cape Ltd	AD, M-F	E	73.206
Cape Times	Independent Newspapers Cape Ltd	MD, M-F	E	48.812
Citizen, The (Daily)	Caxton Publishers & Printers Ltd	MD, M-F	E	98.228
Citizen, The (Saturday)	Caxton Publishers & Printers Ltd	W, Sat	E	77.107
City Press	Media24	W, Sun	E	167.885
Daily Dispatch	Dispatch Media (Pty) Ltd[320]	AD, M-F	E	32.770
Daily News	Independent Newspapers KZN	AD, M-F	E	51.131
Daily Sun	Media24	MD, M-F	E	235.386[321]
Diamond Fields Advertiser	Independent Newspapers Gauteng Ltd	MD, M-F	E	8.775
Herald (Daily)	Johnnic[322]	MD, M-F	E	30.050
Herald (Saturday)	Johnnic	W, Sat	E	23.775

[316] South Africa Year Book 2003/04, 147. For the history of the South African press see also De Beer & Diederichs in De Beer (ed) *Mass Media Towards the Millenium – The South African Handbook of Mass Communication* 2nd edition (1998) chapter 4.

[317] The abbreviations used are the following: MD (morning daily), AD (afternoon daily), BW (bi-weekly), W (weekly), M-F (Monday to Friday), Mo (Monday), Tu (Tuesday), Wed (Wednesday), Th (Thursday), Fr (Friday), Sat (Saturday), Sun (Suday), A (Afrikaans), E (English), Z (Zulu).

[318] Media24 is wholly owned by Naspers, see 1 5 3 2 *infra*.

[319] BDFM publishes for Johncom in partnership with another publisher, see footnote 379 of this thesis *infra*.

[320] Owned by Johnnic.

[321] See also 1 5 3 2 *infra*.

[322] Formerly Times Media Eastern Cape (Times Media was the old name of Johncom, see http://www.southafrica.info/ess_info/sa_glance/constitution/971558.htm).

Ilanga	Mandla Matla Publishing Co (Pty) Ltd	BW, Th Mo	Z	98.492
Isolezwe	Independent Newspapers KZN	MD, M-F	Z	55.195[323]
Independent on Saturday, The	Independent Newspapers KZN	W, Sat	E	56.116
Mail and Guardian	M&G Media (Pty) Ltd	W, Fr	E	37.689
Mercury, The	Independent Newspapers KZN	MD, M-F	E	39.235
Post	Independent Newspapers KZN	W, Wed	E	38.545
Pretoria News (Daily)	Independent Newspapers Gauteng Ltd	AD, M-F	E	27.164
Pretoria News (Saturday)	Independent Newspapers Gauteng Ltd	W, Sat	E	16.477
Rapport	Media24	W, Sun	A	324.882
Saturday Dispatch	Dispatch Media (Pty) Ltd	W, Sat	E	27.816
Saturday Star, The	Independent Newspapers Gauteng Ltd	W, Sat	E	136.345
Soccer Laduuuuuma	Media24	W, Thu	E	217.594
Son, Die	Media24	W, Fri	A	90.015
Southern Cross, The	Catholic Newspapers & Pub Co Ltd	W, Sun	E	10.082
Sowetan	New Africa Publications (NAP)[324]	MD, M-F	E	123.590
Sowetan Sunday World	Johnnic	W, Sun	E	141.634
Star, The	Independent Newspapers Gauteng Ltd	MD, M-F	E	165.948
Sunday Independent, The	Independent Newspapers Gauteng Ltd	W, Sun	E	41.037
Sunday Sun	Media24	W, Sun	E	164.374
Sunday Times	Johnnic	W, Sun	E	505.717
Sunday Tribune	Independent Newspapers KZN	W, Sun	E	109.576
Volksblad, Die (Daily)	Media24	MD, M-F	A	27.179
Volksblad, Die (Saturday)	Media24	W, Sat	A	23.021
Weekend Argus	Independent Newspapers Cape Ltd	W, Sat & Sun	E	103.938
This Day	ThisDay Media	MD, M-F	E	32.401
Weekend Post	Johnnic	W, Sat	E	35.212
Weekend Witness	Natal Witness Pr & Pub Co Pty Ltd	W, Sat	E	27.309

Source: Audit Bureau of Circulations, quoted from: South Africa Year Book 2004/05, 145-146 and own research

[323] In July to December 2004 an average of even 65.109 copies a day was sold, see bizcommunity newsletter of 07 March 2005 (http://www.bizcommunity.com/Article.aspx?c=15&l=196&ai=5971). Between July and December 2002, there were only 34.057 copies sold, see South Africa Yearbook 2003/4, 150.

[324] Johnnic now owns 90,5% of NAP. The remaining shares are owned by an Employee Share Trust (9,25%) and minority shareholders (0,25%), see Johnnic Communications Reviewed Interim Results for the six months ended 30 September 2004, published in Business Times (Sunday Times) (2004-11-28) 9 and *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04) par 2.

Of these newspapers, only the Sunday newspapers, *Sunday Times, Rapport, Sunday Independent and Sunday Sun*, and the newspapers *City Press* and *Business Day* can be regarded as truly national newspapers, because they are published simultaneously in various cities using printing facilities of related dailies.[325] The size of the country – nearly 1500 km separating the main centres of Cape Town and Johannesburg – still precludes national dailies in the true sense of the word. Nevertheless, there is a large number of local dailies. *Summa summarum*, there are at least eighteen dailies in South Africa and according to the latest figures 28 weeklies,[326] nine of them published on Sundays. Nearly 120 regional or country newspapers, most of which are weekly tabloids, serve particular towns or districts in South Africa.[327] In 2003, the Audit Bureau of Circulations listed more than 178 so-called 'knock-and-drops' or 'freebies' newspapers, which are distributed free of charge and appear only in certain neighbourhoods. Only advertising finances them.[328] More than 4,5 million newspapers of that sort are distributed weekly. Press groups such as Media24 and CTP/Caxton are major players in this field.

According to the latest figures a list of newspapers sorted with reference to circulation looks as follows:

Graph 4: **Biggest daily- and weekly-distributed newspapers**

[325] South Africa Yearbook 2003/4, 147. *Rapport*, *City Press* and *Sunday Sun* (all Media24) are printed in four cities and distributed nationally, see http://www.media24.co.za/eng/newspapers_index.html. The *Business Day* is printed in Johannesburg, Cape Town and Durban.
[326] See bizcommunity newsletter of 20 February 2005 (http://www.bizcommunity.com/Article.aspx?c=15&l=196&ai=5809).
[327] South Africa Yearbook 2004/5, 142.
[328] South Africa Yearbook 2003/4, 148.

Urban Weekly Newspapers

Name	Audited circulation Jul-Dec 2004[329]
Sunday Times	505.402
Rapport	322.731
Soccer Laduuuuuma	244.509
Son	199.959
City Press	173.992
Sunday Sun	173.738
Sunday World	143.208
Die Burger	117.092
Sunday Tribune	109.774
Weekend Argus	103.953
Ilanga	103.597

Urban Daily Newspapers

Name	Audited circulation Jul-Dec 2004
Daily Sun	364.356
The Star	171.542[330]
Sowetan	122.825
Die Burger	104.102
Beeld	102.070

Source:Audit Bureau of Circulations, quoted from: media.toolbox newsletter of 22 February 2005 Vol.7 No 07

As regards the weekly-distributed newspapers, a certain degree of diversity can be noticed, even though Media24 holds 6 of the ten biggest weeklies. The *Sunday Times*, the biggest weekly in South Africa, is held by Johnnic. As far as the biggest dailies are concerned, Media24 also plays a predominant role, holding three of the five biggest newspapers.

The newspaper readership is still growing[331] due to publishing in indigenous languages and the growth of the black readership.[332] According to the Audit Bureau of Circulations,[333] urban daily-distributed newspapers show a 4% growth for the period of July to December 2004 since 2001 and 7% growth in the same period in 2003, while urban weeklies have grown 5% and 6% respectively for the same periods. Circulation of urban dailies has risen from 13,3 million readers to 14,5 million over the last six months and there has been growth in the market of urban weeklies from 23 to 28 different newspapers, which show a steady circulation.[334]

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[329] Total net sales per publishing day.

[330] The source also refers to the figure of 166.461 copies.

[331] That makes South Africa one of few countries in the world, where the newspaper readership is growing, see Harber 'Poniepers op 'n galop' DIE BURGER (2004-11-03) 13.

[332] Detailed: South Africa Yearbook 2003/4, 148. See also for instance the growth of the Zulu newspaper *Isolezwe*, selling between July and December 2004 already an average of 65,109 copies a day, bizcommunity newsletter of 07 March 2005 (http://www.bizcommunity.com/Article.aspx?c=15&l=196&ai=5971). For the history of the black press in South Africa see Fourie (ed) *Media Studies Volume 1: Institutions, Theories and Issues* (2001) 49-52.

[333] Quoted from: media.toolbox newsletter of 22 February 2005 Vol. 7 No 07.

[334] However, there has been a significant decrease in advertising expenditure over the same period, from 15,6% to 11,9%, see bizcommunity newsletter of 20 February 2005 (http://www.bizcommunity.com/Article.aspx?c=15&l=196&ai=5809).

There is also a large number of magazine titles distributed in South Africa.[335] Currently, more than 1100 magazine titles are published monthly.[336] The magazine market can be characterised as relatively stable, and considering the explosion of titles in the market over the last few years, magazine sales have remained constant and even growing. The focus for publishers remains on retail sales.[337] Magazines have experienced circulation increases from 8,4 million to 14,8 million over the past five years.[338] Hence, the net sales in the magazine field have increased by 41% since 2001 and 13% over the same period for 2003.[339] Most titles are sold in niche markets with small circulations. The latest magazine figures of the Audit Bureau of Circulations show that there is a decline in the women's magazine segment and an increase in men's magazine.[340] According to the Printing and Publishing Handbook (1999), there were 180 consumer magazine titles in 1977 in South Africa, by 1987 this number had increased to 200, and by 1999, there were 510 titles.[341]

Graph 5: **Sold magazines with the largest circulation, July – December 2004**[342]

Name	Frequency	Language	Audited circulation
Huisgenoot	W	A	340.570
You	W	E	222.845
Sarie	M	A	137.970
TV Plus	M	B	135.563
Rooi Rose	M	A	119.994
FHM	M	E	118.428[343]
Cosmopolitan	M	E	117.255
True Love	M	E	114.793
CAR	M	E	105.934
People	F	E	105.535[344]

[335] For the history of magazine publishing in South Africa see Claasen in De Beer (ed) *Mass Media Towards the Millenium – The South African Handbook of Mass Communication* 2nd edition (1998) chapter 5.
[336] South Africa Yearbook 2004/5, 143.
[337] Detailed: South Africa Yearbook 2003/4, 149.
[338] Audit Bureau of Circulation, quoted from bizcommunity newsletter of 20 February 2005 (http://www.bizcommunity.com/Article.aspx?c=15&l=196&ai=5809).
[339] Audit Bureau of Circulation, quoted from media.toolbox newsletter of 22 February 2005 Vol. 7 No 07.
[340] Charisse Tabak, managing director of Nota Bene Cape Town, explains this by describing the category of women's magazines as 'over-traded' and 'missing the mark in terms of addressing the real needs of contemporary women.' Content would tend to be 'patronizing' and there would be lack of differentiation from title to title, see media.toolbox newsletter of 01 March 2005 Vol. 7 No 08.
[341] Quoted from *Nasmedia / Paarl Post Web Printers (Pty) Ltd* (CT 65/LM/May00) par 23.
[342] The abbreviations used are the following: W (weekly), F (fortnightly), M (monthly), Q (quarterly), E (English), A (Afrikaans), B (bilingual).
[343] *FHM* is therefore the biggest men's magazine in South Africa.
[344] Between July and December 2002 the order has been the following: *Huisgenoot* (347.519 sold copies), *YOU* (231.648), *Sarie* (162.642), *Rooi Rose* (141.155), *True Love* (134.098), *Reader's Digest* (119.373), *TV Plus* (118.015), *People* (113.285), *The Motorist* (110.348) and *Cosmopolitan* (102.984), see South Africa Year Book 2003/04, 149.

Source:Audit Bureau of Circulations, quoted from: media.toolbox newsletter of 22 February 2005 Vol.7 No 07 and own research

Media24 either directly publishes or owns a stake in six of the top ten magazine brands for the period July 2004 to December 2004. Other major publishers in the magazine industry are Caxton, Johnnic, Associated Magazines and Ramsay Son & Parker.

To summarize: the South African press market seems to be stable and growing. A pluralistic press market exists, even though it is shared by a few big publishing houses.[345] In this respect, a resemblance exists with Germany. A decline in certain segments of the print industry is not necessarily a sign of lack of competition. Changing media consumption patterns can be noticed also in other countries, such as the shift to electronic media. As far as consumer magazines are concerned, the print media did not keep pace with the competition and innovation taking place in the media industry:

> 'Most consumer magazine titles are predictable and formulaic. Innovation has been limited to improvements in packaging and paper, but content remains unoriginal.'[346]

The South African press itself, however, can be considered as fairly free, also as far as the freedom of journalists is concerned. The international organisation 'Reporters without borders' publishes since 2002 a 'World Press Freedom Ranking'. The ranking measures the state of press freedom in the world by observing whether independent news media exist in a country or if the authorities constantly repress it. The ranking reflects the degree of freedom that journalists and news organisations enjoy in each country, and the efforts undertaken by the state to respect and ensure respect for this freedom. Hence, it shows, under which conditions journalists work, especially whether their work is unfettered and secure and without governmental influence.[347] In the last ranking (October 2003),[348] South Africa

[345] See in detail 1 5 3 2 *infra*.
[346] Charisse Tabak, managing director of Nota Bene Cape Town, interpreting the latest ABC results, in media.toolbox newsletter of 01 March 2005 Vol. 7 No 08.
[347] To compile this ranking, Reporters Without Borders asked journalists, researchers, jurists and human rights activists to fill out a questionnaire evaluating respect for press freedom in a particular country. It includes every kind of violation directly affecting journalists (such as murders, imprisonment, physical attacks and threats) and news media (censorship, confiscation of issues, searches and harassment) and registers the degree of impunity enjoyed by those responsible for these press freedom violations. The questionnaire also takes account of the legal and judicial situation affecting the news media (such as the penalties for press offences, the existence of a state monopoly in certain areas and the existence of a regulatory body)

is placed at 23rd position in the world (of 166 observed countries), achieving even the 12th best mark in the ranking.[349] Thus, South Africa's ranking has even improved since 2002.[350] The 2003 report Africa[351] observed a 'satisfactory situation' in South Africa and acknowledged that 'no journalists were imprisoned just for doing their job and no news media were shut down for being too critical of the authorities.'[352] Germany is ranked at position eight, getting the 4th best result in the world.[353]

1 5 3 2 Publishing houses

South African newspapers and magazines are mainly organised into press groups, which have burgeoned over the years as a result of take-overs.[354] The four major press groups are Nasionale Pers Ltd (Naspers), Independent Newspapers (Pty) Ltd, Johnnic Communications (Johncom) as well as Caxton and CTP Publishers and Printers Ltd.[355] Other important media players include Primedia, Nail (New Africa Investments Limited)[356] and Kagiso Media Ltd.[357]

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and the behaviour of the authorities towards the state-owned news media and international press. Even the main obstacles to the free flow of information on the Internet are taken into account.

[348] Reporters without borders: Second world press freedom ranking (October 2003), available at: http://www.rsf.org/article.php3?id_article=8247.

[349] With the mark 3.33, due to several of the firms above it achieving the same mark. South Africa therefore got the best ranking in Africa.

[350] Reporters without borders: First worldwide press freedom index (October 2002), available at: http://www.rsf.org/article.php3?id_article=4116. South Africa was ranked at 26th position (mark 7,50 and 16th best mark worldwide of 139 observed countries).

[351] Reporters without borders: Africa introduction – 2003 Annual Report, available at: http://www.rsf.org/article.php3?id_article=6462.

[352] Although it was observed that journalists continued to be the victims of threats and attacks in some isolated regions, South Africa is still getting good marks for respect for press freedom, *cf* Reporters without borders: South Africa - 2003 Annual Report, available at: http://www.rsf.org/article.php3?id_article=6452.

[353] For South Africa see also Berger 'So this is Democracy?', in Report on the state of media freedom in Southern Africa, published by MISA (2003), 71-74.

[354] See the discussion between Louw and Sullivan in Louw (ed) *South African Media Policy: Debates of the 1990s* (1993) chapter 13-15.

[355] For the history of these four press groups see De Beer & Diederichs in De Beer (ed) *Mass Media Towards the Millenium – The South African Handbook of Mass Communication* 2nd edition (1998) 93-97.

[356] Nail is an investment holding company with interests in radio broadcasting, media marketing, printing publications, exhibitions, film and television production, as well as certain non-media activities and was temporarily acquired by a consortium, see for details *The Tiso Consortium (comprising of Investec Bank Ltd, Multi-Direct Investments 180 (Pty) Ltd, Capricorn Capital Partners Holding Co (Pty) Ltd, Mineworkers Investments Co (Pty) Ltd ('MIC') and Safika Holdings (Pty) Ltd) / New Africa Investments Limited ('NAIL')* (CT 59/LM/Oct03) par 9-19. Nail has unbundled into a commercial company (New Africa Capital) and a media company (New Africa Media).

[357] This company is controlled by the Kagiso Trust. Kagiso Media's assets include its Broadcasting Division, which owns 100% of East Coast Radio, 60% of Jacaranda fm, 24,9% of OFM and 47,47% of RadMark. Kagiso's specialist publishing division owns 50% of Butterworths, see for further details Kagiso Media Ltd – Audited results for the year ended 30 June 2004, available at: http://www.kagiso.com/media/Kagiso%20results.pdf.

The biggest South African media company when it comes to print products is Nasionale Pers Ltd (Naspers).[358] Naspers is a multinational media group with operations in, *inter alia*, pay-TV, Internet services, print media and publishing. Naspers controls Media24, M-Net[359] and the satellite pay TV network DStv, MultiChoice and Internet services like News24. Naspers has also extensive interests in rural and suburban newspapers throughout South Africa.[360] According to the recently released financial results for the year to March 2005,[361] the group revenue grew 9% to almost R 14 billion.[362] The bulk of revenue and profits comes from pay-TV,[363] but also from newspapers, magazines, and printing.[364] The wholly owned company Media24 (formerly known as Nasmedia), with a turnover in excess of R 2 billion a year, is according to the company's information 'Africa's biggest publishing group'[365] and the 'dominant player in the South African magazine industry,'[366] controlling more than 60% of the country's total circulation. In total, the company publishes 10 national newspaper titles,[367] almost 40 regional newspapers[368] and more than 30 different magazines.[369] The company uses it subsidiaries NND24 and Newspaper Leaflet Distributors (NLD.24) for distribution of its magazines and newspapers.[370] Media24 Digital is the electronic publishing arm of Media24, offering services around Health, Motoring, Women's Interest, Property, Food and especially News through its online portal News24.com.[371]

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[358] Until 2000, listed financial services company Sanlam was the major shareholder in Naspers, with about 16,5% of the shares. The company is now effectively controlled by Standard Bank Nominees Ltd (18%), Nedcor Bank Nominees Ltd (15,2%), and CMB Nominees Ltd (16,4%), the main shareholder is now Old Mutual (9,7%), see Business Report (2005-06-22) 25. See also www.naspers.com.

[359] M-Net is a pay television network. The Johnnic Group participates in M-Net Supersport, having a 2% interest in MTN Group Ltd, which operates digital cellular network services, commercial satellite signal distribution as well as internet access and managed Internet Protocol network solutions throughout Africa.

[360] For details *cf* Fourie (ed) *Media Studies Volume 1: Institutions, Theories and Issues* (2001) 66.

[361] Naspers Limited, Provisional Report – Summary of the audited results of the Naspers group for the year ended 31 March 2005, published in Business Day (2005-06-30) 11.

[362] See also Derby 'Naspers share price dips even as results shine' Business Day (2005-06-30) 15; Salgado 'Naspers stock dips despite profit leap' Business Report (2005-06-30) 23.

[363] Pay-tv comprises almost 60% of the total revenue.

[364] Naspers Limited, Provisional Report – Summary of the audited results of the Naspers group for the year ended 31 March 2005, published in Business Day (2005-06-30) 11.

[365] See http://www.media24.co.za/eng/community.html#about.

[366] See http://www.media24.co.za/eng/mags/magazines_index.html.

[367] Dailies: *Daily Sun*, *Die Burger* (the first Afrikaans daily in South Africa), *Beeld*, *Volksblad* and *The Witness*; Sunday newspapers: *Rapport*, *Sunday Sun* and *City Press*; Weeklies: *Son* and *Soccer Laduuuuuma*.

[368] List at http://www.media24.co.za/eng/newspapers_index.html. Circa two thirds of the titles are distributed free of charge, *cf* http://www.media24.co.za/eng/circulation.html.

[369] These are, *inter alia*, the magazines *Huisgenoot*, *Sarie*, *TV Plus*, *YOU*, *Fairlady*, *True Love* and *FHM*. For details see http://www.media24.co.za/eng/mags/magazines_index.html.

[370] *Cf* http://www.media24.co.za/eng/distribution/distribution_index.html.

[371] According to the company 'South Africa's leading online news service', see http://www.media24.co.za/eng/internet/internet_index.html.

The importance of Media24 can be observed on the market for dailies. Around 520.000 copies of Afrikaans newspapers are sold from Monday to Friday, that is almost 42% of the national market (1,3 million copies). Only the Independent Newspaper group is a competitor with similar size (490.000 copies, more than 36%).[372] Also on the English newspaper market, Media24 plays a more and more important role. In particular, the newspaper *Daily Sun* is growing remarkably (around 360.000 sold copies).[373] It is expected that the readership will even grow to 400.000 sold copies. That would make Media24 also the biggest player in the English daily newspaper market[374] and the classic distinction between English press (Independent, Johnnic) and Afrikaans press (Naspers) would then become obsolete.[375]

Johnnic Communications Ltd (Johncom)[376] is a media and entertainment company, being controlled by Johnnic Holdings Limited (Johnnic),[377] and recently had revenues of almost R 2 billion.[378] Johncom owns a couple of national and Eastern Cape newspapers,[379] magazines,[380] and also is, *inter alia*, active in the segments of digital publishing, book and

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[372] Harber 'Poniepers op 'n galop' DIE BURGER (2004-11-03) 13.
[373] See Graph 4 (1 5 3 1 *supra*). Between July and December 2002, the audited circulation was only 71.742, see South Africa Yearbook 2003/2004, 150.
[374] The *Daily Sun* would then sell more than all 14 titles of the Independent group together, see Harber 'Poniepers op 'n galop' DIE BURGER (2004-11-03) 13.
[375] See for the historic structure of the press Fourie (ed) *Media Studies Volume 1: Institutions, Theories and Issues* (2001) 47.
[376] See http://www.johncom.co.za; Johncom was formerly known as Times Media Limited (TML).
[377] Johnnic Holdings Ltd is an investment holding company with interests in the media, telecommunications, casino, entertainment, exhibition, and property industries and as public company listed on the JSE. None of its shareholders either directly or indirectly controls Johnnic Holdings (Its main shareholders are Old Mutual (13%); PIC (8,65%); RMB (6,86%); Metropolitan (6,60%); Coronation (6,19%); Liberty Group (5,15%) and Sanlam (5,04%). Johnnic Holdings has more than 20 subsidiaries, see *Johnnic Holdings Limited / Fabcos Investment Holding Company Limited* (CT 01/LM/Jan05) par 2. According to *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04) par 5, Johnnic Holdings Ltd is controlled by the National Empowerment Consortium ('NEC'), a consortium established by labour unions and black owned businesses (see also http://www.southafrica.info/ess_info/sa_glance/constitution/971557.htm). Johnnic recently announced that it intends to unbundled its 62.5% shareholding in Johncom, see Business Report (2004-12-01) 1, Business Report (2004-12-03) 1 and Business Report (2004-12-07) 3.
[378] See Johnnic Communications Reviewed Interim Results for the six months ended 30 September 2004, published in Business Times (Sunday Times) (2004-11-28) 9.
[379] Such as *Sunday Times* (the flagship weekly-distributed newspaper), *Sowetan*, *Sowetan Sunday World, Daily Dispatch*, *Dispatch on Saturday*, *Weekend Post* and *The Herald*. Johncom also publishes financial newspapers and magazines through Business Day Financial Mail Publishers (BDFM), in partnership with Pearson, the UK-based publishers of the Financial Times. These newspapers are *Business Day, Business Day pm, Financial Mail, Summit TV and PR Newswire*. See also http://www.johncom.co.za/busnewspapers.asp.
[380] Johncom produces a wide range of magazine titles spanning business, consumer, and medical publishing. Leading titles include *Elle, SA Home Owners*, *Longevity,* and *Computing SA*, see http://www.johncom.co.za/busmagazines.asp.

map publishing, retail,[381] music, home entertainment and pay television.[382] The bulk of its revenue and profits comes from two divisions: media and pay-TV.[383] Johncom is interlaced with other media interests, such as its stake in M-Net Supersport[384] in a joint venture with Naspers. The Competition Tribunal had to adjudicate upon a proposed transaction involving Johnnic recently, albeit not in the media sector.[385]

Caxton and CTP[386] Publishers and Printers (Caxton),[387] is an associated company of Johnnic: Johncom has 36,2% stake in CTP.[388] Caxton controls the national daily newspaper *The Citizen*, which started off as a pro-government English morning tabloid established during the apartheid years in the late 1970's by the Department of Information.[389] Caxton also publishes several regional and community newspapers and magazines[390] and is also involved in the paper and printing industry and considers itself to be Naspers' major competitor in that industry.[391]

The fourth big group is the Independent News and Media (South Africa) Limited.[392] Its wholly owned subsidiary, Independent Newspapers, publishes a total of 15 daily and

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[381] This includes Exclusive Books (a retailer of a range of books, magazines and newspapers) and the Nu Metro chain of cinemas.

[382] A detailed structure of Johncom is available at http://www.johncom.co.za/ACCESS%20TO%20INFO%20MANUAL%20-%202004.pdf (p. 16).

[383] See Klein 'Johncom rides the crest of a wave' Business Times (Sunday Times) (2004-11-28) 3. *Cf* also for details Johnnic Communications Reviewed Interim Results for the six months ended 30 September 2004, published in Business Times (Sunday Times) (2004-11-28) 9.

[384] Johncom holds 38,5%.

[385] In this (approved) merger case, Johnnic Holdings acquired an additional 25% of the issued share capital of Fabcos Investment Holdings (casino & gaming industry), see *Johnnic Holdings Limited / Fabcos Investment Holding Company Limited* (CT 01/LM/Jan05).

[386] CTP (Cape and Transvaal Printers), a R 100 million printing company, was acquired in 1985.

[387] See http://www.caxton.co.za. Caxton and CTP Publishers and Printers are controlled by the CTP Holdings Ltd (CTP).

[388] According to *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04) par 10, Johncom has only an 18% stake in CTP. Apparently, this merely refers to its direct stake in Caxton (17,3%); Johncom holds an additional indirect stake of 19,8% through a company called Afmed, see http://www.johncom.co.za/pressMar0105a.asp.

[389] See Fourie (ed) *Media Studies Volume 1: Institutions, Theories and Issues* (2001) 45.

[390] *Rooi Rose, Style, People Magazine* and *Farmers Weekly* (the oldest magazine in South Africa), see http://www.caxton.co.za.

[391] See *Caxton and CTP Publishers and Printers Limited v Naspers Limited and Electronic Media Network Limited and Supersport International Holdings Limited and the Competition Commission* (CT 16/FN/Mar04) par 2.

[392] Independent News and Media (South Africa) Limited, in turn, is part of Independent News & Media PLC (INM), an international media and communications group, with a turnover of € 1,56 billion having interests in Australia, Ireland, New Zealand, South Africa and the United Kingdom. The Group publishes 175 newspaper and magazine titles in these 5 countries with weekly circulation of over 13,5 million copies and operates 53 online sites, achieving 95 million page impressions per month in aggregate, see http://www.independentnewsmedia.com/corp.htm and Business Report 'Independent News & Media PLC – celebrating 100 years' (2005-06-09) 18.

weekly newspapers in South Africa's three major metropolitan areas.[393] The group also has interests in magazines,[394] book publishing, radio and broadcasting, outdoor publishing, and electronic media.[395]

1 5 3 3 Distribution

In cities, newspapers are mainly distributed by street sales and door-to-door delivery, while in rural areas, the distribution is mainly done by special truck deliveries.[396] Some of the big publishers use their own distribution system, like Naspers/Media24.[397] Another major distributor of newspapers is Allied Publishing Ltd (Allied). Independent Newspapers (Pty) Ltd and Johncom jointly control Allied, each having a 50% stake in the company.[398] Hence, Allied carries the publications of Johnnic and Independent Newspapers, but also those of Nail and third parties.

In the most recent case concerning a newspaper merger, the *Johnnic Publishing / New Africa Publications* case,[399] the Tribunal pointed out that 'it is clear that distribution is a barrier to entry for a new publication.'[400] It described the distribution market as 'concentrated' and 'characterised by vertically integrated firms.'[401] However, Johnnic's and Independent's joint control of Allied post merger in this sense raised no competition concerns on a verti-

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[393] Newspapers include the titles *Cape Times*, *Cape Argus*, *The Star*, *Sunday Tribune*, *Post*, *Mercury,* and *Daily News*. In March 2005, the group launched also *Daily Voice* (a Cape Town tabloid). According to the firm's information, Independent Newspapers currently receives 48% of the total advertising spend in the paid newspaper market (more than twice that of any other newspaper group), with aggregate weekly sales of 2,8 million copies in Gauteng, KwaZulu Natal and the Western Cape, see http://www.iol.co.za/index.php?click_id=1905.

[394] Such as the magazine *Glamour*.

[395] Moreover, Independent Newspapers also publishes 13 free delivery weekly community newspapers in Cape Town and holds a number of commercial printing and distribution contracts in all areas. *Cf* also Business Report 'Independent News & Media PLC – celebrating 100 years' (2005-06-09) 18.

[396] Detailed: South Africa Yearbook 2003/4, 149.

[397] See 1 5 3 2 *supra*.

[398] This is a result of the acquisition of New Africa Publications by Johnnic Publishing. Independent Newspapers exercised its pre-emption right, already being a shareholder of Allied, see *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04) par 22 and 1 5 3 5 6 *infra*.

[399] *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04). See the discussion of the case in detail 1 5 3 5 6 *infra*.

[400] *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04) par 31.

[401] That would mean that a new entrant had to approach a firm controlled by a rival, or would be rival, for distribution. The Competition Tribunal already mentioned in the *Nasmedia / Paarl Post* case (*Nasmedia / Paarl Post Web Printers (Pty) Ltd* (CT 65/LM/May00) par 28, see also 1 5 3 5 3 *infra*) that all the independent publishers – contacted by the Tribunal in this case – indicated that distribution was a problem. The Tribunal was 'concerned about the possible impact of vertical integration, in particular on the ability of the large integrated companies to use their dominant position in distribution to exclude new competitors in publishing.'

cal level[402] as such joint control would prevent Johncom from exercising any foreclosure strategy, especially in view of the fact that Allied always distributed third parties' newspapers and never refused to do so. Moreover, the parties to the merger argued that Naspers and Caxton also would use their own distribution networks that also work for third parties, and hence foreclosure 'would not only be unsuccessful because of the presence of these rivals, but would also be irrational, because economies of scale are crucial in distribution and spreading the costs of distribution over a wide range of customers is vital to the profitability of the company.'[403]

1 5 3 4 Conclusion

The South African media sector seems to be complex. Media companies cooperate in diversified areas, like broadcasting, publishing, printing, and distribution, forming joint ventures or having shares in holding companies.

In the newspaper markets, there are only a few independent competing firms, whereas the magazine markets seem to be more diverse.

1 5 3 5 Single cases

There are a couple of cases involving media companies, especially newspaper publishers, which will be presented to demonstrate the South African competition authorities' approach in this field.

1 5 3 5 1 The Press Corporation of SA Ltd and CTP Caxton (Pty) Ltd

The merger between The Press Corporation of SA Ltd and CTP Caxton (Pty) Ltd took place in 1998 and was approved. It raised no concerns from a competition law perspective, but led to a dispute between the South African Typographical Union (SATU)[404] and The Press Corporation of SA Ltd in terms of section 189 of the Labour Relations Act 66 of

[402] For the Tribunal's horizontal concerns in this case see 1 5 3 5 6 *infra*.
[403] See *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04) par 29-30.
[404] SATU is a registered trade union, which represents the majority of the newspaper, printing and packaging sector of the market.

1995[405] as a result of the proposed retrenchment of staff which had become necessary because of this merger.[406]

1 5 3 5 2 CT Media Publications / Caxton and Nasionale Media Ltd / Penrose Holdings

There have been two intermediate mergers in 1999, which have been prohibited by the Competition Commission in terms of section 14(1)(b)(iii).[407] Consequently, the parties requested the Competition Tribunal to consider these mergers.[408]

The first merger was between CT Media Publications (Pty) Limited and Caxton Publishers and Printers Limited. CT Media is a subsidiary of Nasionale Media Limited.
The other merger involved Nasnuus, a division of Nasionale Media Limited and Penrose Holdings. Penrose Holdings, in turn, is a subsidiary of Caxton Publishers and Printers Limited. The mergers involved sales of regional newspaper titles. Since both mergers involved the same set of procedural facts, the Tribunal adjudicated upon these transactions together.

The Tribunal held that the Commission's decisions to prohibit were not made within the time period required by section 14(2) of the Act.[409] So it did not have to assess the impact of these transactions on competition, but could already find the Commission's prohibitions of the mergers to be invalid for procedural reasons and directed the Commission 'to issue clearance certificates to the parties and to otherwise comply with Rule 33(2) of the Commission Rules.'[410]

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[405] S 189 of the Labour Relations Act, *inter alia*, sets out: 'When an employer contemplates dismissing one or more employees for reasons based on employer's operational requirements, the employer must consult...any person whom the employer is required to consult in terms of a collective agreement' and in the event that 'there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals'. The fulfilment of the employer's obligations as stated in s 189 was controversial in this case.
[406] See *South African Typographical Union (SATU) v The Press Corporation of SA Ltd* 1998 (11) BLLR 1173 (LC).
[407] S 15 old version.
[408] See *Nasnuus, a division of Nasionale Media Limited v The Competition Commission of South Africa* (CT 27/AM/Mar00) and *CT Media Publications (Pty) Ltd v The Competition Commission of South Africa* (CT 34/AM/Mar00).
[409] In terms of section 14(1) of the Act in its old version the Commission had 30 days to approve or prohibit the merger.
[410] The old Commission's Rules (available at: http://www.compcom.co.za/thelaw/RulesfortheConductof Proceedings.doc) postulated in 33(2): 'If the Commission is deemed to have approved a merger in terms of sec-

1 5 3 5 3 Nasmedia and Paarl Post Web Printers (Pty) Ltd[411]

In this large merger case, the Tribunal unconditionally approved the transactions between Nasmedia Limited (Nasmedia)[412] and Paarl Post Web Printers (Pty) Limited (PPW), by which the parties were forming a new printing company (New Print). Hence, this was a merger of two printing facilities. On the one hand the in-house printer for Nasmedia, which was also a publisher, printer and distributor for several independent publishers and other clients, was to be part of the merged entity. On the other hand, PPW as an independent printer would be 100% owned by New Print.

The parties to the merger planned New Print to be owned by different shareholders (Naspers[413] (65%), Eagle Media[414] (25%), MICEF[415] and employees (each 5%)). Nasmedia would appoint half of the Board members of Newprint with certain restrictions. Accordingly, the Tribunal assumed that Newprint would be controlled by Nasmedia.[416]

The Competition Tribunal defined the relevant product market as the 'printing market for magazines, brochures and advertising inserts printed on litho-web presses.' Moreover, the Tribunal declared the geographic market to be national, since the consumers of the products and the merging parties' competitors were spread across the entire country.[417]

The transaction did not raise competition concerns, since in a post-merger scenario a similar sized (and even larger) competitor (Caxton) and several smaller printers existed and could compete with Newprint. The Court stated that therefore Newprint would 'not be able to control prices, exclude competition or behave to an appreciable extent independently of its competitors in the magazine printing market.'[418] Furthermore, the Court expected an

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tion 14(2), the Commission must – (a) issue a Clearance Certificate, in Form CC 15, to the Participant who filed the Merger Notice; and (b) publish a notice of that approval in the Gazette'.

[411] *Nasmedia / Paarl Post Web Printers (Pty) Ltd* (CT 65/LM/May00).

[412] Nasmedia changed its name to Media24, see already 1 5 3 2 *supra*.

[413] Controlling Nasmedia (now Media24), see 1 5 3 2 *supra*.

[414] That is the holding company of PPW.

[415] Mineworkers Investment Company Empowerment Fund.

[416] Par 29.

[417] Par 14.

[418] Par 22.

increase in competition. It held that this strongly indicated that concentration could in future even decrease, which would also lessen the possibility of collusion.

Publishing houses are in need of printing facilities and ways of distribution for their products. Accordingly, big publishers tend to have their own in-house printers, like CTP,[419] and Nasmedia (Media24).[420]

1 5 3 5 4 The Tiso Consortium and New Africa Investment Ltd (Nail)[421]

In this (conditionally approved) merger,[422] through which the media holding company Nail was acquired by a consortium of several firms, the Tribunal was concerned about the fact that one member of the consortium, which acquired Nail, was – through its holding in the media company Primedia[423] – active in certain of the markets in which Nail was also active (namely magazine publishing in South Africa, radio broadcasting services in Gauteng and in the Western Cape and outdoor advertising nationally). The Tribunal, referring to the Commission's finding, concluded that the transaction raised competition concerns only in the radio service and outdoor advertising markets, as it would lead to an increase in concentration in those markets. The Tribunal followed the Commission, which had suggested that competition concerns could only arise in markets in which the combined market share of Nail and Primedia exceeded 20%.[424] There were no concerns as regards magazine publishing, where neither Nail nor Primedia had significant market shares. The Tribunal

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[419] Owning the Republican Press.

[420] For the printing facilities of Media24 nowadays see http://www.media24.co.za/eng/printing/printing_index.html.

[421] *The Tiso Consortium (comprising of Investec Bank Ltd, Multi-Direct Investments 180 (Pty) Ltd, Capricorn Capital Partners Holding Co (Pty) Ltd, Mineworkers Investments Co (Pty) Ltd ('MIC') and Safika Holdings (Pty) Ltd) / New Africa Investments Limited ('NAIL')* (CT 59/LM/Oct03). *Cf* also *The Competition Commission v The Tiso Consortium and New Africa Investments Limited and Investec Bank Limited and Safika Holdings (Pty) Ltd and Capricorn Capital Partners Holding and Company (Pty) Ltd and Multidirect Investments 180 (Pty) Ltd and Mineworkers Investment Company (Pty) Ltd* (CT 82/FN/Oct04) – fine for omission of notification.

[422] See for the history of this transaction the urgent application of other media companies such as Johnnic to interdict the Tiso consortium from further implementing a series of transactions to purchase shares in Nail: *Johnnic Communications Ltd and Kagiso Media Ltd and Caxton and CTP Publishers and Printers Ltd and Terence Desmond Moolman v New Africa Investments Ltd and Investec Bank Ltd and Safika Holdings (Pty) Ltd and Capricorn Capital Partners Holding Company (Pty) Lts (previously known as Newshelf 730 (Pty) Ltd) and Multidirect Investments 180 (Pty) Ltd and Mineworkers Investment Company (Pty) Ltd and Phaphama Holdings (Pty) Ltd and The Competition Commission and Shares Traded Totally Electronically Ltd and Nedbank Ltd and Standard Corporate and Merchant Bank Ltd and Firstrand Bank Ltd and ABSA Bank Ltd and Société Générale Ltd and Computershare Ltd* (CT 54/FN/Oct03).

[423] The Mineworkers Investment Company had a 19,7% share hold.

[424] See par 23.

took into account that the transaction was only planned to be temporary, and approved the merger subject to conditions.[425]

1 5 3 5 5 Caxton and CTP Publishers and Printers Limited v Naspers Ltd and others[426]

In this case, Caxton sought an order from the Tribunal declaring that a transaction between Naspers, M-Net and Supersport, by which Naspers should acquire shares in the latter firms,[427] constituted a merger, which should have been notified to the Competition Commission. The application was dismissed, because the Tribunal concluded that the transaction did not constitute a 'change of control' in terms of section 12.[428] Although Naspers was increasing it's direct holding in MNet and Supersport, the Tribunal found that M-Net and Supersport would remain subject to joint control despite the transaction.[429]

1 5 3 5 6 Johnnic Publishing Ltd and New Africa Publications Ltd[430]

The most recent merger case between newspaper companies is the large merger between Johnnic Publishing (Pty) Ltd and New Africa Publications Ltd (NAP). The Competition Tribunal approved the transaction without conditions in July 2004, endorsing the findings of the Competition Commission.[431]

Johnnic Publishing, a local wholly owned subsidiary of Johncom,[432] acquired 90,5% of the issued share capital of NAP and hence gained sole control. NAP was a holding company

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[425] The imposed conditions aimed at preventing influence of the Mineworkers Investment Company (the consortium member, which had assets in Primedia) on the businesses of the same markets, in which Nail was active in the interim.

