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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- July 2006 - June 2007 --

This report is submitted by the German Delegation to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 17-18 October 2007.

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Executive Summary

Legislation

1. An amendment of the Act against Restrictions of Competition (ARC) which aims at combating abusive pricing in the energy as well as in the food sector will probably enter into force by the end of 2007.

2. The Bundeskartellamt published its guidelines on the setting of fines and issued a notice on agreements of minor importance (*de minimis*) as well as a new information leaflet for small and medium-sized enterprises.

Organisation

3. The new president Dr Heitzer took office and some significant restructuring measures were carried out.

Agreements / Abusive practices by dominant companies

4. The Bundeskartellamt continued its vigorous fight against cartel agreements. It imposed fines against pharmaceutical wholesalers and manufacturers of electrical household devices. Moreover, in the reporting period several cooperation agreements were examined under competition law. The insurers' pool for pecuniary loss liability risks did not meet with competition law requirements and was prohibited. Further cooperations concerned the media sector and savings banks.

5. The energy sector was again a major area of focus in abuse control this year. Further abuse proceedings were conducted against the lottery companies and a major drugstore chain. .

Merger control

6. A number of significant proceedings in the area of merger control related to the hospital market: The Bundeskartellamt prohibited the planned merger between the University Hospital of Greifswald and the Wolgast district hospital as well as the planned merger between Landesbetrieb Krankenhäuser Hamburg and Krankenhaus Mariahilf. The takeover of Wunstorf District Hospital by Klinikum Hannover was cleared subject to the suspensive conditions, whereas the acquisition Humaine hospitals by Fresenius could be cleared without any conditions or obligations.

1. Changes to competition law and policy, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation, proposed or adopted

7. In the reporting period significant amendments were made to the Telecommunications Act concerning the regulation of new markets.

8. Under the amendment new markets are generally no longer subject to regulation unless there are justified indications to assume that the absence of regulation would in the long term hinder the development of a sustainable pro-competitive market in the area of telecommunications services or networks. In assessing the need for regulation and the imposition of measures by the Federal Network Agency (Bundesnetzagentur) particular account should be taken of the aim to promote efficient infrastructure investments and to encourage innovations.

9. Moreover, the Federal Government adopted a package of measures aimed at achieving better structural conditions for more competition on the supply side of the energy markets in the long term. Although the markets for electricity and gas were opened more than eight years ago, fully functioning competition has not yet developed on the markets upstream and downstream of the networks. With a new regulation on Network Connections for power stations which came into force on June 30, 2007 ("Kraftwerks-Netzanschluss-Verordnung") the Federal Government intends inter alia to remove obstacles to market access for new suppliers in the electricity sector.

10. Another part of the package is the planned replacement of the current system of approval of prices to use the energy networks (network charges) by an incentive regulation intended to stimulate competition ("Anreizregulierungsverordnung"). This regulation was adopted by the Federal Government in June 2007 and will probably enter into force by the end of 2007.

11. Furthermore, as a short-term measure for the energy sector the Federal Government adopted already in April 2007 a draft amendment of ARC and substantiated the general prohibition on abusive conduct in the energy price sector. A new section 29 will empower the Bundeskartellamt to forbid market dominant energy suppliers setting prices that exceed their costs inappropriately (control of abusive conduct). The text of the new section is as follows:

“ 29

Energy Sector

An undertaking which as a provider of electricity or gas (supply company) has a dominant position in a market, either exclusively or jointly with other supply companies, is prohibited from abusing its position by

- demanding fees or other business conditions which are less favourable than those of other supply companies or companies in comparable markets, unless the company can prove that such differentiation is objectively justified.
- demanding fees which are excessive in proportion to its costs.

Costs, which would not arise to the same extent if competition were in place, cannot be taken into account in determining a case of abuse within the meaning of Sentence 1. Sections 19 to 20 shall remain unaffected.”

12. The norm comprises the following elements: The extension of the comparative market concept, reversal of the burden of proof and explicit legalization of the possibility to conduct cost-based price control to determine a case of abuse. It will remain in force until the end of 2012. In addition all future abuse decisions of the competition authorities are to be immediately enforceable. In its comments the Bundeskartellamt welcomed the proposals in the new norm. These modifications will not bring any radical changes. Rather, they will make the design of the instruments to combat abuses of competition law more effective. Abusive pricing in the energy sector, one which is economically important and especially problematic in competition terms, can thus be ended more quickly.

13. The named amendment of the ARC will also tighten the already existing prohibition of offers below the cost price contained in Section 20 par. 4 of the ARC with regard to food. As indicated in last year's report the new provision will also prohibit occasional offers of food below the cost price unless there is an objective justification. An offer below the cost price may be justified if it is through this avoidable that the food deteriorates, that the food can no more be sold and in comparably severe cases. The

Bundeskartellamt criticized the proposal because the new regulation might restrict fair competition on the merits, possibly even to the detriment of consumers.

14. As mentioned above, another change of the ARC concerns the immediate enforcement of decisions of the Bundeskartellamt. In the future, according to the government's plans all kind of abuse control decisions will be immediately enforceable. Section 64 par. 1, subpar.1, will be deleted. This change will lead to further harmonization between German and European Competition Law.

15. The amendment of the ARC still has to be adopted by the German Bundestag and will probably enter into force by the end of 2007.

1.2 Other relevant measures, including new guidelines

16. On 26 September 2006 the Bundeskartellamt published its guidelines on the setting of fines. In line with the 7th amendment to the Act against Restraints of Competition which came into force in July 2005 the level of fines imposed for violations of competition law has been raised to amounts of up to 1 million € In addition, certain violations can be punished by a fine of up to 10 per cent of the total turnover.

17. The guidelines specify how the Bundeskartellamt will apply the new provisions on fines in the future. The calculation of fines is based on the so-called basic amount. This can amount to up to 30 per cent of the turnover which the companies concerned achieved with the products or services connected with the infringement. This provision is identical with its counterpart in the European guidelines for setting fines. The calculation of the exact basic amount takes into account the gravity and duration of the infringement. The final amount is calculated in a second step. This is achieved by increasing or reducing the basic amount on the basis of aggravating and extenuating circumstances. It is also possible to waive or reduce a fine if a company that participated in the infringement submits an application for leniency.

18. Furthermore the guidelines on the setting of fines include the following rules:

- Apart from horizontal and vertical competition restraints and unilateral anti-competitive behaviour (abusive practices, unfair hindrance, boycott, etc.), the guidelines also cover infringements in the area of merger control.
- In the case of price-fixing and quota cartels, territorial and customer agreements and other severe horizontal competition restraints, the basic amount is generally set in the upper range of the maximum possible basic amount.
- For deterrent purposes the basic amount can be raised by up to 100 per cent.
- In its calculation of the maximum limit of 10 per cent of a company's total turnover the Bundeskartellamt takes into account the turnovers of affiliated companies.

19. On March 2007 a new notice on agreements of minor importance (de minimis) and a new information leaflet for small and medium-sized enterprises were issued.

20. The de minimis notice replaces the previous regulation of 1980 and explains in which cases the anti-competitive effects of cooperation agreements are considered to be of minor importance. Agreements between competitors (horizontal agreements) that do not contain so-called hard core restrictions (in particular price-fixing or quota agreements) fall under this provision if the joint market share of the companies involved is below 10%. In the case of vertical agreements (agreements between companies

from different market levels) the threshold is 15%. These thresholds are in line with the European Commission's practice and are not limited to small and medium-sized enterprises.