[426] *Caxton and CTP Publishers and Printers Limited v Naspers Limited and Electronic Media Network Limited and Supersport International Holdings Limited and the Competition Commission* (CT 16/FN/Mar04).

[427] Naspers acquired further shares in Electronic Media Network Ltd (M-Net) and SuperSport International Holdings Ltd.

[428] The Tribunal stated: 'Granted there may be degrees of enhanced quality in forms of control, but the Act cannot be interpreted to make merger notification so burdensome that every increment in shareholding requires an inquest into whether there has been a corresponding increment in the "quality" of control.' (par 45).

[429] MNH98, a company jointly controlled by Naspers and Johncom held 52% of the shares in M-Net and Supersport prior to the transaction. This was not to be changed by the transaction. Also the MNH98 shareholders agreement, contained various clauses that ensured that MNH98 continued to control both MNet and Supersport. See also Competition Tribunal South Africa, Annual Report 2003/2004, RP No 103/2004, p. 35, available at: http://www.comptrib.co.za/Publications/Annual%20Report/Annual%20report%202003%202004.pdf.

[430] *Johnnic Publishing Ltd / New Africa Publications Ltd* (CT 36/LM/Apr04).

[431] *Cf* also Johnnic Communications Reviewed Interim Results for the six months ended 30 September 2004, published in Business Times (Sunday Times) (2004-11-28) 9.

[432] For the structure of the Johnnic Group see 1 5 3 2 *supra*.

whose subsidiaries are primarily involved in publishing newspapers and magazines[433] and in the production of television programmes.[434] In particular, NAP owned the newspapers *The Sowetan* 100% and *Sowetan Sunday World* 50%; the latter was already owned 50% by Johnnic Publishing. NAP also had a 50% interest in the firms Sowetan Television (Pty) Ltd[435] and New Africa Publications Magazines Ltd, and a 33,3% interest in the company Allied Publishing Ltd (a distributor), which was prior to the merger already owned 33,3% by Johncom and to the same extent by Independent Newspapers Gauteng (Pty) Ltd.[436]

First, the Tribunal made important observations about media markets in this case. Referring to the argumentation of the Competition Commission, it pointed out that 'media markets are typically analysed both from the point of view of the consumer, as the reader of the publication, and the consumer as a purchaser of advertising in the publication.'[437] Hence, it differentiated between the 'print media market' and the 'sale of advertising space market.' The definition of the relevant market for newspapers would be determined by a variety of different factors. In this context, the Tribunal observed that:

> '[n]ewspapers seem to operate in very niche markets. This is a function not only of the geographic markets in which they operate, but other factors, which include the frequency and time of day of distribution, the demographics of the readership (including language, race and income groups at which the newspaper is targeted), and the content of the newspaper.'[438]

Furthermore, the Tribunal examined a potential detrimental impact on competition on a horizontal level, in view of the overlap between NAP's and Johncom's newspaper ownership, but concluded that a substantial lessening or prevention of competition in 'any of the relevant market' was not likely.[439] Conversely, it stated broadly that it was 'very unlikely that this merger may result in the substantial lessening or prevention of competition – ver-

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[433] NAP publishes through its wholly owned subsidiary New Africa Publications Magazines Ltd the *Leadership Magazine*, a monthly magazine which focuses on current political and business related issues.
[434] NAP, in turn, was owned by 90,5% by Nail, see *The Tiso Consortium (comprising of Investec Bank Ltd, Multi-Direct Investments 180 (Pty) Ltd, Capricorn Capital Partners Holding Co (Pty) Ltd, Mineworkers Investments Co (Pty) Ltd ('MIC') and Safika Holdings (Pty) Ltd) / New Africa Investments Limited ('NAIL')* (CT 59/LM/Oct03) par 12.
[435] The company produces local television shows.
[436] See already 1 5 3 3 *supra.*
[437] Par 34.
[438] Par 32.
[439] Par 32.

tically, horizontally or otherwise – irrespective of any market delineation.'[440] Analysing the different areas of distribution and the circulation figures, the Tribunal considered the *Sowetan* not to be an important competitor to Johnnic's dailies in the Eastern Cape,[441] nor to Naspers' *Daily Sun* in Gauteng. Moreover, the Competition Tribunal stated that even though the *Sowetan Sunday World* and the *Sunday Times* (owned by Johnnic) were 'both Sunday papers with a national distribution, they are aimed at very different readers which suggests that they are not significant rivals of one another.'[442]

The Tribunal's conclusions on public interest issues are also of interest in this case. The concerns expressed by the Freedom of Expression Institute to the Competition Commission, could not convince the Tribunal to alter its decision based on competition reasons. The Tribunal stated:[443]

> 'Whilst the FEI [Freedom of Expression Institute] is properly concerned with the issue of whether media mergers can lead to a lessening of independent voices in the media it has not shown that a change in the Sowetan's positioning, if there is to be one, is a necessary outcome of the merger and not something that its owners might not have done despite the merger. Nor has it been established that even if there is a change in strategy that this will lessen the number of voices in the market place in a substantial manner.'

The analysis of South African newspaper distribution, which the Tribunal made in this case in view of vertical competition concerns, had already been explained in detail above.[444]

1 5 3 5 7 Other cases

A couple of other merger cases, involving media companies are of interest. Two cases will be discussed here.[445]

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[440] Par 35.
[441] According to the Commission's figures, on which the Tribunal relied, the Eastern Cape market is dominated by *Die Burger* (78,9% market share), followed by the *EP Herald* (1,5%) and the *Daily Dispatch* (0,9%). The *Sowetan* would only sell about 803 copies per day, which is significantly lower than the sales of other papers like *Die Burger* which would sell around 19 000 copies per day.
[442] Par 33.
[443] Par 36.
[444] See 1 5 3 3 *supra*.
[445] Another published decision in the media sector is an application to award costs (*Paarl Post Web Printers (Pty) Ltd v CTP Holdings Ltd and Republican News Agency* (CT 47/IR/A/Jun00)). See also another merger involving Naspers: *Nasionale Pers Limited / Educational Investment Corporation Limited* (CT 45/LM/Apr00).

In the first case,[446] the Tribunal recently had to adjudicate a large merger, involving the media company Venfin Media Investments, a wholly owned subsidiary of VenFin Limited,[447] which has shares in the free-to-air broadcasting station e-tv. The acquisition of the company SAIL Group Ltd, which provides various professional services to the sport and entertainment industries,[448] raised competition concerns notably insofar, as the acquiring firms[449] would not only exercise control over SAIL, but also be in a position to exercise control over e-tv. However, the Tribunal's concern that the acquiring firms 'may have an incentive to use SAIL to foreclose broadcasting rivals of e-tv in relation to sports broadcasting rights,' could be dispelled, though, and the merger was approved unconditionally.

In the second case,[450] the acquiring firm was Multichoice Subscriber Management Services (M-Web), a subsidiary of M-Web Holdings, whose ultimate owner is Naspers.[451] M-Web acquired the entire issued share capital of Tiscali (Pty) Ltd, an Internet Access Provider. The Tribunal stated there to be 'a vertical relationship between a primary internet service provider and a firm which is a significant content contributor to its portal,' but could not discern any serious (vertical) concerns and approved the merger.[452]

1 5 3 6 General tendency

South African competition authorities do not judge competition cases in the press sector on a special basis, although they are aware of the special role of the press in a constitutional democracy.[453]

Nevertheless, the case of *Johnnic Publishing / NAP*, in particular, raises concerns as far as media regulation is concerned. Hence, this case will be commented upon view of the

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In this (conditionally approved) merger, Naspers sought to extend its involvements in the private education sector (see also the Tribunal's following order of 4 March 2003).

[446] *Venfin Media Investments (Pty) Limited / Sail Group Ltd* (CT 67/LM/Sep04).

[447] VenFin Limited is an investment holding company focussing on telecommunication, technology, and media businesses.

[448] See par 12.

[449] The other primary acquiring firm was Tree Tell, a subsidiary of SIG, which holds a 42% stake in Hosken Consolidated Investments (HCI), which in turn owns a 66% stake in e-tv.

[450] *Multichoice Subscriber Management (Pty) Ltd / Tiscali (Pty) Ltd* (CT 72/LM/Sep04).

[451] See 1 5 3 2 *supra*.

[452] Albeit subject to conditions for the sake of employment issues.

[453] See in detail 1 7 *infra*.

potential consequences of the Tribunal's statements for the control of mergers between newspaper publishers, albeit later on.[454]

1 6 Foreign legal systems

South African Competition Law has been widely influenced by foreign competition law. In the judgments of the Competition Tribunal, reference is regularly made to US and European law. Especially US scholarship and antitrust-doctrine tend to play a privileged role in South African jurisdiction. Moreover, the South African Competition Act itself is widely influenced by foreign law. In particular, chapter 3 of the Act is in many respects modelled on the Canadian Competition Act.[455]

The South African Competition Act itself contains a special provision in this regard. Section 1(3) determines that any person interpreting or applying the Act may consider appropriate foreign and international law. Hence, South African competition authorities seem to consider foreign approaches broadly, benefiting from foreign expertise. The present Commissioner of the Competition Commission, Menzi Simelane, recently outlined at the International Competition Network (ICN) Conference the important role of multilateral institutions, exchange programmes, and interaction with other authorities.[456]
Commendable as such an approach may be, there is a certain danger of strict and inadequate 'copying' of foreign principles. European jurisprudence has to be handled particularly carefully since European competition objectives differ from those in South Africa. It has always been recognised in Europe that competition law must promote market integration.[457] Hence, in some cases the European Court of Justice seems to disregard pure economic principles for the sake of the promotion of the common market.[458] Therefore, foreign

[454] See 4 2 4 *infra.*
[455] RSC 1985 C–4. *Cf* Legh in Brassey et al *Competition Law* (2002) 224 showing the parallels; Brassey even criticises merger provisions for being 'blindly borrowed from the corresponding sections of the Canadian law.' (Brassey in Brassey et al *Competition Law* (2002) 18).
[456] Newsletter of the Competition Commission, edition 16, June 2004, p. 3, available at: http://www.compcom.co.za/resources/newsletter%20-%20june%202004/pdf%20version/CompCom%20News.pdf.
[457] See already 1 2 *supra* with further references. *Cf* Sutherland *Competition Law of South Africa* (2004) 2-28.
[458] Especially in *United Brands Company and United Brands Continentaal BV v EC Commission* (1978) ECR 207, 1 CMLR 429 (Case No. 27/76) community goals tended to be more important to the Court than the competitiveness of the market.

law approaches must not be adopted blindly,[459] when they are inappropriate in the South African context. Instead, competition laws of other countries have to be viewed 'in their proper historical, social and institutional contexts.'[460] South African competition authorities seem to be aware of this problem, though. The Competition Appeal Court pointed out that the interpretation of the Competition Act necessitates recourse to the preamble to the Act and the unique South African purposes as set out in section 2:[461]

> 'These are important sources for interpretative guidelines (see also section 1(2) of the Act). Thus care must be taken before an uncritical borrowing of traditional anti-trust economic theories, as developed in the United States of America, encrust the process of interpretation of our Act. Unlike much comparative competition law, the Act specifies among overall its purpose of the maintenance of competition, that small and medium size businesses have an equitable opportunity to participate in the economy and that there be promotion of a greater spread of ownership, in particular to increase the ownership stake of historically disadvantaged persons (section 2(e) and (f) of the Act).'

However, the South African approach signifies the openness of the South African legislature for foreign doctrine and approaches, and can be welcomed. It can even be described as an enlightened approach, since competition law has developed to extremely sophisticated levels in some other countries and regions, and the door is now open for the adoption of the best practice from elsewhere to overcome interpretive and other difficulties. The South African approach is therefore acceptable, if the competition authorities bear the specialties of South African Competition Law in mind, notably as regards the interpretation of the Act.

1 7 The South African Constitution

Mergers between publishing houses that are ruled by the Competition Act are primarily considered with reference to economic arguments. It may be asked, whether the South African Constitution[462] could lead to a different interpretation of the described competition

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[459] See for an example Brassey in Brassey et al *Competition Law* (2002) 18 footnote 84.
[460] Sutherland *Competition Law of South Africa* (2004) 2-4.
[461] *Mondi Ltd and Kohler Cores and Tubes, A division of Kohler Packaging Ltd* (20/CAC/Jun02) par 48.
[462] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), as adopted on 8 May 1996 and amended by the Constitution of the Republic of South Africa Second Amendment Act 3 of 2003.

rules for mergers between publishers. In fact, section 1(2)(a) of the Act prescribes that it must be interpreted in a manner that is consistent with the Constitution. Therefore, rights granted by the Constitution always have to be borne in mind whenever applying the Act.

1 7 1 Freedom of the press

Chapter two of the Constitution consists of the Bill of Rights. Freedom of expression[463] is guaranteed in section 16 of the South African Constitution:

'Everyone has the right to freedom of expression.'

This includes according to subsection 1(a) the 'freedom of the press and other media'.

Freedom of the press being part of freedom of speech has always been recognised as a residual freedom at common law, being permitted, if not expressly forbidden.[464]

Freedom of expression is regarded as an individual right to express opinions and give news and information to the public without interference. Hence, the freedom of the press embraces the right to publish information and it is extended by section 16(1)(b) which protects the 'freedom to receive or impart information or ideas,' and 'probably by section 16(1)(d),'[465] which relates to the right to academic freedom and freedom of scientific research. The freedom of expression is crucial to a democratic society and the vital role of the press in supplying information, in particular of a political nature, is recognised by South African courts.[466] In *South African National Defence Force Union v Minister of Defence*[467] the Constitutional Court declared the freedom of expression to have an 'instrumental function as a guarantor of democracy.'[468] Due to its textual emphasis in the Constitution, it is controversial if an exceptional high degree of protection should be afforded to the press.[469] In particular, it has been discussed, whether the press enjoys exceptional constitutional protection in terms of publishing defamatory statements. The South African courts do not

[463] 'Expression' embraces also activities such as displaying posters, painting, dancing, the publication of photographs and symbolic acts such as flag burning, wearing of certain items of clothing and physical gestures, see De Waal et al *The Bill of Rights Handbook* (2001) 311 with further references.
[464] Burns *Communications Law* (2001) 56.
[465] Burns *Communications Law* (2001) 59.
[466] See for instance the cases *Government of the Republic of South Africa v The Sunday Times Newspaper* 1995 (2) BCLR 182 (T) and *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).
[467] *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC) par 7.
[468] See also De Waal et al *The Bill of Rights Handbook* (2001) 310 with further references.
[469] Declining this approach: De Waal et al *The Bill of Rights Handbook* (2001) 311.

seem to follow a 'press exceptionalism' approach. In the case *Holomisa v Argus Newspapers*[470] for instance, Cameron J did not accept such exceptionalism. In his view, journalists should not enjoy constitutional immunity beyond that granted to ordinary citizens, even though the 'especial importance and role of the media' in a constitutional democracy was recognised.[471]

1 7 2 Application and interpretation of the Bill of Rights

However, section 16 of the South African Constitution could be *interpreted* to encompass 'institutional autonomy' for the press. This entails that the freedom of the press would not only have an individual dimension (protection against the state), but also an *objective* dimension. The latter signifies a proper obligation of the state to protect the institutional independence of the press by enacting and enforcing appropriate laws to guarantee press plurality.

The Constitution does not expressly give a privileged position to the press at all. The text itself only declares the press to be protected. This is not unusual, though, and other legislation follow a similar approach. The German Constitution concisely codifies that the freedom of the press is 'guaranteed'. Moreover, in the United States the First Amendment to the US Constitution only provides that 'Congress shall make no law [...] abridging the freedom of speech, or of the press'.[472] Nevertheless, US and German Courts recognise the exceptional importance of the press for establishing and maintaining an open and democratic society and there are several judgements that concretised the freedom of the press quite precisely.[473]

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[470] *Holomisa v Argus Newspapers Ltd* 1996 (6) BCLR 836 (W).
[471] See *Holomisa v Argus Newspapers Ltd* 1996 (6) BCLR 836 (W) 855-E. See also Davis *Comment on Holomisa v Argus Newspapers Ltd*, 1996 (12) SAJHR 328-337.
[472] First Amendment to Constitution of the United States, available at: http://www.usconstitution.net/const.html.
[473] For the interpretation of the German Federal Constitution Court (*Bundesverfassungsgericht*) see in detail 2 3 6 2 3 *infra*; in the United States Black J stated in *New York Times Co v United States* 403 US 713 (1971) that '[the constitutional guarantee of a free press] gave the press the protection it must have to fulfil its essential role in our democracy.' In *Associated Press v United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945) at 20 it was stated that the First Amendment 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.' This has been repeatedly confirmed by the Supreme Court, see *N.Y. Times Co. v Sullivan*, 376 U.S. 254, 266 (1964); *Citizen Publ'g Co. v United States*, 394 U.S. 131, 139-40 (1969) and *Buckley v Valeo*, 424 U.S. 1, 49 (1976).

The South African Constitution does not recognise expressly such an objective dimension. Hence, it has been argued that such institutional independence does not exist: '[i]n essence, therefore, the right to free expression enjoyed by the South African press is no greater than enjoyed by individuals.'[474] Nevertheless, the broad formulation in the Constitution leaves space for a wider understanding of this constitutional right to 'institutional autonomy' for the press and for placing duties on the state to ensure a plurality of newspaper enterprises, in the same way as the German Federal Constitutional Court (*Bundesverfassungsgericht*).[475]

The Bill of Rights in the South African Constitution was codified to ensure extensive individual protection. The Constitutional Court even affirmed, 'it should be emphasised that in general the Bill of Rights drafted by the CA [Constitutional Assembly] is as extensive as any to be found in any national constitution.'[476]

The question here is not whether freedom of the press should be interpreted in an extensive way as far as the protection of published statements is concerned. Under German constitutional law, the right of expression and the freedom of the press are limited by other fundamental rights and other rights, which are protected by the Constitution, too. Similar restrictions apply to the rights set out in the South African Bill of Rights.[477] The question of interest is, whether the press and press plurality itself is guaranteed by the South African Constitution and whether the state has a duty to take positive steps to protect it.

The starting point for such an approach is section 7(2) of the South African Constitution, which proclaims that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.' Hence, it is accepted that the provisions of the Bill of Rights not only protect certain kinds of activities but also sometimes demand the fulfilment of certain objectives.[478] 'A fundamental right may therefore be infringed [...] by failing to fulfil a positive obligation.'[479]

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[474] Burns *Communications Law* (2001) 59.
[475] See in detail 2 3 6 2 3 *infra*.
[476] *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) par 52.
[477] *Cf* sections 7(3), 16(2) and 36. See also 1 7 4 *infra*.
[478] De Waal et al *The Bill of Rights Handbook* (2001) 126.
[479] De Waal et al *The Bill of Rights Handbook* (2001) 126-127 with further references.

Thus, it has to be asked, if there is such a governmental obligation deriving from the freedom of the press to enact special provisions for the protection of plurality on the press market. In particular, it has to be asked if at a certain point of market concentration in press markets governmental duties in the field of merger control arise.

Basically, the answer to this question lies in the understanding of the application and interpretation of the Bill of Rights.

• Who is bound by the Bill of Rights?

First, the state is obliged to comply with the Bill of Rights. According to section 8(1) of the Constitution '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.' This formulation raises many questions.[480] However, the term 'legislature' refers especially to the Parliament.[481] The term judiciary includes judges and magistrates.[482] Having stated that the legislature and the judiciary are bound by the Bill of Rights, the second question arises:

• How and to which extent are the legislature and the judiciary bound and what responsibilities arise from the Bill of Rights?

As regards the legislature, it can be asserted that legislation must comply with the Bill of Rights.[483] The requirement of consistency with the Bill of Rights, though, does not necessarily include the obligation *to enact* certain provisions, even though the primary responsibility of the legislature is the making of legislation.[484] In the first place, it merely means that promulgated laws and parliamentary acts have to be constitutional.[485] However, the obligation deriving from the Constitution to enact *certain* provisions has not been codified.

Even though the Constitution sets out in section 39(1) that

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[480] Such as the scope of the Bill of Rights (direct applicability) and the question whether the Bill of Rights applies horizontally, meaning its application not only between the state and the individual persons (vertical application), but also between individuals in the private sphere. For the discussion of these aspects see De Waal et al *The Bill of Rights Handbook* (2001) Chapter Three – Application of the Bill of Rights.

[481] The term also includes the provincial legislatures and the municipal councils, see De Waal et al *The Bill of Rights Handbook* (2001) 46. Only the Parliament is of interest here, because the Competition Act is a national law.

[482] De Waal et al *The Bill of Rights Handbook* (2001) 54.

[483] De Waal et al *The Bill of Rights Handbook* (2001) 46.

[484] De Waal et al *The Bill of Rights Handbook* (2001) 46.

[485] See in detail De Waal et al *The Bill of Rights Handbook* (2001) 46-47.

'[w]hen interpreting the Bill of Rights, a court, tribunal or forum

a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

b. must consider international law; and

c. may consider foreign law,'

the Constitutional Court has not declared there to be such an obligation. Conversely, one judgement of the Court makes it unlikely that South Africa will adopt a similar doctrine as for instance the German *Bundesverfassungsgericht*, which proclaimed governmental duties arising from the German Constitution to implement specific legislation to protect the freedom of the press.[486] In the case *Ferreira v Lenin NO*,[487] the South African Constitutional Court pointed out its position vis-à-vis policy making by the legislature:

> 'Whether or not there should be regulation and distribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decisions to undertake such policies conforms with the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require that this be done.'[488]

The Constitutional Court follows the same careful approach as regards declaring a law inconsistent with the Constitution, preserving space for the legislature and other courts to reform the law. The Court will only declare a law constitutionally invalid 'on the issues presented to it and not as a matter of abstract constitutional adjudication.'[489] Moreover, statutory rules have firstly to be interpreted in such a way as to conform to the Bill of Rights.[490]

This approach indicates that there is a certain reluctance to prescribe proactive conduct as regards lawmaking. The Court will most likely not interfere with political decisions, if they are objectively rational.[491] Hence, the Constitutional Court will not demand the enactment of a press-specific Competition Act, nor will it declare the Act unconstitutional with refer-

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[486] See 2 3 6 2 3 *infra*.
[487] *Ferreira v Lenin NO* 1996 (1) SA 984 (CC).
[488] Par 180.
[489] See De Waal et al *The Bill of Rights Handbook* (2001) 66 with further references.
[490] De Waal et al *The Bill of Rights Handbook* (2001) 70. This principle is also recognised under German Constitutional Law (so-called '*verfassungskonforme Auslegung*').
[491] See De Waal et al *The Bill of Rights Handbook* (2001) 53-54.

ence to abstract considerations. It would be very difficult anyway, to prescribe the concrete content of a law to protect the freedom of the press, since there are various means by which to ensure press plurality. This is illustrated by several foreign approaches.[492] Hence, it can be concluded that the Bill of Rights in the South African Constitution does not oblige the legislature to act positively to protect plurality of the press.

1 7 3 Interpretation of the Competition Act

If the South African Constitution will not be interpreted in the described extensive way, the impact of the Bill of Rights on ordinary laws, such as the existing Competition Act, has to be analysed. It has already been stated that the judiciary is bound by the Bill of Rights. Certain obligations could therefore arise for the Competition Tribunal and Competition Appeal Court in interpreting the Competition Act.

It is recognised that 'the Bill of Rights contains a set of values that must be respected whenever ordinary law is interpreted, developed or applied'[493] (so-called indirect application). Section 39(2) of the Constitution provides:

> 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

As indicated above, section 1(2)(a) of the Competition Act, in turn, prescribes that the Act must be interpreted in a manner that is consistent with the South African Constitution.[494]

Thus, in cases of mergers between newspaper enterprises, these provisions could for instance oblige competition authorities to define narrow markets to prevent concentration in press markets or to give sway to public interest issues in order to maintain press plurality.

The Bill of Rights, however, only 'demands furtherance of its values through the operation of the ordinary law.'[495] However, there are limits to these duties. Thus, even if the authorities have to take into account the values of the Bill of Rights and must promote its spirit,

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[492] See 4 2 3 *infra*.
[493] De Waal et al *The Bill of Rights Handbook* (2001) 37.
[494] This reaffirmation 'serves as a reminder of the principle and thereby strengthens the link.' (Sutherland *Competition Law of South Africa* (2004) 4-12 with further references).
[495] De Waal et al *The Bill of Rights Handbook* (2001) 63.

purport, and objects, namely those of the freedom of the press, they are not bound to a *specific* interpretation favouring press-plurality, even if the Constitution is interpreted in a 'purposive' and 'generous' way.[496] On the contrary, the courts have to leave a certain 'space for the legislature to reform the law in accordance with its own interpretation of the Constitution.'[497]

1 7 4 Limitation

Moreover, section 36 of the Constitution recognises that the rights in the Bill of Rights are limited, even though 'only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

In addition, section 16(2) also sets an 'internal modifier'[498] for the freedom of the press and the common law limits the exercise of this right, too, although it must comply with the general scope of the limitations clause in section 36.[499]
The establishment of a legal framework, which intends to maximise competition in South Africa, taken into account the purposes set out in the Competition Act, is indubitably such a law of general application.[500]

1 8 Conclusion

The relatively new South African Competition Law departs remarkably from former legislation. The surveillance of mergers by independent and specialized authorities has been regarded as a remarkable step forward. The creation of new and better resourced competition authorities and the provisions imposing heavy fines for severe infringements of the Act will contribute towards the development of competitive South African markets, which are still often described as oligopolistic, highly concentrated and uncompetitive.

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[496] For this approach to interpretation of the Bill of Rights see De Waal et al *The Bill of Rights Handbook* (2001) 130-135.
[497] See De Waal et al *The Bill of Rights Handbook* (2001) 67-70 on this controversial aspect.
[498] Burns *Communications Law* (2001) 288.
[499] See Burns *Communications Law* (2001) 288, 305-306 and chapter 4 for details.
[500] See also the discussion on the limitation of constitutional rights in chapter 4 *infra*.

Despite the high number of approvals, competition authorities seem to follow a strict policy as far as mergers are concerned, being cautious to approve a merger on efficiency or public interest grounds.

Although the freedom of the press is expressly protected in the South African Constitution and recognised as crucial by South African courts, an institutional independence of the press, which could lead to a governmental obligation to enact laws specifically to protect the press, has not been recognised so far. It remains unsure whether South Africa will follow the approach of a 'multi-dimensional' understanding of the Bill of Rights. The future will show if the courts will interpret the Constitution in this way, even though this is unlikely.

There are a large number of published newspapers and magazines in South Africa, even though only a few big publishing groups seem to have critical mass in this sector.

Competition authorities adjudicate upon mergers between publishing houses as they do upon any other mergers. The question whether these rules adequately protect press plurality in South Africa will be discussed later on.[501]

[501] See the discussion in chapter 4 *infra*.

Chapter 2

European and German Competition Law

2 1 Introduction

This part of the thesis will focus on German Competition Law. Nevertheless, a certain overview of merger control under European Competition Law is unavoidable, because its influence on the national legislation and jurisdiction of the European Member States is wide and a delineation of both the European and German system, is important for the assessment of transactions taking place in the European Community's markets.

2 2 European Competition Law

First, it has to be assessed, which provisions apply if a merger takes place within Europe. Even if there are – due to the European process of harmonisation – parallels between the European and the German legal system, it is crucial for the parties to a merger to know, whether European Law, or the German Competition Act, the so-called 'Act against Restraints of Competition' (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB)) applies.[502]

Since 1 May 2004, a new European merger regulation[503] is in force.[504] The regulation flanks the recent fundamental change in European competition procedure legislation through the regulation 1/2003,[505] issued in terms of Article 83 of the European Treaty (EC

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[502] Gesetz gegen Wettbewerbsbeschränkungen, BGBl I 1998, 2521, as amended by Article 20 Nr. 1 G of 09.12.2004 I 3220, see Appendix II of this thesis.

[503] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJEU L 24/1 of 29.01.2004, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf. For details see also Kofler-Senoner & Scholz 'Die neue Europäische Fusionskontrollverordnung' (2004), wbl 06/2004, 266-273; Böge 'Reform der Europäischen Fusionskontrolle' (2004), WuW 2/2004, 138-148; Staebe & Denzel 'Die neue Europäische Fusionskontrollverordnung (VO 139/2004)' (2004), EWS 5/2004, 194-201.

[504] The old Regulation (Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ No. L 395/1 of 1989, amended by Council Regulation No. 1310/97 of 30 June 1997, OJ No. L180/1 of 1997 and OJ No. L 40/17 of 1998) only continues to apply to concentrations which were the subject of an agreement or announcement or where control was acquired before the date of application of the new regulation, see Article 26(2) of regulation 139/2004.

[505] 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, OJEC L 1/1 of 04.01.2003, also available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2003&nu_doc=1.

Treaty).[506] The regulation 1/2003 brought two major changes: firstly – as far as prohibited practices are concerned (Article 81 and 82 EC)[507] – the EU abolished its system of notifications to the Commission/individual exemption and replaced it with a regime of 'self-assessment' (directly applicable exception system)[508] and, secondly, the regulation provided for a decentralisation of antitrust enforcement and should result in major devolution of enforcement of Articles 81 and 82 of the EC Treaty from the European Commission to the Member States' competition authorities and courts,[509] which have to apply European Competition Law in any case, in which interstate commerce is affected.[510]

However, the merger regulation aims at the harmonisation of the control of mergers in the legislations of the Member States by achieving the objective of ensuring that competition in the common market is not distorted,[511] in accordance with the principle of an open market economy with free competition.[512] The regulation also intends to simplify the assessment of transactions and determinations of competences between European and Member States' competition authorities. As the regulation points out:[513]

> 'The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.'[514]

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[506] See Article 83 EC in Appendix I of this thesis.
[507] See Article 81 and 82 EC in Appendix I of this thesis.
[508] Agreements, which restrain competition, are now automatically exempted, if they fulfil the conditions set out in Article 81(3) EC.
[509] For the application of European law by the Member States' authorities see Article 3 of the Regulation 1/2003. See also Hirsch 'Anwendung der Kartellverfahrensordnung (EG) Nr. 1/2003 durch nationale Gerichte' (2003), ZWeR 2003, 233 ff. Moreover, harmonisation is tried to be obtain by the foundation of the European Competition Network (ECN), see Recital 15-18 of the regulation. *Cf* also Terhechte 'Die Reform des europäischen Kartellrechts – am Ende eines langen Weges?' (2004), EuZW 12/2004, 353.
[510] See Weitbrecht 'To Harmonize or Not to Harmonize – Zur Diskussion um die 7. GWB-Novelle' (2004), EuZW 15/2004, 449.
[511] *Cf* the purpose set out in Article 3(g) EC.
[512] *Cf* Recital 6 of the EC Merger Regulation.
[513] Recital 8 of the EC Merger Regulation.
[514] On the other hand, under certain circumstances parties to a merger may apply for the assessment of the transaction by the European Commission before any notification to the competent (Member States') authorities, even if the merger does not have a Community dimension, see Article 4 V of the EC Merger Regulation. *Cf* for details Rosenthal 'Neuordnung der Zuständigkeiten und des Verfahrens in der Europäischen Fusionskontrolle' (2004), EuZW 11/2004, 327-332.

Overall, the reform of European merger control was rather modestly implemented, though, and major changes have not been made, even though proposed by the Commission in the beginning.[515] Nevertheless, certain aspects have changed. According to the new regulation and likewise German Competition Law, undertakings[516] can notify the proposed transaction even before the conclusion of the merger contract.[517] Even though a 'substantial lessening of competition' criterion ('SLC test') has not been introduced completely, European Merger Law now sets out a 'mixed test'. According to Article 2(3) of the new regulation, a merger shall be declared incompatible with the common market, if it would 'significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'[518] ('SIEC test'). This formulation can be regarded as a compromise between the US approach ('substantial lessening of competition test')[519] and the wording of the old European merger regulation and the approach of other European countries ('creation or strengthening of a dominant position test').[520] This new test has been criticised and it has been argued that American and old European antitrust jurisprudence[521] would now be of reduced value because of the mixed elements in the new approach.[522] Only the future will show, whether

[515] Several major changes have not been implemented like the legal definition of the term 'oligopoly,' *cf* Terhechte 'Die Reform des europäischen Kartellrechts – am Ende eines langen Weges?' (2004), EuZW 12/2004, 353.

[516] The term 'undertaking' has been defined by the European Courts as 'every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed' (see *Höfner and Elser v Macrotron*, Judgment of the European Court of Justice of 23 April 1991, (1991) ECR I–1979 (Case C-41/90) par 21). The European Commission stated: 'The term "undertaking" is not defined in the Treaty. It may, however, refer to any entity engaged in commercial activities and in the case of corporate bodies may refer to a parent or to a subsidiary or to the unit formed by the parent and subsidiaries together.' (*Polypropylene*, Decision of the EC Commission of 23 April 1986 (Case No. IV/31.149)). *Cf* also Sutherland Competition Law of South Africa (2004) section 4.4 for the discussion of the term 'economic activity'.

[517] See Article 4(1) subparagraph 2 of the EC Merger Regulation.

[518] See also Article 2(2).

[519] The 'SLC test' applies also in other European jurisdictions, like the UK and Ireland, as well as in South Africa.

[520] *Cf* Schwarze 'Das wirtschaftsverfassungsrechtliche Konzept des Verfassungsentwurfs des Europäischen Konvents – zugleich eine Untersuchung der Grundprobleme des europäischen Wirtschaftsrechts' (2004), EuZW 5/2004, 135 (138). As will be shown, for instance the German legislature uses the criterion of 'market-dominant position'.

[521] Since the enactment of the Merger Regulation in 1990, there have been more than 2300 decisions of the Commission using the criterion of 'dominant position'.

[522] See for instance Böge 'Reform der Europäischen Fusionskontrolle' (2004), WuW 2/2004, 138 (146); Bergmann & Burholt 'Nicht Fisch und nicht Fleisch – Zur Änderung des materiellen Prüfkriteriums in der Europäischen Fusionskontrollverordnung' (2004), EuZW 6/2004, 161.

the test is workable.[523] The European Competition Commission has already published adapted guidelines on the assessment of horizontal mergers.[524]

The merger regulation sets out exactly when European law has to be applied. Generally speaking, it only applies when the European market is affected by a certain competitive behaviour or a merger between enterprises. According to the European merger regulation, the Commission of the European Communities has exclusive jurisdiction, if the transaction has a 'Community dimension'.[525] This is the case, when certain thresholds, as defined by Article 1(2), are reached.

The regulation uses the term 'concentration' instead of 'merger'. Article 3 defines a concentration. There has to be a 'change of control on a lasting basis'. This may occur in two forms. Firstly, in form of a merger of two or more previously independent undertakings or parts of undertakings; or, secondly, in form of an acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

The definition is quite broad. According to Article 3(2), control can be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking. Hence, control can either be obtained by ownership or the right to use all or part of the assets of an undertaking, or rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

The regulation also sets out, when control is acquired. It is acquired by persons or undertakings which are either holders of the rights or entitled to rights under the contracts concerned, or which have at least the power to exercise the rights deriving from such rights or

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[523] See also Sanden 'Die Europäische Fusionskontrolle im liberalisierten Energiemarkt' (2004), EuZW 20/2004, 620 (622 f.).
[524] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.
[525] Article 1(1).

contracts.[526] The creation of a joint venture performing on a lasting basis 'all the functions of an autonomous economic entity' also constitutes a concentration. Special exceptions are set out for credit institutions, other financial institutions, or insurance companies.[527]

As stated above, to apply European law, such concentration has to have a European Community dimension. According to the regulation, this is the case, if the combined aggregate worldwide turnover of all the undertakings concerned is more than € 5 billion. On top of that, the aggregate Community-wide turnover of each of at least two of the undertakings concerned has to be more than € 250 million. Moreover, there is no Community dimension, if each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[528]

Hence, many mergers – especially mergers between newspaper enterprises – will not be considered in terms of European law, because of these high thresholds.[529]

If European law is applicable, though, Article 21(3) of the regulation points out, that '[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension.' Notwithstanding this Article, 'Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law'.[530] These interests are expressly stated to include 'plurality of the media'. Hence, Member States can still review a proposed merger, approved by the Commission in order to protect media pluralism.[531] German Competition Law, however, expressly out-

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[526] Article 3(3).
[527] See Article 3(5). This provision has been adopted by the German legislature, see § 37 III GWB.
[528] According to Article 1(3) of the regulation, a concentration that does not meet the mentioned thresholds has a Community dimension where '(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State'.
[529] See for instance BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA* at IV, where there was no Community-wide importance, because the transaction did not meet the threshold of € 100 million of Article 1(3)(d) of the old Regulation (No. 4064/89 of 21.12.1989).
[530] Article 21(4).
[531] See also Smith 'Rethinking European Union competence in the field of media ownership: the internal market, fundamental rights and European citizenship' (2004), 29 E.L.Rev. Oct, 669.

lines, that the provisions of the GWB regarding the control of mergers do not apply, if the Commission of the European Communities has exclusive jurisdiction according to the European regulation concerning the control of mergers.[532]

2 3 German Competition Law

As mentioned above, European Competition Law does not apply to every single proposed merger, taking place within the territory of the European Community, nor are European competition authorities always competent to enforce competition law. Therefore, and because this thesis focuses on German Competition Law, the legal system of merger control as codified by the German legislature will now be examined.

2 3 1 Introduction

Merger control, being part of competition law, is regulated under the GWB. This Act contains several provisions to prohibit anti-competitive conduct. Similar to South African law, German Competition Law also aims to outlaw anti-competitive market behaviour in the form of prohibited practices (including abuse of a dominant position). Prohibited practices are not a major focus of this thesis. Nevertheless, there are certain special features and exemptions for the media, which at least have to be noted.

Due to the developments in European Competition Law, the GWB has been amended recently. The new GWB came into force on the 1st of July 2005. Especially the provisions concerning prohibited practices have changed. This has to be borne in mind when reading the following description of German Competition Law. In contrast, the provisions of merger control did not change materially.[533]

2 3 2 Competition authorities and competences

Due to the structure of the Federal Republic of Germany, there are competition authorities in every region (*Land*) as well as a Federal Cartel Office (*Bundeskartellamt*).[534]

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[532] § 35 III GWB. See also 2 3 4 1 1 *infra*.
[533] See for details 2 3 6 *infra*.
[534] See www.bundeskartellamt.de.

Generally speaking, the *Bundeskartellamt* is responsible for the implementation of all provisions of the GWB, if the GWB does not expressly prescribe a special competence for a regional authority and if the effect of an anti-competitive or discriminating act is national.[535] The examination of mergers is the exclusive responsibility of the *Bundeskartellamt*.[536]

The *Bundeskartellamt* can prohibit any anti-competitive restraints of competition and proposed mergers.[537] Besides that, the German legislature conferred several powers and functions on the competition authorities as set out in the GWB, such as the right of obtaining information during the investigations[538] and seizing evidence.[539] German competition authorities are also competent to levy fines in the event of infringements. The provisions governing the power of German competition authorities to impose fines for the infringement of the rules on competition are codified in §§ 81 ff. GWB.

The GWB recognises another independent authority, which has only consultative functions but has to be heard in certain circumstances. This special competition body is the so-called 'monopoly commission' (*Monopolkommission*). According to § 44 I GWB, the *Monopolkommission* issues every second year a report on the competition situation in Germany, such as level and trends of concentration. This commission also assesses the practice of merger control. In addition, the *Monopolkommission* may release special reports on certain topics (*Sondergutachten*). The monopoly commission is independent[540] and consists of five experts in the field of politics, economy or technology.[541]

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[535] § 48 II GWB.
[536] *Cf* the wording of § 36 and § 48 GWB. See also Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 36 Rn. 1.
[537] For the exact procedure and conditions of a prohibition see 2 3 4 *infra*. See also Newssheet of the *Bundeskartellamt*, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/ 03_Infobrosch.pdf for detailed competences of the different departments of the *Bundeskartellamt*.
[538] See for instance § 39 V and § 59 GWB.
[539] For details *cf* §§ 57 ff. GWB.
[540] § 44 II GWB.
[541] § 45 I GWB. The independence of the *Monopolkommission* is strengthened by the fact that the members of the commission may not be members of the federal or regional parliaments nor work for the civil service, *cf* § 45 III GWB.