21. The information leaflet for small and medium-sized enterprises, last published in 1999, was redrafted in view of the 7th Amendment to the Act against Restraints of Competition (ARC). Section 3 of the ARC contains a special provision for the cartels of small and medium-sized enterprises (so-called "Mittelstandskartelle"), according to which agreements can be exempted from the prohibition of cartels if they serve to rationalize economic activities via cooperation among enterprises. As a consequence, some quite extensive co-operations between small and medium-sized enterprises are admissible that under general competition law would have to be prohibited. However, this provision only applies where the case in question does not affect trade between member states of the European Union.

1.3 Staff changes and reorganisations at the Bundeskartellamt

22. On 1 April 2007 Dr Bernhard Heitzer took office as the new President of the Bundeskartellamt. He succeeds Dr Ulf Böge who retired after seven years in office at the age of 65. Before his appointment as President of the Bundeskartellamt, Dr Heitzer was President of the Federal Office of Economics and Export Control (BAFA), an office which he assumed in August 2004.

23. The Bundeskartellamt also carried out some important restructuring measures:

24. Since September 2006 competence for merger and abuse control is distributed among nine instead of previously ten Decision Divisions. The aim of this restructuring measure is to optimize division layout to take account of sector developments and to minimize unclarity about current areas of competence. This restructuring plan is also an attempt to attune lower staff levels resulting from staff reductions in the public service to an increasing amount of tasks. The 10th Decision Division is to be expanded at a later date to serve as a second cartel prosecution department in addition to the 11th Decision which already specialises in this area.

25. Moreover, in July 2007 the Bundeskartellamt set up an Economics Issues Section which is to deal exclusively with economic issues in a modern approach to competition policy.

2. Enforcement of competition law and policy

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1 Summary of activities of competition authorities and courts

26. In the period covered by the report, the Bundeskartellamt imposed fines of approximately 2.6 million against companies in the pharmaceutical wholesale sector. In the cartel proceedings against cement manufacturers the investigations to examine the calculation of additional proceeds were concluded and in the proceedings against ready-mixed concrete manufacturers fines totalling 8.68 million euros were imposed against 35 companies. In a case of boycott the Bundeskartellamt imposed fines totalling more than 1.4 million euros against the SEB and Krups group.

27. In addition the Bundeskartellamt examined the admissibility under competition law of several cooperation agreements, which, inter alia, led to the prohibition of the Insurers' pool for pecuniary loss liability risks (*Versicherungsstelle für Vermögensschadenhaftpflichtisiken*). A case which drew the greatest public attention was the cooperation between the two Pay TV providers arena/Premiere, which the Bundeskartellamt tolerated in a modified form and in view of the time limitation of the cooperation.

28. With regard to cartel detection, from July 2006 to June 2007 the Bundeskartellamt received altogether 24 leniency applications (in a total of nine cases) and conducted 17 dawn raids in administrative offence proceedings, of which 5 were inspections on behalf of the European Commission.

29. With regard to abusive market behaviour the Bundeskartellamt pushed ahead with proceedings against E.ON and RWE in connection with the trading of emission rights and issued a statement of objections to RWE. The case against the regional lottery companies and the German Lotto and Toto Block, which was mentioned in the last report, was concluded and the abusive practices prohibited. In proceedings against sales below cost price the Bundeskartellamt imposed a fine of 300,000 euros against the drugstore chain Rossmann.

30. In the reporting period, the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision in the case "Soda Club".

2.1.2 *Description of significant cases, including those with international implications*

Agreements, action in the form of administrative fine proceedings against cartels / boycotts / cooperations

Cartels

31. The Bundeskartellamt imposed fines amounting to approximately 2.6 million euros against four companies and seven persons responsible in the pharmaceutical wholesale sector on account of anti-competitive agreements. The companies concerned are Andreae-Noris Zahn AG (Anzag), Phoenix Pharmahandel AG & Co. KG (Phoenix), Gehe Pharma Handel GmbH (Gehe) and Sanacorp Pharmahandel AG (Sanacorp).

32. In 2003 a fierce price competition took place in the pharmaceutical wholesale market after Anzag had increased the discounts it granted to pharmacists in order to expand its market share. Following changes in the company's board of directors Anzag decided in late 2003 to put an end to this "discount battle" and agreed with the three other large pharmaceutical wholesalers Sanacorp, Phoenix and Gehe to re-distribute the market shares it had gained as a result of its "push forward" strategy among the three wholesalers. For this purpose, so-called "balance lists" were exchanged at regional level. These listed for the region concerned how many pharmacies, and with what average monthly turnover, had switched from Anzag to one of the other competitors and vice versa. It was planned to adjust any disparities by Anzag granting pharmacies with an according purchase volume unfavourable purchasing conditions to induce them to switch back to the partner to the agreement which had been their previous supplier. This was intended to restore calm to the market, end the discount competition and return to the same market share distribution that was in place before the "push forward" strategy.

33. After the wholesale companies and five individuals personally involved withdrew their appeals, a fine of a total of 2.185 million euros has now become final. In two cases the Bundeskartellamt discontinued its proceedings against individuals personally involved.

34. In June 2007, the Bundeskartellamt prohibited manufacturers of container glass in Germany from jointly purchasing waste glass for their production.

35. In 1993 German container glass manufacturers set up the glass recycling company "Gesellschaft für Glasrecycling und Abfallvermeidung ("GGA") to jointly purchase the entire waste glass recovered from household collections. The GGA has up to now purchased the entire waste glass centrally from the waste management companies and has organized its delivery to special recycling plants.

36. This purchasing cartel prevents the container glass manufacturers' individual demand for secondary glass materials and leads to the elimination of competition because of its substantial share of the waste glass markets. Above all the Bundeskartellamt ascertained in an examination that, contrary to claims made by the member companies, the cartel is not necessary to guarantee the recycling quotas for waste glass in the long term, which for years have exceeded 80 per cent. The production of container glass has long been targeted at high utilization rates of recovered glass.

37. In the cartel proceedings against cement manufacturers the investigations to examine the calculation of additional proceeds, on which the fines imposed in 2003 were based, were concluded after the results of a second search conducted in spring 2004 at the premises of the companies concerned had been evaluated. The investigation, which also took into account the amendment of the ARC, did not reveal any reasons for reducing the fines imposed. In August 2006 the proceedings were handed over to the Düsseldorf Chief Public Prosecutor's Office and will now be continued before the Düsseldorf Higher Regional Court.

38. In the cartel proceedings against ready-mixed concrete manufacturers on account of quota agreements fines totalling 8.68 million euros were imposed against 35 companies. The fines are final. The remaining proceedings against a further approx. 40 companies, mainly small and medium-sized enterprises, have not yet been concluded.

Boycotts

39. The Bundeskartellamt imposed fines totalling more than €1,400,000 against Groupe SEB Deutschland GmbH, Offenbach and Krups GmbH, Offenbach as well as staff responsible, for illegally influencing the pricing policies of traders.

40. Groupe SEB Deutschland and Krups are leading manufacturers of electrical household devices in the German market. The devices are sold in Germany under the brand names Rowenta, Tefal and Krups. From 2003 to the end of 2005 these companies tried to set minimum sales prices for certain products. In order to do this they threatened a large number of retailers and specialist outlets as well as internet dealers with economic pressure if they sold products below the non-binding price recommendation. This economic pressure took its form in the stoppage of sales premiums and deliveries.

Cooperations

41. The Bundeskartellamt prohibited four insurance companies (Allianz, AXA, R + V Allgemeine Versicherung and Victoria Versicherung) from continuing to jointly insure the pecuniary loss liability risks of auditors and chartered accountants from 2009 via the insurers' pool in Wiesbaden ("Versicherungsstelle Wiesbaden").

42. The insurance companies mentioned above only jointly offer pecuniary loss liability insurance via the insurers' pool. As a result insurance cover is only provided at standard premiums and terms. The assumption of risk is also undertaken by the insurance companies concerned on the basis of a stipulated quota arrangement. As a consequence of this cooperation within the insurance pool there is no competition between the insurance companies for insurance premiums and conditions or for service quality in claims processing. The market power of the insurers' pool is evident also from the fact that it has been able to achieve significant premium increases by restructuring its tariffs without seriously jeopardizing its market position.

43. In its assessment the Bundeskartellamt established that each insurance company involved can independently insure auditors which do not belong to the group of the so-called Big 4 (auditing

companies). Cooperation in the provision of insurance for the Big4 (KPMG, Ernst & Young, PwC, Deloitte & Touche) is exempted from the prohibition.

44. In the media sector the Bundeskartellamt examined two cooperations:

45. The Pro7Sat.1 and RTL TV broadcasting groups had planned to encrypt their advertising-financed programmes which are broadcast via satellite (RTL, Vox, Sat.1, Pro7 and further programmes). Under this model access to the programmes of both groups would only have been granted jointly and for a recurring fee, of which the broadcasting groups would have received a share (so-called “Dolphin” project, later “entavio” project). The original plan was to establish a joint venture of the two broadcasting groups. After the Bundeskartellamt had expressed concerns about the project, the broadcasting groups abandoned their plan but went on to negotiate (formally separate) contracts (based on the law of obligations) with the satellite operator SES Astra on the realisation of a model, whose key elements were identical to those of the first one. RTL actually concluded such contracts. The structure of the contracts or drafts, the economic conditions and the developments that led to the contracts suggest that horizontal coordination had taken place between Pro7Sat.1 and RTL. The Bundeskartellamt considered the business model envisaged, i.e. coordinated introduction of encryption with joint provision of reception, collection of fees from viewers and sharing the fees received with the broadcasting groups, to be problematic from a competition law perspective. It announced that a statement of objections was being considered, whereupon Pro7Sat.1 stated that the group had given up on the project.

46. In contrast to this the Bundeskartellamt will tolerate a cooperation between the pay TV providers arena and Premiere in the use of TV broadcasting rights for the German football league (*Bundesliga*) for a limited period of up to 30 September 2009. The model proposed by the companies envisages that arena transfers its broadcasting rights for the Bundesliga to Premiere under a sub-licence agreement. In return arena will receive a grant-back licence for marketing Premiere’s Bundesliga coverage via cable and direct to home (DTH) satellite.

47. Sublicensing to a competitor an exclusive right which is important for the pay TV market, such as the broadcasting rights for the football Bundesliga, is certainly not an ideal situation and can in principle constitute a restraint of competition. However, it cannot be ruled out that without the cooperation arena might not have been able to continue marketing the Bundesliga rights alone, due to the losses incurred. Prohibiting the cooperation would very likely have resulted in the licence being handed back to the German Football League (*Deutsche Fußball Liga, DFL*). In that case the only candidate for taking over the licence would have been Premiere.

48. Under these circumstances the cooperation for a limited period seems acceptable. The time limit and further provisions prevent a foreclosure of the market and keep open the opportunity for competition in the forthcoming award of Bundesliga rights for the seasons starting from 2009/10. As arena’s participation in Premiere will be reduced at the latest by the end of the 2008/09 season, there were no concerns under competition or merger law in this respect.

49. With a view to preventing other cooperations which could be inadmissible, the Bundeskartellamt examined the collective marketing by the savings banks of so-called lighthouse products. These lighthouse products mainly included consumer credits, housing loans and savings schemes. The Bundeskartellamt informed the German Savings Banks’ Association (*Deutscher Sparkassen- und Giroverband*), the creator of these uniform products, that the launch of these “lighthouse products” would not meet with competition law concerns under Section 1 of the ARC and Article 81 EC if the savings banks’ joint standard course of action essentially referred to advertising the products and did not include any features relevant to price. Any forced participation in this strategy would not be admissible either. It would also have to be ensured that, if they participated, savings banks would not have to comply with “best practice” proposals but would

generally be able to use and implement these individually in consideration of their own entrepreneurial freedom. The German Savings Banks' Association was informed that it would have to adequately monitor that its provisions on the lighthouse products were correctly and legitimately applied in accordance with competition law.

Exemptions from the general ban on cartels

50. The 7th Amendment to the ARC which entered into force on 1 July 2005 abolished all existing exemption provisions under which the Bundeskartellamt could exempt agreements from the general ban on cartels. Now the German competition law is in line with EU regulation 1/2003 which introduced legal exemption system. All existing exemption permissions of the Bundeskartellamt will expire on 31 December 2007.

Control of abusive practices by dominant companies / Supervision of price abuses by monopolists (utilities)

51. As reported last year the Bundeskartellamt had received a number of complaints with regard to the introduction of a trading system for emission rights for pollutants and its effect on electricity prices. The Bundeskartellamt examined the complaints and investigated in particular whether E.ON and RWE were using the introduction of CO₂ emissions trading to artificially force up industrial electricity prices and, together with other suppliers, to achieve annual windfall profits running into billions.

52. In December 2006 the Bundeskartellamt informed RWE of its preliminary evaluation that the industrial electricity prices charged by RWE in 2005 were abusive as the company had passed on more than 25 per cent of the value of its CO₂ emission allowances in its electricity prices. The Bundeskartellamt based its evaluation on the economic insight that opportunity costs are in principle taken into account in an internal business calculation. Nevertheless the preliminary examination under competition law had shown that, under the aspect of CO₂ allowance trading, the electricity prices pushed through clearly had to be considered as abusive. According to the Bundeskartellamt's investigations the prices charged by RWE differ from those that would have emerged if effective competition had existed. In addition, only a small proportion of the free CO₂ allowances in fact represented real opportunity costs. After RWE agreed to undertake commitments the proceedings could be concluded with a decision on 26 September 2007. With this decision the Bundeskartellamt committed RWE to sell significant amounts of electricity capacity totalling 6,300 MW in the coming four years to industrial customers through transparent procedures. In the process RWE will credit its customers with the value of the free CO₂ allowances allocated to the capacities sold. For factual reasons the Bundeskartellamt initially examined RWE's pricing policy; the proceedings against E.ON will be continued after this.

53. In addition, several private consumers have complained to the Bundeskartellamt that energy providers have threatened to stop their energy and gas suppliers if they refused to pay the increased prices. The Bundeskartellamt and the *Land* competition authorities regard these threats of non-supply as an inadmissible abuse of a dominant position. Just as inadmissible is the practice of some energy providers of using this situation to cancel special rate contracts with consumers and to downgrade customers to the more expensive standard supply rate.