2 3 3 Legal Framework

2 3 3 1 Structure of the Act

The GWB has six parts. The first part of the GWB deals with restraints of competition,[542] while the second part sets out provisions concerning the competition authorities.[543] The third part contains provisions that regulate judicial proceedings,[544] whereas the fourth part is dedicated to the awarding of public contracts.[545] The fifth part is concerned with the application of the GWB[546] and, finally, the sixth part sets out miscellaneous rules, such as the repeal of the old GWB[547] and transitional provisions.[548]

2 3 3 2 Restraints of competition

The first part of the GWB, dealing with restraints of competition, is subdivided into eight chapters. The first chapter ('cartel agreements'), as well as the second ('vertical agreements'), and notably the seventh chapter ('control of mergers') are of interest here. Hence, an overview of the first two will be given here, while the seventh chapter will be scrutinized later on.

2 3 3 2 1 'Cartel agreements'

The first chapter of the first part of the GWB is headlined 'cartel agreements, cartel decisions, and coordinated conduct'. This chapter deals with all forms of restraint of competition, caused on a horizontal level.

According to § 1 GWB, all agreements between competitors, decisions by an association of firms or concerted conducts are prohibited, if they are aimed at or leading to prevention, restraints or distortion of competition (so-called 'cartel agreements').

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[542] §§ 1 to 47 GWB.
[543] §§ 48 to 53 GWB.
[544] §§ 54 to 96 GWB.
[545] §§ 54 to 96 GWB.
[546] § 130 GWB.
[547] The GWB was amended in 1998 by the sixth Act to amend the GWB, which came into force on 1 January 1999.
[548] § 131 GWB.

There are a couple of exemptions from this general prohibitive regulation of the GWB, codified in §§ 2 to 8 GWB. According to these sections, certain cartels in terms of § 1 GWB can be exempted from prohibition in certain circumstances. However, the cartel agreement always has to be notified or the parties have to apply for exemption.[549] § 4 GWB, for instance empowers the *Bundeskartellamt* to grant exemption from the prohibition of § 1 GWB, if the cartel agreement helps small and medium-sized enterprises. For publishers, also § 2 and § 7 GWB are of special importance.[550] The conditions set out in § 7 GWB are quite strict, though, so that this exemption does not apply often. For instance, such cartels have to lead to an improvement (for instance of the development of goods or services), which could not be obtained in other ways. Moreover, the consumers have to adequately participate in the financial profits. Furthermore, this restraint of competition may not lead to a market-dominant position, nor may it strengthen market domination. For instance, a group of national newspapers[551] applied for such an exemption to cooperate in the advertisement market. The parties to the agreement founded a limited company to sell national recruitment advertisements jointly and co-ordinately (so-called *Anzeigenkooperation*). The *Bundeskartellamt* prohibited the agreement, declaring it anti-competitive[552] and rejecting an exemption in terms of § 7 GWB.[553] The appeal against the decision was dismissed.[554]

A uniquely German – and still very controversial[555] – regulation is codified in § 8 GWB. According to this section, the Minister for Economic Affairs and Employment may grant an exemption from a prohibition of anti-competitive conduct. This concept is called the 'Minister's permission' (*Ministererlaubnis*). If, for instance, the *Bundeskartellamt* prohibits a cartel, the Minister can still approve it. It is obvious why this section is so controversial. Such permission allows the Minister to overrule the decisions of specialised competition authorities, which rule on every case in a fair and economically reasonable manner. Hence, it may be contended that the danger of abuse for political reasons is immanent, even though

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[549] See §§ 9 and 10 GWB.
[550] *Cf* Löffler & Ricker *Handbuch des Presserechts* (2000), 4. Auflage, 651 with further references.
[551] *Süddeutsche Zeitung*, *Frankfurter Rundschau* and *Welt/Welt am Sonntag*.
[552] The *Bundeskartellamt* was especially concerned about the effects on prices.
[553] BKartA, WuW/E DE-V 209 ff.. See also Bechtold 'Medienkartellrecht – Aktueller Überblick über die deutsche Praxis' (2000), AfP 2000, 156.
[554] *Cf* Bechtold 'Medienkartellrecht – Aktueller Überblick über die deutsche Praxis' (2000), AfP 2000, 436.
[555] See for instance for the parliamentary discussion about this concept (for the control of mergers), Press Release of the *Bundestag* (Lower House of Parliament), available at http://www.bundestag.de/bic/hib/2003/2003_040/07.html.

the provision sets high hurdles. An exemption for such restraints of competition 'exceptionally' has to be 'necessary' because there are 'prevailing reasons for the economy as a whole and the general good'.[556]

If a *Ministererlaubnis* is granted because the majority of enterprises in a certain industry are directly endangered, the exemption is only admissible, if there are no other legal or political preventive measures possible at all. Moreover, such an exemption may only be granted in 'exceptionally serious special cases'.[557] Furthermore, the *Ministererlaubnis* has to be regarded as a last resort for the parties concerned, because normally an exemption according to §§ 2 to 7 GWB can be granted and § 8 GWB only applies, if such other exemptions do not.

2 3 3 2 2 Vertical agreements

The GWB proscribes vertical price-fixing. § 14 GWB prohibits any agreements between enterprises which restrain one of the parties' freedom to set prices or business conditions. A specific exception is made in German law for newspapers and magazines.[558] According to § 15 GWB, a publishing house may determine the retail price for its products. Competition authorities can intervene in such agreements, only in special circumstances for instance in cases of abusive price-fixing.[559] The German legislature justifies this exception for publishers with cultural and educational arguments.[560] Moreover, the distribution of newspapers and magazines in Germany is subject to a special system, which explains this legally tolerated restraint of competition. Besides subscriptions, all newspaper companies distribute their products via wholesalers (so-called *Pressegrossisten*), who each have their exclusive territory to sell the newspapers and magazines to the retailers. The wholesaler chooses how many copies of different newspapers he or she sells to the retailer (so-called *Dispositionsrecht*), being bound only by the principle of neutrality and press plurality.[561] The retailer, in turn, is allowed to return all unsold copies, getting back the complete pur-

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[556] *Cf* § 8 I GWB.
[557] *Cf* the wording of § 8 II GWB.
[558] The provision refers to 'publisher products' (*Verlagserzeugnisse*), which has to be interpreted broadly including also CD-ROMs under certain circumstances, see Löffler & Ricker *Handbuch des Presserechts* (2000), 4. Auflage, 653.
[559] § 15 III GWB. For details see Löffler & Ricker *Handbuch des Presserechts* (2000), 4. Auflage, 652-655.
[560] *Cf* Begründung zum Regierungsentwurf, BR-Drs. 857/97, p. 36; Löffler & Ricker *Handbuch des Presserechts* (2000), 4. Auflage, 653.
[561] *Cf* BGH, WuW/E BGH 879 ff. – *Dispositionsrecht*.

chase price (so-called *Remissionsrecht*). This system, which guarantees the plurality of press products, only works if the retailers are not able to set different prices for the different newspapers and magazines. The price-fixing, which ensures the principle of exclusivity of the wholesalers, leads to a diminution of competition, but is legally desirable to ensure press plurality.[562] The *Bundesverfassungsgericht* even attributed constitutional protection to the wholesaler of newspapers and magazines in order to promote freedom of the press.[563]

Other forms of vertical agreements are also prohibited in this chapter, like abusive exclusionary acts (such as tying arrangements), if they affect competition substantially.[564] Finally, according to § 17 GWB certain licence agreements are exempted from prohibition.

2 3 4 The control of mergers

The control of mergers aims at the maintenance of structural conditions of markets, that allow effective competition. Examining mergers and their effects on competition, German competition authorities approach a merger principally by following these steps:

• Can the transaction be scrutinized under the provisions set out in the GWB for the control of mergers (applicability of the provisions for the control of mergers)? Two main steps have to be assessed: the scope of application of the GWB (*Anwendungsbereich des GWB*) and the statutory definition of a merger (so-called *Zusammenschlusstatbestand*).

- The transaction is within the scope of application of the GWB, if the merging parties reach certain turnover thresholds and national competition authorities have jurisdiction.

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[562] *Cf* Bechtold 'Medienkartellrecht – Aktueller Überblick über die deutsche Praxis' (2000), AfP 2000, 436 (437).

[563] In the case BVerfGE 77, 346 ff. – *Pressegrosso*, a wholesaler was condemned for distributing illegal content by delivering a certain magazine to retailers. The *Bundesverfassungsgericht* stated that whenever applying statutory (criminal) law, also to press wholesalers the freedom of the press has to be borne in mind, this should lead to a restrictive interpretation of the statutory law: 'Art. 5 Abs. 1 Satz 2 GG ist auf die hier zu beurteilende Tätigkeit des Presse-Grossisten anwendbar. Das Grundrecht der Pressefreiheit gewährleistet als subjektives Recht den im Pressewesen tätigen Personen und Unternehmen Freiheit von staatlichem Zwang; als objektives Recht garantiert es die Freiheit des Pressewesens insgesamt. Dieser Schutz reicht von der Beschaffung der Information bis zur Verbreitung der Nachricht und der Meinung (BVerfGE 10, 118 (121)). Er beschränkt sich nicht auf die unmittelbar inhaltsbezogenen Pressetätigkeiten, sondern erfaßt im Interesse einer ungehinderten Meinungsverbreitung auch inhaltsferne Hilfsfunktionen von Presseunternehmen (vgl. BVerfGE 25, 296 (304) - Buchhaltung; BVerfGE 64, 108 (114 f.) - Anzeigenaufnahme). Im einzelnen kommt es für die Definition des Schutzbereichs darauf an, was notwendige Bedingung des Funktionierens einer freien Presse ist (BVerfGE 66, 116 (134)).' (p. 354).

[564] *Cf* § 16 GWB. See also Löffler & Ricker *Handbuch des Presserechts* (2000), 4. Auflage, 656 for the importance of this section to publishers.

- The statutory definition of a merger is fulfilled, if the transaction constitutes a merger as defined by the Act.

• If these conditions are fulfilled, the transaction is notifiable[565] and the competition authorities have to assess the effects of the merger on competition.

• If it is likely that the merger will lead to a 'market-dominant position' or will strengthen it, the merger will be prohibited, unless certain exemptions apply[566] or a conditional approval is an adequate remedy for the merger's detrimental effect.

2 3 4 1 Applicability of the provisions for the control of mergers

First, the provisions for the control of mergers have to be applicable.

2 3 4 1 1 Scope of application of the GWB (Anwendungsbereich des GWB)

To be subject to control, the transaction has to be within the scope of application of the GWB. This depends on the turnovers of the participating firms. According to § 35 I GWB, the provisions concerning the control of mergers only apply, if the combined aggregate worldwide turnover of all participating undertakings was more than € 500 million during the last business year preceding the merger. Additionally, the domestic turnover of at least one of the participating undertakings must have been more than € 25 million.[567]

Even in that case, two exceptions ('bagatelle clauses') are set out in § 35 II GWB. Of importance is § 35 II Nr. 1 GWB, which consists of a so-called '*de-minimis* clause'.[568] § 35 I GWB – and therefore the provisions controlling mergers – do not apply, if one of the parties to a merger, that is not a 'controlled undertaking' within the meaning of § 36 II GWB, had a worldwide turnover of less than € 10 million during the last business year and affiliates itself with another undertaking. The *de-minimis* clause does not apply to mergers between newspaper enterprises.[569]

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[565] Competition authorities often scrutinise the statutory definition of a merger and the obligation to notify in a single step, see for instance BKartA, decision of 04.05.2004, B 3 - 2450 – Fa - 154/03 – *Colgate-Palmolive Company/Gaba Holding AG* par 4.

[566] See 2 3 4 4 2 *infra*.

[567] For the press-specific turnover calculation see 2 3 5 1 *infra*.

[568] Also sometimes simply called 'bagatelle clause' and formerly known as '*Anschlussklausel*' ('affiliation clause'), because the provision initially intended to facilitate the sale of medium-sized enterprises.

[569] See 2 3 5 1 *infra*.

The second exception is § 35 II Nr. 2 GWB, the so-called 'bagatelle market clause'.[570] According to this section, which also applies to publishers,[571] a merger may not be regulated in a market which has existed for at least 5 years and on which products or commercial services of a sales volume of less than € 15 million were transacted during the last calendar year. Nevertheless, mergers may be subject to assessment, if the involved parties also produce and distribute products on other ('non bagatelle') markets.[572] In this case, a merger's effects only on the 'bagatelle market' may not be part of the merger consideration.[573]

Generally, the *Bundeskartellamt* is responsible for the examination of all mergers within these thresholds, if European authorities are not. Accordingly, § 35 III GWB outlines, that these provisions only do not apply, if the Commission of the European Communities has exclusive jurisdiction according to the European regulation concerning mergers.[574]

2 3 4 1 2 Statutory definition of a merger (Zusammenschlusstatbestand)

The transaction has to be a merger *per definitionem* according to the GWB. § 37 GWB defines, when a merger takes place. A list of cases is enumerated in § 37 I Nr. 1 to 4, which is remarkably similar to the one provided in South Africa in section 12 of the Competition Act[575] and is modelled on European law.[576] According to § 37 I GWB, a transaction will be regarded as merger in one of the following circumstances:

- If an undertaking[577] acquires the 'whole or a substantial part' of the assets[578] of another

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[570] Also called 'minor market clause'.
[571] See in detail 2 3 5 1 *infra*.
[572] As the BKartA points out: '[O]nly if a concentration **exclusively** affects a minor market is it not subject to control, and therefore not subject to notification. A necessary, but not a sufficient, condition for this is that the acquired undertaking operates exclusively on a market that is a minor market. It may, however, be open to question whether such a case will not for example also improve the position of the purchaser in the upstream market.' (Information leaflet relating to the German control of concentrations, November 2000, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/00_MerkblattFuKoD_e.pdf, p. 4.
[573] See for instance the case BKartA, decision of 04.05.2004, B 3 - 2450 – Fa - 154/03 – *Colgate-Palmolive Company/Gaba Holding AG* par 16.
[574] See already 2 2 *supra*.
[575] See 1 5 1 2 2 *supra*.
[576] See 2 2 *supra*.
[577] According to § 36 III GWB, also a person is also regarded as 'undertaking,' if he or she holds the majority shares in a company.
[578] The definition of assets is understood in the broadest sense, including all rights or even customer relations, as far as they have monetary value, KG, WuW/E OLG 4095 (4102) – *W + i Verlag/Weiss-Druck*. See

undertaking[579] (§ 37 I Nr. 1 GWB); or

- In the event of acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control may be constituted by rights, contracts or any other means, which either separately or in combination allow the acquiring firm(s)[580] to exercise determinant influence on the activity of the target firm, notably via ownership or the rights to use all or part of the assets of the target firm (licences)[581] or by rights and contracts,[582] which allow determinant influence[583] on the structure, voting or decisions of the organs of the target firm[584] (§ 37 I Nr. 2 GWB); or
- If the acquiring firm holds due to the transaction shares of the target firm of 50% or 25% of the capital or the voting rights of the target firm[585] (§ 37 I Nr. 3 GWB).

Due to § 37 I Nr. 3 b) GWB it is often believed that a minority shareholding below 25% of an enterprise cannot raise competition law concerns. Thus, it is a common practice to ac-

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also Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 10.

[579] The amalgamation of two firms (*cf* s 12(1)(b)(ii) of the South African Competition Act) is also embraced by this provision, see Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 21.

[580] The control can be exercised jointly by several enterprises.

[581] The *abstract* aptitude of the acquired part of the enterprise (licence) to change the market position of the acquiring firm is decisive, not the *concrete* effect of the acquisition on its market position, BGH, WuW/E BGH 2783 (2785) – *Warenzeichenerwerb*.

[582] In detail: Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 29.

[583] As a rule, this is the case if the acquiring firm(s) can decisively influence strategic business policy decisions or the composition of the supervisory or administrative boards of the target firm.

[584] A internal change of control may also constitute a merger, such as the 'split' of an enterprise, *cf* Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 42, or the change from jointly exercised control to sole control, see BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA* at V. (licence agreement to publish a foreign magazine).

[585] In this case, it is only decisive whether the thresholds are exceeded or not. It is not important for § 37 I Nr. 3 GWB, whether certain additional rights are acquired, so that even a minimum increase of 0,01% in shares can make this section applicable, see Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 50. According to § 37 I Nr. 3, S 2 GWB shares of other firms can be attributed to an enterprise, if the shares held are fiduciary. ('The shares held by the undertaking also include the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking within the parameters mentioned above, this is deemed to constitute a concentration among the acquiring undertakings with respect to those markets on which the other undertaking operates as well (joint venture)', see Information leaflet relating to the German control of concentrations, November 2000, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/00_MerkblattFuKoD_e.pdf, p. 5). According to the court ruling, this is the case, if the enterprise bears the economic risk of the involvement and is able to practice control, *cf* BGH, WuW/E DE-R 613 (615) – *Treuhanderwerb*.

quire a shareholding of only 24,9%.[586] Conversely, according to § 37 I Nr. 4 GWB an acquisition can be considered a 'merger,' if it enables the acquiring firm(s) to influence the target firm – directly or indirectly – in a competitive way. Hence, such transactions principally can be scrutinised under the provisions set out in the GWB for the control of mergers and can be prohibited by the competition authorities. This clause (which applies to all transactions not falling under §§ 37 I Nr. 1 to 3 GWB)[587] has been interpreted broadly by the *Bundesgerichtshof* (BGH). According to a recent judgement concerning the press market,[588] it is not necessary that the acquiring firm be legally or practically able to enforce all his competitive interests. To apply § 37 I Nr. 4 GWB, it suffices that it can be expected that the majority shareholder will 'show consideration for the interests of the purchaser.'[589] Thus, only a certain degree of 'influence' of the minority shareholder is essential, but not a real 'control' of the enterprise.[590] Moreover, there is no minimum of shares, which have to be acquired for considering a union between enterprises as a 'merger' according to § 37 GWB.[591] Thus, § 37 I Nr. 4 GWB applies quite broadly, regardless of its subsidiarity to the sections § 37 I Nr. 1 to 3 GWB.[592] The legislature intended with that regulation to avoid dubious legal circumventions of competition provisions, especially in the media sector.[593] However, this section does not only deal with the acquisition of minority shares on a horizontal level,[594] even though the lawmaker especially intended to cover such situations with

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[586] See for instance BKartA, decision of 02.04.2004, B 6 - 22122 – Fb - 81/03 – *KG Wochenkurier/WM/LR Medienverlag*. *Cf* Knapp & Meßmer 'Minderheitsbeteiligungen geraten ins Visier des Kartellamts – Auch unter 25 Prozent kann eine Anmeldung nötig sein' Frankfurter Allgemeine Zeitung (2005-01-12) 21.

[587] Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 7 and 61.

[588] BGH, WuW/E DE-R 609 ff. – *ASV/Stilke*.

[589] 'Im Sinne dieses Zusammenschlusstatbestandes setzt das Merkmal des wettbewerblich erheblichen Einflusses nicht voraus, dass der Erwerber der Minderheitsbeteiligung seine wettbewerblichen Interessen in allen Belangen rechtlich oder tatsächlich durchsetzen kann. Für die Anwendung der Vorschrift genügt, dass nach Art der Vertragsgestaltung und der wirtschaftlichen Verhältnisse zu erwarten ist, dass der Mehrheitsgesellschafter auf die Vorstellungen des Erwerbers Rücksicht nimmt oder diesem freien Raum lässt', BGH, WuW/E DE-R 609 (610) – *ASV/Stilke*.

[590] BGH, WuW/E DE-R 609 ff. – *ASV/Stilke*.

[591] Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 63. In its decision of the 9 September 2004, the *Bundeskartellamt* even prohibited a purchase of only 9,015% shares, *cf* Knapp & Meßmer 'Minderheitsbeteiligungen geraten ins Visier des Kartellamts – Auch unter 25 Prozent kann eine Anmeldung nötig sein' Frankfurter Allgemeine Zeitung (2005-01-12) 21.

[592] Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 63.

[593] BT-Drs. 13/9720, p. 43.

[594] *Cf* BGH, WuW/E DE-R 609 ff. – *ASV/Stilke* with further references.

this provision.[595] The applicability of § 37 I Nr. 4 GWB on vertical agreements has already been confirmed by lower courts.[596]

2 3 4 2 Necessity of notification

Under German Competition Law, the parties to proposed mergers, for which the provisions of the GWB are applicable,[597] principally have to notify the planned transaction to the *Bundeskartellamt* before[598] implementing it.[599] However, unlike European law § 39 GWB does not prescribe a certain period in which the merger has to be notified.[600] Even though this section does not technically codify a 'proper legal' obligation to the parties,[601] the omission of notification – and not only the implementation of the merger[602] – constitutes an infringement of the law (administrative offence)[603] and can lead to a fine up to € 25.000.[604] Moreover, the notification is not a condition for competition authorities to prohibit the merger. If a merger has been implemented but not notified, the transaction can be prohibited nevertheless.[605]

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[595] BT-Drs. 11/4610, p. 13 and 19.
[596] KG, WuW/E DE-R 270 ff. – *ASV/Stilke*. Also see the decision of the *Bundeskartellamt*, WuW/E DE-V1 ff.
[597] See 2 3 4 1 *supra*. *Cf* also § 130 II GWB, for the condition that the transaction has to have effect on the domestic market.
[598] § 39 VI GWB also prescribes the obligation to notify after implementation.
[599] § 39 GWB. For further details concerning the notification process and the notification form see Merkblatt des Bundeskartellamtes zur deutschen Fusionskontrolle (Information leaflet relating to the German control of concentrations, November 2000), available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Merkblatt_Dt_Fuko.pdf (German) and http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/00_MerkblattFuKoD_e.pdf (English).
[600] Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 39 Rn. 2 therefore points out correctly, that a sanction for violating the notification duty itself is meaningless, because either the merger is implemented (what can lead to a fine for the implementation itself) or the merger is not implemented (so notification was never compulsory). For the discussion on this issue see Rosenthal 'Neuordnung der Zuständigkeiten und des Verfahrens in der Europäischen Fusionskontrolle' (2004), EuZW 11/2004, 327 (329) footnote 13 with further references. Only importance of the section is, that correct details have to be given in the notification papers, see § 39 III 4 GWB.
[601] *Cf* Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 39 Rn. 1.
[602] *Cf* footnote 614 of this thesis *infra*.
[603] § 81 I Nr. 7 GWB. § 81 I Nr. 4 GWB in conjunction with § 39 VI GWB applies in the case of the omission of notification of a merger after its implementation.
[604] § 81 II 1 a.E. GWB.
[605] Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 40 Rn. 32.

§ 41 I GWB, in addition, can be regarded as a 'supporting provision'. It determines that all mergers, which are not approved by the *Bundeskartellamt* may not be implemented and that all transactions, which violate this principle, are of no effect.[606] The implementation of unapproved mergers is penalised under § 81 Nr. 1 GWB. Hence, a system of preventive control of mergers is codified under German Competition Law.
According to § 39 II GWB, the parties to the merger always have to notify the transaction. It is sufficient, however, that one of the participating parties to a merger fulfils its notification duty on behalf of the others.[607]

A fee is charged for the notification of mergers that are subject to merger control.[608] The amount of the fee is determined according to the personnel and material expenses of the *Bundeskartellamt*. Account is taken of the economic significance of the merger.[609]

2 3 4 3 Procedure

After notification, the *Bundeskartellamt* assesses, if the merger proceedings can be concluded and the merger can be approved without formal considerations of the effect on competition.

If additional assessment is necessary,[610] the *Bundeskartellamt* has to start the 'main review proceedings' (*Hauptprüfverfahren*).[611] A merger can only be prohibited, if the *Bundeskartellamt* has announced to the parties to the merger within one month after notification that the merger is going to be scrutinized in detail. Hence, the start of the main review proceedings within a month after notification is a condition for every prohibition.[612] Once the main review proceedings have been initiated, the *Bundeskartellamt* has to decide on the merger within four month. In general, a merger will be regarded as approved, if

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[606] However, the *Bundeskartellamt* may, upon application, grant an exemption from the prohibition of putting a merger into effect if the participating undertakings put forward important reasons for this, notably to prevent serious damage to a participating undertaking or to a third party, § 41 II 1 GWB.
[607] Thus, Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 39 Rn. 7 speaks of a 'joint obligation' of all participating firms.
[608] § 80 I 2 Nr. 1 GWB.
[609] § 80 II 1 GWB. In principle, the fee may not exceed € 50.000, *cf* § 80 II 2 Nr. 1 GWB.
[610] Notably because of the complexity of the case, *cf* BT-Drs. 13/9720, S.59.
[611] § 40 I 2 GWB.
[612] § 40 I 1 GWB. See also Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 40 Rn. 3.

the *Bundeskartellamt* has not prohibited it within four months after its notification.[613] Thus, not only the clearance by the *Bundeskartellamt*, but also the lapse of the above-described periods enables the parties to a proposed merger to implement it.[614]

According to § 40 II GWB, the *Bundeskartellamt* has to prohibit a merger, or approve it.[615] An approval can also be subject to certain conditions and obligations.[616] Nevertheless, these conditions and obligations may not require constant monitoring.[617] An approval or conditional approval may be revoked in view of certain unlawful actions of the parties to the merger, such as non-compliance with the imposed conditions or obligations.[618]

Where an approval has been revoked, the *Bundeskartellamt* has to order the demerger.[619] However, such a decision is only to be made, if no special exemption is granted. The parties to a prohibited merger can apply[620] within one month after the prohibition for exemption.[621] The Federal Minister for Economic Affairs and Employment can grant such an exemption. Here again, this concept is called 'Minister's permission' (*Ministererlaubnis*) and is subject to strict conditions, enumerated in § 42 GWB.[622]

According to this section, the Minister approves a merger, if advantages of the merger for the economy as a whole 'offset' the restraints of competition, or the merger is justified by 'overriding public interest'.[623] It is impossible to specify a precise point of delineation between these two alternatives.[624] However, the term 'public interest' embraces besides

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[613] § 40 II 2 GWB. *Cf* § 40 II 3 Nr. 1 to 3 GWB for exceptions.
[614] On the other hand, anyone, who deliberately or negligently puts into effect a notifiable merger, which has not been cleared by the *Bundeskartellamt* or where the described periods have not elapsed, or who participates in putting such merger into effect can be punished by a fine even up to € 500.000, § 81 II 1 GWB in conjunction with § 81 I Nr. 1 GWB and § 41 I 1 GWB.
[615] See in detail 2 3 4 4 2 *infra*.
[616] § 40 III GWB.
[617] § 40 III 2 GWB. On this aspect see KG, WuW/E OLG 1937 (1944) – *Thyssen-Hüller*; for the different forms of possible conditions see in detail Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 40 Rn. 20 ff.
[618] § 40 III 2 in conjunction with § 12 II 1 Nr. 2 and 3 GWB. See also Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 40 Rn. 27.
[619] § 41 III 1 GWB.
[620] It suffices that one of the involved enterprises applies for the exemption, Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 42 Rn. 17.
[621] See § 42 III GWB.
[622] See already 2 3 3 2 1 *supra* for exemptions from prohibited cartels.
[623] § 42 I 1 GWB.
[624] Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 42 Rn. 4.

economic values also social, cultural, and moral goods and values.[625] The Minister regarded for instance the safeguarding of jobs[626] and military-political reasons as such interests.[627] Hence, while the *Bundeskartellamt* principally has to take into account only aspects of competition, the Minister for Economic Affairs and Employment may consider a wider range of aspects.[628]

Aspects such as the removal of structural crises, the strengthening of international competitiveness or the maintenance or the creation of essential economic sectors[629] have been made out by the Minister as 'advantages of the merger for the economy as a whole'.[630]

The competitiveness of the enterprises involved on markets beyond the application of the GWB has to be taken into account, too.[631] Additionally, the section imposes that the Minister's permission may only be given if the 'order of the market economy' is not endangered by the dimension of the restrains of competition.[632]

Finally, the 'Minister's permission' may be subject to conditions if necessary.[633] The legislature seemed to be aware of the risks of such an exemption, but nevertheless wanted to empower the Minister in exceptional cases to overrule the decisions of the competition authorities.[634] So the Minister for Economic Affairs and Employment has to inform the *Mo-*

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[625] See Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 42 Rn. 5.
[626] This argument was only regarded as sufficient interest, because the merger led also to other advantages, notably international competitiveness.
[627] See BMWi, WuW/E 177 (182) – *IBH/Wibau*; BMWi, WuW/E 191 (198) – *Daimler/MBB*.
[628] See Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 42 Rn.1.
[629] Notably the energy supply sector.
[630] *Cf* Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 42 Rn. 9 with further references.
[631] § 42 I 2 GWB.
[632] § 42 I 3 GWB.
[633] § 42 II 1 GWB.
[634] *Cf* Begründung zum Regierungsentwurf, BT-Drs. 13/9720, S.44 hh).

nopolkommission,[635] which issues its opinion of the exemption,[636] although this statement is not binding.[637]

The decisions of the *Bundeskartellamt* constitute administrative acts, which can be contested (so-called '*Beschwerde*') within one month to a Higher Regional Court (*Oberlandesgericht*[638]).[639] According to § 63 IV GWB, the Higher Regional Court of that district, where the relevant competition authority has its seat, has exclusive jurisdiction over this appeal. In case of §§ 35 to 42 GWB, only that Higher Regional Court, where the *Bundeskartellamt* is based, has jurisdiction.[640]

If this remedy does not succeed, an appeal to the Chamber for Competition Matters at the German Federal Court (*Kartellsenat des Bundesgerichtshofs*) is possible. The *Bundesgerichtshof* only analyses if the High Court has violated the law with its decision. It does not examine the facts (so-called *Rechtsbeschwerde* or *Revision*).[641]

Only the parties that participated in the merger proceedings may contest the decisions of the *Bundeskartellamt*.[642] According to § 54 II and III GWB, every person who 'applied for the instituting of legal proceedings,'[643] but also cartels, firms or trade association, against which the proceedings are directed,[644] are regarded as 'participant,' or persons or associations of persons, if their interests are substantially affected by the decision and they have been summonsed by the competition authorities.[645] Finally, in the case of share or assets purchases, vendors also are participants.[646]

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[635] See 2 3 2 *supra*.
[636] See for instance: Zusammenschlussvorhaben der Georg von Holtzbrinck GmbH & Co. KG mit der Berliner Verlag GmbH & Co. KG – 36. Ergänzendes Sondergutachten der Monopolkommission (April 2003), available at: http://www.monopolkommission.de/sg_36/text_s36.pdf.
[637] Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 42 Rn. 20.
[638] That is the high court and court of appeal of a *Land* (German region).
[639] § 63 GWB.
[640] Hence the *Oberlandesgericht* Düsseldorf is competent for the hearing of appeals against merger decisions (the *Bundeskartellamt* moved to Bonn in 1999). Before this time, the BKartA had its seat in Berlin, which explains the plurality of decisions by the *Kammergericht* (Higher Regional Court of Berlin).
[641] For the case of an amendment of the law during the proceedings *cf* BGH, WuW/E Verg 297 (305) – *Tariftreueerklärung II*; BGH, WuW/E DE-R 399 (401) – *Verbundnetz* with further references.
[642] § 63 II GWB.
[643] § 54 II Nr. 1 GWB.
[644] § 54 II Nr. 2 GWB.
[645] § 54 II Nr. 3 GWB.
[646] § 54 II Nr. 4 GWB. This section refers to 'cases of § 37 I Nr. 1 or 3,' see 2 3 4 1 2 *supra*.

Hence, third parties interested in the outcome of a case may only take legal action against decisions of the *Bundeskartellamt*, such as merger approvals, if the competition authorities have requested them to participate in the proceedings. At first glance, it seems unfair to make legal actions of third parties dependent on the competition authority's summons, but if the interests of a third party are substantially affected, there is a proper right to participate,[647] for which the party may – as expressly set out in § 54 II Nr. 3 GWB – apply.

2 3 4 4 Consideration on the merger's effect on competition

German competition authorities are concerned with the potential effects of mergers on competition. As under South African law, not only horizontal mergers but also vertical mergers may raise competition concerns. Vertical mergers can be particularly problematic if the acquiring firm gains eminent influence on the downstream market in a post-merger scenario. This, for instance, can be the case if a newspaper company acquires interests in a newspaper retailer, as happened in the *ASV/Stilke* case.[648] In this case, the Axel Springer AG (a big publisher) intended to buy shares of the Stilke Buch- und Zeitschriftenhandelsgesellschaft mbH (a distributor and newspaper retailer). The merger was prohibited, even though only minority shares would have been acquired.[649] The competition authorities were concerned about the influence on competition on the upstream (newspaper) market, since Springer would have been in a position widely to promote the sales of its own newspapers via the retailer's shops, disadvantaging competitors.[650] No publishing houses are currently involved in the newspaper retail business in Germany, and an acquisition of shares of a retailer was regarded as being detrimental to the principle of neutrality[651] in this sector.[652]

2 3 4 4 1 Definition of the relevant market

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[647] Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 40 Rn. 29.
[648] BGH, WuW/E DE-R 609 ff. – *ASV/Stilke*.
[649] In this case, a stake of 24%.
[650] See BGH, WuW/E DE-R 609 ff. – *ASV/Stilke* par II 2. c).
[651] This principle shall guarantee a fair distribution of all press products.
[652] See BGH, WuW/E DE-R 609 ff. – *ASV/Stilke* par II 2. e).

For the assessment of the effects of a merger on competition, again, the relevant market has to be defined first. German authorities and jurisprudence define the product market from the customer's point of view (functional substitutability of goods and services), a concept that is colloquially referred to as *Bedarfsmarktkonzept*.[653] Hence, all products are part of a relevant product market, which are – from a reasonable, average customer's point of view – apt to accommodate the demand in the same way (and are therefore substitutable), even if they differ in certain details, like construction, quality, or price.[654] A customer may be the end consumer, but also a wholesaler or retailer, depending on which level the merger would take place. If a merger between manufacturers is concerned, competition authorities assess, to whom the products of the parties are sold.[655] The end consumers' demand influences the market strategies and demand of all players 'higher' in the market chain, so also their behaviour has to be taken into account,[656] especially when end consumer products are sold.[657]

Competition authorities also assess the relevant geographic market for all relevant product markets. Authorities are obliged to assess the merger's effect on competition only insofar as the GWB applies, hence in the German territory.[658] Nevertheless, influences on competition from abroad may be taken into account in terms of § 36 I GWB.

2 3 4 4 2 Prohibition or approval of mergers

According to § 36 GWB, the *Bundeskartellamt* has to prohibit a mergers, if it the transaction is calculated to lead to a market-dominant position or strengthening of it.

The existence of such a market-dominant position is defined in § 19 II GWB, which also applies to mergers, even though this section refers to the abuse of a market-dominant po-

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[653] '*Bedarf*' means in this context the customers' need for certain products and services.
[654] 'Zu einem sachlich relevanten Markt gehören alle Produkte, die in den Augen eines vernünftigen, durchschnittlichen Abnehmers wegen gleicher Eignung und Verwendungszwecke geeignet sind, einen bestimmten Bedarf auf zumutbare, gleichwertige Weise zu befriedigen, auch wenn sie sich in Einzelheiten wie Konstruktion, Qualität, Preis und ähnlichem unterscheiden', KG, WuW/E OLG 3795 – *Pillsbury–Sonnen-Bassermann*. See also BGH, WuW/E BGH 2433 (2436 f.) – *Gruner + Jahr/ Zeit II* and BGH, WuW/E BGH 2150 (2153) – *Edelstahlbestecke*.
[655] *Cf* OLG Düsseldorf, WuW/E DE-R 1112 (1113) – *Melitta/Airflo*.
[656] In detail BKartA, decision of 02.03.2004, B 10 - 102/03.
[657] KG, WuW/E OLG 3795 – *Pillsbury–Sonnen-Bassermann*.
[658] BGH, WuW/E BGH 3026 (3029 f.) – *Backofenmarkt*.

sition.[659] According to this provision, an enterprise is market-dominant, if there is no or only insignificant competition in the market in which it acts as offeror of products or purveyor of services or as customer.[660] Alternatively, there is also market dominance, if the enterprise has a 'paramount market position' vis-à-vis its competitors.[661] The *Bundesgerichtshof* postulated that an enterprise has such a 'paramount market position,' if it has reached a lead over its competitors, that provides the enterprise with a paramount scope of action, which is no longer controlled effectively by competition.[662] The 'paramount market position,' however, has to be determined by a plurality of factors, which are enumerated in the section, 'especially' the market share and financial strength of the enterprise and barriers to entry to the market for other firms.[663] The assessment of the market share is of particular importance,[664] because the market share shows the market position of an enterprise and its economic success on this market and thus indicates its ability to prevail against its competitors.[665] South African competition authorities impute relevance to market share data as an indicator of competitiveness in the same way:

> 'Although market share data are rarely dispositive and must always be complemented by an analysis of entry barriers and other dynamic features of the market in question, they are legitimately and widely used as reliable prima facie indicators of the competitive temperature in a given market.'[666]

§ 19 III 1 GWB sets out a presumption for market dominance, if the enterprise has at least a market share of one-third. The presumption is refutable, though, for instance in cases where the merged entity would have a market share exceeding this margin, but substantial competition can be expected due to the market structure.[667] § 19 III 2 GWB sets out a presumption for market dominance for oligopolies.[668]

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[659] Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 36 Rn. 59.
[660] § 19 II 1 Nr. 1 GWB.
[661] § 19 II 1 Nr. 2 GWB.
[662] *Cf* for instance BGH, WuW/E BGH 1445 (1449) – *Valium.*
[663] *Cf* § 19 II GWB in Appendix II of this thesis.
[664] See BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II* at V. 1.2.3.1.
[665] See BGH, WuW/E BGH 1501 (1503) – *Kfz-Kupplungen.*
[666] *Murray & Roberts Ltd / The Cementation Company (Africa) Ltd* (CT 02/LM/Jan04) par 31.
[667] *Cf* for instance BKartA, decision of 04.05.2004, B 3 - 2450 – Fa - 154/03 – *Colgate-Palmolive Company/Gaba Holding AG* par 57.
[668] In detail see Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 36 Rn. 111 f.

The *Bundeskartellamt* published guidelines,[669] in which it sets out how it interprets market domination. For instance, a transaction through which an internal change of control of a firm is caused – like the change from jointly exercised control to sole control – is regarded as strengthening market domination, if the transaction intensifies the influence of the acquiring firm on the target firm.[670]

The proposed merger has to 'lead' to a market-dominant position or the strengthening of it. This means that the merger has to be *causal* to the detrimental effects. Hence, it is accepted that a merger, which is calculated to lead to a market-dominant position or a strengthening thereof, has to be approved, if even without the proposed transaction, a deterioration of the structure of competition would occur.[671] However, according to the *Bundeskartellamt* such an approval requires, firstly, that the target firm cannot be sold to a third party, which would continue to run the enterprise and, secondly, it must be shown, that the target firm would have to leave the market without the merger. Finally, it must be proven that the market shares of the target firm would fall completely to the market-dominant acquiring firm.[672] The condition that a significant competitor will be removed from the market and competition will be diminished in consequence of the failure of this competitor is equivalent to the 'failing-firm doctrine' as known in South Africa. The German approach is modelled on the European Commission's test, which requires that the following conditions be satisfied:

> 'Firstly, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative purchase than the notified

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[669] Auslegungsgrundsätze des Bundeskartellamtes zum Begriff der Marktbeherrschung (Principles of Interpretation, October 2000), available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Auslegungsgrunds.pdf (German) and http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/02_Checkliste_e.pdf (English).

[670] BKartA, Principles of Interpretation, p. 9.

[671] BGH, WuW/E BGH 1655 (1660) – *Zementmahlanlage II*; WuW/E BGH 2731 (2736) – *Inlandstochter*.