54. The Bundeskartellamt called on all energy providers in its area of responsibility to refrain from issuing such threats in the future and abuse proceedings against one company could be discontinued after it had ruled out the occurrence of any such violations in future.

55. In order to create a better basis for exercising abuse control in the gas sector the Bundeskartellamt and the *Land* authorities conducted a survey of the gas prices of 739 providers

throughout Germany. In January 2007 the Bundeskartellamt accordingly published a national gas price comparison for household consumers on its website. By publishing the gas prices for household consumers it is to be expected to create more transparency and encourage competition.

56. Last year it was already reported that the Bundeskartellamt issued a warning letter to regional lottery companies and the German Lotto and Toto Block. Meanwhile, the Bundeskartellamt has prohibited the companies from violating German and European competition law.

57. The lottery companies jointly dominate the demand market for nationwide commercial lottery agency services. They have abused this dominant position in several instances by (1) hindering commercial lottery agents from establishing stationary lottery collection points, e.g. in supermarkets and petrol stations, (2) agreeing on dividing up the market geographically between the 16 German lottery companies and (3) registering the stakes collected through commercial lottery agents with the aim of distributing them in a competitively neutral manner among the German *Länder*.

58. The lottery companies and the DLTB filed an appeal against the Bundeskartellamt's decision at the Düsseldorf Higher Regional Court. The Düsseldorf Higher Regional Court rejected the appeal in essence. The parties have now lodged an appeal on points of law with the Federal Court of Justice (BGH).

59. The Bundeskartellamt imposed fines totalling 300,000 euros against the drugstore chain Rossmann. According to the Bundeskartellamt's findings, in 2005 Rossmann sold drugstore products from various manufacturers below its cost price. This pricing policy was applied to 55 products that were sold in a total of 250 cases at prices that were in some cases clearly below the cost price.

60. The proceedings were unusually complex because they required extensive investigations at Rossmann and its suppliers to determine the cost price of the 55 products. To determine the cost price, not only the charged net price had to be taken into account but also all relevant purchase conditions that were agreed between Rossmann and its suppliers. Accordingly, all conditions – including contributions to advertising costs and other lump-sum payments- had to be included in the calculation of the cost price of each product on a pro rata basis of the turnover achieved with it.

61. In the reporting period the Bundeskartellamt received several complaints regarding illegal conduct in the area of vertical distribution agreements. The complaints concerned in particular threats of refusal to sell or other obstructive practices towards dealers who sold products at low prices over the internet and did not adhere to the prices set by the manufacturers.

62. In some cases the dealers were also given certain turnover thresholds for internet trade which were not to be exceeded. In a selective distribution system the dealer agreements of a manufacturer of school bags e.g. stipulated that a maximum of one third of the turnover achieved could be accounted for by internet sales. The Bundeskartellamt accepted in this case that there were comprehensible indications that the products primarily concerned (school bags) required on-the-spot customer service. It thus considered an anti-competitive clause which made internet distribution dependent on the existence of a retail shop to be acceptable. However, as regards limiting the volume of internet turnover, the authority did not consider the preconditions under Section 3 (1) of the ARC and Article 81 (3) EC to be fulfilled. After the dealer agreements were adjusted and the restriction of the volume of internet trade abandoned, the Bundeskartellamt discontinued the proceedings.

Activities of the courts

63. As reported last year the Bundeskartellamt prohibited the company Soda Club from abusing its dominant position. Soda Club opposed the decision and its immediate enforceability by applying to the Düsseldorf Higher Regional Court. Meanwhile, the Higher Regional Court has not only confirmed the immediate enforceability, but also confirmed the Bundeskartellamt's decision in the merits.

64. An interesting case is currently pending in the Nord-KS case concerning the market for sand-lime brick. For the establishment of a joint venture the Bundeskartellamt (in accordance with Section 1 ARC) had imposed the condition that one shareholder, Xella GmbH abandon its participation in the joint venture. The Bundeskartellamt's decision was confirmed in essence by the Düsseldorf Higher Regional Court. However, the latter held the view that the companies should be left to decide how they wished to remediate their violation of Section 1 ARC. The obligation imposed by the Bundeskartellamt, i.e. that a shareholder would have to quit the joint venture, was therefore disproportionate. The Bundeskartellamt has appealed to the Federal Court of Justice (BGH) against refusal of leave to appeal against this decision on points of law.

2.2 *Mergers and acquisitions*

2.2.1 *Summary of activities of competition authorities and courts*

65. In 2006, 1829 mergers were notified to the Bundeskartellamt, of which 91 were not subject to control. The number of notifications in 2006 even exceeded the previous record level of 1,735 in the stock-exchange boom of 2000. Main examination proceedings were initiated in 39 cases.

66. In the period covered by the report the Bundeskartellamt prohibited five mergers and cleared 5 mergers subject to conditions and obligations. Following the amendment to the ARC in 2005 the parties are no longer obliged to notify the consummation of a proposed merger after review, so that in contrast to previous years the number of mergers that have been put into effect cannot be reported.

67. The restructuring process in the hospital sector continued in the reporting period. This applies to hospitals of every size and all groups of hospital operators. As a result since 2005 more than 40 hospital mergers have been notified to the Bundeskartellamt. The first prohibition decision on a merger between public-law hospital operators was issued in the Greifswald University Hospital/Wolgast District Hospital case. Further, the Bundeskartellamt prohibited the planned merger between Landesbetrieb Krankenhäuser Hamburg and Krankenhaus Mariahilf. The takeover of Wunstorf District Hospital by Klinikum Hannover was cleared subject to the suspensive conditions. By contrast, the acquisition Humaine hospitals by Fresenius could be cleared without any conditions or obligations after the parties sold one hospital to a third party already within the merger proceedings.

68. Further important merger proceedings concerned inter alia the vehicle business ("Porsche/VW", "VW/MAN"), the retail market ("METRO/WalMart", "Pratiker/Max Bahr"), the bookselling market ("DBH/Weiland") and the air traffic market ("dba/Air Berlin").

69. In the period covered by the report, the Düsseldorf Higher Regional Court released two decisions of outstanding significance for the Bundeskartellamt's future decision-making practice, one concerning the energy sector and another concerning the hospital sector. The Federal Court of Justice mainly focused on the "print media" sector ("Gruner+Jahr/National Geographic) and released one important decision on the Bundeskartellamt's summons procedures.

2.2.2 *Description of significant cases*

Prohibition or prevention of mergers

70. The Bundeskartellamt prohibited the University Hospital of Greifswald from taking over the Wolgast district hospital. This was for the first time that the Bundeskartellamt prohibited a merger between public hospitals. The University Hospital of Greifswald has fifteen specialised departments with a total of approx. 780 beds and is the only major provider of comprehensive hospital services within a large radius. The Greifswald hospital is financed by the federal state of Mecklenburg-Western Pomerania which operates another university hospital with approx. 1070 beds in Rostock. The Wolgast district hospital has five specialised departments with a total of 180 beds.

71. The merger would have further strengthened the dominant position of the Greifswald University Hospital. In the “Greifswald” market, market shares would have increased by approx. 25 % to approx. 80% of the overall market and, with regard to individual specialised departments such as surgery, obstetrics and gynaecology, paediatrics and otorhinolaryngology, in some cases to approx. more than 90%.

72. The federal state of Mecklenburg-Western Pomerania argued that its total turnover does not exceed the turnover threshold of 500 Mio € and that a prohibition of the merger would restrict the constitutionally protected freedom of research and teaching (Art. 5 (3) of the Basic Law). The Bundeskartellamt did not agree with this assessment. Firstly, the total turnover achieved by the federal state not only includes turnover achieved by its university hospitals but also all turnover achieved through other commercial activities of the state. Secondly, the Bundeskartellamt was unable to conceive how its prohibition decision could represent a violation of the freedom of research and teaching. It has been confirmed by the highest courts that the exercise of a constitutionally protected right, such as the right of local self-administration, also has to move within the sphere of general law.

73. The parties filed a complaint against this prohibition decision at the Düsseldorf Higher Regional Court, and the case is still pending.

74. Another hospital merger was prohibited in June 2007. The Bundeskartellamt prohibited the planned acquisition of Mariahilf Hospital in the Free and Hanseatic City of Hamburg by LBK Hamburg GmbH (Landesbetrieb Krankenhäuser – “LBK”). LBK is the major provider of hospital services in the City of Hamburg. Amalgamated under LBK are hospitals which were originally owned by the City of Hamburg. LBK is under the joint control of the Asklepios private hospital group and the Free and Hanseatic City of Hamburg. Mariahilf Hospital is owned by a Catholic order. LBK plans to merge Mariahilf Hospital with its Asklepios Clinic in Harburg.

75. In its examination of the merger project the Bundeskartellamt established that the hospitals operated by the Asklepios Group and the Free and Hanseatic City of Hamburg jointly dominate the hospital market in Hamburg. The merger project would have considerably strengthened the existing dominant position of the partnership between the City of Hamburg and Asklepios. Their share of the market would have risen from approx. 55 per cent to approx. 75 per cent. In the geographic market this would have eliminated one of the two rival hospitals located there. Mariahilf Hospital is even the leading hospital in the geographic market in the specialised areas of gynaecology and obstetrics and paediatrics. This leading position would also have gone to LBK, meaning that the joint market share would have risen to approx. 95 per cent.

76. The Bundeskartellamt could not follow the argument of the parties concerned that the requirements for a so-called failing firm defence were fulfilled. An analysis of Mariahilf’s economic data has shown that the economic situation of Mariahilf Hospital does not fulfil the requirements of a failing

firm defence within the meaning of the merger control regulations but that its financial ratios are within the norm of an average German hospital. Above all a third party expressed the intention during the proceedings of acquiring Mariahilf Hospital which had been offered for sale.

77. The parties and the third parties summoned to the proceedings have appealed against this decision before the Düsseldorf Higher Regional Court. However, as Mariahilf Hospital has since been sold to a third party, it is questionable whether the right to appeal is still upheld.

78. In December 2006, the Bundeskartellamt informed RWE Energy AG that its plan to acquire 76.88% of the shares in SaarFerngas AG raises substantial competition concerns as the concentration would lead to a strengthening of dominant positions in the electricity and natural gas sales markets. The companies subsequently offered several commitments to remedy the negative impact on competition in the gas and electricity markets. According to the Bundeskartellamt's estimation, however, these commitments did not suffice. In March 2007, the Bundeskartellamt prohibited the takeover of SaarFerngas by RWE.

79. RWE Energy is the distribution company of the RWE group and provides electricity, natural gas, water and associated services throughout Germany. SaarFerngas is a regional gas transmission company that provides municipal utilities and regional suppliers in Saarland and Rhineland Palatinate with natural gas. RWE and SaarFerngas hold stakes in municipal utilities and regional suppliers in the areas affected by the concentration, and in other gas transmission companies. In addition, 20% of SaarFerngas is held indirectly by the E.ON group.

80. According to the Bundeskartellamt's findings the concentration would lead to significant market foreclosure effects. These would in particular result from the merging of the companies' participations in distributors which would further secure electricity and gas sales. The concentration would in particular strengthen the dominant position of SaarFerngas in the gas sector, because its gas sales would be secured by RWE's participations in distributors. The merger would also fulfil the prohibition criteria in several local markets for the supply of end consumers. In the electricity sector the acquisition of shares in distributors would strengthen the dominant positions held by RWE together with E.ON on the national electricity markets. In addition, the concentration would worsen competitive conditions in a number of local markets for household customers.

81. The parties have appealed against the prohibition decision before the Düsseldorf Higher Regional Court. However, in this case, as well, it is questionable whether the appeal will be decided at all because it has become apparent that SaarFerngas is to be sold to a third party.

82. Further, the Bundeskartellamt prohibited the merger of Sulzer AG, Switzerland, Kelmix Holding AG, Switzerland, and Werfo AG, Liechtenstein in February 2007. Sulzer and Kelmix produce inter alia so-called "two-component cartridges" which are used for the filling of e.g. silicon adhesives in the industrial and construction sector or in impression materials used in dental treatment.

83. The Bundeskartellamt prohibited the merger as Kelmix, through its subsidiary Mixpac, was already dominant in the Europe-wide market for two-component cartridges and accessories for medical and dental applications. The acquisition by Sulzer has strengthened this market position even further. The merger would also have created a dominant position in the Europe-wide market for two-component cartridges for industrial and construction applications. The country by far the most affected by the merger is Germany, as about 50 per cent of the Europe-wide turnover in these markets is achieved here.

84. Although merger control proceedings were still in progress Sulzer already put the merger into effect in late 2006 in view of the so-called "minor market clause" which exempts certain cases from the obligation to notify. In the case at hand the Bundeskartellamt does not consider the minor market clause to

be applicable. Hence, the Bundeskartellamt did not only prohibit this merger, but also ordered the dissolution of the merger. The dissolution order is immediately enforceable.

85. The parties appealed against this decision before the Düsseldorf Higher Regional Court. Upon the parties' application and with regard to the immediately enforceable dissolution order, the Düsseldorf Higher Regional Court ordered that the suspensive effect be reinstated as the two relevant markets were covered by the minor market clause. According to the court an addition of the turnovers achieved in both markets did not come into consideration. As in its decision of 22 December 2006 in the E.I. du Pont/Pedex case, the court's view was that the relevant geographic market, on which the application of the minor market clause had to focus, was always limited to the domestic market. Irrespective of whether the economically relevant market was wider than the domestic market, only the domestic share of the turnover was to represent the basis for considering the minor market clause. The court's argumentation was based on the terms and purpose of this clause which was meant to exempt cases of minor importance for the economy as a whole from merger control. The Bundeskartellamt has lodged an appeal against this decision on points of law at the Federal Court of Justice. The case is still pending.

86. Another merger proceedings which solely concerned foreign companies and was prohibited by the Bundeskartellamt was the planned acquisition of the hearing aid business of GN Store Nord A/S, Ballerup, Denmark by Phonak Holding AG, Stäfa, Switzerland. The companies to be acquired are known in the market concerned under the name GN ReSound. Phonak is one of the world's leading producers of hearing aids. The other two main producers are Siemens and the Danish company William Demant/Oticon.

87. The planned concentration affected the German market for the production and sale of hearing aids. In terms of sales revenue, Germany is the second largest market for hearing aids after the United States. Siemens, Phonak and Oticon together hold a share of more than 80% in this market. Their combined market share exceeds those of their next-largest competitors GN ReSound and Widex by more than 70%.