[672] 'Bei einem Zusammenschluss, der zur Entstehung oder Verstärkung marktbeherrschender Stellungen führt, sind die Untersagungsvoraussetzungen dann zu verneinen, wenn auch ohne den Zusammenschluss dieselbe Verschlechterung der Wettbewerbsstruktur wie durch den Zusammenschluss einträte (mangelnde Kausalität des Zusammenschlusses). Dies setzt insbesondere voraus, dass das zu erwerbende Unternehmen an einen Dritten, der es fortführen würde, nicht veräußerbar ist, ferner, dass es ohne den Zusammenschluss aus dem Markt austreten müsste und dass seine Marktanteile im letzteren Fall vollständig dem marktbeherrschenden Erwerber zuwachsen würden', BKartA, decision of 10.12.2002, B 6 - 22121 – U - 98/02 – *Holtzbrinck/Berliner Verlag/G+J I* at V.1.3.

merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market.'[673]

The European Commission points out that the inevitability of the assets of the failing firm leaving the market in question may, notably in a case of merger to monopoly, 'underlie a finding that the market share of the failing firm would in any event accrue to the other merging party.'[674]

As already pointed out, § 36 GWB obliges the *Bundeskartellamt* to prohibit a merger, if it is likely that the merger will lead to a market-dominant position or will strengthen it. There is one exception, though, which resembles the concept of 'pro-competitive gains' under South African law. According to § 36 I, 2. HS GWB, the proposed merger does not have to be prohibited, if the participating parties can prove that the merger will 'also lead to improvements in the competition conditions and that these improvements outweigh the disadvantages of market domination' (so-called *Abwägungsklausel*). Such improvements are regarded as exceptional,[675] though, and mere improvements, which do not *outweigh* the detrimental effects of the merger, such as the improvement of the competitive position of only one competitor, are not sufficient.[676]

2 3 4 5 Practice of merger control

According to § 53 I GWB, every second year, the *Bundeskartellamt* has to publish a report on all aspects of its work (*Tätigkeitsbericht*).[677] Every year, there are about 1500 merger decisions.[678] The *Bundeskartellamt* approves most of the proposed mergers. For the re-

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[673] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 90, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf. See also *Iscor Limited / Saldanha Steel (Pty) Ltd* (CT 67/LM/Dec01) par 82.

[674] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 footnote 111, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf) referring to the judgment of the European Court of Justice, joined cases No. C-68/94 and C-30/95 – *Kali and Salz*, par 115-116.

[675] See for instance KG, WuW/E OLG 2228 (2233) – *Zeitungsmarkt München*.

[676] Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 36 Rn. 152.

[677] See for instance the latest published report: Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2001/2002 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet, BT-Drs. 15/1226, also available at: http://dip.bundestag.de/btd/15/012/1501226.pdf.

[678] Newssheet of the *Bundeskartellamt*, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/03_Infobrosch.pdf.

port year 2001/2002, the *Bundeskartellamt* received 3152 notifications. Of these, only 95 have been assessed in the main review proceedings[679] and only 8 have been prohibited; 62 have been approved unconditionally, 25 conditionally.[680]

2 3 5 Mergers between newspaper enterprises

Generally, mergers between newspaper enterprises are subject to the same competition rules as other mergers. There is no special act, nor special authority, which controls such mergers. Arguably, there is no 'unique' press- or media merger control. Nevertheless, the consideration of media mergers shows some special features.

In 1976, special provisions for the control of mergers between publishing houses were enacted by the third amendment of the GWB, only three years after the German legislature introduced a system of merger control. In fact, these provisions were introduced, because it turned out that the general provisions of 1973 with their relatively high thresholds were not apt to guarantee effective competition in the newspaper sector, consisting predominantly of local or regional enterprises with smaller turnovers. Hence, in the 1960s and 70s, there had been a large number of mergers, which resulted in high concentration in many press markets.[681] The government wanted to face increasing concentration on these markets with specific provisions.[682]

Since that time, certain sections exist, which only apply to 'press mergers'. Moreover, the competition authorities have developed a special interpretation of the GWB for media mergers, when it comes to the definition of the relevant market and market dominance.

2 3 5 1 Application of the provisions for the control of mergers

For the consideration of mergers between publishing houses, competition authorities have to assess like in any other merger case, whether the proposed transaction can be scrutinized under the provisions set out in the GWB for the control of mergers. Hence, the

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[679] See 2 3 4 3 *supra*.

[680] Between 1973 and 2002, only 173 mergers have been prohibited, of which only 89 were non-appealable; in 45 cases the prohibition was revoked. *Cf* Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2001/2002 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet, BT-Drs. 15/1226, p. 12-14, also available at: http://dip.bundestag.de/btd/15/012/1501226.pdf.

[681] *Cf* Graph 7 (2 3 5 4 1 2 *infra*).

[682] Weberling 'Novellierung der Pressefusionskontrolle: Auslaufmodell Pressevielfalt? Zur geplanten Lockerung des Pressekartellrechts' (2004), *pro*media, Nr. 7/04, 22.

transaction has to be within the scope of application of the GWB (*Anwendungsbereich des GWB*). But in the case of publishing mergers, the provisions concerning merger control apply, even if the turnovers of the merging parties are relatively low. According to § 38 III GWB, for the calculation of the combined annual turnover of the merging parties, the actual turnover has to be multiplied by 20 when it comes to publishers. This section is referred to as 'press calculation clause' (*Presserechenklausel*), even though it nowadays also applies to broadcasting and the production and distribution of broadcasting programmes.[683] However, this provision especially applies to the turnovers of undertakings, whose operations wholly or partially consist of the publication, production or distribution of newspapers, magazines and parts thereof. 'Newspapers' and 'magazines' are defined as all periodical publications.[684] The definition of 'newspaper' includes advertisement papers, if they contain a 'not completely insignificant editorial part.'[685] The calculation method applies to all mergers, in which publishing houses are involved, even if a particular merger is outside the press or broadcasting sector.[686]

Hence, the control of mergers in this field happens much sooner than in other market segments. The participating parties to a newspaper merger only must have had worldwide turnovers of over € 25 million in total during the last business year preceding the merger and, additionally, the domestic turnover of at least one of the participating undertakings must have been more than € 1,25 million, for the transaction to be within the scope of application of the GWB.

Moreover, according to § 35 II 2 GWB, the above-mentioned '*de-minimis* clause' (§ 35 II Nr. 1 GWB) does not apply to mergers between print media enterprises. As the provision sets out, the *de-minimis* clause does not apply, if the merger restrains competition concerning 'the publisher, the production and distribution of newspapers and magazines or parts thereof'. So this is not an exception for all media, but only applies to the print media

[683] The section was extended to broadcasting only with the sixth amendment of the GWB (1999).
[684] Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 38 Rn. 17.
[685] BGH, WuW/E BGH 1905 (1905 f.) – *Münchner Anzeigenblätter;* confirmed by BVerfG, WuW/E VG 307 (308) – *Münchner Anzeigenblätter.* See also BGH, WuW/E BGH 2443 (2449) – *Südkurier/Singener Wochenblatt.*
[686] Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 38 Rn. 16.

and not for instance to broadcasting, although § 38 III GWB also applies to the latter sector.[687]

Furthermore, the 'bagatelle market clause' (§ 35 II Nr. 2 GWB) applies to press mergers. Nevertheless, this section is not often of decisive importance, as the 'press-specific' turnover calculation in § 38 III GWB leads to a figure of € 0,75 million for press-related markets.[688] Thus, only markets, on which products or services of a sales volume of less than this amount were transacted during the last calendar year, are not subject to control.

Secondly, the transaction has to fulfil the statutory definition of a merger (*Zusammenschlusstatbestand*) as set out in § 37 GWB. As shown above, competition authorities interpret this section quite broadly.[689] Moreover, the *Bundeskartellamt* pointed out, that a substantial part of the assets within the meaning of § 37 I Nr. 1 GWB

> 'means not only parts of the assets which, in terms of quantity, are sufficiently large in relation to the seller's total assets. Rather, a part of the assets is substantial whenever it has a significance of its own as regards production, distribution targets and current market conditions and whenever it consequently appears to be a unit that can be separated from the seller's other assets.'[690]

In the case of newspaper mergers, the courts concluded that the assignment of the title of a newspaper[691] is a transaction in terms of § 37 I Nr. 1 GWB. The permission to use and publish a newspaper title would fulfil the requirement of being the acquisition of a 'substantial part' of the assets of another enterprise in terms of § 37 I Nr. 1 GWB.[692] Hence, in the *G+J/RBA* case,[693] the acquisition of the exclusive licence to publish the magazine *National*

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[687] See Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 35 Rn. 34.
[688] *Cf* recently BKartA, decision of 01.03.2005, B 6 – 22122 – Fb – 103/04 – *S-W Verlag* at IV.; also see Bechtold 'Medienkartellrecht – Aktueller Überblick über die deutsche Praxis' (2000), AfP 2000, 436 (437).
[689] See 2 3 4 1 2 *supra*.
[690] Information leaflet relating to the German control of concentrations, November 2000, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/00_MerkblattFuKoD_e.pdf, p. 12.
[691] Under German law, the newspaper title (the name of the newspaper) is generally protected under German Trademark Law with the publication of the first edition of the newspaper (it is even possible, to obtain protection before this time) and thus constitutes a right, which can be assigned.
[692] KG, WuW/E OLG 4095 (4102) – *W + i Verlag/Weiss-Druck*. See also BKartA, decision of 01.03.2005, B 6 – 22122 – Fb – 103/04 – *S-W Verlag* at V.
[693] BKartA, decision of 02.08.2004, B 6 - 026/04 – *Gruner + Jahr/RBA*.

Geographic on the German market in a German edition was labelled a merger, especially because of the economic strength of the title.

2 3 5 2 Definition of the relevant market

On a newspaper market level, the product market – as for other industries[694] – is defined from the customer's point of view. As regards newspapers, readers and advertisers are the publishers' customers, either buying the press product itself or advertising space in the newspaper. Accordingly, the *Bundeskartellamt* and the competition courts differentiate between the 'reader market' and 'advertisement market'.[695] Moreover, it has been stated clearly that there are different sub-markets. The diverging characteristics of different types of newspapers and magazines, like their content and periodical appearance, determine, whether the publication can be regarded as substitutable with others to accommodate the demand of the reader or the advertising industry in the same way. Competition courts, however, already affirmed that there is no substitutability between books and magazines.[696] The *Bundeskartellamt* also distinguishes between newspaper and magazine markets, even though the delineation between newspapers and magazines is not always easy to draw. It is characteristic for magazines – in contrast to newspapers – that their content, generally speaking, focuses on certain topics and subjects.[697] In practice, though, also newspapers, especially weeklies, have such 'magazine elements,' or even proper 'magazine parts'.

According to the *Bundeskartellamt*, the 'reader market' and 'advertisement market' for press products are divisible themselves. Competition authorities use certain criteria to subdivide the 'reader markets'. As far as newspapers are concerned, the criterion of topicality is used to differentiate between daily- and weekly-distributed newspapers.[698] Sunday papers (that are the seventh issue of a daily) are considered to be dailies, because they are only a special daily for Sundays,[699] in contrast to newspapers only being distributed on Sundays.[700]

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[694] See 2 3 4 4 1 *supra*.
[695] See for instance KG, WuW/E OLG 2228 ff. – *Zeitungsmarkt München*.
[696] See KG, WuW/E OLG 2825 (2832) – *Taschenbücher*.
[697] See Löffler *Presserecht* (1997), 4. Auflage, Einleitung, Rn. 14 bis 16.
[698] BGH, WuW/E BGH 2112 (2121 f.) – *Gruner + Jahr/Zeit I*.
[699] BGH, WuW/E BGH 2433 (2438) – *Gruner + Jahr/Zeit II*.
[700] See BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II*.

Dailies are divided into 'newspapers on subscription' (*Abonnement-Tageszeitung*) and 'street-traded newspapers' (*Straßenverkaufszeitung* or *Boulevardzeitung*), because these types of dailies differ in terms of their depth of the coverage and layout.[701] This differentiation is controversial[702] and misleading, because subscribed newspapers are in general street-traded as well.[703] A further distinction is drawn between national and regional or local dailies.[704] Hence, competition authorities defined a specific 'reader market for daily-distributed newspapers on subscription with regional or local coverage'.[705] There is a clear line between this product market and the reader markets for street-traded newspapers on the one hand, and for national dailies on the other, because these newspapers are not substitutable from the reader's point of view. In contrast to national dailies, newspapers with regional or local coverage would accommodate the reader's demand for regional or local news and information. Compared to street-traded newspapers, they differ in depth of the coverage and layout.

Typically, there are no daily or regional journals. However, magazines are classified as publications for a broader readership (*Publikumszeitschriften*) and specialist journals (*Fachzeitschriften*).[706] The former have been divided into political weekly journals[707] and general magazines[708] by the competition courts. The *Bundeskartellamt* subdivides the market for publications with a broader readership into 'special interest magazines' and 'general interest magazines,' because magazines that accommodate the reader's demand for a certain topic would not be substitutable with magazines with other special or general topics.[709] Thus, laying meticulous stress on the interests and demand of the reader, very

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[701] Constant court ruling, see for instance BGH, WuW/E BGH 1854 (1856 f.) – *Zeitungsmarkt München*; BGH, WuW/E BGH 2425 (2428) – *Niederrheinische Anzeigenblätter*. See also KG, WuW/E OLG 2228 (2230) – *Zeitungsmarkt München*; KG, WuW/E DE-R 270 (275 f.) – *ASV/Stilke*.

[702] *Cf* for instance the case BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II* at V.1.1.1, in which Holtzbrinck pleaded for the definition of one single market including both regional dailies on subscription and street-traded newspapers.

[703] See Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 36 Rn. 160.

[704] *Cf* BGH, WuW/E BGH 2112 ff. – *Gruner + Jahr/Zeit I*.

[705] BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II* at V.1.1.1.

[706] See for instance BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA*. Cf Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 36 Rn. 161; for the specialist journals see also BKartA, WuW/E 1709 (1710) – *Bertelsmann/Deutscher Verkehrsverlag*.

[707] BGH, WuW/E BGH 2433 (2436) – *Gruner + Jahr/Zeit II*.

[708] BGH, WuW/E BGH 2112 (2114) – *Gruner + Jahr/Zeit I*.

[709] BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA*.

detailed definitions of the different markets for newspapers and magazines have been developed by the competition authorities. Hence, the *Bundeskartellamt* even defined a subdivision of the special interest magazine market, namely the market for 'popular science magazines'.[710] Arguably, the narrow definition of markets by the *Bundeskartellamt* is very detailed and not favourable for the parties to a merger, because market domination is more likely to occur on such narrowly defined markets. Thus, in the *Gruner + Jahr/RBA* case,[711] the parties contested the market definition of 'popular science magazines' and pleaded for a broader understanding of reader markets, in this case for a market of 'non-fiction or report magazines,' which would also include niche publications, like travel magazines.

The 'advertisement market' can be subdivided, too, although competition authorities generally define broader product markets, because the demand of the advertisers and not the readers' demand is of importance. The area of distribution and not the form of publication is determinative, because advertisers regularly place advertisements in publications of different reader markets at the same time. Hence, daily-distributed newspapers (street-traded and on subscription) and advertisement papers can be classified as belonging to the same advertisement market.[712] Criteria for the definition of advertising markets are the price, the frequency of publication and hence actuality, because these factors determine the clientele. Here again, it has to be asked if different press products are substitutable from the advertisers' point of view.[713] In the case *Südkurier/'akzent'*,[714] the *Bundeskartellamt* assessed different markets, on which the parties to the proposed merger (a publisher, which sold regional dailies on subscription and a regional, free of charge distributed 'cultural magazine') were active, especially because of the 'completely different market strategies' for advertisers. Hence, the *Bundeskartellamt* concluded that the merger would not lead to a strengthening of the – uncontroversial – dominant position of the publisher with its regional dailies on subscription on the advertising markets.

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[710] BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA*; for the structure of this market see Graph 6 (2 3 5 4 1 2 *infra*).
[711] BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA.*
[712] See BGH, WuW/E BGH 1685 (1692) – *Springer/Elbe-Wochenblatt;* WuW/E BGH 2425 (2428) – *Niederrheinische Anzeigenblätter*; WuW/E BGH 2443 (2449) – *Südkurier/Singener Wochenblatt.*
[713] See BGH, WuW/E BGH 1905 (1907) – *Münchner Anzeigenblätter.*
[714] BKartA, decision of 12.04.2000, B 6 - 20/00 – *Südkurier/'akzent'.*

In a recent case,[715] the *Bundeskartellamt* even defined an own market for 'national recruitment advertisements'.[716]

The relevant geographic markets for newspapers depend on the area of distribution, which can be nationwide, regional, or even local. Competition courts precisely define the geographic market as well and have even developed sub-local advertisement markets.[717] Mostly, the 'core area of distribution' (*Kernverbreitungsgebiet*) of a newspaper is decisive. If a newspaper is for instance mainly distributed in a city, but also to some extent in the urban area around it, the geographic market will be defined as only the city market, if the coverage is primarily focussed on topics concerning the city. Thus, in the *Holtzbrinck/Berliner Verlag/G + J* case the *Bundeskartellamt* defined the geographic market as the 'market of Berlin,' even though the respective newspapers were also sold in the region Brandenburg and even though one page of the newspaper *Tagesspiegel* was dedicated to specific coverage of this region.[718]

2 3 5 3 Prohibition or approval of newspaper mergers

As mentioned above, there are no special provisions regarding the effects of a media merger on competition. The above-described lower thresholds for mergers involving media companies were inserted in order to make control of transactions in this sector possible at all. Thus, the *Bundeskartellamt* assesses, whether it is likely that the merger will lead to a market-dominant position or will strengthen it.[719] Barriers to entry to the market for other firms in terms of § 19 II GWB are of special importance in newspaper mergers.[720] Moreover, the circulation and the enterprises' resources[721] have to be assessed and taken into

[715] BKartA, WuW/E DE-V100 ff. – *Stellenmarkt für Deutschland GmbH.*
[716] For further details of the definition of the relevant product market for press products see Golz *Der sachlich relevante Markt bei Verlagserzeugnissen* (2003).
[717] BGH, WuW/E BGH 1905 (1906 f.) – *Münchner Anzeigenblätter.*
[718] In Berlin itself, 82,9% of the *Berliner Zeitung*, 87,5% of the *Tagesspiegel* and 81,6% of the *Berliner Morgenpost* (the latter is the main competitor of Holtzbrinck on this market and belonging to the Axel Springer AG) were sold, see BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II* at V.1.1.2; for the distinction between core distribution areas and marginal areas see also OLG Düsseldorf, WuW/E OLG 1645 (1649) – *Valium Librium.*
[719] § 36 GWB in conjunction with § 19 II GWB, see 2 3 4 4 2 *supra.*
[720] *Cf* BGH, WuW/E BGH 2425 (2429) – *Niederrheinische Anzeigenblätter;* BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA.* See in detail 2 3 6 2 2 *infra.*
[721] This could be structural or personal resources, for instance of the holding company of a publishing house. See for example BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA* (G+J is part of Bertelsmann).

account to determine a market-dominant position.[722] Nevertheless, the mere count of distributed press products does not necessarily equal the market share. The turnover achieved is decisive. This differentiation is particularly crucial in the case of free of charge distributed press products, like advertisement papers. Here, turnovers achieved from the sales of advertising space have to be looked at.[723]

It has consistently been ruled in press merger cases, that a 'strengthening of market domination' in terms of § 36 GWB does not need to result in a 'qualitative minimum effect'; every strengthening – even if very low – is sufficient, if there is a quasi monopoly in that market.[724] In press markets, such quasi monopoly situations exist quite often.[725]

Competition authorities also take into account the interdependences between the 'reader market' and 'advertisement market,' because both are characterised by a 'close reciprocal relation.'[726] A dominant position on the advertisement market is likely to guarantee stable income. This increases the resources of a newspaper company to improve the quality of the press product and hence eventually the amount of readers. The high circulation, in turn, guarantees higher profits, because of the increase in sold newspapers.[727] Moreover, profits will also increase, because advertising is linked to the amount of distributed newspapers.[728] Structural changes on one market may therefore have a strong impact on the other market.[729] At least in the long term, changes of competition on the reader market are thus likely to influence also the advertisement market. The Higher Regional Court of Berlin (*Kammergericht*) declared in the *Zeitungsmarkt München* case,[730] that if a publishing house has a predominant market position on the reader market, it is an 'important factor, if the prime position of the enterprise on the reader market can be balanced permanently by

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[722] *Cf* BGH, WuW/E BGH 1905 (1907) – *Münchner Anzeigenblätter*.
[723] BGH, WuW/E BGH 1905 (1907) – *Münchner Anzeigenblätter*. In this case, however, the BGH stated that there was no decisive difference between the share in the total circulation of the respective markets and the share in the totality of advertisements, because the number of distributed products would usually determine the price of advertisements.
[724] See BGH, WuW/E BGH 1685 (1691 f.) – *Springer/Elbe-Wochenblatt*. See also Bechtold 'Medienkartellrecht – Aktueller Überblick über die deutsche Praxis' (2000), AfP 2000, 156 (158) with further references.
[725] See 2 3 5 4 1 2 *infra*.
[726] KG, WuW/E OLG 2228 (2232) – *Zeitungsmarkt München*. This interrelation is often called 'reader-advertisement-spiral' (*Leser-Anzeigen-Spirale*).
[727] Especially for press products, economy of scale is important.
[728] In Germany, the prices for advertisements are measures in 'price per 1000 reader contacts' (*Tausendkontaktpreis* (TKP)).
[729] *Cf* KG, WuW/E OLG 2228 (2232) – *Zeitungsmarkt München*.
[730] KG, WuW/E OLG 2228 (2232) – *Zeitungsmarkt München*.

the success of its competitors on the advertisement market and the scope of action of the leading enterprise on the reader market therefore may be limited and controlled.'[731]

If other publishers have a strong position on the advertisement market, it is more likely that they can face the leading position of the firm on the reader market. This can be explained by the importance of advertising for a newspaper, which guarantees the economic basis of a newspaper. Profits from advertising increase the paper's editorial and technical resources and thus ultimately guarantee the newspaper's success on the reader market.

The exception set out in § 36 I, 2. HS GWB (*Abwägungsklausel*) also applies to mergers between newspapers. Competition authorities have to assess, if the merger 'also leads to improvements of the competition conditions which improvements outweigh the disadvantages of the market domination'. Competition authorities sometimes recognise such improvements in press merger cases, if the proposed transaction safeguards the maintenance of an editorially independent newspaper.[732] Accordingly, several newspaper mergers with some anti-competitive aspects have been approved.[733] Nevertheless, the *Bundeskartellamt* is cautious with such 'safeguard-approvals' (so-called *Sanierungsfusionen*).[734] It rather uses the 'failing firm doctrine,'[735] to determine, whether a newspaper would be forced out of the market without the merger. The *Bundeskartellamt* stated that competition authorities could not rely on the merging parties' announcements and promises. As it pointed out, 'the editorial independence of daily-distributed newspapers of a concern is an entrepreneurial behaviour, which can be changed any time and may there-

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[731] 'Wegen der Bedeutung, die das Anzeigenaufkommen für die wirtschaftliche Grundlage einer Zeitung, aber auch für ihre redaktionelle und technische Ausstattung und damit letztlich für den Erfolg auf dem Lesermarkt hat, [...] stellt dieser Umstand bei der Abwägung, ob ein Unternehmen der Zeitungsbranche gegenüber seinen Wettbewerbern eine überragende Marktstellung hat, einen wesentlichen Faktor dar, wenn seine vorrangige Stellung auf dem Lesermarkt durch die Erfolge seiner Wettbewerber auf dem Anzeigenmarkt dauerhaft ausgeglichen werden und auf diese Weise der Verhaltensspielraum des auf dem Lesermarkt führenden Unternehmens beschränkt und kontrolliert werden kann.'; confirmed by BGH, WuW/E BGH 1854 (1856 ff.) – *Zeitungsmarkt München*.

[732] This is controversial, see KG, WuW/E OLG 2228 (2233) – *Zeitungsmarkt München* with further references.

[733] For instance in 1998, the merger between the newspapers *Kölner-Stadt-Anzeiger* and *Kölnischen Rundschau* was approved.

[734] See Birnbaum *Die Problematik von Sanierungsfusionen bei deutschen Tageszeitungen im Recht der Zusammenschlusskontrolle* (1989) for details.

[735] See 2 3 4 4 2 *supra*.

fore not be taken into account in terms of the control of mergers, which aims at the preservation of competitive structures.'[736]

The *Bundeskartellamt* always assesses possible improvements on the reader market and advertisement market in press merger cases, when it considers § 36 I, 2. HS GWB, acknowledging the interdependences between both markets.[737]

As regards conditional approvals, the *Bundeskartellamt* often approves a press merger subject to the condition that the publisher sells one or more of his newspapers to an independent third party, which is able to continue to run the paper(s).[738]

2 3 5 4 Practice of merger control

To understand press merger control as exercised by German competition authorities, the newspaper market situation has to be analysed in detail.

2 3 5 4 1 The newspaper and magazine market situation

First, the big German publishers will be described, and the newspaper and magazine markets will be examined thereafter.

2 3 5 4 1 1 Newspaper and magazine publishers

The Axel Springer AG (AS)[739] is the biggest publisher in Germany in the newspaper sector, publishing more than every fifth newspaper, that is a reader market share of over

[736] 'Die redaktionelle Selbständigkeit von Tageszeitungen eines Konzerns ist eine unternehmerische Verhaltensweise, die jederzeit geändert werden kann und deswegen bei der die Erhaltung wettbewerblicher Strukturen bezweckenden Zusammenschlusskontrolle nicht berücksichtigt werden darf', BKartA, decision of 10.12.2002, B 6 - 22121 – U - 98/02 – *Holtzbrinck/Berliner Verlag/G+J I* at V.1.2.1. and BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II* at V.1.2.2.

[737] See for instance BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II* at V.1.4.1.

[738] See for instance BKartA, decision of 22.08.2001, B 6 - 56/01 – *SV-C/WEKA*. *Cf* also Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2001/2002 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet, BT-Drs. 15/1226, also available at: http://dip.bundestag.de/btd/15/012/1501226.pdf, S.138.

[739] See http://www.axelspringer.de.

20%.[740] In 2004, Springer had an annual turnover of € 2,4 billion.[741] The group publishes and prints magazines,[742] books, advertisement papers, and all kinds of newspapers.[743] The most famous and biggest daily-distributed street-traded newspaper in Europe,[744] the *Bild* (nowadays approximately 3,7 million sold copies[745]), is published by AS.[746]

The Gruner + Jahr AG & Co. KG Druck- und Verlagshaus, Hamburg (G+J) is one of the biggest magazine publishers in Europe with a worldwide portfolio of 125 magazines.[747] In 2004, G+J had a worldwide turnover of more than € 2,4 billion.[748] 74,9% of the publishing house's shares are held by the Bertelsmann AG, which is a global media player in the field of books, press, print, broadcasting[749] and entertainment with a worldwide turnover of approximately € 16,8 billion in 2003.[750] However, on the magazine markets, there are several other big publishers, for instance the Heinrich Bauer Zeitschriften Verlag KG, Hamburg, with a turnover of € 1,66 in 2004 and worldwide 125 titles published.[751] Bauer publishes television-, youth-, and women's magazines.[752] As far as the two former categories are concerned, Bauer's national market share is approximately 50%, in the latter field it is around 40%. The Hubert Burda Media company is also one of the biggest magazine publishers in Germany,[753] and it even publishes 239 titles worldwide, with an annual turnover exceeding € 1,5 billion in 2003.[754]

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[740] See Graph 8 (2 3 5 4 1 2 *infra*). *Cf* also Hamann 'Außer Kontrolle' DIE ZEIT Nr. 17 (2005-04-21), available at: http://www.zeit.de/2005/17/springer-psm.

[741] Schulz 'Der Moskau-Peking-Express' DER SPIEGEL Nr. 18 (2005-05-02) 181. In 1996, the annual turnover was already around € 2,27 billion, *cf* BGH, WuW/E DE-R 609 ff. – *ASV/Stilke*.

[742] Such as *Hörzu*, *Bild der Frau*, *Auto Bild* and *Computer Bild*.

[743] AS publishes national and regional newspapers, on subscription and street-traded, such as *Bild*, *Hamburger Abendblatt*, *Die Welt*, *Berliner Morgenpost*, *B.Z.* and participates in the papers *Lübecker Nachrichten* and *Kieler Nachrichten*.

[744] See Publishing Market Watch, Sector Report 1: The European Newspaper Market (European Commission 2004, available at: http://www.publishing-watch.org/documents/PMW-o-20040316-02%20European%20Newspaper%20Publishing%20Submission%20Final.pdf) referring to World Press Trends 2002, International Federation of Audit Bureaux of Circulation.

[745] The circulation even used to be over 5 million in the 1980s.

[746] For details see BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II* at I 3.1.

[747] In Germany, G+J publishes several magazines, beside others the magazines *Stern*, *GEO*, *Brigitte*, *Capital*, *Eltern* and *Schöner Wohnen*, *cf* www.guj.de.

[748] Schulz 'Der Moskau-Peking-Express' DER SPIEGEL Nr. 18 (2005-05-02) 181.

[749] One of the big German private broadcasting company, the RTL Group, is controlled by Bertelsmann.

[750] € 5,2 billion were turned over in Germany.

[751] Schulz 'Der Moskau-Peking-Express' DER SPIEGEL Nr. 18 (2005-05-02) 181.

[752] Big titles are for instance *Bravo*, *TV Hören&Sehen* and *TV Movie*.

[753] Burda publishes for instance titles such as *Focus*, *Bunte* and *Freizeit Revue*.

[754] Schulz 'Der Moskau-Peking-Express' DER SPIEGEL Nr. 18 (2005-05-02) 181.

Another big publisher of newspapers and magazines is the Georg von Holtzbrinck group (Holtzbrinck), which had a worldwide turnover of around € 1,9 billion in 2003.[755] The group is active in the book sector and prints and publishes daily newspapers on subscription, political weeklies, but is also involved in broadcasting.[756] Holtzbrinck is one of the biggest publishing firms of regional newspapers in Germany.

The Westdeutsche Allgemeine Verlags AG (WAZ) also has to be named as an important publisher, especially on the (regional) daily-distributed newspaper market.[757]

2 3 5 4 1 2 Newspaper and magazine markets

The printing media industry (publishing and printing) is an important economic sector in Germany. As reported by the German Federal Statistical Office (*Statistisches Bundesamt*), publishing houses had turnovers of € 22,3 billion (€ 9,7 billion with distribution and € 10 billion with press advertising) in 1994.[758] In the same year, 3160 enterprises resident in Germany were engaged in the publication of a total of 1436 newspapers (381 main titles) and 9093 magazines:[759] an unusual high number of titles. In 2000, this industry generated 1,2% of the total economic output.[760]

In 1994, a daily average circulation of 30,6 million newspapers (21,1 million newspapers on subscription and 9,6 million street-traded newspapers), and 387,8 million magazines were counted. Not less than 325 newspaper publishers and 1951 magazine publishers were found.[761] According to the newest figures, there are 331 publishers of local and re-

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[755] See www.holtzbrinck.com. In 2002, the Holtzbrinck group had a worldwide turnover of € 2,241 billion, nearly half of it turned over in Germany. The publishing, production and distribution of newspapers and magazines led to turnovers of an upper three-digit million amount, see BKartA, decision of 02.04.2004, B 6 - 22122 – Fb - 81/03 – *KG Wochenkurier/WM/LR Medienverlag.*

[756] Holtzbrinck publishes the national daily-distributed business paper *Handelsblatt* and the political weekly *Die Zeit* as well as several regional dailies on subscription, such as: *Südkurier* (Konstanz), *Saarbrücker Zeitung* (Saarbrücken), *Trierischer Volksfreund* (Trier), *Mainpost* (Würzburg), *Lausitzer Rundschau* (Cottbus), *Potsdamer Neueste Nachrichten* (Potsdam) and *Der Tagesspiegel* (Berlin).

[757] Other big publishers that should at least be mentioned are the Verlagsgesellschaft Madsack GmbH & Co. (Hannover) and the Unternehmensgruppe M. DuMont Schauberg (Köln).

[758] Statistisches Bundesamt, Pressemitteilung vom 11.06.1996, available at: http://www.destatis.de/presse/deutsch/pm1996/p1570073.htm.

[759] Statistisches Bundesamt, Pressemitteilung vom 11.06.1996, available at: http://www.destatis.de/presse/deutsch/pm1996/p1570073.htm.

[760] Statistisches Bundesamt, Pressemitteilung vom 08.10.2002, available at: http://www.destatis.de/presse/deutsch/pm2002/zdw41.htm.

[761] Statistisches Bundesamt, Pressemitteilung vom 11.06.1996, available at: http://www.destatis.de/presse/deutsch/pm1996/p1570073.htm.

gional newspapers on subscription (circulation of 15,8 million), ten publishing houses for national dailies (circulation of 1,6 million) and eight for street-traded newspapers (circulation of 5,2 million). Moreover, seven Sunday papers (circulation of 4,3 million) and 25 weeklies (circulation of 1,9 million) exist.[762]

Notwithstanding the plurality of publishers and published press products, the concentration on newspaper markets is generally high, when the narrow market definition of the competition authorities is applied. For instance, the *Bundeskartellamt* defined a market for 'popular science magazines,'[763] which leads to the following concentration rates on the next page:

Graph 6: **The 'popular science magazines' market (2003)**[764]

Magazine title	Publisher	Frequency	Circulation (average)	Market share (%)
GEO	Gruner + Jahr	monthly	380.000	29,8
P.M.	Gruner + Jahr	monthly	335.000	26,2
National Geographic	Gruner + Jahr	monthly	247.000	19,3
Spektrum der Wissenschaft	v. Holtzbrinck	monthly	100.500	7,9
Bild der Wissenschaft	Konradin	monthly	114.328	9,0
Natur & Kosmos	Konradin	monthly	100.105	7,8
Total Market			1.276.933	100

In the market for 'popular science magazines' G+J would have published the monthly-distributed titles *GEO*,[765] *P.M.* and *National Geographic*, and therefore would have had a market-dominant position, having a market share of over 75%.[766]

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[762] Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004) par 9, available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf. See also the figures of the IVW for details on circulation: www.ivw.de.

[763] See already 2 3 5 2 *supra*.

[764] According to the assessment of BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA*.

Hence, oligopolies or even (quasi) monopolies exist in many markets, especially on a local and regional level.[767] For instance, the Axel Springer publishing group has a share of 75% in the national market for 'street traded newspapers'.[768] In 2002, the ten biggest publishers controlled approximately 56% of all distributed papers.[769]

Moreover, even though there are nowadays statistically 349 publishers of daily-distributed newspapers,[770] this figure does not equal the amount of editorially independent publishers. Editorially independent newspapers are measured in 'editorial units' (*publizistische Einheiten*). These units are editorially independent dailies, because the complete newspaper is produced independently, including the part of the newspaper consisting in advertisements.

Graph 7: **Editorial Units in Germany**

Year	Editorial Unit
1954	225
1964	183
1976	121
1989	119 (plus 37 GDR)
2003	134

Hence, the number of editorially independent dailies is much smaller than the amount of published newspapers in total. As indicated above, until the introduction of specific provi-

[765] Circulation of even 506.835 copies sold worldwide.
[766] Accordingly, the transaction was prohibited by the *Bundeskartellamt*, see BKartA, decision of 03.08.2004, B 6 - 045/04 – *Gruner + Jahr/RBA*; confirmed recently by the OLG Düsseldorf, decision of 15.06.2005, VI-Kart 25/04 (V) – *Gruner + Jahr/RBA*.
[767] *Cf* Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004) par 5, available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf.
[768] *Cf* BGH, WuW/E DE-R 609 ff. – *ASV/Stilke* par I.
[769] Daten zur Pressefusionskontrolle (DJV), available at: www.djv.de/downloads/Daten.pdf. See also Frankfurter Allgemeine Zeitung, 03-12-16.
[770] See Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004) par 4, available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf.

sions for press mergers in 1976, the amount of editorially independent newspapers decreased significantly.

Especially on the market for daily-distributed newspapers, five big publishing groups share 42,4% of the market, as shown by following graph:

Graph 8: **Level of concentration on the daily newspaper market (2002)**

Publisher	Market share of circulation (%)
Axel Springer AG	23,4
Verlagsgruppe WAZ	6,1
Verlagsgruppe Stuttgarter Zeitung, Rheinpfalz, Südwest Presse	4,9
Verlagsgruppe DuMont-Schauberg	4,2
Ippen-Gruppe	3,8
Total	**42,4**

Source: Media Perspektiven Basisdaten 2002

2 3 5 4 2 General tendency

As far as mergers between newspapers are concerned, the following data is available:[771] Between 1976 and 1995, 23 mergers between daily newspapers have been prohibited. The application for fourteen proposed mergers has been withdrawn because of competition concerns of the *Bundeskartellamt*. It is not recorded, however, how many applications for merger approvals have been issued during this period.

Between 1995 and 2002, the number of 90 notifications of daily newspaper mergers has been reported. Eight of the proposed mergers have been prohibited; seven applications have been withdrawn by the respective parties.

[771] *Cf* Daten zur Pressefusionskontrolle (DJV), available at: www.djv.de/downloads/Daten.pdf.

Hence, between 1976 and 2002, competition authorities prohibited 31 mergers concerning dailies. In thirteen of these prohibitions, the parties appealed to the *Bundesgerichtshof*,[772] in four cases successfully. In eighteen of these 31 prohibited mergers, big publishers were involved.[773] Recently, the *Bundeskartellamt* approved a merger concerning a big daily-distributed newspaper.[774]

Even though a large number of newspaper mergers has been approved, most of these transactions involve the peripheral activities of newspaper firms, such as production, printing or distribution. Mergers often fell within the merger control regime only because of formal reasons.[775] Still, merger control in the newspaper sector has to be described as rather restricted, despite the high concentration in most markets.

2 3 6 Seventh amendment of the GWB

The German government has amended the GWB recently (seventh amendment of the GWB). The new GWB has been in force from the 1st of July 2005. Besides adapting national law to European legislation,[776] it was also planned to substitute certain provisions concerning the control of mergers between newspaper enterprises.[777] Even though the German government finally did not succeed in its plan to change the latter provisions, the possible impact of the proposed amendment on control of mergers between newspaper

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[772] For the procedure see 2 3 4 3 *supra*.

[773] AS (10), WAZ group (5), Süddeutscher Verlag (2), Westdeutscher Verlag/Rheinische Post (1).

[774] The Federal Cartel Office approved the acquisition of the company Druck- und Verlagshaus Frankfurt am Main, which owned the daily newspaper *Frankfurter Rundschau*. The transaction was controversial, though not for competition reasons but for political reasons. The acquiring firm DDVG belongs to the political party the SPD, which governs in Germany at the moment, see epd medien 'Bundeskartellamt genehmigt Übernahme der "'Rundschau"', Nr. 37 (2004-05-15) 15.

[775] See Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004) par 8, available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf.

[776] 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, OJEC L 1/1 of 04.01.2003, also available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2003&nu_doc=1, see already 2 2 *supra*.

[777] Other crucial aspects of the amendment are a) the introduction of a *locus standi* for trade unions, b) restrictions on the right of third parties to apply for interim relief against approved mergers and c) the tightening up of penalties especially in the case of 'hard-core cartels,' see in detail the memorandum of the German government (Regierungsbegründung zum Gesetzentwurf), BR-Drs. 441/04 v. 28.05.2004, par A.2.. *Cf* also Frankfurter Allgemeine Zeitung 'Verbraucherverbände werden Partei im Kartellverfahren' (2003-12-24) 12 and Frankfurter Allgemeine Zeitung 'Wirtschaftsminister Clement beschränkt Klagen gegen genehmigte Fusionen' (2003-12-23) 11. For a short description of the amendment in its latest version see Meyer-Lindemann 'Kartellnovelle bringt Annäherung an europäisches Recht' Börsen-Zeitung (2005-06-22), available at: http://www.boersen-zeitung.com/online/redaktion/aktuell/bz117039.htm.

enterprises will be described and criticized, because it can be expected that there will still be discussion about an amendment of the newspaper provisions in the next few years.

2 3 6 1 The control of mergers between newspaper enterprises after the amendment

The Minister for Economic Affairs and Employment issued a first draft of the amendment of the GWB in December 2003,[778] which was to be put into effect on the 1st of May 2004. The draft was highly controversial and it came in for criticism.[779] The German government issued a revised draft in August 2004.[780] After further debates, the political parties in the government agreed on a final draft on 11 March 2005,[781] which was passed by the *Bundestag* (Federal Lower House of Parliament).[782] In April 2005, though, the *Bundesrat* (Federal Upper House of Parliament), which is dominated by the opposition parties, rejected the draft.[783] Consequently, the so-called '*Vermittlungsausschuss,*' a body consisting of members of the *Bundestag* and *Bundesrat*, tried to find a consensus on the law in a sort of 'mediation procedure'[784] and submitted its compromise (*Beschlussempfehlung des Vermittlungsausschusses*).[785] In the end – after a discussion of almost one and a half years – the government had to give up the idea of changing the provisions concerning press mergers. The *Bundesrat* ultimately passed the act to amend the GWB without the controversial proposed changes on press mergers.[786]

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[778] Referentenentwurfs des Bundeswirtschaftsministeriums vom 18.12.2003, available at: http://www.fiw-online.de/archiv/D/7.GWB-Novelle-Referentenentwurf.pdf. See also AfP 'Pressefusionsrecht wird liberalisiert', 1/2004, 46.