88. In the Bundeskartellamt's view the acquisition of GN ReSound would lead to a collective dominant position of Siemens, Phonak and Oticon (so-called "oligopoly"). The oligopolists are already closely linked by a number of business relations. In addition, they cooperate in the area of basic patents and custom-designed technologies. The companies have installed an extensive market information system via the central association of the electronics and electrotechnical industry (Zentralverband Elektrotechnik- und Elektrotechnikindustrie e.V., ZVEI). Stable demand and supply conditions, the almost market-wide listing of all the oligopolists with hearing aid retailers and transparency on the time of launch of new products already facilitate parallel conduct between the oligopolists. The average prices of hearing aids charged by Siemens, Phonak and Oticon to hearing aid retailers do not differ significantly. The fact that there have been changes in market shares in the recent years is not an indication that an oligopoly does not exist, since these occurred mainly to the detriment of outsiders.

89. The already weak competition within the oligopoly would become insignificant after the merger. The joint market share would increase to approx. 90%. By taking over the technological and productive potential of GN ReSound and securing by further acquisition the oligopoly's leading position in the enabling technology sector, the oligopoly would succeed in eliminating the little competition potential remained in the market. The merger would further weaken innovation and price competition, ultimately to the detriment of the consumer.

90. The parties to the merger appealed against the decision to the Düsseldorf Higher Regional Court. Similar to the Sulzer/Kelmix/Werfo case they substantiated their appeal by stating that the Bundeskartellamt's decision was contrary to international law because the seats of business of the companies concerned were located outside Germany. The case is still pending.

Clearances subject to conditions and obligations

91. The Bundeskartellamt cleared the acquisition of a majority holding in Ed. Züblin AG, Stuttgart by the construction holding company Strabag SE, Spittal/Drau (Austria) with obligations as far as this involves Züblin's subsidiary, Roba Baustoff GmbH., Augsburg. The merger had already been notified to the European Commission in August 2005, which cleared it. However, the Commission then referred the case to the Bundeskartellamt since the merger affects various regional markets for asphalt mix in Germany.

92. The Strabag group is active in the field of civil and structural engineering and road construction, especially in Germany, Austria and eastern Europe. The company plays a leading role in road construction in Germany. Strabag's activities in the production of building materials have up to now been of secondary importance. Züblin and its subsidiary, Roba, were part of Walter Bau Ag, which was the subject of insolvency proceedings in the spring of 2005. Walter Bau was an internationally active construction company specialising in prefabricated construction, engineering and traffic infrastructure construction. Roba is active predominantly in the production and distribution of asphalt mix and ready-mixed concrete.

93. The Bundeskartellamt had issued a warning letter about the merger because it would have led to the creation or strengthening of dominant positions in the production and distribution of asphalt mix in the market areas of Berlin, Munich and Chemnitz. In view of the close business connections between Strabag and the market leader in the asphalt sector, the Werhahn group, no significant competition to the Werhahn works could be expected following the acquisition of the Roba works by Strabag.

94. In order to avoid a prohibition Strabag offered to break up its strong corporate links with the Werhahn Group, in particular by divesting the Deutag GmbH & Co. KG, a joint venture by Strabag and the Werhahn Group. On the basis of this commitment the merger could be cleared.

95. In January 2007 the Bundeskartellamt cleared the takeover of the Max Bahr DIY chain by Praktiker AG subject to the obligation to sell a total of four DIY stores to another independent DIY store operator.

96. Praktiker AG plans to take over a total of about 80 mostly large building supplies and DIY stores whose total domestic sales are in the upper three-digit million euro range. The concentration leads to overlaps in 39 relevant regional markets. Whereas in most cases the project raised no concerns under merger control law, the concentration would have created dominant positions in four regional markets (Lüneburg, Rostock, Schwerin and Cottbus).

97. Therefore, the Bundeskartellamt cleared the merger subject to the obligation that the companies concerned sell one DIY store in each of the regional markets concerned. This will lead to a considerable reduction of Praktiker's and Max Bahr's joint market share while at the same time allowing competitors to enter the market or expand their own market positions. However, the parties filed a complaint against this decision to the Düsseldorf Higher Regional Court, and the case is still pending.

98. Moreover in January 2007, the Bundeskartellamt cleared the acquisition of Weiland bookstore chain by DBH Buchhandels GmbH & Co. KG, a joint venture of Weltbild and Hugendubel, subject to the condition that a Weiland bookshop in Hannover is sold to an independent third party. DBH is Germany's largest bookstore chain with more than 400 outlets. It is active both in the traditional full-line bookselling sector (Hugendubel, Habel) and in the stationary mail order / remainder bookselling sector (Weltbild Plus, Wohlthat). In Northern Germany Weiland operates 21 full-line retail bookshops.

99. In Hannover the companies are represented by one large bookshop each, i.e. Schmorl (Hugendubel) and Weiland. The merger would therefore have created a dominant position in the regional market for the book retail trade and the full-line book retail trade in Hannover, respectively. The sale of the

Weiland bookshop prevents the creation of a dominant position so that the merger could be cleared subject to the above condition.

100. This was the first time the Bundeskartellamt undertook an in-depth examination of the bookselling markets. To help determine the market's structure it questioned more than 80 companies which have at least one branch in the relevant geographic market. Because of the existing price maintenance according to the law on resale price maintenance for books the investigations focused on the analysis of the so-called "quality competition". This includes factors such as the range and depth of the product range on the shelf and in the warehouse, book presentations, customer service, order facilities, authors' readings and book signing events.

101. The merger of DBH and Weiland is part of a larger wave of concentrations in the book retail trade in Germany.

102. In February 2007, the Bundeskartellamt cleared the takeover of ABAC Aria Compressa S.p.A. by Atlas Copco Italia S.p.A. under the suspensive condition that part of ABAC's German business be sold to a company not under Atlas Copco's control.

103. The companies concerned manufacture and distribute different types of compressors. Without the divestment obligation the merger would have resulted in a dominant position of Atlas Copco in two of the German compressors markets affected. With ABAC's subsidiary ALUP Kompressoren GmbH, Köngen, Atlas Copco would have gained a further manufacturer of compressors with a well-established brand, a domestic production site and a well-developed domestic distribution system.

104. As already mentioned above, also one hospital merger was cleared subject to conditions, namely the Bundeskartellamt cleared the acquisition of Wunstorf District Hospital in Lower Saxony by Klinikum Region Hannover GmbH subject to suspensive conditions.

105. Wunstorf District Hospital is one of eight psychiatric hospitals which the State of Lower Saxony is currently offering for sale. The thirteen hospitals operated by the municipalities of Hannover Region are concentrated in Klinikum Region Hannover GmbH. This includes the clinic for psychiatry and psychotherapy in Langenhagen.

106. The merger would strengthen the existing dominant positions of both Wunstorf District Hospital and the psychiatric clinic of Region Hannover GmbH in Langenhagen. Wunstorf Hospital and the psychiatric clinic of Hannover Region have market shares already exceeding 70 per cent in their respective service areas. These would rise to 80 per cent as a result of the merger. Other market structure factors analysed also indicate that the merger would strengthen the dominant positions. The Bundeskartellamt first based its decision on a relevant product market for psychiatric hospital services. The reason for this were the specific municipal provisions in the State of Lower Saxony and special features of psychiatric hospital services.