[779] See for instance Frankfurter Allgemeine Zeitung 'Clement erleichtert Pressefusionen' (2003-12-19) 12. Even the Scientific Council of the Ministry for Economic Affairs and Employment described the proposed amendment as an 'error' ('Irrweg'), see Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004), available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf.

[780] BT-Drs. 15/3640 v. 12.8.2004.

[781] Printed in BR-Drs. 210/05 v. 08.04.2005.

[782] See epd medien 'Neuregelungen der Pressefusionskontrolle verabschiedet', Nr. 20 (2005-03-16) 14.

[783] See BR-Drs. 210/05 and Press Release of the *Bundesrat* (Federal Upper House of Parliament), Nr. 69/2005 of 29.04.2005, 'Bundesrat schickt "Pressefusionsgesetz" in den Vermittlungsausschuss', available at: http://www3.bundesrat.de/Site/Inhalt/DE/1_20Aktuelles/1.2_20Presse/1.2.1_20Pressemitteilungen/1.2.1.5_20Pressemitteilungen_202005/HI/69,templateId=renderUnterseiteKomplett.html. *Cf* also epd medien, Nr. 33/2005.

[784] *Cf* Art. 77 II GG. The *Bundesrat* initiated this procedure, see BR-Drs. 210/05 (Beschluss) v. 29.04.2005.

[785] BT-Drs. 15/5735 v. 15.06.2005.

[786] See DIE WELT 'Die Regeln für Pressefusionen bleiben unverändert' (2005-06-18), available at: http://www.welt.de/data/2005/06/18/733391.html. The draft, on which was agreed in the *Vermittlungsausschuss*, first passed the *Bundestag* (see Deutscher Bundestag, PlPr. 15/181 v. 16.06.2005,1709) and the next day the *Bundesrat* (see Deutscher Bundesrat, PlPr. 812 v. 17.06.2005, 239).

The proposed amendment encompassed several provisions, which restrain the control of mergers between enterprises. There were three aspects of particular relevance to publishers:

- The new § 31 GWB enabled co-operations between publishers in the advertisement field
- § 35 GWB in its new proposed version made the '*de-minimis* clause'[787] applicable to mergers between publishers, albeit with a figure of € 2 million, instead of the € 10 million limit that applies to other transactions
- The new § 38 III GWB diminished the scope of application of the GWB,[788] by raising the thresholds applying in accordance with that provision from € 25 million/€ 1,25 million to € 50 million/€ 2,5 million

The possibility of cooperation in the advertisement field in § 31 GWB, which was constructed as an exemption from the cartel agreement prohibition in § 1 GWB, was modelled on the suggestion of the Federal Association of German Newspaper Publishers (*Bundesverband Deutscher Zeitungsverleger* (BDZV)).[789] It was very broad in earlier drafts, but more restricted in the final draft. Publishers were only allowed to create co-operations to 'rationalize economic processes' in the field of advertisement, printing and distribution, if such agreements helped to enhance the competitiveness of the involved companies and the cooperation was 'necessary for the long-term protection of the economic basis and the continuation of at least one of the participating newspapers'. Furthermore, no more than five newspapers could participate in such agreements. In addition, such co-operations had to be notified to the competition authorities prior to their implementation. The proposed § 31 III GWB clarified that such agreements were excluded from prohibition in terms of § 36 GWB with regard to the markets that would be directly affected by the cooperation.

The diminution of the scope of application of the GWB in § 38 III GWB was to be achieved by halving the press-specific multiplication factor.[790] For the calculation of the combined annual turnover of merging newspaper companies, the actual turnover was to be multiplied only by 10. Hence, the control of newspaper mergers would only have been possible, if the firms involved together had worldwide turnovers of over € 50 million (instead of € 25 mil-

[787] See 2 3 4 1 1 and 2 3 5 1 *supra*.
[788] See 2 3 5 1 *supra*.
[789] *Cf* BDZV-Stellungnahme zur geplanten Änderung der Pressefusionskontrolle (05.02.2004), published in epd medien, Nr. 12/13 (2004-02-21) 30.
[790] See 2 3 5 1 *supra*.

lion) during the last business year preceding the merger and, additionally, the domestic turnover of at least one of the participating undertakings would have had to be more than € 2,5 million (instead of € 1,25 million), so that the transaction was within the scope of application of the GWB.
This amendment would have only applied to publishers, the turnovers of companies in the broadcasting sector was still to be multiplied by 20.

According to the first draft, a merger between enterprises would have been approvable even if it led to a 'market-dominant position' or strengthened it, if the maintenance of 'independent editorial units' (*selbständige publizistische Einheit*) were guaranteed (so-called 'old publisher clause' ('*Altverlegerklausel*')).[791] According to § 36 Ia GWB[792] in that version, the maintenance of such independent editorial units was presumed under three conditions. The seller (old owner) of the newspaper or a third party had to keep shares and voting rights of the newspaper company of more than 25%. According to the draft, the purchaser was not allowed to have 'competitive substantial influence' on this 'third party'. Secondly, the old owner or the independent third party had to keep the right of the newspaper title. Finally, the vendor or the third party had to have a veto-right or a right of codetermination with regard to decisions that are substantial for the maintenance of the newspaper as independent editorial unit. According to the draft, such a decision for instance would have been the dismissal or recruitment of the chief editor. Competition authorities would have been entitled to enforce this by imposing conditions and monitoring the content of the newspaper, to discern whether the content had been changed. § 36 Ib GWB of that draft set out that the exception of § 36 Ia GWB only applied to mergers that were 'necessary' for the long-term protection of the economic basis of one of the participating newspaper companies as independent editorial units.[793] This 'necessity' was presumed, if one of the newspapers had declining advertisement revenues in the last three business years prior to the notification of the merger or if the revenues were at least substantially below average of comparable newspapers. After severe criticism, the government suggested an additional condition to prevent a big publisher from acquiring small newspapers. § 36 Ia was

[791] *Cf* also Frankfurter Allgemeine Zeitung 'Clement erleichtert Pressefusionen' (2003-12-19) 12.
[792] See old draft (BT-Drs. 15/3640 v. 12.8.2004) par 21.
[793] The memorandum of the German government (Regierungsbegründung zum Gesetzentwurf), BR-Drs. 441/04 v. 28.05.2004, par 4.h)cc) asserted that this would be only the case, if the existence of the acquired newspaper as independent editorial unit would be 'with high probability without the merger seriously endangered'.

not to be applicable, if the continued application of this section was to lead to a market-dominant position or the strengthening thereof on geographic neighbouring markets.

In the end, however, the German government decided not to implement the highly controversial § 36 Ia and Ib GWB,[794] a clause that differed remarkably from broad principles underlying the GWB. It would have established an extraordinary exception for newspaper mergers.

The criticism of the planned new provisions for mergers between newspaper enterprises may be explained by its context. The publishing group Holtzbrinck tried to acquire the Berliner Verlag KG, a publisher (belonging to Gruner + Jahr) which was active on the newspaper market in the city of Berlin with the newspapers *Berliner Zeitung* (a daily newspaper on subscription), *Berliner Kurier* (a daily street-traded newspaper) and the 'city magazine' *Tip*. The *Bundeskartellamt* prohibited the acquisition in 2002,[795] stating that the merger would lead to a market-dominant position for Holtzbrinck on the reader markets for 'regional daily-distributed newspapers on subscription' and 'city magazines' in Berlin, because pre-merger Holtzbrinck, *inter alia*, already owned the daily-distributed newspaper *Tagesspiegel* and the city magazine *Zitty*. Both were published in the Berlin market. Moreover, the *Bundeskartellamt* was not convinced by Holtzbrinck's argumentation, which was to the effect that the *Tagesspiegel* could not survive as editorially independent newspaper, if the merger with the Berliner Verlag was to be prohibited. Holtzbrinck argued that the *Tagesspiegel* would run at a deficit and that it would be impossible to sell it.[796] Moreover, Holtzbrinck suggested to maintain the editorial independence of the *Berliner Zeitung* and only to merge on a distribution and advertisement level.[797]

As a consequence of the prohibition, the parties to the merger applied for the Minister's permission[798] to continue with the merger in January 2003. The *Monopolkommission* sug-

[794] *Cf* epd medien 'Koalition einigt sich auf neue Pressefusionskontrolle', Nr. 12 (2005-02-16) 13.
[795] BKartA, decision of 10.12.2002, B 6 - 22121 – U - 98/02 – *Holtzbrinck/Berliner Verlag/G+J I*. See also epd medien, Nr. 98/2002.
[796] *Cf* BKartA, decision of 10.12.2002, B 6 - 22121 – U - 98/02 – *Holtzbrinck/Berliner Verlag/G+J I* at V.1.3.
[797] Holtzbrinck's plan consisted of founding an independent company, which would guarantee editorial independence (so-called 'foundation model' (*Stiftungsmodell*)).
[798] See 2 3 4 3 *supra*.

gested that the Minister should not grant such permission.[799] After a hearing, the Minister for Economic Affairs and Employment urged Holtzbrinck to try to sell the *Tagesspiegel*. He was not convinced that it was impossible to sell the newspaper.[800] Accordingly, Holtzbrinck invited tenders, to which the Heinrich Bauer Verlag replied, offering to buy the *Tagesspiegel* for € 20 million. In a second special report (*Sondergutachten*) the *Monopolkommission* still recommended that a *Ministererlaubnis* not be granted.[801] The parties, however, finally revoked their request at the end of September 2003. The next month, the merger was notified for the second time, but with a different content. Holtzbrinck announced the sale of the *Tagesspiegel* to the former Holtzbrinck-manager Pierre Gerckens, to dispel the competition concerns of the *Bundeskartellamt*.[802] Notwithstanding this concession,[803] the *Bundeskartellamt* prohibited the merger again in February 2004,[804] asserting that the *Tagesspiegel* would still have to be attributed to Holtzbrinck in terms of § 37 I Nr. 3, S 2 GWB.[805] In fact, Holtzbrinck had a call option, which granted the company the right to re-buy 75% of the newspaper after the anticipated amendment of the GWB. Moreover, the price was significantly lower than the price offered by the Bauer Verlag, which pointed towards a tactical acquisition.[806] Holtzbrinck contested the decision of the *Bundeskartellamt*,[807] but without success.[808]

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[799] See Zusammenschlussvorhaben der Georg von Holtzbrinck GmbH & Co. KG mit der Berliner Verlag GmbH & Co. KG – 36. Ergänzendes Sondergutachten der Monopolkommission (April 2003) par 161, available at: http://www.monopolkommission.de/sg_36/text_s36.pdf. *Cf* also the analysis of Säcker 'Der Fall "Tagesspiegel/Berliner Zeitung" – A Never Ending Story' (2003), BB 2003, 2245-2250.

[800] See epd medien 'Bauer Verlag hat Kaufangebot für "Tagesspiegel" abgegeben', Nr. 47 (2003-06-16) 10.

[801] Zusammenschlussvorhaben der Georg von Holtzbrinck GmbH & Co. KG mit der Berliner Verlag GmbH & Co. KG – 38. Ergänzendes Sondergutachten der Monopolkommission (August 2003) par 93, available at: http://www.monopolkommission.de/sg_38/text_s38.pdf.

[802] See epd medien "Tagesspiegel' wird von Holtzbrinck-Manager übernommen', Nr. 77/78 (2003-10-01) 15-16.

[803] The sale of the *Tagesspiegel* itself did not raise competition concerns and was approved by the *Bundeskartellamt,* see BKartA, decision of 07.11.2003, B 6 – 121/03 – *Holtzbrinck/Gerckens.*

[804] BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II.*

[805] *Cf* footnote 585 of this thesis *supra.*

[806] See also Frankfurter Allgemeine Zeitung 'Kartellamt widersetzt sich weiter der Übernahme der Berliner Zeitung' (2003-12-20) 13.

[807] See epd medien 'Holtzbrinck legt Beschwerde gegen Kartellentscheidung ein', Nr. 9 (2004-02-07) 13.

[808] See decision of the OLG Düsseldorf, Az.: IV Kart 7/04. *Cf* Kurp 'Holtzbrinck scheitert mit Kartell-Beschwerde – Übernahme der Berliner Zeitung bleibt auch nach OLG-Beschluss verboten' (2004-10-27), available at: http://www.medienmaerkte.de/artikel/print/032909_tagesspiegel.html.

Against this background, the proposed amendment seemed to be designed only for allowing the planned acquisition of the Berliner Verlag by the Holtzbrinck group and was hence described as 'lex Holtzbrinck'.[809]

2 3 6 2 Discussion

The new provisions, even in the latest version, are highly controversial and criticism has often been simply sarcastic.[810] On the one hand, critics demanded the strict maintenance of the old provisions concerning the control of mergers between newspaper enterprises.[811] The president of the *Bundeskartellamt*, Böge, in particular, criticised the government's plans to amend the control of mergers between publishers and pleaded for the maintenance of the *status quo*.[812] On the other hand, the big publishing houses welcomed the relaxation of the merger control provisions.[813] They called for an even more drastic change of the provisions. For instance, the Federal Association of German Newspaper Publishers (*Bundesverband Deutscher Zeitungsverleger* (BDZV)) demanded a raise in the thresholds in the GWB from € 25 million to € 100 million and application of the *de-minimis* clause to newspaper companies in the same way as it applies to other mergers.[814]

The proposed concept of allowing mergers between newspaper enterprises, even where they lead to a dominant-market position, just as long as editorial independence is guaranteed, was particularly contentious.[815] The idea of maintaining a plurality of independent

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[809] See for instance Bremer & Martini 'Kartellrechtsreform und Sicherung der Pressevielfalt – Wäre eine »Lex Holtzbrinck« im Rahmen der 7. GWB-Novelle verfassungsgemäß?' (2003), ZUM 2003, 942-959; Weberling 'Novellierung der Pressefusionskontrolle: Auslaufmodell Pressevielfalt? Zur geplanten Lockerung des Pressekartellrechts' (2004), *pro*media, Nr. 7/04, 23.

[810] The chairman of the German journalists' association (Deutschen Journalisten-Verbandes (DJV)) Michael Konken for instance described the draft as 'Christmas present for the big publishers', quoted from: journalist 'Pressefusionskontrolle – Den Großen Tür und Tor geöffnet' (2/2004) 17.

[811] See for instance Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004) par 34, available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf.

[812] Speech held at the Friedrich-Ebert-Stiftung, Berlin (28 January 2004); Böge 'Reform der Pressefusionskontrolle: Forderungen, Vorschläge, Konsequenzen' (2004), MMR 4/2004, 227-231. See also epd medien 'Kartellamt lehnt Novelle der Pressefusionskontrolle ab', Nr. 7 (2004-01-31) 12.

[813] See for instance epd medien 'Hombach begrüßt Gesetzentwurf zur Pressefusionskontrolle', Nr. 49 (2004-06-26) 16.

[814] This should even exclude the application of § 38 III GWB (press-specific calculation) on this clause, see BDZV-Stellungnahme zur geplanten Änderung der Pressefusionskontrolle (05.02.2004), published in epd medien, Nr. 12/13 (2004-02-21) 31. See also Frankfurter Allgemeine Zeitung 'Clement erleichtert Pressefusionen' (2003-12-19) 12.

[815] See for instance Schauerte 'Die Axt im Blätterwald' Frankfurter Allgemeine Zeitung (2004-02-17) 12.

editorial units as such is honourable, but the mechanism for achieving it in the proposed draft by the government was an error. As will be shown, a conditional approval combined with constant monitoring of the press content is not possible, for both constitutional and competition reasons. The concept of approving such mergers in the knowledge of the creation or strengthening of market dominance cannot be justified by the idea of press plurality. Moreover, in practice, such a control would not have functioned and the implementation of this concept would have been fatal to press plurality. Fortunately, the government decided against implementing it.

Nevertheless, the draft in its latest version remains controversial.[816] It is particularly contentious, whether the proposed amendment would be constitutional or at variance with the *Grundrechte*, in the German 'Bill of Rights'. This will be analysed later on.

2 3 6 2 1 Need for amendment

It can nevertheless be asked whether it is actually necessary to amend those sections of the GWB, which are concerned with the control of newspaper enterprises. The implementation of the provisions concerning the control of newspaper enterprises is not legally prescribed by European legislation. The German government was aware of this.[817]

In the memorandum of the first draft[818] it was explained, that the situation for newspaper enterprises was 'economically difficult' at the time. There was a constant downward trend in the advertising revenues of newspapers in the preceding decade. It was argued not only to be a result of the general economic situation, but also of 'fundamental structural changes, especially on the newspaper markets.' Big newspaper and magazine companies agreed with the draft, arguing that there would be less revenues (because of the decline in sales of newspapers and advertisements) and therefore an economic need to expand more easily.

[816] See epd medien 'Unterschiedliches Echo auf neue Pressefusionskontrolle', Nr. 13 (2005-02-19) 14. The DJV was content with the draft.
[817] See memorandum of the German government (Regierungsbegründung zum Gesetzentwurf), BR-Drs. 441/04 v. 28.05.2004, par A.2.
[818] Published in epd medien 'Neue Regelungen zur Pressefusionskontrolle', Nr. 9 (2004-02-07) 29-32.

Interestingly though, the big newspaper and magazine companies in Germany, do not seem to struggle economically at all, but rather have the financial resources to invest abroad. Economic activity beyond the German borders is actually a feature of all big German publishers. G+J actually publishes 85 titles abroad and only 40 in Germany.[819] The same applies to Springer (30 titles in Germany / 120 titles abroad), Bauer (35/90) and Burda (80/159).[820] The Westdeutsche Allgemeine Zeitung group (WAZ) for instance keeps on spending a high amount of their earned profits to expand in other European countries. The WAZ for example acquired interests in a multitude of (especially Eastern-)European newspapers and magazines. The group holds 100% of the shares in at least eight newspaper enterprises in Hungary and Bulgaria as well as 20 other involvements in Bulgaria, Croatia, Macedonia, Montenegro, Austria, Rumania, the Republic of Serbia and Hungary. As far as magazines are concerned, the investments of the WAZ are even greater, having shares in 56 magazines in Bulgaria, Croatia, Austria, the Republic of Serbia and Hungary.[821] Moreover, AS and big magazine publishers like Burda, Bauer and G+J similarly are expanding their businesses, especially on the Russian and Polish markets.[822] Furthermore, AS recently announced interest in the ProSiebenSat.1 Media AG, a broadcasting group, which runs the two big German broadcasting channels ProSieben and Sat.1.[823] Nevertheless, it cannot be denied, that the economic crisis of the last years has also affected the media industry. There has been an enormous decrease in advertising revenues. In 2004, the amount of money, enterprises were willing to spend on advertising for instance in magazines, was € 400 million less than it was five years ago.[824] Hence, there has been a remarkable decline in the newspapers and magazine publishers revenues.[825] Moreover, employees of media enterprises had to be dismissed.[826] The decrease in the

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[819] G+J even makes 62% of all his turnovers abroad, see Schulz 'Der Moskau-Peking-Express' DER SPIEGEL Nr. 18 (2005-05-02) 181.

[820] See Schulz 'Der Moskau-Peking-Express' DER SPIEGEL Nr. 18 (2005-05-02) 181.

[821] Alone for one of the last deals, the purchase of shares of the newspaper 'Romania Libera' in Romania, the WAZ spent approximately € 3 million. The WAZ concern is said to participate in 158 titles in the Balkan region, *cf* Hanfeld 'Eine beispielhafte Lösung – Wie die WAZ und ihr Gegenspieler Bacanu sich über die 'Romania Liberia' geeinigt haben' Frankfurter Allgemeine Zeitung (2004-12-23) 40 with all figures in detail.

[822] *Cf* Schulz 'Der Moskau-Peking-Express' DER SPIEGEL Nr. 18 (2005-05-02) 181.

[823] The group also owns the (mainly movie) channel *Kabel 1*, the news channel *N24* and the entertainment/interactive game show channel *Neun Live*, see Hamann 'Außer Kontrolle' DIE ZEIT Nr. 17 (2005-04-21), available at: http://www.zeit.de/2005/17/springer-psm.

[824] Schulz 'Der Moskau-Peking-Express' DER SPIEGEL Nr. 18 (2005-05-02) 180.

[825] See Publishing Market Watch, Final Report, par 13 Annex 2 (European Commission 2005, available at: http://www.publishing-watch.org/documents/PMW-o-20050127%20%20Final%20report.pdf).

[826] The BAW Institute for Economic Research of the university of Bremen (*Institut für Wirtschaftsforschung*, see http://www.baw.uni-bremen.de) established for the end of 2003 a decline in employment between 2,67 and 4,27 percent in the 'media cities' Berlin, Hamburg, Munich and Cologne.

print media industry seems to be a global trend,[827] which might also be a result of the growing importance of electronic media,[828] even though the Internet cannot be regarded as a substitute for the 'classic' media.[829] Nevertheless, like other industrial sectors, media companies have to look for novel strategies to increase their profits. Last year, a number of enterprises began to sell successfully newspapers in tabloid[830] format.[831] Other ideas to use the advantages of the newspaper as distribution medium are experimented with these days in different countries.[832] Moreover, the economic crisis seems to be over. According to newly released figures, German media companies have increased their income from advertisement in 2004 by 5,8% to a total of € 18,2 billion.[833] The number of advertisement pages in newspapers increased in January and February 2005 by 7,6% compared to 2004.[834] Especially daily-distributed newspapers could increase their income by 10,7%.[835]

Problems in the publishing industry exist, but the legislature should not react with an amendment of the competition law, to address a temporary crisis. The asserted 'structural crisis' of the newspaper industry can only be observed on the advertisement market. Thus, there is certainly an argument to be made that co-operations between publishers in the

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[827] Since 1998 in North America, 7000 printers have gone out of business and 110.000 people in the industry have lost their jobs, see Marsland 'Does print stand a chance in a wired world?' (2005-01-25), available at: http://www.biz-community.com/ Article/196/109/5576.html.

[828] Especially losses for recruitment advertisement could be a result of job sites on the Internet, although it is not clearly proved.

[829] It rather seems that the Internet is used for advertisement complementarily, see *pro*media, 'Es geht stetig bergauf, allerdings eher im Schneckentempo' – Interview mit Volker Nickel (Sprecher des Zentralverbandes der Deutschen Werbewirtschaft), (Nr. 7/04) 41.

[830] As the Tribunal defines these newspapers in *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04) par 17: 'A "tabloid newspaper" is defined as a newspaper whose content is populist in style and contains very little informative news. A tabloid has pages half the size of the average paper, characterised by bold headlines and large photographs.'

[831] The Axel Springer AG and the Verlagsgruppe Georg von Holtzbrinck have started to distribute such small-sized newspapers to a low price of 20 to 50 cent, see e-fellows.net newsletter of 23 March 2005 (http://www.e-fellows.net).

[832] In the Netherlands, for instance, the magazine *Libelle* organises events for its readers in addition to its 'core business,' a practice also used by the German *Bild*. In Italy, on the other hand, magazines sell their own manufactured but limited and good value products for a short period. Finally, the German *Financial Times* established a newsletter for Blackberry, Smartphone and PDA, see also interview with Annet Aris, professor for media strategy at the INSEAD in Paris, in e-fellows.net newsletter of 23 March 2005 (http://www.e-fellows.net). In South Africa, the latest idea to build reader circulation was to cooperate with broadcasting programmes. Afrikaans daily *Beeld* and sister papers *Die Burger* and *Volksblad* invested in product placement on M-Net's popular Egoli soap opera. Readers and viewers alike were encouraged to participate in a daily interactive competition, see bizcommunity newsletter of 23 March 2005 (http://www.bizcommunity.com/Article.aspx?c=90&l=196&ai=6117).

[833] Hamburger Abendblatt 'Mehr Werbung in den Medien' (2005-01-15/16) 24 (referring to data of Nielsen Media Research).

[834] Suggestions of the Economic Committee of the Federal Upper House of Parliament (*Wirtschaftsausschuss des Bundesrates*) for the seventh amendment of the GWB, BR-Drs. 210/1/05 v. 18.04.2005 par 6.

[835] Hamburger Abendblatt 'Mehr Werbung in den Medien' (2005-01-15/16) 24.

advertisement field should be facilitated. Hence, the decision of the government to allow co-operations in § 31 GWB seems to be reasonable. This section would have been justifiable. All other proposed amendments of press provisions – especially the lowering of thresholds and the section that would lead to the condonation of mergers, even if they are likely to lead to market dominance – lack this justification.

An evaluation of the rules regarding media regulation in other countries also militates against changing the law. According to a study undertaken on behalf of the Ministry for Economic Affairs and Technology (now Ministry for Economic Affairs and Employment),[836] German newspaper enterprises already have a relatively large 'scope of action' to expand their business externally. Mergers are only limited by the above-described lower thresholds, but they are assessed on pure competition aspects. There are no limits relating to the circulation of the newspaper and no special provisions for regional markets, such as provisions, which demand a certain degree of plurality. Moreover, only rudimentary cross-ownership rules exist.[837]

2 3 6 2 2 Impact on competition

If the proposed draft had been implemented, detrimental effects for the competitive situation in press markets would have been likely. The new provisions would have had detrimental consequences for concentration levels. Here, the situation rather demands stricter provisions to maintain a certain level of diversity. It is highly likely, that the proposed provisions would have reinforced the existing concentration in newspaper and magazine markets, enabling big publishers to swallow small- and medium-sized enterprises.[838] The number of 'control-free' transaction would have increased significantly, if the thresholds in § 38 III GWB were set to a higher level. Additionally, the bagatelle market clause[839] would have been extended in its application, which is also linked to the press-specific calculation

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[836] Vergleich der kartellrechtlichen Regelungen und ihrer Rechtsanwendung für Fusionen und Kooperationen im Bereich Presse und Pressegroßhandel in Europa und den USA – Forschungsauftrag Nr. 49/01 des Bundesministeriums für Wirtschaft und Technologie (Knoche & Zerdick, 07.08.2002) p. 186, available at: http://www2.kommwiss.fu-berlin.de/%7Ekommoek/www/Veranstaltungen/WS2003_2004/Konzentration/Pressekonzentration_und_Regulierung.zip.

[837] See 4 2 3 *infra* for cross-ownership provisions in Germany.

[838] Even the memorandum of the German government (Regierungsbegründung zum Gesetzentwurf), BR-Drs. 441/04 v. 28.05.2004, par 4.h)bb) admits that due to the new thresholds in § 38 III GWB around 50 publishers additionally could merge and as a result of the introduction of the *de-minimis* clause, it would be possible to acquire 30 publishing houses without control; same criticism: Röper 'Rotationen' (2003), journalist 11/2003, 15.

[839] See 2 3 4 1 1 and 2 3 5 1 *supra*.

in § 38 III GWB. This would have increased the ability to merge without supervision in the markets for newspapers on subscription. These newspapers are often sold on small regional and local markets. Moreover, the application of the *de-minimis* clause[840] to mergers between newspaper companies, also would have most likely led to several acquisitions, without any supervision by competition authorities.[841] Big publishers like the Axel Springer AG have already announced, that they intend to establish 'regional newspaper-chains' by buying small competitors.[842] The situation on local newspaper markets is already alarming. A diverse coverage of local issues often does not exist. The German trade union for the employees in the service industry, ver.di, announced that in more than half of all towns in Germany only one local newspaper exists (so-called 'single paper districts').[843] In the western part of Germany there is only one or no independent regional daily newspaper on subscription in more than 50% of all districts. In 1997, in the eastern part of Germany, even 85% of the press was owned by ten big West-German publishers.[844] The abolishment of the *de-minimis* clause would enable big publishers to acquire local newspapers, which normally have small turnovers, without the control of competition authorities. Against this background, such 'enlargement of the press companies' scope of actions'[845] has to be obviated.

Moreover, there is another, press-specific argument that militates against the facilitation of mergers between newspaper enterprises. It has been shown that levels of concentration are already high in newspaper markets. As was argued earlier, the ease of market entry is a crucial aspect in merger analysis,[846] especially when concentration levels are significant. That is not specific to the media, but barriers to entry are very high in press markets. The establishment of an editorial office, equipped with highly-educated editorial staff, journalis-

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[840] See 2 3 4 1 1 and 2 3 5 1 *supra*.
[841] Also the Economic Committee of the Federal Upper House of Parliament suggested not to make the *de-minimis* clause applicable to newspaper mergers, see Suggestions of the Economic Committee of the Federal Upper House of Parliament (*Wirtschaftsausschuss des Bundesrates*) for the seventh amendment of the GWB, BR-Drs. 210/1/05 v. 18.04.2005 par 10.
[842] See Frankfurter Allgemeine Zeitung (2004-02-27).
[843] *Cf* taz (2003-12-22), available at: http://www.taz.de/pt/2003/12/22/a0064.nf/textdruck. See also Daten zur Pressefusionskontrolle (DJV), available at: www.djv.de/downloads/Daten.pdf.
[844] See Weberling 'Novellierung der Pressefusionskontrolle: Auslaufmodell Pressevielfalt? Zur geplanten Lockerung des Pressekartellrechts' (2004), *pro*media, Nr. 7/04, 24.
[845] Memorandum of the first draft to amend the GWB, published in epd medien 'Neue Regelungen zur Pressefusionskontrolle', Nr. 9 (2004-02-07) 32.
[846] See 2 3 5 3 *supra* and the 'Entry Analysis' in the 1992 United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines [with April 8, 1997, Revisions to section 4 on efficiencies] Section 3.0, available at: http://www.ftc.gov/bc/docs/horizmer.htm.

tic information networks, production and distribution costs, advertisement for the readers' awareness of the new press product, just to name some aspects, are significant barriers, especially when the new entrant has to face major players, which have abundant resources to keep prices on the lowest level. Moreover, an eminent share of a newspaper company's revenue comes from the advertisement business. In Germany, two thirds of all revenues used to be generated by selling advertising space. Since 2001, it is still 57,5% on average.[847] Local advertisers usually have to contract with the strongest newspaper in a market. That leads to a tendency to advertise only in this 'first-brand' newspaper.[848] The consequence is that only a small part of the advertising budget remains for all other newspapers in this market. That, in turn, does not only facilitate acquisition of competitors, but also impedes new firms from entering the market. A newspaper can only be successful if it attracts a critical mass of readers, because the amount of readers (circulation) is the most important factor for the advertising industry ('close reciprocal relation' between reader and advertisement market).[849] Therefore, newspapers have to offer an attractive journalistic content from the very beginning, which demands high expenses, even if low revenues must be expected in the beginning, especially for regional and local papers. Hence, start-ups in this sector are highly risky and in the case of failure, all expenses are practically lost, which usually scares off investors.

In addition, barriers to entry arise from another characteristic of press products, which can truly be regarded as 'unique.'[850] Newspapers differ from other products in the special relation that exists between the reader as consumer and the newspaper, which can be described as the 'reader-paper-bond' (*Leser-Blatt-Bindung*).[851] Notably in the case of regional newspapers on subscription, such a bond between the reader and 'his' newspaper can be observed. Newspapers transmit opinions, with which the reader wants to identify. It is an important motivation for the readers to buy the press product, if their own opinions and problems are addressed therein and if the paper accommodates their needs for infor-

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[847] Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004) par 5, available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf.

[848] In German Media Science so-called '*Erstzeitung*'.

[849] See 2 3 5 3 *supra*.

[850] Baker *Human Liberty and Freedom of Speech* (1989) 228.

[851] See for instance BKartA, decision of 02.02.2004, B 6 - 22121 – U - 120/03 – *Holtzbrinck/Berliner Verlag/G+J II* at V.1.2.3.2.

mation and entertainment. Hence, there is often special customer loyalty[852] to the special 'newspaper brand'. Thus, it is also highly likely that the prices of newspapers are relatively inelastic for consumers as once they have found their preferred newspaper they will be reluctant to change merely because of a small but significant price increase. There have been only a few new successful entrants into newspaper markets in the last decades.[853] Five new newspapers were established between 1999 and 2001, but none could persist.[854]

Hence, there is certainly an argument to be made, that it is more difficult for new entrants to achieve a stable market position and to create such a 'reader-paper-bond' by drawing readers from other papers. Especially where the market is characterised by such entry-barriers, the law has to prevent 'artificial' barriers to new entries caused by concentration, so that the self-correcting forces of the marketplace can impede the attainment and maintenance of monopolies in press markets.

2 3 6 2 3 Constitutional aspects

German Media Law – and especially the Law of the Press – is strongly influenced by constitutional jurisprudence. The German Constitution (*Grundgesetz*)[855] sets out in Article 5 I 2 GG (Article 5 section 1 sentence 2) as briefly as the South African Constitution that the freedom of the press is guaranteed. Nevertheless, the German Federal Constitutional Court (*Bundesverfassungsgericht*) has interpreted and developed the principle of press freedom in a number of cases.

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[852] *Cf* Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31/5 of 05.02.2004 par 71(c), also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

[853] For example the newspapers *taz*, *Financial Times Deutschland* and a couple of local newspapers.

[854] See Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004) par 5, available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf.

[855] Grundgesetz für die Bundesrepublik Deutschland enacted the 23 Mai 1949 - as amended by Art. 1 of the Act of 26 July 2002 I 2863 (available at: http://bundesrecht.juris.de/bundesrecht/gg/index.html). The German Constitution is often designated as 'Basic Law' (which is the translation word-for-word). However, this thesis will use the proper designation '*Grundgesetz*'.

The *Bundesverfassungsgericht* consistently underlines the importance of a free press for the public discussion and the process of forming a 'public opinion' by providing information on all aspects of life, and creating a political forum for the exchange of ideas. In contrast to the South African approach, the freedom of the press is recognised to be a special fundamental right - and not just a part of freedom of expression[856] - which is also regarded as an essential element of democracy.[857]

In the landmark judgment of 5 August 1966 (so-called *Spiegel* case),[858] the Federal Constitutional Court stressed the necessity of a free press for a democratic society by outlining its function as an intermediary between the government and the people.[859] The *Bundesverfassungsgericht* found that a free press is a fundamental element of a liberal state, because of its essential role in both creating and transmitting public opinion. The Court postulated that the basic rights (*Grundrechte*), like freedom of speech, freedom of the press and the right to human dignity are primarily 'defence rights' against governmental or administrative conduct. Hence, the state may generally not interfere with these rights.[860] Moreover, the Court postulated that if one of these rights is fundamentally endangered, the government has to enact provisions to protect it. Therefore, these rights do not only have a 'subjective-defensive' dimension but also an 'objective' one, although the scope of the dimensions differs depending on the right concerned.

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[856] See BVerfGE 10, 118 (121) – *Berufsverbot*.
[857] See BVerfGE 7, 198 ff. – *Lüth*; for details *cf* Wendt in von Münch & Kunig (eds) *Grundgesetz-Kommentar Band 1, 5. Auflage* (2000) Art. 5.
[858] BVerfGE 20, 162 – *Spiegel*. *Cf* also Wendt in von Münch & Kunig (eds) *Grundgesetz-Kommentar Band 1, 5. Auflage* (2000) Art. 5 Rn. 35.
[859] 'Eine freie, nicht von der öffentlichen Gewalt gelenkte, keiner Zensur unterworfene Presse ist ein Wesenselement des freiheitlichen Staates; insbesondere ist eine freie, regelmäßig erscheinende politische Presse für die moderne Demokratie unentbehrlich. Soll der Bürger politische Entscheidungen treffen, muß er umfassend informiert sein, aber auch die Meinungen kennen und gegeneinander abwägen können, die andere sich gebildet haben. Die Presse hält diese ständige Diskussion in Gang; sie beschafft die Informationen, nimmt selbst dazu Stellung und wirkt damit als orientierende Kraft in der öffentlichen Auseinandersetzung. In ihr artikuliert sich die öffentliche Meinung; die Argumente klären sich in Rede und Gegenrede, gewinnen deutliche Konturen und erleichtern so dem Bürger Urteil und Entscheidung. In der repräsentativen Demokratie steht die Presse zugleich als ständiges Verbindungs- und Kontrollorgan zwischen dem Volk und seinen gewählten Vertretern in Parlament und Regierung. Sie faßt die in der Gesellschaft und ihren Gruppen unaufhörlich sich neu bildenden Meinungen und Forderungen kritisch zusammen, stellt sie zur Erörterung und trägt sie an die politisch handelnden Staatsorgane heran, die auf diese Weise ihre Entscheidungen auch in Einzelfragen der Tagespolitik ständig am Maßstab der im Volk tatsächlich vertretenen Auffassungen messen können.' (BVerfGE 20, 162 (174 f.) – *Spiegel*).
[860] BVerfGE 20, 162 (174) – *Spiegel*.

Hence, according to constitutional jurisdiction, the freedom of the press has two constitutional aspects. On the one hand, it guarantees a free press itself, thus a right to defend an infringement of it by governmental or administrative conduct (protective claim by the press against coercive action, so-called '*Abwehrrecht gegenüber dem Staat*'). On the other hand, the Court recognises a proper *obligation* on the state to create a legal framework to guarantee the freedom of the press, especially by promulgating laws, which are apt to preclude 'monopolies of opinions.'[861] The *Bundesverfassungsgericht* pointed out in a later case[862] that the lawgiver is 'obliged in particular to face tendencies of concentration early and as effectively as possible, particularly because it is difficult to change undesirable developments.'[863] Hence, freedom of the press can only be guaranteed if there are a number of independent press undertakings.

This doctrine of an 'objective-legal' dimension of a constitutional right was applied to other rights as well. The *Bundesverfassungsgericht* recognised a strict governmental obligation to provide protective provisions for the freedom of broadcasting, which is also guaranteed in Article 5 I 2 GG.[864] The Court emphasized the hypothetical risks to the society of abuse of a potential monopolist. It argued, that the state must guard this freedom by providing a legal framework, which ensures the independence of broadcasting companies from governmental influence as far as the broadcasted content is concerned. This regulatory framework has to ensure free access for potential broadcasting companies, due process in frequency allocation and so forth. This explains the high level of regulation in German broadcasting law. German broadcasting law provides a plethora of regulations and principles based upon the jurisdiction of the *Bundesverfassungsgericht*. Here, a difference with

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[861] 'Der Funktion der freien Presse im demokratischen Staat entspricht ihre Rechtsstellung nach der Verfassung. Das Grundgesetz gewährleistet in Art. 5 die Pressefreiheit. Wird damit zunächst - entsprechend der systematischen Stellung der Bestimmung und ihrem traditionellen Verständnis - ein subjektives Grundrecht für die im Pressewesen tätigen Personen und Unternehmen gewährt, das seinen Trägern Freiheit gegenüber staatlichem Zwang verbürgt und ihnen in gewissen Zusammenhängen eine bevorzugte Rechtsstellung sichert, so hat die Bestimmung zugleich auch eine objektiv-rechtliche Seite. Sie garantiert das Institut "Freie Presse". Der Staat ist - unabhängig von subjektiven Berechtigungen Einzelner - verpflichtet, in seiner Rechtsordnung überall, wo der Geltungsbereich einer Norm die Presse berührt, dem Postulat ihrer Freiheit Rechnung zu tragen. Freie Gründung von Presseorganen, freier Zugang zu den Presseberufen, Auskunftspflichten der öffentlichen Behörden sind prinzipielle Folgerungen daraus; doch ließe sich etwa auch an eine Pflicht des Staates denken, Gefahren abzuwehren, die einem freien Pressewesen aus der Bildung von Meinungsmonopolen erwachsen könnten' (BVerfGE 20, 162 (175 f.) – *Spiegel*).

[862] BVerfGE 73, 118 ff. – *Niedersachsen*.

[863] 'Insbesondere obliegt es ihm [dem Gesetzgeber], Tendenzen zur Konzentration rechtzeitig und so wirksam wie möglich entgegenzutreten, zumal Fehlentwicklungen gerade insoweit schwer rückgängig zu machen sind.' (p. 159 f.).