107. The merger was cleared under the suspensive condition that the beds were transferred to an independent competitor. This means that Klinikum Region Hannover GmbH can only put the merger with Wunstorf Regional Hospital into effect once the transfer of beds has taken place. This arrangement was necessary because the transfer of bed capacities is not solely dependent on the decision of Klinikum Region Hannover. Due to public law regulations governing hospitals and hospital planning, the approval of third parties, including the health insurance funds and the State of Lower Saxony, is necessary for various implementation procedures.

Clearances and withdrawal of application

108. The Bundeskartellamt approved an increase in the share of Dr. Ing. h.c. F. Porsche AG, Stuttgart, in Volkswagen AG, Wolfsburg, to 25.1 per cent of its ordinary stock. After Porsche already gained a competitively considerable influence on Volkswagen by acquiring 19 per cent of Volkswagen's equity stock in the autumn of 2005, the plan to increase its share further to over 25 per cent fulfilled criteria for renewed examination under merger control. However, the activities of Porsche and Volkswagen only overlap one another in their sports cars and all-terrain vehicle business, without creating or strengthening a dominant position.

109. In August 2006 the Bundeskartellamt cleared the acquisition by Synthes Inc., West Chester (USA) of patent and trademark rights held by the Stiftung Arbeitsgemeinschaft für Osteosynthese, AO-Stiftung (Association for the Study of Internal Fixation, AO Foundation), Davos. The Bundeskartellamt had expressed concerns about the planned cooperation agreement between the AO Foundation and Synthes. The parties concerned have therefore suspended the agreement for the time being.

110. Synthes Inc. manufactures and distributes products for the surgical treatment of bone damage. It is inter alia the market leader in the market for implants and instruments for trauma treatment. The relevant patents and trademark rights have so far been held by AO Foundation and licensed to Synthes. The acquisition by Synthes does not lead to a strengthening of its market position, also because Synthes already has joint control of the property rights due to special provisions laid down in the license agreement.

111. The cooperation agreement on the other hand would have strengthened the market position of Synthes Inc. in the markets concerned. The AO Foundation carries out a product certification system awarding a quality mark which is known and recognised by doctors. Synthes Inc. already uses this system almost exclusively. Furthermore the AO Foundation organises training courses on osteosynthesis methods and only uses certified products in practical exercises. The cooperation agreement would have permanently excluded the possibility of opening the Foundation's services to third parties. Synthes and the AO Foundation now intend to find a form of cooperation which is admissible under cartel law.

112. The Bundeskartellamt has cleared the acquisition in whole of dba Luftfahrtgesellschaft mbH, Nürnberg, by Air Berlin plc & Co. Luftverkehrs KG, Berlin. Air Berlin mainly offers flights to European metropolises and classic holiday areas whereas dba operates mostly domestic flights. Consequently, the route networks of both airlines complement each other, apart from a few overlaps that do not raise any competition concerns but rather constitute a strengthening of Air Berlin over Lufthansa which is still dominant in the markets affected.

113. In the hospital sector the Bundeskartellamt cleared the acquisition of Humaine-Kliniken GmbH, Fulda, by Fresenius AG, Bad Homburg. Fresenius plans to acquire 60 per cent of the shares in Humaine with a right of option on the remaining 40 per cent.

114. The Fresenius group is active worldwide as a manufacturer of medical products, provider of health services and operator of hospitals. Humaine is a German-Swiss hospital chain with currently four hospitals and two rehabilitation clinics in Germany and two rehabilitation clinics in Switzerland.

115. According to the investigations of the Bundeskartellamt the merger would have led to the creation of a dominant position in one geographic market. The Bundeskartellamt informed the parties to the merger of this fact, whereupon these sold a hospital in the region concerned to a third party. Consequently the merger could be cleared without any conditions or obligations.

116. In September 2006 the Bundeskartellamt cleared the planned acquisition of all shares in TravelTainment AG, Aachen, by Amadeus IT Group SA, Madrid (Spain).

117. The market affected is the German market for computer reservation systems (“CRS”) used in the package holiday industry. Although Amadeus already holds a strong position in this market, this will not be further strengthened by the merger. No market share addition is to be expected because the search software provided by TravelTainment for online travel agencies and for Internet portals for direct online sales by tour operators (the so-called Internet Booking Engine (“IBE”)) do not belong to the CRS market.

118. In addition, the concentration will not significantly strengthen Amadeus’ financial power, nor will it improve its access to CRS sales markets or eliminate potential competition. The possibility to offer bundled packages (IBE and CRS) does not noticeably increase Amadeus’ scope of action since other large CRS providers, such as Sabre, are already able to do the same.

119. The acquisition of the self-service consumer markets operated by the US trading concern Wal-Mart by METRO AG was cleared in October 2006. A total of 85 Wal-Mart sites across the whole of Germany are affected by the clearance. The European Commission, which would have been responsible for the merger due to the turnover thresholds of the companies involved, had referred the case to the Bundeskartellamt at the request of the companies concerned since it affected markets exclusively within Germany. The Bundeskartellamt was able to clear the merger without applying any obligations because it does not lead to the creation or strengthening of a dominant position in the markets concerned.

120. The Bundeskartellamt examined 52 regional food retail markets, to which, apart from classical retail outlets, self-service stores, consumer markets and discounters, as forms of distribution, also belong. Since the cash&carry markets operated by METRO under its own name are attributed to the wholesale market, they did not come into consideration in the examination. The merger does not create or strengthen a dominant position in any of the regional markets.

121. Neither does it result in a dominant position in the national procurement market in which the companies are active as buyers, even though the food products purchased from the procurement market for METRO cash&carry markets were taken into consideration. The market shares of the parties to the merger clearly remain under one third, the threshold from which dominance can be presumed, and other competitors have at least comparatively high market shares

122. The Bundeskartellamt cleared the acquisition of a minority shareholding in MAN AG, Munich, by Volkswagen AG, Wolfsburg. The merger affects the commercial vehicle sector. The business activities of Volkswagen and MAN do not overlap, either in Germany or Europe. MAN produces and distributes buses and medium and heavy-duty trucks in Europe, whereas Volkswagen produces and distributes light commercial vehicles.

123. Finally the Bundeskartellamt reports that it still continues to take a critical view of the strategy of the grid companies E.ON and RWE to further their vertical integration through participations in regional and local electricity and gas providers and to strengthen and consolidate their market positions in the various gas and electricity markets. In view of the highly concentrated market structures and the low degree of residual competition even small strengthening effects are of considerable competitive relevance and lead to structural changes in the market conditions. The Bundeskartellamt thus issued a statement of objections regarding the RWE/Stadtwerke Völklingen merger, and the parties to the concentration withdrew the project in December 2006. Several further concentration projects which involved participations by E.ON and RWE in regional supply companies were withdrawn by the parties involved after confidential preliminary talks with the Bundeskartellamt or during the course of the examination under merger control law.

Activities of the Courts

124. Of particular significance was the decision taken by the Düsseldorf Higher Regional Court in the E.ON/Eschwege case. Central to the proceedings were the fundamental questions of whether Germany's electricity markets are still dominated by a powerful duopoly of the two large energy companies E.ON and RWE and whether this duopoly is foreclosing markets and expanding its market power by a joint strategy of acquiring successive shares in municipal utilities. In these proceedings the Bundeskartellamt based its opinion on two national surveys which it conducted on the market situation in the electricity markets in Germany. According to these both companies hold a paramount position in the generation and distribution of electricity. By confirming the Bundeskartellamt's decision the Düsseldorf Higher Regional Court has taken a landmark decision which has wide repercussions for the German electricity sector, as it reinforces the Bundeskartellamt in its strategy in other merger control and abuse proceedings in which the electricity duopoly E.ON and RWE are involved.

125. A further important decision taken by the Düsseldorf Higher Regional Court concerned the hospital sector. After the Federal Ministry of Economics and Technology had not granted ministerial authorisation to the seller of the two hospitals of the administrative district of Rhön Grabfeld (see last year's report par. 38) the parties concerned further prosecuted the complaint proceedings at the Düsseldorf Higher Regional Court. However, the Higher Regional Court also confirmed the Bundeskartellamt's decision, in particular pointing out that merger control is fully applicable to mergers between hospitals and was not overridden by social-law provisions.

126. In 2004, the Bundeskartellamt prohibited Gruner+Jahr from purchasing the licence for publishing the German edition of "National Geographic" and the intended purchase of all shares of the equal joint venture of Gruner+Jahr with the Spanish enterprise RBA Publicaciones Internacionales. Gruner+Jahr appealed against both prohibition decisions. In the reporting period the Federal Court of Justice then confirmed the Bundeskartellamt's decision with regard to the acquisition of shares, but not regarding the acquisition of the licence. Granting a licence only constitutes an acquisition of control if the granting or transfer of the rights of use involves the acquisition of "a substantial part" of the assets of another company. This was not the case.

127. In its "Pepcom" decision of 7 November 2006 the Federal Court of Justice confirmed the Bundeskartellamt's summons procedures and accepted the authority's powers of discretion in this respect. In the case of several applications for admittance to proceedings which concern the same economic interests, the Bundeskartellamt can choose one company and reject the applications of the other companies. However the company, whose application for admittance was rejected purely on the grounds of economy of procedure, has a right to appeal against the decision on the merits of the case.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

128. In the reporting period the Bundeskartellamt promoted the principle of competition in various ways at both national and international level.

ICN

129. It continued to actively participate in conferences and several working groups of the International Competition Network (ICN). The 2005/2006 project "Interaction between public and private enforcement" of the ICN Cartels Working Group was extended and this year again led by the Bundeskartellamt. In addition since May 2006 the Bundeskartellamt co-chaired the newly established Unilateral Conduct Working Group together with the US Federal Trade Commission and the subgroup "Dominance/Market

Power” of this Working Group together with the Russian FAS. For the 6th ICN Annual Conference in Moscow, the Working Group developed a report on the objectives of unilateral conduct laws, the assessment of dominance/substantial market power and state-created monopolies.

ECN/ECA

130. In May 2004 the European Competition Network (ECN) was established. The years of practice show that the competition authorities of the Member States and the European Commission have successfully used the cooperation possibilities within the ECN.

131. By the end of June 2007 a total of 742 cases had been posted on the joint intranet of the competition authorities. The Bundeskartellamt itself notified 78 of its own cases. Use has also been made of the competences on the exchange of information and official assistance. In the period covered by the report, the Bundeskartellamt exchanged confidential information with other competition authorities in the ECN on the basis of Article 12 of Regulation 1/2003 on several occasions.

132. Within the scope of the forum of the European Competition Authorities (ECA), which has been in existence since April 2001 and unites the competition authorities of the states of the European Economic Area, the European Commission and the EFTA supervisory authority, meetings took place between the heads of the authorities in Lisbon in April 2007. The Lisbon meeting dealt inter alia with competition issues in the air traffic sector and the issue of sanctions and fines in the different Member States. Furthermore, the DG's discussed the topics of impact assessment of competition decisions, priority setting and the question of NCA's in their regulatory environment. The DG's established a new working group on priority setting. The ECA Air Traffic Working Group led by the Bundeskartellamt presented its last report on 'Competition in relation to airports'. It was decided to end the Air Traffic Working Group after 7 years of successful work.

Annual meeting of the Working Group on Competition Law

133. At national level the Bundeskartellamt once again organised the annual meeting of the Working Group on Competition Law at which university professors from law and economics faculties as well as judges from the cartel divisions of the Federal Court of Justice and the Düsseldorf Higher Regional Court discussed the treatment of so called conglomerate mergers under merger control. The Bundeskartellamt recognizes it as an ongoing task to continually review, improve and amend its own positions on this.

Franco-German Competition Day

134. In September 2006 the second Franco-German Competition Day was held at the Bundeskartellamt. The theme of this year's meeting was: "Protecting Competition or SMEs? - Illegal practices below the level of market dominance". Among the 120 participants were members of the French and German competition authorities, company representatives, university professors, judges and representatives of the European Commission.

International Conference on Competition

135. From 25 - 27 March 2007 the Bundeskartellamt hosted the International Conference on Competition, which has been held every other year for the last 25 years and the European Competition Day, which has taken place biannually since 2000 and is hosted by the respective EU presidency. In order to make foreign guests, in particular, aware of Germany's federal structure, the conference, attended by approx. 380 participants and over 70 nations, was held for the first time in Munich and not at the seat of the Bundeskartellamt.

136. The underlying theme of the conference was "Competition as a Cornerstone of a Free Economic and Social Order". This event met with great interest among the professional public all the more so since competition experts from all over the world discussed diverse aspects of economic policy with representatives from industry, politics and the judiciary.

Enhancing the principles of competition

137. Finally the Bundeskartellamt enhanced the principle of competition by offering its comments to legislative projects at European level as well as national level.

138. In addition to numerous informal comments in phone calls and via e-mail, it gave its written opinions in altogether 15 cases to draft amendments at national and European level concerning competition related matters such as the energy, the railway and the telecommunications sector, public procurement law and the waste disposal/management sector. Further, the Monopolies Commission presented its opinion on the upcoming amendment of the ARC in view of price abuse control in the energy and trade sectors.

4. Resources of competition authorities

4.1 Overall resources

4.1.1 Annual budget (in euros and USD)

Budget 2007		Change over 2006
Euros	17.00 mio	+0.30 mio
USD ¹	22.81 mio	+3.59 mio

4.1.2 Number of employees

	number	Change over 2005
Economists	42	-3
Lawyers	73	-6
Other experts	6	+2
Support staff	164	+3
Total	285	-4

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5. Summaries of or references to new reports and studies on competition policy issues

Baron, Michael: Das neue Kriterium "erhebliche Behinderung wirksamen Wettbewerbs" (SIEC) in der europäischen Fusionskontrolle : Anmerkungen zum Verhältnis von deutscher und europäischer Fusionskontrolle
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¹ Exchange rate as of 15. August 2007; 1 euro = 1.34156 USD.

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in: Internationale Wettbewerbspolitik / Oberender, Peter... –
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- Basedow, Jürgen: Perspektiven des Kartelldeliktrechts
in: Zeitschrift für Wettbewerbsrecht ; 4(2006) Heft 3 ; S. 294-305
- Bornkamm, Joachim: Die Verpflichtungszusage nach 32 b GWB :
Ein neues Instrument im deutschen Kartellverwaltungsverfahren
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- Bundeskartellamt: Konglomerate Zusammenschlüsse in der Fusionskontrolle:
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die Sitzung des Arbeitskreises Kartellrecht am 21. September 2006 /
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