[864] See for instance the so-called 'Third broadcasting case' of 1981 (BVerfGE 57, 295 ff. – *FRAG*).

the law of the press can be observed. While broadcasting expressly needs a high degree of regulation, the Federal Constitutional Court stated that commercial competition, unrestricted by the state, is generally sufficient to guarantee plurality in the press sector.[865] The state only has to provide a legal framework, in which competition can prevail.[866]

Hence, the government did not enact the same comprehensive rules for the press as for broadcasting. The German Broadcasting Treaty (*Rundfunkstaatsvertrag* (RfStV)),[867] for instance, provides a special provision for the *internal* growth of broadcasters. According to § 26 RfStV, broadcasters may only have a certain share of television viewers. Even though every broadcaster may own an unlimited amount of broadcasting channels, broadcasting companies are not allowed to have 'prevailing power of opinions' (*vorherrschende Meinungsmacht*).[868] A special independent body, the Commission for the Assessment of Concentration in the Media Sector (*Kommission zur Ermittlung der Konzentration im Medienbereich* (KEK))[869] was established to ensure 'plurality of opinions' (*Meinungsvielfalt*). A complex calculation method[870] is used to scrutinize which share of the audience is watching programmes of a particular broadcasting company. If the annual average equals or exceeds 30%, it is presumed that 'prevailing power of opinions' exists.[871] A share of television viewers of 25% can lead to such a presumption as well, especially if the broadcasting company has a market-dominant position on a 'media-relevant related market' (*medienrelevanter verwandter Markt*).[872] If a broadcaster reached 'prevailing power of opinions,' no more licences will be granted for additional channels for the same broadcaster.[873] Moreover, existing licences can be countermanded until there is no more 'prevailing power of opinions,' if the broadcaster does not successfully reduce his shares or 'influence on opin-

[865] BVerfGE 20, 162 (176) – *Spiegel*.
[866] To the degree of regulation in the different media see also Hoffmann-Riem *Kommunikationsfreiheiten – Kommentierung zu Art. 5 Abs. 1 und 2 sowie Art. 8 GG* (2002).
[867] Rundfunkstaatsvertrag vom 31. 8. 1991, zuletzt geändert durch den Achten Rundfunkänderungsstaatsvertrag vom 8./15. Oktober 2004, available at: http://www.br-online.de/br-intern/organisation/pdf/rundfunk-staatsvertrag.pdf.
[868] § 26 I RfStV.
[869] See § 35 II Nr. 1 RfStV. The KEK consists of six experts in broadcasting and commercial law, *cf* § 35 III RfStV, who are not bound by any instructions, § 35 VI RfStV.
[870] *Cf* § 27 RfStV.
[871] § 26 II 1 RfStV.
[872] For details see § 26 II 2 RfStV. Broadcasters can 'lower' their shares by several ways, such as granting broadcasting time to independent third parties, *cf* § 26 II 3 RfStV referring to § 25 IV and § 26 V RfStV.
[873] § 26 III RfStV.

ions' in other ways.[874] However, such provisions do not exist for publishing houses. Competition law regulates only external growth via mergers.

In the *Münchner Anzeigenblätter* case,[875] the *Bundesverfassungsgericht* declared the provisions of the GWB concerning the control of mergers between newspaper enterprises to be constitutional.

As explained above, the freedom of the press is specially protected under the German Constitution. However, the freedom of the press is limited by other fundamental rights, or rights protected by the Constitution.[876] Article 5 II GG prescribes that the freedom of the press and the freedom of expression[877] are limited by general laws (*allgemeine Gesetze*),[878] laws for the protection of minors and for the protection against defamation. A law is 'general,' if it does not aim at the prohibition of a certain *content* of communication. In several cases, the German Federal Constitutional Court drew the borders of the freedom of the press according to other constitutional rights like the right of privacy, the public interest in criminal prosecution and child protection.

In the *Münchner Anzeigenblätter* case, the Court concluded that the newspaper merger provisions are such general laws, because they serve primarily to fight economic dominance and are not aiming at media content.[879] The *Bundesverfassungsgericht* pointed out, that the rules bring 'specific adjustments to the special structures of the press markets' but no special criteria for specific journalistic competition. Hence, the (only) reason for the lowering of the thresholds of merger control with regard to press mergers is to effectively stave off anti-competitive concentration and thus potential abuse of market dominance.[880]

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[874] § 26 IV 3. These provisions, however, have not played a significant role so far. In 2002, the RTL Group (owned by Bertelsmann) as the biggest broadcasting group had with all its stations a market share of 24,3%, see Media Perspektiven Basisdaten 2002 – Marktanteile der Fernsehprogramme.

[875] BVerfG, WuW/E VG 307 f. – *Münchner Anzeigenblätter.*

[876] So-called '*Rechte mit Verfassungsrang*'.

[877] The provision equally applies to the freedom of broadcasting and the freedom to receive information.

[878] *Cf* the limitation of the rights in the South African Bill of Rights by 'law of general application,' section 36(1) of the South African Constitution, see 1 7 4 *supra*.

[879] BVerfG, WuW/E VG 307 – *Münchner Anzeigenblätter*. See also BGH, WuW/E BGH 1685 – *Springer/Elbe-Wochenblatt*; Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 36 Rn. 157.

[880] Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 38 Rn. 15.

Therefore, the German government was regarded as competent to enact specific press merger provisions.[881]

However, the new proposed provisions in the first draft would have been a violation of the *Grundgesetz*. Admittedly, the *Bundesverfassungsgericht* has consistently granted a certain freedom to the legislature as regards lawmaking. For instance, the Court pointed out in the *Münchner Anzeigenblätter* case that it is up to the lawmaker to decide on the scope of the press-specific turnover calculation clause and the multiplication factor.[882]

Nevertheless, the legislature may not enact unconstitutional provisions. The amendment of the GWB in its proposed form would have led to a constant monitoring of the content of press products. The German government is not competent to do so and would violate the freedom of the press if it did.[883] Constant monitoring is generally frowned upon in merger considerations. As noted already, a conditional approval is never admissible in merger considerations, if it aims at constant monitoring.[884] The legal instrument of the imposition of conditions in merger cases must *structurally* compensate the detrimental effects of a merger on competition.[885] It has even been maintained that the proposed monitoring would have been a violation of the prohibition of censorship, as set out in Article 5 III of the German Constitution.[886]

Moreover, it is doubtful whether the German federal government is competent to enact such provisions. The *Grundgesetz* differentiates quite complexly between the competence of the federal government and the governments of the regions (*Länder*).[887] Article 74 Nr. 16 GG empowers the federal government to enact laws for the prevention of the abuse of economic dominance. This includes the elimination of economic dominance and sanc-

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[881] BVerfG, WuW/E VG 307 – *Münchner Anzeigenblätter.*
[882] BVerfG, WuW/E VG 307 (308) – *Münchner Anzeigenblätter.*
[883] With the same criticism: Association of German Local Newspapers, see epd medien 'Verband der Lokalzeitungen gegen Clements Fusionspläne', Nr. 9 (2004-02-07) 14; BDZV-Stellungnahme zur geplanten Änderung der Pressefusionskontrolle (05.02.2004), published in epd medien, Nr. 12/13 (2004-02-21) 33.
[884] See § 40 III 2 GWB.
[885] *Cf* Bosch in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 40 Rn. 21.
[886] *Cf* Frankfurter Allgemeine Zeitung 'Achtung Zensur' (2003-12-20) 13.
[887] *Cf* chapter VII of the GG; also see Pieroth in Jarras & Pieroth *Grundgesetz für die Bundesrepublik Deutschland, Kommentar* (2004), Art. 70 Rn. 1.

tions.[888] Nevertheless, there is no federal competence to maintain competition through the regulation of media *content*. Thus, a pluralistic press market may not be enforced by laws, which prescribe newspaper content. The federal government's competence embraces the enactment of provisions ensuring competitiveness on the press sector, only if they do not aim at press-specific goals.

Thus, in the *Münchner Anzeigenblätter* case the Federal Constitutional Court pointed out that the third amendment of the GWB was constitutional, because it aimed at the establishment of an effective control of mergers in the press sector, and not directly at journalistic plurality in the press markets. Journalistic plurality is guaranteed only *indirectly* by guaranteeing a competitive market situation.

The proposed seventh amendment, on the contrary, contained provisions that were intended to directly maintain press plurality. Hence, there is an argument to be made that the federal government would not have been competent to enact the new supervision measure.[889]

However, the amendment – even if revised – still touched a constitutionally 'sensitive' nerve. The freedom of the press has to be borne in mind, when provisions are enacted, which are highly likely to influence the press structure. The German Constitution obliges the federal government to protect the freedom of the press, which, to a certain degree, also includes plurality of press products. Nevertheless, the state is only competent to guarantee an economic environment, which enables newspaper publishers to compete with each other. Therefore, the government's scope of action is limited on both sides. First, there is a proper obligation on the state to enact adequate competition-protecting laws in the media sector, and, secondly, these laws may only protect competition and plurality of press products indirectly. The latest version of the government's draft followed this ap-

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[888] Pieroth in Jarras & Pieroth *Grundgesetz für die Bundesrepublik Deutschland, Kommentar* (2004), Art. 74 Rn. 35.

[889] *Cf* Stellungnahme zum Entwurf eines siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (16 September 2004, Hans-Bredow-Institut für Medienforschung, Schulz), 5; Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Arbeit (Dokumentation Nr. 535) – 'Keine Aufweichung der Pressefusionskontrolle' (August 2004) par 33, available at: http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/doku-nr-535-keine-aufweichung-pressefusionskontrolle,property=pdf.pdf.

proach, even though, from an economic and legal point of view, the amendment would have been an error.

2 3 6 3 Conclusion

The proposed amendment in its first draft would not have been consistent with the German Constitution. The revision of the amendment may have dispelled the most serious constitutional concerns, but still could not be justified on economic and political grounds. The amendment would not have enhanced competition in the newspaper markets, but it would have most likely led to a higher level of concentration in such markets. Hence, detrimental effects for the consumers (readers and advertisers) would have been the most likely outcome. In the long term, the amendment would have endangered the plurality of newspaper titles, independent editors and journalists and hence the transmission of a variety of opinions via newspapers.

The weak economic situation cannot justify the approach of the German government. It may be that newspaper enterprises – like companies in other industries – struggle with the momentary recession, especially because of the decline in advertising revenues. It may also be that new avenues for advertising such as the Internet have impacted negatively on newspapers. Nevertheless, the amendment cannot be a solution for these economic and structural woes of the print media. The reasons for the decline in profits of newspaper publishers are multiple.[890]

From a competition perspective, it would have been a reasonable approach to empower competition authorities to scrutinize mergers and during this process to approve mergers, if competitive circumstances demand it, rather than to withhold such mergers from any control. The *Bundeskartellamt* approves a merger if it is necessary in order to rescue a newspaper company, and hence to maintain plurality in press markets (*Sanierungsfusionen*).[891] Moreover, competition authorities already allow co-operation of publishers for instance on the advertisement market. Such forms of collaboration are not necessarily an-

[890] A decline in newspaper readers may also have socio-cultural reasons. See for instance *pro*media, 'Das Internet bietet keinen Ersatz für die Zeitungslektüre' – Interview mit Renate Köcher (Geschäftsführerin des Instituts für Demoskopie in Allensbach), (Nr. 7/04) 16.
[891] See 2 3 5 3 *supra*.

anti-competitive but may even be benign.[892] This is recognized also in other jurisdiction, for instance in US antitrust law.[893] The US Congress has even passed a Newspaper Preservation Act, restricting the application of antitrust provisions to arrangements between newspapers to safeguard press plurality.[894]

The idea of the new § 31 GWB can be justified on economic grounds and has to be regarded as being within the constitutionally guaranteed 'scope of action,' which allows the legislature to face structural problems of certain industrial sectors.[895] Nevertheless, if an amendment of the press-specific provisions comes onto the table in the future, the legislature has to set stricter limits for co-operations in the advertisement field. For instance only arrangements, which are necessary to safeguard independent newspaper companies, should be facilitated. Moreover, the suggested rules did not set out limits for the scope of the co-operation.[896] The Economic Committee of the Federal Upper House of Parliament (*Wirtschaftsausschuss des Bundesrates*) suggested a limit of total turnovers of € 100 million and € 50 million for each involved enterprise.[897] This would seem to be a reasonable constraint on such agreements. Furthermore, it is problematic that § 31 GWB only em-

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[892] See Sutherland *Competition Law of South Africa* (2004) 5-47 to 5-51 for the discussion of the positive and anti-competitive effects of joint ventures.

[893] See Antitrust Guidelines For Collaborations Among Competitors, issued by the Federal Trade Commission and the U.S. Department of Justice (April 2000) section 2.1, available at: http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf: 'The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways. For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration. A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration. The potential efficiencies from competitor collaborations may be achieved through a variety of contractual arrangements including joint ventures, trade or professional associations, licensing arrangements, or strategic alliances. Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. For example, one participant may have special technical expertise that usefully complements another participant's manufacturing process, allowing the latter participant to lower its production cost or improve the quality of its product. In other instances, a collaboration may facilitate the attainment of scale or scope economies beyond the reach of any single participant. For example, two firms may be able to combine their research or marketing activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products. Consumers may benefit from these collaborations as the participants are able to lower prices, improve quality, or bring new products to market faster.'

[894] See in detail 4 2 3 *infra*.

[895] Also agreeing with this concept: Weberling 'Novellierung der Pressefusionskontrolle: Auslaufmodell Pressevielfalt? Zur geplanten Lockerung des Pressekartellrechts' (2004), *pro*media, Nr. 7/04, 22.

[896] The president of the *Bundeskartellamt*, Böge, criticised especially this point of the revised draft and held that a 'price cartel in the advertisement business' would be exempted, quoted from: Frankfurter Allgemeine Zeitung 'Kartellamtspräsident kritisiert Clements Pressefusionspläne' (2004-05-06) 1.

[897] See Suggestions of the Economic Committee of the Federal Upper House of Parliament (*Wirtschaftsausschuss des Bundesrates*) for the seventh amendment of the GWB, BR-Drs. 210/1/05 v. 18.04.2005 par 7.

braced newspapers and not magazines.[898] Both press products are equally protected by the Constitution. Therefore, no difference should be made between them. Magazines are important for the creation of the public opinion, too, and the content of the press product ought not to be used as the basis for differentiation. Hence, the Association of German Magazine Publishers (*Verband Deutscher Zeitschriftenverleger* (VDZ)) criticised this section for being unconstitutional.[899] Furthermore, it is not easy to specify a precise point of delineation between newspapers and magazines.[900] In addition, § 31 III GWB raised concerns insofar as no legislative exceptions are made for co-operation in other industries. This privilege for a specific industry would have been unique under German Competition Law and cannot be justified. A provision, which facilitates newspaper mergers, even in the advertisement field, should not be codified, especially where co-operations are already possible. The section also embraces printing and distribution and would enhance concentration on these markets.

Despite the high concentration levels in most of the press markets, the provisions concerning the control of mergers have proved successful since their implementation in the 1970s. Germany has a multitude of publishing houses and independent newspapers. The German government should not endanger press pluralism by facilitating mergers in this field. It is not the task of the lawmaker to react to the momentary problems of the publishing industry. Nevertheless, the competition authorities should reconsider their practice, especially the use of the problematically narrow market definitions. In particular, it has to be enquired if it is still appropriate to consider advertisement markets in newspapers separately from the market for electronically published advertisements on the Internet. Moreover, attention should be paid to the strict conditions for 'safeguard-approvals'.[901]

Even though the controversial new press-merger provisions have not been implemented, it can be expected that the German government will continue to hold on to its proposed amendment. Further discussion in this field will hopefully lead to a revised draft, which can dispel the above-described concerns. The latest approach of the government, however, is

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[898] See also the criticism of the Economic Committee in: Suggestions of the Economic Committee of the Federal Upper House of Parliament (*Wirtschaftsausschuss des Bundesrates*) for the seventh amendment of the GWB, BR-Drs. 210/1/05 v. 18.04.2005 par 5-6.
[899] See epd medien 'VDZ lehnt Neuregelungen der Pressefusionskontrolle ab', Nr. 20 (2005-03-16) 14.
[900] See 2 3 5 2 *supra*.
[901] See 2 3 5 3 *supra*.

to be commended. In the final draft, the time of application for the new provisions, allowing co-operations in the advertisement field, was limited to only five years. This was done to provide for an opportunity to observe their effectiveness.[902]

[902] See the proposed § 131 VII GWB. *Cf* also epd medien 'Neuregelungen der Pressefusionskontrolle verabschiedet', Nr. 20 (2005-03-16) 14.

Chapter 3
Comparison

The South African and German Competition Law differ in certain aspects, but fundamental similarities can be noticed. First, this chapter will give a synopsis of the most important aspects of both legal systems. Thereafter, certain selected aspects will be described in detail.

3 1 Synopsis

Graph 9: **Synopsis**

Aspect	South African Competition Law	German Competition Law
Purposes of Competition Law	• Main economic purpose for mergers: Prevention of market power • Several purposes in the Competition Act, including - Promotion of efficiency - Consumer welfare - Protection of SMEs - Promotion of ownership of historically disadvantaged persons	• Main economic purpose for mergers: Prevention of market power • No expressed purposes in the GWB, but main purpose is the prevention of restraints of competition
Competition authorities	Powerful and independent bodies	Powerful and independent bodies
Definition of mergers	Broad definition (change of control)	Broad definition (including minority shareholding with competitively significant influence)
Necessity of notification	• Notification only compulsory for certain transactions (depending on the turnovers and assets of the parties to the merger) • Low thresholds	• Notification only compulsory for certain transactions (depending on the turnovers and assets of the parties to the merger) • High thresholds
Definition of the relevant market	• Definition of the product and geographic market • Test of functional interchangeability or substitutability of a product or service from the consumer's point of view	• Definition of the product and geographic market • Test of functional interchangeability or substitutability of a product or service from the consumer's point of view
Newspaper markets	Reader and advertisement markets are recognised (also sub-markets)	Reader and advertisement markets are recognised (also narrowly defined sub-markets)
Merger prohibition criterion	• A merger has to be prohibited, if the merger is likely to substantially prevent or lessen competition • Several factors are taken into account (a non-exhaustive list of factors	• A merger has to be prohibited, if it is likely that the merger will lead to a market-dominant position or will strengthen it • Several factors are taken into ac-

	is codified)	count (a non-exhaustive list of factors is codified)
Exemptions	Several exemptions: • Pro-competitive gains • Public interest ground	Several exemptions: • Pro-competitive gains • Public interest ground • 'Minister's permission'
Enforcement	• Severe penalties • Wide powers of the Competition Commission (investigation rights, seizure, right to summon)	• Severe penalties • Wide powers of the *Bundeskartellamt* (investigation rights, seizure, right to summon)
Practice of merger control	General permissive tendency	General permissive tendency
Press mergers	No specific provisions	• Specific provisions (notably lower turnover thresholds), but consideration according to the general rules
Right of third parties to take legal action against approved mergers	• Trade unions and employees are allowed to appeal the decisions of the Competition Tribunal to the Competition Appeal Court, regardless if the Tribunal approved, conditionally approved or prohibited the merger • Competitors and consumers are not allowed to appeal the decisions of the Tribunal, even if they participated in the proceedings of the Tribunal • Competition Commission is not allowed to appeal against decision	• Application for interim relief only admissible, if the third party's own rights are infringed[903] • Appeal of third parties against merger approval only admitted, if the third party is 'substantially affected by the decision' and took part of the proceedings (but right of participation) • Other legal actions are possible, if the third party is adversely affected in its 'competitive interests'

3 2 Similarities between South African and German Competition Law

The South African Competition Act and the German GWB are similarly structured, dealing with prohibited practices and the control of mergers. In a nutshell, it can be stated that South Africa and Germany follow the same approach to controlling mergers. Both nations have codified a legal system of compulsory notification of transactions involving firms of a certain size, in order to be able to consider the transactions' detrimental effects on competition before their implementation and thus in advance of structural changes of the market. Both recognise the duty of notification for proposed mergers between parties who's turnovers are above certain thresholds, even though the German thresholds are very high compared to the South African ones. In this context, it can be argued that both jurisdictions seem to be determined to maintain wide access to the control of proposed transactions by

[903] The right is now restricted due to the seventh amendment of the GWB.

broadly interpreting 'acquisition of control'. South African and German competition authorities acknowledge that an internal change of control (as from joint to sole control) constitutes a notifiable transaction. This is consistent with the practice in other jurisdictions, such as Europe.[904]

Both jurisdictions follow the same approach to determine detrimental effects of mergers on competition structures, aiming at the protection of competition, but not competitors. Moreover, competition authorities define the relevant product and geographic market in the same way.

Furthermore, competition authorities are equally powerful and independent bodies, equipped with legal powers to examine proposed transactions effectively. Especially as regards the factors, which are assessed to determine potential anti-competitive consequences of a transaction, German and South African Competition Law are remarkably similar. Both competition laws empower the competition authorities to assess the merger's effect on competition quite independently, allowing them to take into account a variety of different criteria, which do not constitute a closed list.

Certain similarities can be explained by the influence of European law on both legal systems. For instance, the German definition of a merger in § 37 I Nr. 2 GWB ('acquisition of control') was introduced in the GWB following Article 3 I lit. b) of the European merger regulation.[905] Moreover, US antitrust law and doctrine has widely influenced European, South African, and German legislation and jurisdiction. Nevertheless, in some ways both South African and German law have departed from these systems in the same way. For

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[904] *Cf ICI / Tioxide* 1991 (4) CMLR 854 (Case No. IV/M/023). In this case the European Commission held that a change from sole control to joint control amounted to a concentration, because '[d]ecisive influence exercised singly is substantially different to the decisive influence exercised jointly, since the latter has to take into account the potentially different interest of the other party or parties concerned' (par 2) and '[b]y changing the quality of decisive influence' exercised by one of the firms on the other, 'the transaction will bring about a durable change of the structure of the concerned parties.' (par 4).

[905] VO 4064/89. See the memorandum of the German legislature to the sixth amendment of the GWB (Reg.Begr. zur 6. GWB-Novelle FIW-Sonderheft, S.80). See also Schütz in *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht Gemeinschaftskommentar* (2001), § 37 Rn. 24; for the influence of European jurisdiction on the interpretation of section 12 of the South African Competition Act see Legh in Brassey et al *Competition Law* (2002) 240-241.

instance, the express efficiency defence for the parties to a merger is codified in South Africa and Germany but is absent from the US Clayton Act.[906]

A specialised authority exists under neither South African nor German Competition Law to intervene in media mergers. Conversely, in the United Kingdom the Office of Communications (Ofcom)[907] was empowered to deal with media mergers. It has both investigative and advisory duties in this regard. The UK Enterprise Act 2002[908] requires Ofcom to investigate specific matters of media public interest, arising from the merger of newspapers or broadcast media companies. Hence, a specialized body for media mergers was created recognising the importance of media plurality, even though Ofcom has no statutory role unless the Secretary of State for Trade and Industry issues an intervention notice on media mergers. Such a notice must be issued on public interest grounds.[909] When the Secretary of State issues the notice in relation to a media merger, Ofcom has a duty to advise the Secretary of State on whether the merger is in the public interest. Ofcom assesses the merger's effects on the public interest with reference to the considerations specified in the intervention notice under the Enterprise Act's merger control regime.[910] The Secretary of State will then decide whether to refer the merger to the Competition Commission.

As regards mergers involving newspapers, Ofcom applies the media mergers' public interest test to proposed mergers and assesses the impact of these mergers on the media market. In such cases, the public interest considerations, as defined by the Enterprise Act,[911] are:

- the need for accurate presentation of news in newspapers
- the need for free expression of opinion in newspapers
- the need for, to the extent that is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or parts of the UK

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[906] *Cf Trident Steel (Pty) Ltd Dorbyl Ltd* (CT 89/LM/Oct00) par 70. On the US approach see also especially par 52-67 with further references.
[907] See www.ofcom.gov.uk.
[908] As amended by the Communications Act 2003, available at: http://www.hmso.gov.uk/acts/acts2002/20020040.htm.
[909] *Cf* section 42(2) of the Enterprise Act. See also *Ofcom guidance for the public interest test for media mergers*, p. 1, available at: http://www.ofcom.org.uk/codes_guidelines/broadcasting/media_mergers/?a=87101.
[910] See Part 3, Chapter 2 of the Enterprise Act.
[911] S 58(2A)-(2B).

It seems to be a sound approach to the problem of mergers between newspaper enterprises to take into account the specific role, which the media play in a democratic society. In the case of newspaper mergers, Ofcom has a panel of experts in the newspaper industry on which it draws to provide analysis and advice in each case.[912] This ensures that decisions are not made without the specific knowledge of this industrial sector. Ofcom may also offer confidential, non-binding advice to the parties in advance of notification of a media merger.

3 3 Differences between South African and German Competition Law

As shown above, German competition authorities determine whether a merger is likely to create or strengthen a 'market-dominant position' (MDP). In South Africa, the question is whether a merger substantially prevents or lessens competition (SPLC). However, the difference between these tests appears to be textual rather than substantive. According to a comparative research study, conducted by the *Bundeskartellamt*,[913] no major differences could be observed regarding the prohibition criteria codified in the legal systems of Germany, the European Union, the United States of America, and Australia. All tests were flexible enough to use economic criteria, such as market share data, market structure, barriers to entry, countervailing power and so forth. The study concluded that the similarities in both approaches would be the result of the identical major purpose: the prevention of market power. Even though the South African test differs slightly from a 'substantial lessening of competition' test (SLC), as used in the United States, the textual nuance ('prevent or lessen') is not significant.

As indicated above, the 'likeliness' of a transaction to substantially prevent or lessen competition only implies that competition authorities are enjoined to make a predictive judgement of the scrutinised transaction.[914] This can be found in the German approach of likeliness of market domination. Certain differences, such as conditions set out for the failing firm defence, are rather marginal.

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[912] See *Ofcom guidance for the public interest test for media mergers*, p. 2, available at: http://www.ofcom.org.uk/codes_guidelines/broadcasting/media_mergers/?a=87101.

[913] Bundeskartellamt 'Das Untersagungskriterium in der Fusionskontrolle – Marktbeherrschende Stellung versus Substantial Lessening of Competition?' Arbeitspapier im Rahmen des Arbeitskreises Kartellrecht (2001), available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/AKK_01.pdf.

[914] See 1 5 1 2 4 *supra*.

The South African and German acts differ sharply when comes to their respective goals. German Competition Law is aimed at promoting consumer interests through economic efficiency. The South African Competition Act is stated to have several 'non-competition' objectives. This can only be understood in historical context. As shown above, however, the purposes and specific public interest grounds set out in the Competition Act have not influenced the Competition Tribunal's decisions substantially so far.

Hence, South African and German Competition Law basically follow the same approach. Competition authorities nowadays collaborate and benchmark in an attempt to meet international best-practice.

Chapter 4
Discussion and Conclusion

4 1 Introduction

In the first chapter of this thesis it was shown that South Africa does not have specific provisions in its Competition Act for the control of mergers between newspaper enterprises. In this respect, the South African approach differs from the German one. Nevertheless, South African media regulation is complex and well-developed. The regulation of the media will be analysed in this chapter. The central question will be whether South Africa requires media-specific and more specifically press-specific, competition law rules.

4 2 Does South Africa need a media-specific competition law?

To answer the question, if South Africa needs a media-specific competition law, the existing provisions, regulating the media in South Africa, have to be looked at first.

4 2 1 South African media regulation

South African media policy aims to achieve several goals. As regards broadcasting, there is a plurality of objectives, to contribute to democracy, encourage ownership and control of broadcasting services by people from historically disadvantaged communities and establish a strong and committed public broadcaster to service the needs of all South Africans.[915] Finally, it is aimed at guaranteeing fair competition in this sector.

Several laws regulate the South African media sector to give this policy legal backbone. Broadcasting is highly regimented. The Broadcasting Act[916] and Independent Broadcasting Authority (IBA) Act[917] control frequency and licence allocation and supervision of broadcasting content. The Independent Broadcasting Authority Act's purposes are set out in section 2. It is, *inter alia*, intended to promote the provision of a diverse range of sound television broadcasting services, on a national, regional and local level, and to ensure that

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[915] See South Africa Yearbook 2004/5, 136.
[916] Broadcasting Act 4 of 1999.
[917] Independent Broadcasting Authority Act 153 of 1993 as amended by Broadcasting Amendment Act 64 of 2002, available at: Juta's Statutes (2003) II, 2-19.

broadcasting services, viewed collectively provide for regular news and services. In May 2000, the ICASA Act[918] was proclaimed, paving the way for the merger of the South African Telecommunications Regulatory Authority (SATRA) and the IBA[919] and the establishment of the Independent Communications Authority of South Africa (ICASA),[920] which is responsible for the supervision of telecommunications and broadcasting. ICASA so far granted a large number of licences for private radio stations.[921]

For the sake of political transparency, fairness, and equity in the media, the Independent Media Commission was established by the Independent Media Commission Act in 1993.[922] According to section 3, the primary objectives of this Act are to ensure equitable treatment of all political parties by broadcasting services and to ensure that State-financed publications and State information services are not, directly or indirectly, used to advance the interests of any political party, whether directly or indirectly, during the election period, so as to promote and contribute towards the creation of a climate favourable to free political participation and free and fair elections.

Moreover, there are limitation of foreign ownership in the media sector. Early in 2003, the level of ownership of private radio and television stations for a foreigner was set at 20%, though this level will be raised to increase investment.[923] Furthermore, there has already been a discussion about the enactment of cross-ownership regulations, such as a prohibition on control of a broadcasting station by a person who already controls a newspaper.[924]

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[918] Act 13 of 2000.
[919] *Cf* http://www.info.gov.za/speeches/1999/9911091035a1002.htm. Both authorities merged on 1st July 2000.
[920] See www.icasa.org.za.
[921] In detail: South Africa Yearbook 2003/4, 144-145. ICASA, *inter alia*, is also responsible for monitoring the activities of the broadcasting and telecommunications operators and for regulating the broadcasting and telecommunications industry as a whole, see South Africa Yearbook 2004/5, 128; for the powers of ICASA see also Competition Law and Policy in South Africa – OECD Global Forum on Competition Peer Review: Paris, 11 February 2003, p. 35, available at: http://www.comptrib.co.za/Publications/South%20Africa%20Peer%20Review.PDF. The powers of ICASA may raise the problem of concurrent jurisdiction, see Sutherland *Competition Law of South Africa* (2004) 4-48. The Competition Commission, however, pleads for the removal of concurrency in jurisdiction between the Competition Commission and ICASA on competition matters, see recently Submission of the Competition Commission and Competition Tribunal on the Convergence Bill (B9-2005) for consideration by the Portfolio Committee on Communications (2005), available at: http://www.compcom.co.za/policyresearch/Comments%20on%20the%20Convergence%20Bill%20April%202005.doc.
[922] Independent Media Commission Act 148 of 1993 as amended by Proclamation 54 of 1994, available at: Juta's Statutes (2003) II, 2-12.
[923] South Africa Yearbook 2003/4, 143.
[924] See Burns *Communications Law* (2001) 306-307 for details.

Certain quotas for locally produced content on local radio and television are imposed. These quotas have been raised recently for public and community radio stations to 40%, while quotas for private and public commercial stations were raised to 25%. As far as television is concerned, different quotas exist for public broadcasters (55%), commercial private and public free-to-air stations (30%), and for pay stations (8%).[925] German broadcasting law, in contrast to legislations in other European countries like France, does not set out such quotas, even though it has been proposed recently that they be introduced to promote German and European content.[926] South African broadcasting regulation seems to be in many ways similar to the comparable German provisions. The law even provides some restrictions, which do not exist under German broadcasting law.

4 2 2 The need for regulation

The extent to which competition law may be used to regulate markets is controversial. The Chicago School scholars criticize an overly rigid regulation of markets, and argue that antitrust intervention is only necessary – and justified – to correct clear cases of market inefficiency.[927] Although the Chicago school has made some valuable contributions to antitrust law, this 'almost religious belief in the self-correcting abilities of markets'[928] cannot be followed through. In particular, it seems to be beyond doubt that South African competition authorities cannot follow a pure Chicago School approach, because of section 2 of the Competition Act.[929] The language used by the legislature in section 2 of the Act is pellucid. Efficiency is merely one goal besides other more general ones, like social and economic welfare.

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[925] *Cf* South Africa Yearbook 2003/4, 143-144.

[926] However, such an approach would be highly problematic in terms of the German Constitution, because the *Bundesverfassungsgericht* has consistently pointed out that the freedom of broadcasting notably consists in the protection of the broadcasted content against governmental influence, *cf* BVerfGE 12, 205 ff. – *Deutschland-Fernsehen*; BVerfGE 57, 295 ff. – *FRAG*; BVerfGE 90, 60 ff. – *Gebührenurteil.*

[927] See for instance Posner 'The Chicago School of Antitrust Analysis' (1979) 127 UPALR 925-948. Chicago scholars argue that competition policy should seek to maximize allocative efficiency – the state of affairs in which consumer welfare is optimised occurring where price equals marginal costs in a market of perfect or nearly perfect competition – without impairing productive efficiency – the ratio of a firm's output and input. Bork *The Antitrust Paradox - A Policy at War with Itself* (1993) 91 states: 'The whole task of anti-trust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.'. See also Sutherland *Competition Law of South Africa* (2004) 2-17 to 2-21.

[928] Sutherland *Competition Law of South Africa* (2004) 2-18.

[929] See 1 2 *supra*.

The imposition of a system of official scrutiny and control over those mergers between enterprises, which are of significant size, is necessary and justified by the purpose for which the legal framework was established. The objective to ensure that mergers, which are subject to this process, will not have adverse and unjustified effects by preventing or lessening competition in the market or markets in which the merging enterprises operate, is crucial for the market itself.[930] The prevention of concentrated markets or even monopolies via competition law is not intended as punishment.[931] It simply prevents structural changes in the market, which would be detrimental to competition. Internal growth via the successful improvement of a competitor's performance is not restrained, if a market-dominant position is not abused.[932]

The detrimental effects of uncontrolled market behaviour, especially the lack of control of mergers, which would facilitate prohibited practices or even lead to monopolies, have already been indicated above.[933] As far as the necessity of merger control is concerned, it has to be agreed with Lewis, chairperson of the Competition Tribunal that:[934]

> 'Merger regulation is a key aspect of competition law – in fact by helping to maintain competitively structured markets merger regulation limits the necessity for invasive intervention later on.'

US courts also emphasise the necessity of competition law as a regulator:[935]

> 'Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every

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[930] Lewis puts it this way: 'The task of competition regulators is to ensure that the process of competition does not destroy the very basis of its own existence.' (Lewis 'Competition Policy in South Africa – Where has it come from and where is it going?' (2002), speech to Investment Analysts' Society of South Africa, 16th May 2002, Johannesburg, available at: http://www.comptrib.co.za/Publications/Speeches/IAS%20speech.htm).

[931] As Areeda & Hovenkamp *Antitrust Law III* Second Edition (2002) 24 point out for the expansion of firms vis-à-vis their rivals: 'If there is a reason for dissolving a monopoly that has persistently kept a market to itself by expansion of capacity, that reason is failure of the market to correct the situation, not the behavior of the monopolist in expanding capacity to meet estimated demands. It is absurd to classify such behavior as unlawfully "exclusionary".'

[932] See for the exception under German broadcasting law 2 3 6 2 3 *supra*.

[933] See 1 5 *supra*.

[934] Lewis 'Competition Policy in South Africa – Where has it come from and where is it going?' (2002), speech to Investment Analysts' Society of South Africa, 16th May 2002, Johannesburg, available at: http://www.comptrib.co.za/Publications/Speeches/IAS%20speech.htm.

[935] *United States v Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 1135.

business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.'[936]

4 2 3 The need for regulation of the press

As stated above, independent newspapers play an essential role in democracies. Newspapers transmit political news and opinions. They allow citizens to be informed and to be able to develop their own political opinions. It goes without saying that a properly functioning democracy requires an informed electorate.

There are many ways to ensure a flow of information. Print media is only one, alongside others like broadcasting and the Internet. The Internet is a fast growing source of information. More and more people have access to the Internet (4,6% of the South African population in 2002).[937] Most of the bigger newspaper companies in South Africa have websites on the Internet. There are more than 600 online magazines (so-called 'netzines'), with at least 16 of them specialising in daily news.[938] Moreover, all other global online publications are available in South Africa.

Hence, South Africa's media market is characterised by a large number of information sources. Besides daily and weekly newspapers and magazines, there is a plurality of public and private radio and television stations.[939] Private television stations in particular have become a counter in the broadcasting sector to public stations, even though they are still rare in South Africa. Although M-Net exists since 1986, it is only a private subscription

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[936] *Cf* United States v. Philadelphia National Bank, 374 U.S. 321, 371, 83 S.Ct. 1715, 1745, 10 L.Ed.2d 915 (1963).

[937] South Africa Yearbook 2003/4, 157. According to the International Telecommunication Union, in 2003 even 6,82 percent of the population used Internet, see http://www.itu.int/ITU-D/ict/statistics/at_glance/Internet03.pdf. In comparison, in Germany it is around 47% (with 34,4 million Internet users in 2003, *cf* Media Perspektiven Basisdaten 2002 – Internetnutzer in Deutschland.

[938] South Africa Yearbook 2004/5, 143.

[939] See for details Mersham in De Beer (ed) *Mass Media Towards the Millenium – The South African Handbook of Mass Communication* 2nd edition (1998) chapter 8.

television service;[940] the first private free-to-air station, e-tv, started broadcasting only in 1998.[941] Public broadcasting is subject to rules guaranteeing variety and neutrality, and the maintenance and promotion of political news. New forms of information exchange are developing, especially on the Internet, such as blogs (web logging-online diaries) and vlogs (video logs online).[942]

Nevertheless, newspapers play a special role due to the peculiarity of the written word. Printed information will be, generally speaking, more 'reflective' and permanent than broadcasted, or online-distributed, and hence 'non-persistent' news. Also from the recipient's point of view, newspapers differ from other media entities. Newspapers are in general 'believed to be more intent on objective and relatively complete, even if opinionated, journalistic coverage while broadcasters are thought to be more concerned with packaging and 'selling' entertainment to the public.'[943] In contrast to daily newspapers, the Internet is often only used to find particular news.[944] Moreover, especially in rural areas, newspapers are still the only source of information for many South Africans. Thus, the other media cannot substitute a free press, even though they tend to play an increasingly important role.

The question remains, if there is a specific need for regulating the press by competition law. Private claims, particularly in the context of defamation cases, and self-regulation via press associations can ensure a certain level of control of press *content*.[945] In South Africa, the office of the Independent Press Ombudsman was opened in 1997. Members of the public who have complaints or concerns about reports in newspapers and magazines can submit their grievances to the Ombudsman. Should they not be satisfied with the resultant ruling, they can lodge an appeal with an independent appeal panel.[946] Even though such self-regulating mechanism should only be understood as an alternative to private civil

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[940] Also the satellite network DStv is run as pay TV.
[941] *Cf* South Africa Yearbook 2003/4, 145-146.
[942] *Cf* Marsland 'Newspapers' role in influencing opinion is dead' (2005-01-23), available at: http://www.biz-community.com/Article/196/109/5556.html.
[943] Baker *Human Liberty and Freedom of Speech* (1989) 227.
[944] See *pro*media, 'Das Internet bietet keinen Ersatz für die Zeitungslektüre' – Interview mit Renate Köcher (Geschäftsführerin des Instituts für Demoskopie in Allensbach), (Nr. 7/04) 16.
[945] Private claims can also assist in the enforcement of antitrust laws, as it is intended by the US Clayton Act, *cf* Sutherland *Competition Law of South Africa* (2004) 2-14.
[946] See Retief *Media ethics – an introduction to responsible journalism* (2002) chapter 13. *Cf* also Burns *Communications Law* (2001) 302-305.

claims and their effectiveness may be dubitable, it seems to be an enlightened approach. Nevertheless, self-regulation may only be appropriate and sufficient as far as the content of newspapers is concerned. The content of press products cannot be subject to the State's control before publication. This would be unconstitutional censorship.[947] Due to their respective pasts, censorship is a sensitive issue in both South Africa and Germany.[948] To a certain extent the state must be able to examine publications for criminal offences, but the free work of journalists must be guaranteed as well. Thus, under the German Law there are several privileges for the press to ensure journalists' free and independent work. For instance, § 186 of the German Criminal Code (*Strafgesetzbuch* (StGB)) outlaws untrue and contemptible allegations, if they are likely to be detrimental to someone and the asserting person either knows that the allegation is not true, or he or she cannot prove the truth of the statement. Nevertheless, according to § 193 StGB, a journalist may not be punished for publishing an untrue statement (and neither is a civil claim possible), if he or she respected the 'journalistic duties of care' (*journalistische Sorgfaltspflichten*), such as research with due care.[949] Moreover, a statement is deemed to be lawful at the time of its publication.[950] Other privileges of journalists, such as the right to refuse to give evidence or restriction on seizure of journalistic sources are codified as well.[951]

Admittedly, there has to be some belief in the self-regulating power of (press) markets. Nevertheless, self-regulation cannot be a real alternative to the legal control of mergers or prohibited practices by competition law. Only competition law can ensure that market *structures* remain competitive and that there is a plurality of competing newspaper enterprises and therefore press products. Firms will not consider the interests of their competitors, but, in contrast, try to maximise their own market share and market power, and with it their profits. This is economically reasonable and surely not reprehensible, but proves the

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[947] For the South African concept of prior restraint of the freedom of expression see the case *Government of the Republic of South Africa v The Sunday Times Newspaper* 1995 (2) BCLR 182 (T).
[948] See especially Art. 5 S. 3 GG (prohibition of censorship); for details thereon see Jarass in Jarass & Pieroth *Grundgesetz für die Bundesrepublik Deutschland, Kommentar* (2004), Art. 5 Rn. 63 f.
[949] *Cf* BGH, BGHZ 59, 76; NJW 1997, 1148 (1149).
[950] *Cf* BVerfGE 99, 185 (198).
[951] See for instance § 53 I Nr. 5 StPO and § 97 V StPO. The right to refuse to give evidence can be found in every procedural code, as for civil, administrative, and social proceedings. Under South African law, in contrast, the protection of journalists' sources is not codified, but the courts have acknowledged a wide interpretation of the 'just excuse' doctrine in the Criminal Procedure Act for journalists. Imprisonment for the refusal or failure to provide information is due to the amendment of s 205 of this Act the exception rather than the rule. See for details Burns *Communications Law* (2001) 292-298. *Cf* also De Waal et al *The Bill of Rights Handbook* (2001) 313-314.

need for regulation to ensure competition and therefore diversity, not least on the consumers' behalf. Monopolies in press markets have to be prevented to guarantee diversity in news and information[952] and to protect a marketplace of ideas and – as the US Supreme Court has stated – 'the widest possible dissemination of information from diverse and antagonistic sources.'[953] As shown earlier, in most press markets, barriers to entry are quite high,[954] which calls for regulation to guarantee media diversity. In this context, it should be mentioned that South Africa is promoting media diversity also in other ways. In 2002, the Media Development and Diversity Agency (MDDA) was founded.[955] Government, the media industry, and other donors jointly fund this independent and statutory body, and finance projects to support community and small media.[956]

The specialties of press markets justify unique regulation. However, only the market itself should guarantee a plurality of content. Neither under German, nor under South African Constitutional Law, should the State interfere in press content prior to publication. The awareness of both countries' histories should sensitise government to the dangers of intervention in press content. A free press *de facto* neither existed under the Nazi regime nor under the Apartheid government.[957] In South Africa, editorial independence was impossible, because newspapers were classified as either 'pro-government' or 'anti-government'.[958] The Afrikaans press was privileged and the government influenced press content either directly or by indirect means, such as threats and inquiries. Especially the establishment of a 'self-control system' made editors feel insecure about publishable content and therefore 'newspapers decided to play it safe and ignored news that would provoke the ire of the government.'[959] Only after the Information Scandal in the late 1970s, which exposed the Department of Information's campaign to influence public opinion on a

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[952] Burns states: 'A diversity of news and information is generally not feasible in a monopolistic environment, and the regulation of monopolies, cross-ownership and internal measures of control ensure the realisation of the democratic ideal of the collective right to be informed.' (Burns *Communications Law* (2001) 56).
[953] *Associated Press v United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945) at 20.
[954] See 2 3 6 2 2 *supra*.
[955] See MDDA Act 2002 (Act 14 of 2002). See also www.mdda.org.za.
[956] Recently, the MDDA for instance announced to offer bursaries to six print media projects to enable small publishers to develop the management skills to assist them in becoming sustainable, see bizcommunity newsletter of 07 March 2005 (http://www.bizcommunity.com/Article.aspx?c=15&l=196&ai=5971).
[957] For South Africa see in detail *The Role of Media Under Apartheid* – African National Congress Submission to the Truth and Reconciliation Commission (15 September 1997).
[958] See Fourie (ed) *Media Studies Volume 1: Institutions, Theories and Issues* (2001) 43-44. *Cf* also for the relation between the government and the media under Apartheid: Fourie 'Rethinking the role of the media in South Africa' (2002), Communicaire 21(1) – July 2002, 19-27.
[959] Fourie (ed) *Media Studies Volume 1: Institutions, Theories and Issues* (2001) 44.

global scale by, *inter alia*, establishing and purchasing newspapers did 'the Afrikaans press [begin] to express misgivings about the government and apartheid with an increasing frequency, producing cracks in the apartheid system that ultimately led to self-destruction.'[960] Notwithstanding this scandal, the South African government established the New Media Council in 1983 which forced newspapers to join the Newspaper Press Union.[961] In the same year, strict limits on the compulsory registration of newspapers[962] were imposed.[963] Furthermore, on 21 July 1985 the State of Emergency was declared by the government, followed by the second State of Emergency on 12 June 1986.

> 'Special powers were granted to the ministers of law and order and home affairs to close any newspaper they wished, either temporarily or permanently.'[964]

This State of Emergency was aimed to control information and ensure that only government-friendly information reached the South African public. It was only lifted in 1990.

Against this historical background, both countries have a special obligation to protect the press, also as a 'public watchdog' for governmental behaviour. During the last 60 years, German legislation and jurisprudence have clearly pointed that out. Remarkable success is also discernable in South Africa. The newspaper press is no longer subject to licensing and governmental control[965] and the freedom of the press is constitutionally protected. Our former regimes – as cruel and horrible as they were – give us a unique chance to promote and maintain freedom of the press in the future. Democracy and the market itself will be strong enough to guarantee diversity. Hence, only the reader's demand should bring out a plurality of press products, which only can happen, if the legal framework allows a competitive environment. Such a framework cannot be unconstitutional, if it aims at guaranteeing press plurality by restricting anti-competitive mergers and preventing the establishment of 'monopolies of opinions,' and by outlawing practices that lead to foreclosure of new entrants.[966]

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[960] Fourie (ed) *Media Studies Volume 1: Institutions, Theories and Issues* (2001) 45.
[961] See De Beer & Diederichs in De Beer (ed) *Mass Media Towards the Millenium – The South African Handbook of Mass Communication* 2nd edition (1998) 108-109.
[962] See Newspaper Imprint and Registration Act 63 of 1971.
[963] See section 15 of the Internal Security Act 74 of 1982 and the Registration of Newspapers Amendment Act 98 of 1982. *Cf* Burns *Communications Law* (2001) 56 and 299.
[964] Fourie (ed) *Media Studies Volume 1: Institutions, Theories and Issues* (2001) 47.
[965] See Burns *Communications Law* (2001) 59 and 298-301.
[966] Also the Supreme Court of the United Stated asserted in *Associated Press v United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945) at 20 that '[i]t would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument agains

Moreover, regulation in this sector differs materially from other business sectors. In markets, which are privatised on the consumers' behalf, price-regulation can be an adequate instrument to ensure a smooth transition from governmental (monopolistic) control to private ownership as in the telecommunication sector,[967] or the energy market. Here, the price[968] is of importance to the customers. In these sectors, a special regulatory authority is sufficient to prevent abusive pricing of the quasi-monopolist and ensure the openness of the market for new entrants.[969]

As shown, legal control to some extent is essential to guarantee media plurality.[970] However, there are many ways, to maintain and guarantee competition in the press sector, such as the enactment of specific turnover thresholds for publishing houses, as under German law. Other approaches differing from both the German and South African system also seem to be successful. For instance, the concept of a specialized authority, which intervenes in cases of media mergers on public interest grounds, as it exists in the United Kingdom in form of the Ofcom,[971] will have to be taken into account as a possible option. According to this approach control of the regulation exercised by the 'common' authorities, like the Competition Commission or the *Bundeskartellamt*, rather than regulations itself seems to be the best approach. Some mergers have to be prohibited from a purely economic point of view, but public interest grounds demand a different decision exercised by

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application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guarantted by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'

[967] For the present South African efforts to liberate the telecommunication sector and end the monopoly of Telkom, see Masango 'Deregulation won't do much for residential consumers' Business Report (2005-01-25) 2. See also South Africa Yearbook 2004/5, 130-132.

[968] The German Telecommunication Act (*Telekommunikationsgesetz* (TKG)), for instance, primarily intends to guarantee the safeguarding of the consumers' interests by maintaining stable prices, but also the privacy of transmitted content, a national wide functioning infrastructure, due frequency allocation to capable telecommunication providers and so forth, see § 2 II TKG. Mathias Kuth, president of the German Regulation Authority for Telecommunication and Postal Services (*Regulierungsbehörde für Telekommunikation und Post* (RegTP)), maintains that regulation can ensure low prices and quality of services at the same time, see Frankfurter Allgemeine Zeitung 'Nur Monopolisten können Kosten an Kunden durchreichen' (2005-01-05) 13.

[969] Under German law, the RegTP (now called *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*) is even empowered to set (consumer end-)prices in certain cases.

[970] See for instance the discussion about regulating media on a European level: Smith 'Rethinking European Union competence in the field of media ownership: the internal market, fundamental rights and European citizenship' (2004), 29 E.L.Rev. Oct, 652-672.

[971] See 3 2 *supra*.

an independent body. Again, governmental intervention for political reasons must be avoided, and independence of such a body, preferably consisting of a panel of media experts, would have to be guaranteed.

Another approach is the regulation of the media industry as a whole. The enactment of cross-ownership provision, as in the United Kingdom, is necessary for comprehensive prevention of 'opinion monopolies'. In the UK, the Communications Act[972] provides in Schedule 14 for special 'Media Ownership Rules'. According to section 1 of this schedule, any person that runs a national newspaper, or national newspapers, which for the time being together have a national market share of 20% or more, is not allowed to hold a national broadcasting licence.[973] Likewise, similar restrictions apply as far as regional broadcasting licences are concerned, if the person runs a local newspaper with a local market share of 20% or more in the coverage area of the service, or if he or she runs local newspapers, which for the time being together have a local market share of 20% or more in that coverage area. Moreover, according to section 2, proprietors of newspapers with a market share of 20% or more may only restrictively participate in a body corporate, which is the holder of a broadcasting licence. The same restrictions apply for the participation in newspapers for broadcasting licence holders. A similar approach to local and national markets can be observed in the United States, where cross-ownership rules prevent media enterprises from buying a broadcasting company, if they already own a newspaper in the respective coverage area. Even though the Federal Communications Commission (FCC) suggested in 2003 that liberal rules be enacted,[974] the US-government has not amended the existing law yet.[975] Germany does not have such provisions on a national level.[976] This situation makes it difficult to control acquisitions in the broadcasting sector by publishers. Competition authorities generally only examine the economic effects on each market separately,[977]

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[972] UK Communications Act 2003, available at: http://www.legislation.hmso.gov.uk/acts/acts2003/20030021.htm.

[973] 'Licence to provide a Channel 3 service'.

[974] Federal Communications Commission Media Ownership Policy Reexamination, available at: http://www.fcc.gov/ownership/.

[975] See also the criticism of Moore 'Double crossed: Why the newspaper/broadcast cross-ownership ban remains necessary in the public interest' (2004), 88 Minn. L. Rev. 1697-1730.

[976] Only on a regional level, the *Länder* enacted provisions to prevent big publishers from contolling broadcasting stations. In Hamburg for instance, the regional Media Law ('*Hamburgisches Mediengesetz* (HmbMedienG)' geändert durch das Gesetz zur Neuordnung des Hamburgischen Medienrechts v. 2 Juli 2003, HmbGVBl. Nr. 28, Seite 209) prescribes in § 19 II that only under certain conditions a broadcasting licence may be granted to persons, who have a market-dominant position on the market for daily-distributed newspapers in Hamburg.

[977] The *Bundeskartellamt* even regards the advertisement markets in the newspaper and broadcasting sector separately; for an exception concerning the assessment of cross-media effects see 2 3 6 2 3 *supra*.

and cannot take into account that merging firms may gain eminent 'opinion power' in the media sector. The discussion about the recently announced acquisition of the ProSieben-Sat.1 Media AG by the Axel Springer AG illustrates this problem.[978]

In the United States, the Newspaper Preservation Act (NPA)[979] was established to maintain press plurality. This law was enacted in an attempt to keep newspapers from failing, especially if it would leave only one daily paper in a market and '[i]n the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States'.[980] The law creates a limited antitrust exemption, by allowing the creation of Joint Operating Arrangements (JOA)[981] by newspapers after applying for it with the Attorney General. The latter grants such exemption in situations where he or she finds that 'not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.'[982] This antitrust exemption is limited in many respects, though. Firstly, mergers between newspapers are expressly not embraced by the Act.[983] Moreover, the Act provides for strict conditions. For instance, there has to be a 'failing newspaper,' meaning that a newspaper publication is 'in probable danger of financial failure'.[984]

4 2 4 Conclusion

The different approaches in other countries show, that the regulation of the press, through competition law, is mostly regarded as crucial, to the maintainance of press plurality. The diversity of approaches and the discussion about the amendment of the GWB, however, show that there are a variety of models for approaching this problem.

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[978] See already 2 3 6 2 1 *supra*. Yet, 'cross-media-effects' should be part of press merger assessments.

[979] Newspaper Preservation Act of 1970, Title 15, Chapter 43 of the U.S. Code, available at: http://caselaw.lp.findlaw.com/casecode/uscodes/15/chapters/43/sections/section_1801.html.

[980] § 1801.

[981] Such JOAs are defined by § 1802(2) as 'any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: Provided, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.'.

[982] § 1803(b).

[983] See § 1802(2) last sentence (footnote 981 of this thesis *supra*).

[984] § 1802(5). For further references on the NPA see http://www.antitrustinstitute.org/links/exempt.cfm.

South African competition authorities primarily adjudicate upon mergers on competition grounds. This approach is, generally speaking, commendable also for cases of mergers between newspaper publishers. Nevertheless, the specialties of the case and the specific role of the press in a democratic society should always be taken into account, particularly in view of the lack of special provisions in the Competition Act guaranteeing press plurality.

The most recent case of the Competition Tribunal in the newspaper sector, the merger between Johnnic Publishing and NAP,[985] nevertheless, raises serious concerns about the absence of special provisions for the control of newspaper mergers. In this case, the Tribunal considered under public interest issues, the concerns of the Freedom of Expression Institute (FXI)[986] that the merger would result in a loss of one of the independent voices in the print media. The Tribunal, however, was not willing to prohibit the merger simply to ensure that the number of newspapers is not reduced. It stated that causality between the transaction and the diminution of the 'plurality of voices' has to be shown.

From the Tribunal's point of view, the decision could not have been different. The Competition Act does not recognise press-specific criteria that have to be considered in determining the competitive effects of a media merger. In this respect, South African law does not differ from other legal systems, such as Germany. For the most part, competition authorities assess mergers between newspaper companies exactly like mergers in other industrial sectors.

In South African Competition Law, unlike in Germany, there are also no special thresholds for press companies. Indeed, s 13 of the South African Competition Act, at least, has the advantage, of allowing the Commission the flexibility to assess small (newspaper) mergers, even though they are *a priori* not notifiable. However, this section has not played an important role in mergers between newspaper enterprises so far and it will cause uncertainty for firms that are required to notify in terms of it.

Futhermore the Competition Act does not recognise a media-specific public interest exception. The authorities are not allowed to balance results purely based on competition

[985] *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04), see 1 5 3 5 6 *supra*.
[986] See http://www.fxi.org.za.

against the need to maintain press plurality, as is the case in the United Kingdom. External intervention on public interest grounds for the media sector is not provided for in the Competition Act.[987]

The public interest aspects under South African Competition Law in section 12A(3) are, as shown above,[988] aimed at different goals, and the competition authorities are reluctant to alter a decision reached on competition grounds, with reference to the public interest. There has been no case, in which competition authorities has prohibited a merger, which was sound on competition issues, only on public interest grounds.[989] In contrast, the Competition Appeals Court implied in the *Schumann Sasol / Price's Daelite* case,[990] that public interest factors should not prevent a merger if there are no competition policy reasons to do so. After rejecting the Tribunal's conclusions about competitive effects, the court found it unnecessary to consider whether public interest factors were relevant. Against this background, it is unlikely that the competition authorities would prohibit a merger between two newspaper companies only to maintain press plurality. The only public interest ground, that would give the Tribunal the opportunity to 'create' a press-specific law by expansive interpretation of the Act concerns the effect of the merger on 'a particular industrial sector or region,'[991] has not been called on so far, even though public interest considerations are in general recognised as essential in the consideration of mergers.[992]

The conservatism of competition authorities is understandable to some extent, for the Act sets high hurdles. Public interests have to 'outweigh' competition aspects. Hence it may be necessary to consider the (controversial)[993] idea of creating an independent authority that

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[987] See 1 5 1 2 6 *supra.*
[988] See 1 5 1 2 6 *supra.*
[989] The Tribunal recognises such possibility, though, see for instance recently *Harmony Gold Mining Company Ltd / Gold Fields Ltd* (CT 93/LM/NOV04) par 56. See also 1 5 1 2 6 *supra.*
[990] *Schumann Sasol (South Africa) (Pty) Ltd and Price's Daelite (Pty) Ltd* (10/CAC/Aug01).
[991] S 12A(3)(a).
[992] According to Lewis it is 'wholly appropriate that they be incorporated into a merger evaluation' (Lewis 'Competition Policy in South Africa – Where has it come from and where is it going?' (2002), speech to Investment Analysts' Society of South Africa, 16th May 2002, Johannesburg, available at: http://www.comptrib.co.za/Publications/Speeches/IAS%20speech.htm).
[993] Lewis, for instances, strongly opposes the idea of allowing a political authority like a Minister to veto on public interest grounds the decision taken by a competition authority on competition grounds, stating that '[i]t certainly invites massive lobbying.' (Lewis 'Competition Policy in South Africa – Where has it come from and where is it going?' (2002), speech to Investment Analysts' Society of South Africa, 16th May 2002, Johannesburg, available at: http://www.comptrib.co.za/Publications/Speeches/IAS%20speech.htm).

will be able to intervene on public interest grounds in press mergers as the Tribunal is obviously not willing to take a much needed pro-active stance.[994]

Moreover, the competition authorities assess only the specific impacts on competition of every single merger on the single market(s) concerned. This is problematic, when it comes to the highly concentrated structure of the South African press markets. In the case *Johnnic Publishing / NAP*, Johnnic's stake in its associated firm CPT, which publishes the newspaper *The Citizen*, was not a substantial part of the competition authorities' merger assessment. The Tribunal relied on the findings of the Commission, 'having found that Johncom does not have a controlling stake in CTP.'[995] The Tribunal did not analyse this involvement any further, even though it ought to have led to further scrutiny of concentration patterns in the market for nationally published daily-distributed newspapers.

In South Africa, the new Competition Act is still in an early stage of implementation. So far competition authorities have not concerned themselves much with the specialities of media mergers. Time will tell, whether an amendment of the Act is necessary to ensure special consideration of such mergers. It will have to be discerned, whether special provisions for media (and notably newspaper) mergers are necessary to maintain a degree of pluralism in this sector. As the Competition Appeal Court[996] pointed out, 'the Act is [...] a broad one, designed to cater to the needs of all sectors of commerce, and not industry specific. It is a springboard that could possibly give rise to future, more industry specific legislation.' Nevertheless, either a special interpretation of the Act as far as media mergers are concerned – or amendment of the Act will be necessary to cater for media mergers. Bearing in mind the consequences for the young South African democracy, both legislature and competition authorities should be encouraged to take into account the necessity of the protection of a free, but above all a competitive press.

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[994] See the very cautious approach in the decisions cited under 1 5 1 2 6 *supra*.
[995] *Johnnic Publishing Ltd / New Africa Publications* (CT 36/LM/Apr04) par 10.
[996] *Association of Shipping Lines v The Competition Commission of South Africa* (22/CAC/Sep02) par 17, denying a special status of the maritime industry under the Act.

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Vodacom Pty Ltd and GSM / Vodacom Pty Ltd and Teljoy Holdings Ltd (CT 10/LM/Nov99 and 13/LM/Nov99)

Xstrata South Africa (Pty) Ltd / Egalite (Pty) Ltd and International Carbon Holdings (Pty) Ltd (CT 54/LM/Jul04)

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7 Appendix I – Relevant Provisions of the EC Treaty

Article 81 EC

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   — any agreement or category of agreements between undertakings,
   — any decision or category of decisions by associations of undertakings,
   — any concerted practice or category of concerted practices,
   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

Article 82 EC

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
   (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
   (b) limiting production, markets or technical development to the prejudice of consumers;
   (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 83

1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.
2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
   (a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments;
   (b) to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
   (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82;
   (d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;
   (e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article.

8 Appendix II – Relevant Provisions of the GWB

Erster Teil Wettbewerbsbeschränkungen

Erster Abschnitt Kartellvereinbarungen, Kartellbeschlüsse und abgestimmtes Verhalten

§ 1 Kartellverbot

Vereinbarungen zwischen miteinander im Wettbewerb stehenden Unternehmen, Beschlüsse von Unternehmensvereinigungen und aufeinander abgestimmte Verhaltensweisen, die eine Verhinderung, Einschränkung oder Verfälschung des Wettbewerbs bezwecken oder bewirken, sind verboten.

§ 7 Sonstige Kartelle

(1) Vereinbarungen und Beschlüsse, die unter angemessener Beteiligung der Verbraucher an dem entstehenden Gewinn zu einer Verbesserung der Entwicklung, Erzeugung, Verteilung, Beschaffung, Rücknahme oder Entsorgung von Waren oder Dienstleistungen beitragen, können vom Verbot des § 1 freigestellt werden, wenn die Verbesserung von den beteiligten Unternehmen auf andere Weise nicht erreicht werden kann, in einem angemessenen Verhältnis zu der damit verbundenen Wettbewerbsbeschränkung steht und die Wettbewerbsbeschränkung nicht zur Entstehung oder Verstärkung einer marktbeherrschenden Stellung führt.

(2) Vereinbarungen und Beschlüsse, die eine Rationalisierung wirtschaftlicher Vorgänge durch Spezialisierung oder auf andere Weise, den gemeinsamen Einkauf von Waren oder die gemeinsame Beschaffung gewerblicher Leistungen oder die einheitliche Anwendung von Konditionen zum Gegenstand haben, können nur nach § 2 Abs. 2 und den §§ 3 bis 5 vom Verbot des § 1 freigestellt werden.

§ 8 Ministererlaubnis

(1) Liegen die Voraussetzungen der §§ 2 bis 7 nicht vor, so kann der Bundesminister für Wirtschaft und Arbeit Vereinbarungen und Beschlüsse vom Verbot des § 1 freistellen, wenn ausnahmsweise die Beschränkung des Wettbewerbs aus überwiegenden Gründen der Gesamtwirtschaft und des Gemeinwohls notwendig ist.

(2) Besteht eine unmittelbare Gefahr für den Bestand des überwiegenden Teils der Unternehmen eines Wirtschaftszweiges, so ist die Freistellung nur zulässig, wenn andere gesetzliche oder wirtschaftspolitische Maßnahmen nicht oder nicht rechtzeitig getroffen werden können und die Beschränkung des Wettbewerbs geeignet ist, die Gefahr abzuwenden. Die Freistellung ist nur in besonders schwerwiegenden Einzelfällen zulässig.

§ 9 Anmeldung von Kartellen, Widerspruchsverfahren

(1) Vereinbarungen und Beschlüsse der in den §§ 2 bis 4 Abs. 1 bezeichneten Art sowie ihre Änderungen und Ergänzungen bedürfen zur Freistellung vom Verbot des § 1 der Anmeldung bei der Kartellbehörde. In den Fällen des § 2 Abs. 1 ist der Anmeldung die Stellungnahme eines Rationalisierungsverbandes, in den Fällen des § 2 Abs. 2 die der betroffenen Lieferanten und Abnehmer beizufügen. Rationalisierungsverbände im Sinne des Gesetzes sind Verbände, zu deren satzungsmäßigen Aufgaben es gehört, Normungsund Typungsvorhaben durchzuführen oder zu prüfen und dabei die Lieferanten und Abnehmer, die durch die Vorhaben betroffen werden, in angemessener Weise zu beteiligen.

(2) Bei der Anmeldung sind anzugeben:

1. Firma oder sonstige Bezeichnung und Ort der Niederlassung oder Sitz der beteiligten Unternehmen;
2. Rechtsform und Anschrift des Kartells;
3. Name und Anschrift der Person, die zur Vertretung bestellt (§ 13) oder sonstig bevollmächtigt ist, bei juristischen Personen die gesetzliche Vertretung des Kartells.

In der Anmeldung dürfen keine unrichtigen oder unvollständigen Angaben gemacht oder benutzt werden, um für den Anmeldenden oder einen anderen eine Freistellung zu erschleichen oder die Kartellbehörde zu veranlassen, in den Fällen der §§ 2 bis 4 Abs. 1 nicht zu widersprechen.

(3) Vereinbarungen und Beschlüsse der in den §§ 2 bis 4 Abs. 1 bezeichneten Art sind vom Verbot des § 1 freigestellt und werden wirksam, wenn die Kartellbehörde innerhalb einer Frist von drei Monaten seit Eingang der Anmeldung nicht widerspricht. Die Kartellbehörde hat zu widersprechen, wenn die in den §§ 2 bis 4 Abs. 1 bezeichneten Voraussetzungen oder die nach Absatz 1 Satz 2 erforderlichen Stellungnahmen nicht vorliegen. Die anmeldenden Unternehmen haben nachzuweisen, daß die in den §§ 2 bis 4 Abs. 1 bezeichneten Voraussetzungen und die nach Absatz 1 Satz 2 erforderlichen Stellungnahmen vorliegen. Werden Änderungen oder Ergänzungen einer Vereinbarung oder eines Beschlusses der in den §§ 2 bis 4

Abs. 1 bezeichneten Art angemeldet, durch die der Kreis der beteiligten Unternehmen nicht verändert und die Vereinbarung oder der Beschluß nicht auf andere Waren oder Leistungen erstreckt wird, beträgt die in Satz 1 genannte Frist einen Monat.
(4) Vereinbarungen und Beschlüsse der in § 4 Abs. 2 bezeichneten Art sind von den beteiligten Unternehmen bei der Kartellbehörde gemäß Satz 2 unverzüglich anzumelden. Die Anmeldung ist nur wirksam, wenn die Satzung oder der Gesellschaftsvertrag beigefügt ist, die Angaben nach Absatz 2 Nr. 1 und 2 enthalten sind und wenn die Anmeldung über den betroffenen Wirtschaftszweig, vorgesehene institutionelle Ausschüsse sowie die gegenwärtigen Verrechnungs- und Außenumsätze der beteiligten Unternehmen Aufschluß gibt. Alle zwei Jahre seit Anmeldung sind der Kartellbehörde von den beteiligten Unternehmen Änderungen der in Satz 2 bezeichneten Angaben, der Satzung oder des Gesellschaftsvertrages sowie des Kreises der beteiligten Unternehmen anzuzeigen.
(5) Die Beendigung oder Aufhebung der in den §§ 2 bis 4 genannten Vereinbarungen und Beschlüsse ist der Kartellbehörde mitzuteilen.

§ 10 Freistellungsantrag, Erteilung der Freistellung
(1) Vereinbarungen und Beschlüsse der in den §§ 5 bis 8 bezeichneten Art können auf Antrag durch Verfügung der Kartellbehörde vom Verbot des § 1 freigestellt werden. Sie werden mit Bestandskraft der Verfügung wirksam. In den Fällen des § 8 ist dem Antrag eine Stellungnahme der betroffenen inländischen Erzeuger und Abnehmer beizufügen, es sei denn, eine solche ist nicht zu erlangen.
(2) Sind die Voraussetzungen für eine Freistellung nach den §§ 5 bis 8 nicht erfüllt, lehnt die Kartellbehörde den in Absatz 1 genannten Antrag durch Verfügung ab.
(3) Für Anträge nach Absatz 1 Satz 1 gilt § 9 Abs. 2 und 5 entsprechend.
(4) Die Freistellung nach den §§ 5 bis 8 ist zu befristen. Die Frist soll in der Regel fünf Jahre nicht überschreiten. Die Freistellung kann mit Bedingungen und Auflagen verbunden werden.
(5) Die Freistellung kann auf Antrag verlängert werden, wenn die Voraussetzungen der §§ 5 bis 8 weiterhin erfüllt sind. Die Verlängerung wird nur für diejenigen beteiligten Unternehmen erteilt, die sich damit der Kartellbehörde gegenüber schriftlich einverstanden erklärt haben; die Erklärung muß von den einzelnen Unternehmen selbst und kann erst drei Monate vor Ablauf der Freistellung abgegeben werden. Absatz 2 gilt entsprechend.

Zweiter Abschnitt Vertikalvereinbarungen
§ 14 Verbot von Vereinbarungen über Preisgestaltung oder Geschäftsbedingungen
Vereinbarungen zwischen Unternehmen über Waren oder gewerbliche Leistungen, die sich auf Märkte innerhalb des Geltungsbereichs dieses Gesetzes beziehen, sind verboten, soweit sie einen Beteiligten in der Freiheit der Gestaltung von Preisen oder Geschäftsbedingungen bei solchen Vereinbarungen beschränken, die er mit Dritten über die gelieferten Waren, über andere Waren oder über gewerbliche Leistungen schließt.

§ 15 Preisbindung bei Zeitungen und Zeitschriften
(1) § 14 gilt nicht, soweit ein Unternehmen, das Zeitungen oder Zeitschriften herstellt, die Abnehmer dieser Erzeugnisse rechtlich oder wirtschaftlich bindet, bei der Weiterveräußerung bestimmte Preise zu vereinbaren oder ihren Abnehmern die gleiche Bindung bis zur Weiterveräußerung an den letzten Verbraucher aufzuerlegen. Zu Zeitungen und Zeitschriften zählen auch Produkte, die Zeitungen oder Zeitschriften reproduzieren oder substituieren und bei Würdigung der Gesamtumstände als überwiegend verlagstypisch anzusehen sind, sowie kombinierte Produkte, bei denen eine Zeitung oder Zeitschrift im Vordergrund steht.
(2) Vereinbarungen der in Absatz 1 bezeichneten Art sind, soweit sie Preise und Preisbestandteile betreffen, schriftlich abzufassen. Es genügt, wenn die Beteiligten Urkunden unterzeichnen, die auf eine Preisliste oder auf Preismitteilungen Bezug nehmen. § 126 Abs. 2 des Bürgerlichen Gesetzbuchs findet keine Anwendung.
(3) Das Bundeskartellamt kann von Amts wegen oder auf Antrag eines gebundenen Abnehmers die Preisbindung für unwirksam erklären und die Anwendung einer neuen, gleichartigen Preisbindung verbieten, wenn 1. die Preisbindung mißbräuchlich gehandhabt wird oder 2. die Preisbindung oder ihre Verbindung mit anderen Wettbewerbsbeschränkungen geeignet ist, die gebundenen Waren zu verteuern oder ein Sinken ihrer Preise zu verhindern oder ihre Erzeugung oder ihren Absatz zu beschränken.

§ 16 Mißbrauchsaufsicht über Ausschließlichkeitsbindungen
Die Kartellbehörde kann Vereinbarungen zwischen Unternehmen über Waren oder gewerbliche Leistungen für unwirksam erklären und die Anwendung neuer, gleichartiger Bindungen verbieten, soweit sie einen Beteiligten

1. in der Freiheit der Verwendung der gelieferten Waren, anderer Waren oder gewerblicher Leistungen beschränken oder

2. darin beschränken, andere Waren oder gewerbliche Leistungen von Dritten zu beziehen oder an Dritte abzugeben, oder
3. darin beschränken, die gelieferten Waren an Dritte abzugeben, oder
4. verpflichten, Waren oder gewerbliche Leistungen abzunehmen, die weder sachlich noch handelsüblich dazugehören,

und soweit durch das Ausmaß solcher Beschränkungen der Wettbewerb auf dem Markt für diese oder andere Waren oder gewerbliche Leistungen wesentlich beeinträchtigt wird.

Dritter Abschnitt Marktbeherrschung, wettbewerbsbeschränkendes Verhalten

§ 19 Mißbrauch einer marktbeherrschenden Stellung

(1) Die mißbräuchliche Ausnutzung einer marktbeherrschenden Stellung durch ein oder mehrere Unternehmen ist verboten.

(2) Ein Unternehmen ist marktbeherrschend, soweit es als Anbieter oder Nachfrager einer bestimmten Art von Waren oder gewerblichen Leistungen

1. ohne Wettbewerber ist oder keinem wesentlichen Wettbewerb ausgesetzt ist oder
2. eine im Verhältnis zu seinen Wettbewerbern überragende Marktstellung hat; hierbei sind insbesondere sein Marktanteil, seine Finanzkraft, sein Zugang zu den Beschaffungs- oder Absatzmärkten, Verflechtungen mit anderen Unternehmen, rechtliche oder tatsächliche Schranken für den Marktzutritt anderer Unternehmen, der tatsächliche oder potentielle Wettbewerb durch innerhalb oder außerhalb des Geltungsbereichs dieses Gesetzes ansässige Unternehmen, die Fähigkeit, sein Angebot oder seine Nachfrage auf andere Waren oder gewerbliche Leistungen umzustellen, sowie die Möglichkeit der Marktgegenseite, auf andere Unternehmen auszuweichen, zu berücksichtigen.

Zwei oder mehr Unternehmen sind marktbeherrschend, soweit zwischen ihnen für eine bestimmte Art von Waren oder gewerblichen Leistungen ein wesentlicher Wettbewerb nicht besteht und soweit sie in ihrer Gesamtheit die Voraussetzungen des Satzes 1 erfüllen.

(3) Es wird vermutet, daß ein Unternehmen marktbeherrschend ist, wenn es einen Marktanteil von mindestens einem Drittel hat. Eine Gesamtheit von Unternehmen gilt als marktbeherrschend, wenn sie

1. aus drei oder weniger Unternehmen besteht, die zusammen einen Marktanteil von 50 vom Hundert erreichen, oder
2. aus fünf oder weniger Unternehmen besteht, die zusammen einen Marktanteil von zwei Dritteln erreichen,

es sei denn, die Unternehmen weisen nach, daß die Wettbewerbsbedingungen zwischen ihnen wesentlichen Wettbewerb erwarten lassen oder die Gesamtheit der Unternehmen im Verhältnis zu den übrigen Wettbewerbern keine überragende Marktstellung hat.

(4) Ein Mißbrauch liegt insbesondere vor, wenn ein marktbeherrschendes Unternehmen als Anbieter oder Nachfrager einer bestimmten Art von Waren oder gewerblichen Leistungen

1. die Wettbewerbsmöglichkeiten anderer Unternehmen in einer für den Wettbewerb auf dem Markt erheblichen Weise ohne sachlich gerechtfertigten Grund beeinträchtigt;
2. Entgelte oder sonstige Geschäftsbedingungen fordert, die von denjenigen abweichen, die sich bei wirksamem Wettbewerb mit hoher Wahrscheinlichkeit ergeben würden; hierbei sind insbesondere die Verhaltensweisen von Unternehmen auf vergleichbaren Märkten mit wirksamem Wettbewerb zu berücksichtigen;
3. ungünstigere Entgelte oder sonstige Geschäftsbedingungen fordert, als sie das marktbeherrschende Unternehmen selbst auf vergleichbaren Märkten von gleichartigen Abnehmern fordert, es sei denn, daß der Unterschied sachlich gerechtfertigt ist;
4. sich weigert, einem anderen Unternehmen gegen angemessenes Entgelt Zugang zu den eigenen Netzen oder anderen Infrastruktureinrichtungen zu gewähren, wenn es dem anderen Unternehmen aus rechtlichen oder tatsächlichen Gründen ohne die Mitbenutzung nicht möglich ist, auf dem vor- oder nachgelagerten Markt als Wettbewerber des marktbeherrschenden Unternehmens tätig zu werden; dies gilt nicht, wenn das marktbeherrschende Unternehmen nachweist, daß die Mitbenutzung aus betriebsbedingten oder sonstigen Gründen nicht möglich oder nicht zumutbar ist.

Siebenter Abschnitt Zusammenschlußkontrolle

§ 35 Geltungsbereich der Zusammenschlußkontrolle

(1) Die Vorschriften über die Zusammenschlußkontrolle finden Anwendung, wenn im letzten Geschäftsjahr vor dem Zusammenschluß

1. die beteiligten Unternehmen insgesamt weltweit Umsatzerlöse von mehr als 500 Millionen Euro und
2. mindestens ein beteiligtes Unternehmen im Inland Umsatzerlöse von mehr als 25 Millionen Euro

erzielt haben.

(2) Absatz 1 gilt nicht,

1. soweit sich ein Unternehmen, das nicht im Sinne des § 36 Abs. 2 abhängig ist und im letzten Geschäftsjahr weltweit Umsatzerlöse von weniger als zehn Millionen Euro erzielt hat, mit einem anderen Unternehmen zusammenschließt oder
2. soweit ein Markt betroffen ist, auf dem seit mindestens fünf Jahren Waren oder gewerbliche Leistungen angeboten werden und auf dem im letzten Kalenderjahr weniger als 15 Millionen Euro umgesetzt wurden.

Soweit durch den Zusammenschluß der Wettbewerb beim Verlag, bei der Herstellung oder beim Vertrieb von Zeitungen oder Zeitschriften oder deren Bestandteilen beschränkt wird, gilt nur Satz 1 Nr. 2.
(3) Die Vorschriften dieses Gesetzes finden keine Anwendung, soweit die Kommission der Europäischen Gemeinschaften nach der Verordnung (EWG) Nr. 4064/89 des Rates vom 21. Dezember 1989 über die Kontrolle von Unternehmenszusammenschlüssen in ihrer jeweils geltenden Fassung ausschließlich zuständig ist.

§ 36 Grundsätze für die Beurteilung von Zusammenschlüssen

(1) Ein Zusammenschluß, von dem zu erwarten ist, daß er eine marktbeherrschende Stellung begründet oder verstärkt, ist vom Bundeskartellamt zu untersagen, es sei denn, die beteiligten Unternehmen weisen nach, daß durch den Zusammenschluß auch Verbesserungen der Wettbewerbsbedingungen eintreten und daß diese Verbesserungen die Nachteile der Marktbeherrschung überwiegen.
(2) Ist ein beteiligtes Unternehmen ein abhängiges oder herrschendes Unternehmen im Sinne des § 17 des Aktiengesetzes oder ein Konzernunternehmen im Sinne des § 18 des Aktiengesetzes, sind die so verbundenen Unternehmen als einheitliches Unternehmen anzusehen. Wirken mehrere Unternehmen derart zusammen, daß sie gemeinsam einen beherrschenden Einfluß auf ein anderes Unternehmen ausüben können, gilt jedes von ihnen als herrschendes.
(3) Steht einer Person oder Personenvereinigung, die nicht Unternehmen ist, die Mehrheitsbeteiligung an einem Unternehmen zu, gilt sie als Unternehmen.

§ 37 Zusammenschluß

(1) Ein Zusammenschluß liegt in folgenden Fällen vor:

1. Erwerb des Vermögens eines anderen Unternehmens ganz oder zu einem wesentlichen Teil;
2. Erwerb der unmittelbaren oder mittelbaren Kontrolle durch ein oder mehrere Unternehmen über die Gesamtheit oder Teile eines oder mehrerer anderer Unternehmen. Die Kontrolle wird durch Rechte, Verträge oder andere Mittel begründet, die einzeln oder zusammen unter Berücksichtigung aller tatsächlichen und rechtlichen Umstände die Möglichkeit gewähren, einen bestimmenden Einfluß auf die Tätigkeit eines Unternehmens auszuüben, insbesondere durch
   a) Eigentums- oder Nutzungsrechte an einer Gesamtheit oder an Teilen des Vermögens des Unternehmens,
   b) Rechte oder Verträge, die einen bestimmenden Einfluß auf die Zusammensetzung, die Beratungen oder Beschlüsse der Organe des Unternehmens gewähren;
3. Erwerb von Anteilen an einem anderen Unternehmen, wenn die Anteile allein oder zusammen mit sonstigen, dem Unternehmen bereits gehörenden Anteilen
   a) 50 vom Hundert oder
   b) 25 vom Hundert

   des Kapitals oder der Stimmrechte des anderen Unternehmens erreichen. Zu den Anteilen, die dem Unternehmen gehören, rechnen auch die Anteile, die einem anderen für Rechnung dieses Unternehmens gehören und, wenn der Inhaber des Unternehmens ein Einzelkaufmann ist, auch die Anteile, die sonstiges Vermögen des Inhabers sind. Erwerben mehrere Unternehmen gleichzeitig oder nacheinander Anteile im vorbezeichneten Umfang an einem anderen Unternehmen, gilt dies hinsichtlich der Märkte, auf denen das andere Unternehmen tätig ist, auch als Zusammenschluß der sich beteiligenden Unternehmen untereinander;
4. jede sonstige Verbindung von Unternehmen, auf Grund deren ein oder mehrere Unternehmen unmittelbar oder mittelbar einen wettbewerblich erheblichen Einfluß auf ein anderes Unternehmen ausüben können.

(2) Ein Zusammenschluß liegt auch dann vor, wenn die beteiligten Unternehmen bereits vorher zusammengeschlossen waren, es sei denn, der Zusammenschluß führt nicht zu einer wesentlichen Verstärkung der bestehenden Unternehmensverbindung.
(3) Erwerben Kreditinstitute, Finanzinstitute oder Versicherungsunternehmen Anteile an einem anderen Unternehmen zum Zwecke der Veräußerung, gilt dies nicht als Zusammenschluß, solange sie das Stimmrecht aus den Anteilen nicht ausüben und sofern die Veräußerung innerhalb eines Jahres erfolgt.

Diese Frist kann vom Bundeskartellamt auf Antrag verlängert werden, wenn glaubhaft gemacht wird, daß die Veräußerung innerhalb der Frist unzumutbar war.

§ 38 Berechnung der Umsatzerlöse und der Marktanteile

(1) Für die Ermittlung der Umsatzerlöse gilt § 277 Abs. 1 des Handelsgesetzbuchs. Umsatzerlöse aus Lieferungen und Leistungen zwischen verbundenen Unternehmen (Innenumsatzerlöse) sowie Verbrauchsteuern bleiben außer Betracht.

(2) Für den Handel mit Waren sind nur drei Viertel der Umsatzerlöse in Ansatz zu bringen.

(3) Für den Verlag, die Herstellung und den Vertrieb von Zeitungen, Zeitschriften und deren Bestandteilen, die Herstellung, den Vertrieb und die Veranstaltung von Rundfunkprogrammen und den Absatz von Rundfunkwerbezeiten ist das Zwanzigfache der Umsatzerlöse in Ansatz zu bringen.

(4) An die Stelle der Umsatzerlöse tritt bei Kreditinstituten, Finanzinstituten und Bausparkassen der Gesamtbetrag der in § 34 Abs. 2 Satz 1 Nr. 1 Buchstabe a bis e der Verordnung über die Rechnungslegung der Kreditinstitute vom 10. Februar 1992 (BGBl. I S. 203) genannten Erträge abzüglich der Umsatzsteuer und sonstiger direkt auf diese Erträge erhobener Steuern. Bei Versicherungsunternehmen sind die Prämieneinnahmen des letzten abgeschlossenen Geschäftsjahres maßgebend. Prämieneinnahmen sind die Einnahmen aus dem Erst- und Rückversicherungsgeschäft einschließlich der in Rückdeckung gegebenen Anteile.

(5) Beim Erwerb des Vermögens eines anderen Unternehmens ist für die Berechnung der Marktanteile und der Umsatzerlöse des Veräußerers nur auf den veräußerten Vermögensteil abzustellen.

§ 39 Anmelde- und Anzeigepflicht

(1) Zusammenschlüsse sind vor dem Vollzug beim Bundeskartellamt gemäß den Absätzen 2 und 3 anzumelden.

(2) Zur Anmeldung sind verpflichtet:

1. die am Zusammenschluß beteiligten Unternehmen,
2. in den Fällen des § 37 Abs. 1 Nr. 1 und 3 auch der Veräußerer.

(3) In der Anmeldung ist die Form des Zusammenschlusses anzugeben. Die Anmeldung muß ferner über jedes beteiligte Unternehmen folgende Angaben enthalten:

1. die Firma oder sonstige Bezeichnung und den Ort der Niederlassung oder den Sitz;
2. die Art des Geschäftsbetriebes;
3. die Umsatzerlöse im Inland, in der Europäischen Union und weltweit; anstelle der Umsatzerlöse sind bei Kreditinstituten, Finanzinstituten und Bausparkassen der Gesamtbetrag der Erträge gemäß § 38 Abs. 4, bei Versicherungsunternehmen die Prämieneinnahmen anzugeben;
4. die Marktanteile einschließlich der Grundlagen für ihre Berechnung oder Schätzung, wenn diese im Geltungsbereich dieses Gesetzes oder in einem wesentlichen Teil desselben für die beteiligten Unternehmen zusammen mindestens 20 vom Hundert erreichen;
5. beim Erwerb von Anteilen an einem anderen Unternehmen die Höhe der erworbenen und der insgesamt gehaltenen Beteiligung;
6. eine zustellungsbevollmächtigte Person im Inland, sofern sich der Sitz des Unternehmens nicht im Geltungsbereich dieses Gesetzes befindet.

Ist ein beteiligtes Unternehmen ein verbundenes Unternehmen, sind die Angaben nach Satz 2 Nr. 1 und 2 auch über die verbundenen Unternehmen und die Angaben nach Satz 2 Nr. 3 und Nr. 4 über jedes am Zusammenschluß beteiligte Unternehmen und die mit ihm verbundenen Unternehmen insgesamt zu machen sowie die Konzernbeziehungen, Abhängigkeits- und Beteiligungsverhältnisse zwischen den verbundenen Unternehmen mitzuteilen. In der Anmeldung dürfen keine unrichtigen oder unvollständigen Angaben gemacht oder benutzt werden, um die Kartellbehörde zu veranlassen, eine Untersagung nach § 36 Abs. 1 oder eine Mitteilung nach § 40 Abs. 1 zu unterlassen.

(4) Eine Anmeldung ist nicht erforderlich, wenn die Kommission der Europäischen Gemeinschaften einen Zusammenschluß an das Bundeskartellamt verwiesen hat und dem Bundeskartellamt die nach Absatz 3 erforderlichen Angaben in deutscher Sprache vorliegen. Das Bundeskartellamt teilt den beteiligten Unternehmen unverzüglich den Zeitpunkt des Eingangs der Verweisungsentscheidung mit.

(5) Das Bundeskartellamt kann von jedem beteiligten Unternehmen Auskunft über Marktanteile einschließlich der Grundlagen für die Berechnung oder Schätzung sowie über den Umsatzerlös bei einer bestimmten Art von Waren oder gewerblichen Leistungen verlangen, den das Unternehmen im letzten Geschäftsjahr vor dem Zusammenschluß erzielt hat.

(6) Die beteiligten Unternehmen haben dem Bundeskartellamt den Vollzug des Zusammenschlusses unverzüglich anzuzeigen.

§ 40 Verfahren der Zusammenschlußkontrolle

(1) Das Bundeskartellamt darf einen Zusammenschluß, der ihm angemeldet worden ist, nur untersagen, wenn es den anmeldenden Unternehmen innerhalb einer Frist von einem Monat seit Eingang der vollständigen Anmeldung mitteilt, daß es in die Prüfung des Zusammenschlusses (Hauptprüfverfahren) eingetreten ist. Das Hauptprüfverfahren soll eingeleitet werden, wenn eine weitere Prüfung des Zusammenschlusses erforderlich ist.

(2) Im Hauptprüfverfahren entscheidet das Bundeskartellamt durch Verfügung, ob der Zusammenschluß untersagt oder freigegeben wird. Ergeht die Verfügung nicht innerhalb einer Frist von vier Monaten seit Eingang der vollständigen Anmeldung, gilt der Zusammenschluß als freigegeben. Dies gilt nicht, wenn

1. die anmeldenden Unternehmen einer Fristverlängerung zugestimmt haben,
2. das Bundeskartellamt wegen unrichtiger Angaben oder wegen einer nicht rechtzeitig erteilten Auskunft nach § 39 Abs. 5 oder § 50 die Mitteilung nach Absatz 1 oder die Untersagung des Zusammenschlusses unterlassen hat,
3. eine zustellungsbevollmächtigte Person im Inland entgegen § 39 Abs. 3 Satz 2 Nr. 6 nicht mehr benannt ist.

(3) Die Freigabe kann mit Bedingungen und Auflagen verbunden werden. Diese dürfen sich nicht darauf richten, die beteiligten Unternehmen einer laufenden Verhaltenskontrolle zu unterstellen. § 12 Abs. 2 Satz 1 Nr. 2 und 3 gilt entsprechend.

(4) Vor einer Untersagung ist den obersten Landesbehörden, in deren Gebiet die beteiligten Unternehmen ihren Sitz haben, Gelegenheit zur Stellungnahme zu geben.

(5) Die Fristen nach den Absätzen 1 und 2 Satz 2 beginnen in den Fällen des § 39 Abs. 4 Satz 1 mit dem Eingang der Verweisungsentscheidung beim Bundeskartellamt.

(6) Wird eine Freigabe des Bundeskartellamts durch gerichtlichen Beschluß rechtskräftig ganz oder teilweise aufgehoben, beginnt die Frist nach Absatz 2 Satz 2 mit Eintritt der Rechtskraft von neuem.

§ 41 Vollzugsverbot, Entflechtung

(1) Die Unternehmen dürfen einen Zusammenschluß, der vom Bundeskartellamt nicht freigegeben ist, nicht vor Ablauf der Fristen nach § 40 Abs. 1 Satz 1 und Abs. 2 Satz 2 vollziehen oder am Vollzug dieses Zusammenschlusses mitwirken. Rechtsgeschäfte, die gegen dieses Verbot verstoßen, sind unwirksam. Dies gilt nicht für Verträge über die Umwandlung, Eingliederung oder Gründung eines Unternehmens und für Unternehmensverträge im Sinne der §§ 291 und 292 des Aktiengesetzes, sobald sie durch Eintragung in das zuständige Register rechtswirksam geworden sind.

(2) Das Bundeskartellamt kann auf Antrag Befreiungen vom Vollzugsverbot erteilen, wenn die beteiligten Unternehmen hierfür wichtige Gründe geltend machen, insbesondere um schweren Schaden von einem beteiligten Unternehmen oder von Dritten abzuwenden. Die Befreiung kann jederzeit, auch vor der Anmeldung, erteilt und mit Bedingungen und Auflagen verbunden werden. § 12 Abs. 2 Satz 1 Nr. 2 und 3 gilt entsprechend.

(3) Ein vollzogener Zusammenschluß, den das Bundeskartellamt untersagt oder dessen Freigabe es widerrufen hat, ist aufzulösen, wenn nicht der Bundesminister für Wirtschaft und Arbeit nach § 42 die Erlaubnis zu dem Zusammenschluß erteilt. Das Bundeskartellamt ordnet die zur Auflösung des Zusammenschlusses erforderlichen Maßnahmen an. Die Wettbewerbsbeschränkung kann auch auf andere Weise als durch Wiederherstellung des früheren Zustands beseitigt werden.

(4) Zur Durchsetzung seiner Anordnung kann das Bundeskartellamt insbesondere

1. einmalig oder mehrfach ein Zwangsgeld von fünftausend bis fünfhunderttausend Euro festsetzen,
2. die Ausübung des Stimmrechts aus Anteilen an einem beteiligten Unternehmen, die einem anderen beteiligten Unternehmen gehören oder ihm zuzurechnen sind, untersagen oder einschränken,
3. einen Treuhänder bestellen, der die Auflösung des Zusammenschlusses herbeiführt.

§ 42 Ministererlaubnis

(1) Der Bundesminister für Wirtschaft und Arbeit erteilt auf Antrag die Erlaubnis zu einem vom Bundeskartellamt untersagten Zusammenschluß, wenn im Einzelfall die Wettbewerbsbeschränkung von gesamtwirtschaftlichen Vorteilen des Zusammenschlusses aufgewogen wird oder der Zusammenschluß durch ein überragendes Interesse der Allgemeinheit gerechtfertigt ist. Hierbei ist auch die Wettbewerbsfähigkeit der beteiligten Unternehmen auf Märkten außerhalb des Geltungsbereichs dieses Gesetzes zu berücksichtigen. Die Erlaubnis darf nur erteilt werden, wenn durch das Ausmaß der Wettbewerbsbeschränkung die marktwirtschaftliche Ordnung nicht gefährdet wird.

(2) Die Erlaubnis kann mit Bedingungen und Auflagen verbunden werden. § 40 Abs. 3 gilt entsprechend.

(3) Der Antrag ist innerhalb einer Frist von einem Monat seit Zustellung der Untersagung beim Bundesministerium für Wirtschaft und Arbeit schriftlich zu stellen. Wird die Untersagung angefochten, beginnt die Frist in dem Zeitpunkt, in dem die Untersagung unanfechtbar wird.
(4) Der Bundesminister für Wirtschaft und Arbeit soll über den Antrag innerhalb von vier Monaten entscheiden. Vor der Entscheidung ist eine Stellungnahme der Monopolkommission einzuholen und den obersten Landesbehörden, in deren Gebiet die beteiligten Unternehmen ihren Sitz haben, Gelegenheit zur Stellungnahme zu geben.

Achter Abschnitt Monopolkommission
§ 44 Aufgaben
(1) Die Monopolkommission erstellt alle zwei Jahre ein Gutachten, in dem sie den Stand und die absehbare Entwicklung der Unternehmenskonzentration in der Bundesrepublik Deutschland beurteilt, die Anwendung der Vorschriften über die Zusammenschlußkontrolle würdigt sowie zu sonstigen aktuellen wettbewerbspolitischen Fragen Stellung nimmt. Das Gutachten soll die Verhältnisse in den letzten beiden abgeschlossenen Kalenderjahren einbeziehen und bis zum 30. Juni des darauffolgenden Jahres abgeschlossen sein. Die Bundesregierung kann die Monopolkommission mit der Erstattung zusätzlicher Gutachten beauftragen. Darüber hinaus kann die Monopolkommission nach ihrem Ermessen Gutachten erstellen.
(2) Die Monopolkommission ist nur an den durch dieses Gesetz begründeten Auftrag gebunden und in ihrer Tätigkeit unabhängig. Vertritt eine Minderheit bei der Abfassung der Gutachten eine abweichende Auffassung, so kann sie diese in dem Gutachten zum Ausdruck bringen.
(3) Die Monopolkommission leitet ihre Gutachten der Bundesregierung zu. Die Bundesregierung legt Gutachten nach Absatz 1 Satz 1 den gesetzgebenden Körperschaften unverzüglich vor und nimmt zu ihnen in angemessener Frist Stellung. Die Gutachten werden von der Monopolkommission veröffentlicht. Bei Gutachten nach Absatz 1 Satz 1 erfolgt dies zu dem Zeitpunkt, zu dem sie von der Bundesregierung der gesetzgebenden Körperschaft vorgelegt werden.

§ 45 Mitglieder
(1) Die Monopolkommission besteht aus fünf Mitgliedern, die über besondere volkswirtschaftliche, betriebswirtschaftliche, sozialpolitische, technologische oder wirtschaftsrechtliche Kenntnisse und Erfahrungen verfügen müssen. Die Monopolkommission wählt aus ihrer Mitte einen Vorsitzenden.
(2) Die Mitglieder der Monopolkommission werden auf Vorschlag der Bundesregierung durch den Bundespräsidenten für die Dauer von vier Jahren berufen. Wiederberufungen sind zulässig. Die Bundesregierung hört die Mitglieder der Kommission an, bevor sie neue Mitglieder vorschlägt. Die Mitglieder sind berechtigt, ihr Amt durch Erklärung gegenüber dem Bundespräsidenten niederzulegen. Scheidet ein Mitglied vorzeitig aus, so wird ein neues Mitglied für die Dauer der Amtszeit des ausgeschiedenen Mitglieds berufen.
(3) Die Mitglieder der Monopolkommission dürfen weder der Regierung oder einer gesetzgebenden Körperschaft des Bundes oder eines Landes noch dem öffentlichen Dienst des Bundes, eines Landes oder einer sonstigen juristischen Person des öffentlichen Rechts, es sei denn als Hochschullehrer oder als Mitarbeiter eines wissenschaftlichen Instituts, angehören. Ferner dürfen sie weder einen Wirtschaftsverband noch eine
Arbeitgeber- oder Arbeitnehmerorganisation repräsentieren oder zu diesen in einem ständigen Dienst- oder Geschäftsbesorgungsverhältnis stehen. Sie dürfen auch nicht während des letzten Jahres vor der Berufung zum Mitglied der Monopolkommission eine derartige Stellung innegehabt haben.

Zweiter Teil Kartellbehörden

Erster Abschnitt Allgemeine Vorschriften
§ 48 Zuständigkeit
(1) Kartellbehörden sind das Bundeskartellamt, das Bundesministerium für Wirtschaft und Arbeit und die nach Landesrecht zuständigen obersten Landesbehörden.
(2) Weist eine Vorschrift dieses Gesetzes eine Zuständigkeit nicht einer bestimmten Kartellbehörde zu, so nimmt das Bundeskartellamt die in diesem Gesetz der Kartellbehörde übertragenen Aufgaben und Befugnisse wahr, wenn die Wirkung der Marktbeeinflussung oder des wettbewerbsbeschränkenden oder diskriminierenden Verhaltens oder einer Wettbewerbsregel über das Gebiet eines Landes hinausreicht. In

allen übrigen Fällen nimmt diese Aufgaben und Befugnisse die nach Landesrecht zuständige oberste Landesbehörde wahr.

Zweiter Abschnitt Bundeskartellamt
§ 51 Sitz, Organisation
(1) Das Bundeskartellamt ist eine selbständige Bundesoberbehörde mit dem Sitz in Bonn. Es gehört zum Geschäftsbereich des Bundesministeriums für Wirtschaft und Arbeit.
(2) Die Entscheidungen des Bundeskartellamts werden von den Beschlussabteilungen getroffen, die nach Bestimmung des Bundesministeriums für Wirtschaft und Arbeit gebildet werden. Im übrigen regelt der Präsident die Verteilung und den Gang der Geschäfte des Bundeskartellamts durch eine Geschäftsordnung; sie bedarf der Bestätigung durch das Bundesministerium für Wirtschaft und Arbeit.
(3) Die Beschlußabteilungen entscheiden in der Besetzung mit einem oder einer Vorsitzenden und zwei Beisitzenden.
(4) Vorsitzende und Beisitzende der Beschlußabteilungen müssen Beamte auf Lebenszeit sein und die Befähigung zum Richteramt oder zum höheren Verwaltungsdienst haben.
(5) Die Mitglieder des Bundeskartellamts dürfen weder ein Unternehmen innehaben oder leiten noch dürfen sie Mitglied des Vorstandes oder des Aufsichtsrates eines Unternehmens, eines Kartells oder einer Wirtschafts- oder Berufsvereinigung sein.

§ 53 Tätigkeitsbericht
(1) Das Bundeskartellamt veröffentlicht alle zwei Jahre einen Bericht über seine Tätigkeit sowie über die Lage und Entwicklung auf seinem Aufgabengebiet. In den Bericht sind die allgemeinen Weisungen des Bundesministeriums für Wirtschaft und Arbeit nach § 52 aufzunehmen. Es veröffentlicht ferner fortlaufend seine
Verwaltungsgrundsätze.
(2) Die Bundesregierung leitet den Bericht des Bundeskartellamts dem Bundestag unverzüglich mit ihrer Stellungnahme zu.

Dritter Teil Verfahren

Erster Abschnitt Verwaltungssachen
I. Verfahren vor den Kartellbehörden
§ 54 Einleitung des Verfahrens, Beteiligte
(1) Die Kartellbehörde leitet ein Verfahren von Amts wegen oder auf Antrag ein. Die Kartellbehörde kann auf entsprechendes Ersuchen zum Schutz eines Beschwerdeführers ein Verfahren von Amts wegen einleiten.
(2) An dem Verfahren vor der Kartellbehörde sind beteiligt,
1. wer die Einleitung eines Verfahrens beantragt hat;
2. Kartelle, Unternehmen, Wirtschafts- oder Berufsvereinigungen, gegen die sich das Verfahren richtet;
3. Personen und Personenvereinigungen, deren Interessen durch die Entscheidung erheblich berührt werden und die die Kartellbehörde auf ihren Antrag zu dem Verfahren beigeladen hat;
4. in den Fällen des § 37 Abs. 1 Nr. 1 oder 3 auch der Veräußerer.

(3) An Verfahren vor obersten Landesbehörden ist auch das Bundeskartellamt beteiligt.

§ 56 Anhörung, mündliche Verhandlung
(1) Die Kartellbehörde hat den Beteiligten Gelegenheit zur Stellungnahme zu geben und sie auf Antrag eines Beteiligten zu einer mündlichen Verhandlung zu laden.
(2) Vertretern der von dem Verfahren berührten Wirtschaftskreise kann die Kartellbehörde in geeigneten Fällen Gelegenheit zur Stellungnahme geben.
(3) In den Fällen des § 19 entscheidet die Kartellbehörde auf Grund öffentlicher mündlicher Verhandlung; mit Einverständnis der Beteiligten kann ohne mündliche Verhandlung entschieden werden. Auf Antrag eines Beteiligten oder von Amts wegen ist für die Verhandlung oder für einen Teil davon die Öffentlichkeit auszuschließen, wenn sie eine Gefährdung der öffentlichen Ordnung, insbesondere der Staatssicherheit, oder die Gefährdung eines wichtigen Geschäfts- oder Betriebsgeheimnisses besorgen läßt. In den Fällen des § 42 sind im Verfahren vor dem Bundesministerium für Wirtschaft und Arbeit die Sätze 1 und 2 entsprechend anzuwenden.

§ 57 Ermittlungen, Beweiserhebung
(1) Die Kartellbehörde kann alle Ermittlungen führen und alle Beweise erheben, die erforderlich sind.

(2) Für den Beweis durch Augenschein, Zeugen und Sachverständige sind § 372 Abs. 1, §§ 376, 377, 378, 380 bis 387, 390, 395 bis 397, 398 Abs. 1, §§ 401, 402, 404, 404a, 406 bis 409, 411 bis 414 der Zivilprozeßordnung sinngemäß anzuwenden; Haft darf nicht verhängt werden. Für die Entscheidung über die Beschwerde ist das Oberlandesgericht zuständig.
(3) Über die Zeugenaussage soll eine Niederschrift aufgenommen werden, die von dem ermittelnden Mitglied der Kartellbehörde und, wenn ein Urkundsbeamter zugezogen ist, auch von diesem zu unterschreiben ist. Die Niederschrift soll Ort und Tag der Verhandlung sowie die Namen der Mitwirkenden und Beteiligten ersehen lassen.
(4) Die Niederschrift ist dem Zeugen zur Genehmigung vorzulesen oder zur eigenen Durchsicht vorzulegen. Die erteilte Genehmigung ist zu vermerken und von dem Zeugen zu unterschreiben. Unterbleibt die Unterschrift, so ist der Grund hierfür anzugeben.
(5) Bei der Vernehmung von Sachverständigen sind die Bestimmungen der Absätze 3 und 4 entsprechend anzuwenden.
(6) Die Kartellbehörde kann das Amtsgericht um die Beeidigung von Zeugen ersuchen, wenn sie die Beeidigung zur Herbeiführung einer wahrheitsgemäßen Aussage für notwendig erachtet. Über die Beeidigung entscheidet das Gericht.

§ 58 Beschlagnahme
(1) Die Kartellbehörde kann Gegenstände, die als Beweismittel für die Ermittlung von Bedeutung sein können, beschlagnahmen. Die Beschlagnahme ist dem davon Betroffenen unverzüglich bekanntzumachen.
(2) Die Kartellbehörde hat binnen drei Tagen die richterliche Bestätigung des Amtsgerichts, in dessen Bezirk die Beschlagnahme vorgenommen ist, nachzusuchen, wenn bei der Beschlagnahme weder der davon Betroffene noch ein erwachsener Angehöriger anwesend war oder wenn der Betroffene und im Falle seiner Abwesenheit ein erwachsener Angehöriger des Betroffenen gegen die Beschlagnahme ausdrücklich Widerspruch erhoben hat.
(3) Der Betroffene kann gegen die Beschlagnahme jederzeit die richterliche Entscheidung nachsuchen. Hierüber ist er zu belehren. Über den Antrag entscheidet das nach Absatz 2 zuständige Gericht.
(4) Gegen die richterliche Entscheidung ist die Beschwerde zulässig. Die §§ 306 bis 310 und 311a der Strafprozeßordnung gelten entsprechend.

§ 59 Auskunftsverlangen
(1) Soweit es zur Erfüllung der in diesem Gesetz der Kartellbehörde übertragenen Aufgaben erforderlich ist, kann die Kartellbehörde

1. von Unternehmen und Vereinigungen von Unternehmen Auskunft über ihre wirtschaftlichen Verhältnisse sowie die Herausgabe von Unterlagen verlangen;
2. bei Unternehmen und Vereinigungen von Unternehmen innerhalb der üblichen Geschäftszeiten die geschäftlichen Unterlagen einsehen und prüfen;
3. von Wirtschafts- und Berufsvereinigungen Auskunft über die Satzung, über die Beschlüsse sowie über Anzahl und Namen der Mitglieder verlangen, für die die Beschlüsse bestimmt sind.

(2) Die Inhaber der Unternehmen und ihre Vertretung, bei juristischen Personen, Gesellschaften und nicht rechtsfähigen Vereinen die nach Gesetz oder Satzung zur Vertretung berufenen Personen sowie die gemäß § 13 Abs. 2 Satz 1 zur Vertretung bestellten Personen sind verpflichtet, die verlangten Unterlagen herauszugeben, die verlangten Auskünfte zu erteilen, die geschäftlichen Unterlagen zur Einsichtnahme und Prüfung vorzulegen und die Prüfung dieser geschäftlichen Unterlagen sowie das Betreten von Geschäftsräumen und -grundstücken zu dulden.
(3) Personen, die von der Kartellbehörde mit der Vornahme von Prüfungen beauftragt werden, dürfen die Räume der Unternehmen und Vereinigungen von Unternehmen betreten. Das Grundrecht des Artikels 13 des Grundgesetzes wird insoweit eingeschränkt.
(4) Durchsuchungen können nur auf Anordnung des Amtsrichters, in dessen Bezirk die Durchsuchung erfolgen soll, vorgenommen werden. Auf die Anfechtung dieser Anordnung finden die §§ 306 bis 310 und 311a der Strafprozeßordnung entsprechende Anwendung. Bei Gefahr im Verzuge können die in Absatz 3 bezeichneten Personen während der Geschäftszeit die erforderlichen Durchsuchungen ohne richterliche Anordnung vornehmen. An Ort und Stelle ist eine Niederschrift über die Durchsuchung und ihr wesentliches Ergebnis aufzunehmen, aus der sich, falls keine richterliche Anordnung ergangen ist, auch die Tatsachen ergeben, die zur Annahme einer Gefahr im Verzuge geführt haben.
(5) Zur Auskunft Verpflichtete können die Auskunft auf solche Fragen verweigern, deren Beantwortung sie selbst oder Angehörige, die in § 383 Abs. 1 Nr. 1 bis 3 der Zivilprozeßordnung bezeichnet sind, der Gefahr strafgerichtlicher Verfolgung oder eines Verfahrens nach dem Gesetz über Ordnungswidrigkeiten aussetzen würde.

(6) Das Bundesministerium für Wirtschaft und Arbeit oder die oberste Landesbehörde fordern die Auskunft durch schriftliche Einzelverfügung, das Bundeskartellamt fordert sie durch Beschluß an. Darin sind die Rechtsgrundlage, der Gegenstand und der Zweck des Auskunftsverlangens anzugeben und eine angemessene Frist zur Erteilung der Auskunft zu bestimmen.
(7) Das Bundesministerium für Wirtschaft und Arbeit oder die oberste Landesbehörde ordnen die Prüfung durch schriftliche Einzelverfügung, das Bundeskartellamt ordnet sie durch Beschluß mit Zustimmung des Präsidenten an. In der Anordnung sind Zeitpunkt, Rechtsgrundlage, Gegenstand und Zweck der Prüfung anzugeben.

II. Beschwerde
§ 63 Zulässigkeit, Zuständigkeit
(1) Gegen Verfügungen der Kartellbehörde ist die Beschwerde zulässig. Sie kann auch auf neue Tatsachen und Beweismittel gestützt werden.
(2) Die Beschwerde steht den am Verfahren vor der Kartellbehörde Beteiligten (§ 54 Abs. 2 und 3) zu.
(3) Die Beschwerde ist auch gegen die Unterlassung einer beantragten Verfügung der Kartellbehörde zulässig, auf deren Vornahme der Antragsteller ein Recht zu haben behauptet. Als Unterlassung gilt es auch, wenn die Kartellbehörde den Antrag auf Vornahme der Verfügung ohne zureichenden Grund in angemessener Frist nicht beschieden hat. Die Unterlassung ist dann einer Ablehnung gleichzuachten.
(4) Über die Beschwerde entscheidet ausschließlich das für den Sitz der Kartellbehörde zuständige Oberlandesgericht, in den Fällen der §§ 35 bis 42 ausschließlich das für den Sitz des Bundeskartellamts zuständige Oberlandesgericht, und zwar auch dann, wenn sich die Beschwerde gegen eine Verfügung des Bundesministeriums für Wirtschaft und Arbeit richtet. § 36 der Zivilprozessordnung gilt entsprechend.

IV. Gemeinsame Bestimmungen
§ 80 Gebührenpflichtige Handlungen
(1) Im Verfahren vor der Kartellbehörde werden Kosten (Gebühren und Auslagen) zur Deckung des Verwaltungsaufwandes erhoben. Gebührenpflichtig sind (gebührenpflichtige Handlungen)

1. Anmeldungen nach § 9 Abs. 1, § 22 Abs. 4, § 28 Abs. 1 Satz 2, § 29 Abs. 3 oder 4, § 30 Abs. 1 Satz 2 in Verbindung mit Satz 1, § 39 Abs. 1 sowie nach § 8 Abs. 3 Satz 5 bis 7 des Personenbeförderungsgesetzes und § 12 Abs. 7 des Allgemeinen Eisenbahngesetzes;
2. Amtshandlungen auf Grund der §§ 10, 12, 15 bis 18, 22 Abs. 6, § 23 Abs. 3, §§ 24, 26, 29, 32, 36, 40, 41, 42 und 60;
3. Erteilung von Abschriften aus den Akten der Kartellbehörde.

Daneben werden als Auslagen die Kosten der öffentlichen Bekanntmachungen und die in entsprechender Anwendung des Gesetzes über die Entschädigung von Zeugen und Sachverständigen zu zahlenden Beträge erhoben. Auf die Gebühr für die Untersagung eines Zusammenschlusses nach § 36 Abs. 1 sind die Gebühren für die Anmeldung eines Zusammenschlusses nach § 39 Abs. 1 anzurechnen.
(2) Die Höhe der Gebühren bestimmt sich nach dem personellen und sachlichen Aufwand der Kartellbehörde unter Berücksichtigung der wirtschaftlichen Bedeutung, die der Gegenstand der gebührenpflichtigen Handlung hat. Die Gebührensätze dürfen jedoch nicht übersteigen

1. 50.000 Euro in den Fällen der §§ 36, 39, 40, 41 und 42;
2. 25.000 Euro in den Fällen der §§ 10, 29 Abs. 1 - auch in Verbindung mit Abs. 3 - und des § 32;
3. 7.500 Euro in den Fällen der §§ 9 und 29 Abs. 4;
4. 5.000 Euro in den Fällen des § 15 Abs. 3, der §§ 16, 17 Abs. 3, §§ 18, 22 Abs. 6, des § 23 Abs. 3, § 26 Abs. 1 und § 29 Abs. 2 - auch in Verbindung mit Abs. 3 -;
5. 2.500 Euro in den Fällen des § 28 Abs. 1 Satz 2 und § 30 Abs. 1 Satz 2;
6. 1.250 Euro in den Fällen des § 22 Abs. 4;
7. 250 Euro in den Fällen des § 8 Abs. 3 Satz 5 bis 7 des Personenbeförderungsgesetzes und § 12 Abs. 7 des Allgemeinen Eisenbahngesetzes;
8. 17,50 Euro für die Erteilung beglaubigter Abschriften (Absatz 1 Nr. 3);
9. a) in den Fällen des § 12 Abs. 2 den Betrag für die Freistellung,
   b) in den Fällen des § 12 Abs. 1 und § 29 Abs. 3 und 4 den Betrag für die Anmeldung (Nr. 2 bis 5), 7.500 Euro für Verfügungen in bezug auf Vereinbarungen oder Beschlüsse der in § 4 Abs. 2 bezeichneten Art und 250 Euro für Verfügungen in bezug auf Vereinbarungen oder Beschlüsse der in § 28 Abs. 1 bezeichneten Art,
   c) im Falle des § 26 Abs. 4 den Betrag für die Entscheidung nach § 26 Abs. 1 (Nr. 4),
   d) in den Fällen des § 60 ein Fünftel der Gebühr in der Hauptsache.

Ist der personelle oder sachliche Aufwand der Kartellbehörde unter Berücksichtigung des wirtschaftlichen Werts der gebührenpflichtigen Handlung im Einzelfall außergewöhnlich hoch, kann die Gebühr bis auf das

Doppelte erhöht werden. Aus Gründen der Billigkeit kann die unter Berücksichtigung der Sätze 1 bis 3 ermittelte Gebühr bis auf ein Zehntel ermäßigt werden.
(3) Zur Abgeltung mehrfacher gleichartiger Amtshandlungen oder gleichartiger Anmeldungen desselben Gebührenschuldners können Pauschgebührensätze, die den geringen Umfang des Verwaltungsaufwandes berücksichtigen, vorgesehen werden.
(4) Gebühren dürfen nicht erhoben werden

1. für mündliche und schriftliche Auskünfte und Anregungen;
2. wenn sie bei richtiger Behandlung der Sache nicht entstanden wären;
3. in den Fällen des § 42, wenn die vorangegangene Verfügung des Bundeskartellamts nach § 36 Abs. 1 aufgehoben worden ist.

(5) Wird ein Antrag zurückgenommen, bevor darüber entschieden ist, so ist die Hälfte der Gebühr zu entrichten. Das gleiche gilt, wenn eine Anmeldung innerhalb von drei Monaten nach Eingang bei der Kartellbehörde zurückgenommen wird.
(6) Kostenschuldner ist

1. in den Fällen des Absatzes 1 Satz 2 Nr. 1, wer eine Anmeldung eingereicht hat;
2. in den Fällen des Absatzes 1 Satz 2 Nr. 2, wer durch einen Antrag die Tätigkeit der Kartellbehörde veranlaßt hat, oder derjenige, gegen den eine Verfügung der Kartellbehörde ergangen ist;
3. in den Fällen des Absatzes 1 Satz 2 Nr. 3, wer die Herstellung der Abschriften veranlaßt hat.

Kostenschuldner ist auch, wer die Zahlung der Kosten durch eine vor der Kartellbehörde abgegebene oder ihr mitgeteilte Erklärung übernommen hat oder wer für die Kostenschuld eines anderen kraft Gesetzes haftet. Mehrere Kostenschuldner haften als Gesamtschuldner.
(7) Der Anspruch auf Zahlung der Gebühren verjährt in vier Jahren nach der Gebührenfestsetzung. Der Anspruch auf Erstattung der Auslagen verjährt in vier Jahren nach ihrer Entstehung.
(8) Die Bundesregierung wird ermächtigt, durch Rechtsverordnung, die der Zustimmung des Bundesrates bedarf, die Gebührensätze und die Erhebung der Gebühren vom Kostenschuldner in Durchführung der Vorschriften der Absätze 1 bis 6 sowie die Erstattung von Auslagen nach Absatz 1 Satz 3 zu regeln. Sie kann dabei auch Vorschriften über die Kostenbefreiung von juristischen Personen des öffentlichen Rechts, über die Verjährung sowie über die Kostenerhebung treffen.
(9) Durch Rechtsverordnung der Bundesregierung, die der Zustimmung des Bundesrates bedarf, wird das Nähere über die Erstattung der durch das Verfahren vor der Kartellbehörde entstehenden Kosten nach den Grundsätzen des § 78 bestimmt.

Zweiter Abschnitt Bußgeldverfahren
§ 81 Bußgeldvorschriften
(1) Ordnungswidrig handelt, wer vorsätzlich oder fahrlässig

1. einer Vorschrift der §§ 1, 14, 17 Abs. 1 Satz 1, auch in Verbindung mit §§ 18, 19 Abs. 1, § 20 Abs. 1, auch in Verbindung mit Absatz 2 Satz 1, § 20 Abs. 3 Satz 1, auch in Verbindung mit Satz 2, § 20 Abs. 4 Satz 1 oder Abs. 6, §§ 21, 22 Abs. 1 oder § 41 Abs. 1 Satz 1 über die Verbote dort genannter Vereinbarungen oder Verträge, der mißbräuchlichen Ausnutzung einer marktbeherrschenden Stellung, der Behinderung oder unterschiedlichen Behandlung von Unternehmen oder sonstigen wettbewerbsbeschränkenden Verhaltens oder über Empfehlungs- oder Vollzugsverbote zuwiderhandelt,
2. entgegen § 9 Abs. 2 Satz 2, auch in Verbindung mit § 29 Abs. 3 Satz 1 oder Abs. 4, § 24 Abs. 4 Satz 3 oder § 39 Abs. 3 Satz 4 eine Angabe macht oder benutzt,
3. entgegen § 9 Abs. 4 Satz 1 oder § 28 Abs. 1 Satz 2 Vereinbarungen und Beschlüsse nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig anmeldet,
4. entgegen § 9 Abs. 4 Satz 3 oder § 39 Abs. 6 eine Anzeige nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig erstattet,
5. einer vollziehbaren Auflage nach § 10 Abs. 4 Satz 3, § 12 Abs. 2 Satz 1, jeweils auch in Verbindung mit § 17 Abs. 3 Satz 3, § 40 Abs. 3 Satz 1 oder § 42 Abs. 2 Satz 1 zuwiderhandelt,
6. einer vollziehbaren Anordnung nach
   a) § 12 Abs. 1 Nr. 1, auch in Verbindung mit § 29 Abs. 4, § 15 Abs. 3, §§ 16, 22 Abs. 6, § 23 Abs. 3 Satz 1, §§ 32, 41 Abs. 4 Nr. 2 oder § 50 Abs. 2 Satz 2 oder
   b) § 39 Abs. 5

   zuwiderhandelt,
7. entgegen § 39 Abs. 1 Zusammenschlüsse nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig anmeldet,
8. entgegen § 59 Abs. 2 eine Auskunft nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig erteilt, Unterlagen nicht, nicht vollständig oder nicht rechtzeitig herausgibt, geschäftliche Unterlagen nicht, nicht vollständig oder nicht rechtzeitig zur Einsichtnahme und Prüfung vorlegt oder die Prüfung

dieser geschäftlichen Unterlagen sowie das Betreten von Geschäftsräumen und -grundstücken nicht duldet oder

9. einer einstweiligen Anordnung nach den §§ 60 oder 64 Abs. 3 oder einer Anordnung nach § 65 zuwiderhandelt.

(2) Die Ordnungswidrigkeit kann in den Fällen des Absatzes 1 Nr. 1, 2, 5, 6 Buchstabe a und Nr. 9 mit einer Geldbuße bis zu fünfhunderttausend Euro, über diesen Betrag hinaus bis zur dreifachen Höhe des durch die Zuwiderhandlung erlangten Mehrerlöses, in den übrigen Fällen mit einer Geldbuße bis zu fünfundzwanzigtausend Euro geahndet werden. Die Höhe des Mehrerlöses kann geschätzt werden.
(3) Die Verjährung der Verfolgung von Ordnungswidrigkeiten nach Absatz 1 richtet sich nach den Vorschriften des Gesetzes über Ordnungswidrigkeiten auch dann, wenn die Tat durch Verbreiten von Druckschriften begangen wird. Die Verfolgung der Ordnungswidrigkeiten nach Absatz 1 Nr. 1 verjährt in fünf Jahren.
(4) Verwaltungsbehörde im Sinne des § 36 Abs. 1 Nr. 1 des Gesetzes über Ordnungswidrigkeiten ist

1. die nach § 48 zuständige Behörde, soweit es sich um Ordnungswidrigkeiten nach Absatz 1 handelt,
2. das Bundeskartellamt, soweit es sich dabei um Verfahren nach § 50 handelt.

(5) Vereinbarungen und Beschlüsse der in § 1 bezeichneten Art, die nach § 9 angemeldet worden sind, werden nicht als Ordnungswidrigkeit verfolgt, solange die Kartellbehörde nicht gemäß § 9 Abs. 3 widersprochen hat. Gleiches gilt für Vereinbarungen und Beschlüsse, für die ein Antrag nach § 10 gestellt worden ist, solange die Kartellbehörde den Antrag nicht nach § 10 Abs. 2 abgelehnt hat.

Vierter Teil Vergabe öffentlicher Aufträge

Fünfter Teil Anwendungsbereich des Gesetzes

§ 130 Unternehmen der öffentlichen Hand, Geltungsbereich
(1) Dieses Gesetz findet auch Anwendung auf Unternehmen, die ganz oder teilweise im Eigentum der öffentlichen Hand stehen oder die von ihr verwaltet oder betrieben werden. Die Vorschriften des Ersten bis Dritten Teils dieses Gesetzes finden keine Anwendung auf die Deutsche Bundesbank und die Kreditanstalt für Wiederaufbau.
(2) Dieses Gesetz findet Anwendung auf alle Wettbewerbsbeschränkungen, die sich im Geltungsbereich dieses Gesetzes auswirken, auch wenn sie außerhalb des Geltungsbereichs dieses Gesetzes veranlaßt werden.
(3) Die Vorschriften des Energiewirtschaftsgesetzes stehen der Anwendung der §§ 19 und 20 nicht entgegen.

Sechster Teil Übergangs- und Schlussbestimmungen