



# Bundeskartellamt

open markets | fair competition

The Bundeskartellamt in Bonn  
Organisation, Tasks and Activities



July 2010

Bundeskartellamt  
Kaiser-Friedrich-Straße 16  
53113 Bonn

Print and Layout:  
Siebengebirgs-Druck GmbH & Co. KG  
Bad Honnef

Photos:  
Bundeskartellamt  
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# The Bundeskartellamt in Bonn Organisation, Tasks and Activities



Dear Reader,

Competition is a cornerstone of our economic and social order. The competition system is founded on values which are elementary to our society. "Freedom, own initiative and individual responsibility". The fact that in principle competition produces the best overall economic results, is undisputed in most national economies.

Just as in sport, economic competition can only function, however, if there are rules which everyone has to observe. The Act against Restraints of Competition, (ARC) which came into force in 1958, sets these rules and thus provides the legal framework within which the market participants can move. It is the Bundeskartellamt's task to enforce the ARC and in doing so to protect competition.

Anyone who does not have the frequent contact that companies and lawyers have with the ARC and the Bundeskartellamt cannot generally be aware of the Bundeskartellamt's tasks in their specific detail and in the authority's daily practice. Does the Bundeskartellamt examine every proposed merger in Germany? What action does the Bundeskartellamt take against cartels? What possibilities does the Bundeskartellamt have to impose penalties? How does the Bundeskartellamt find out about violations of the ARC?

This brochure gives answers to these and many more questions. It also provides practical examples to support the theoretical statements presented. You will find more detailed information in our leaflets, principles of interpretation, activity reports, case summaries and decisions on our website [www.bundeskartellamt.de](http://www.bundeskartellamt.de).

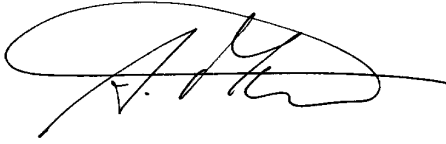
The Bundeskartellamt's endeavours to protect competition can only be successful if a wide public is convinced of the importance of the competition principle.

And so it is my particular interest to make the work of our authority transparent and to encourage discussion on competition issues beyond the professional public.



I hope that this brochure will encourage you to look at competition issues more closely.

I wish you interesting reading!

A handwritten signature in black ink, consisting of a large, sweeping loop at the top, followed by several sharp, angular strokes that form the letters 'A', 'M', and 'D'. The signature is written over a horizontal line.

Andreas Mundt  
President of the Bundeskartellamt



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## I. Protection of competition

### 1. Advantages of competition as an organising principle

In a free market economy there is no central body, e.g. the State, which plans which goods are to be produced and sold at which price. In a free market economy the supply of and demand for a product or service come together in the market place. This free interaction enables prices to be determined, which in turn perform an important steering function for the exchange of goods and services. The prices show the suppliers the areas in which they can best use their production factors, e.g. machines, most efficiently. They also indicate to customers how they can cover a certain requirement as economically as possible.

Competition means that different companies can compete with one another for the favour of their customers or their suppliers. Customers or suppliers can switch to another company offering or buying comparable services at a better price or at better conditions. However, the competition principle, i.e. protecting competition, is not an end in itself. It is the pressure created by competition which induces suppliers to drop (or at worst moderately raise) the prices of their products or services, improve quality and further develop their products technically. Consumers, in particular, benefit from a competitively organized market because they can select/pick from a wide range of offer the goods and services which best match their expectations (e.g. good quality, appropriate price-performance ratio, good service).

Companies which offer their customers good services at reasonable prices, in comparison to other companies, can achieve higher turnover and profits in a competitively organized market. In a competition situation, however, poor service or excessive prices are “punished” by losses or even elimination/exit from the market. In his book “The Wealth of Nations” Adam Smith, the founder of the classic theory of economics, coined the phrase “invisible hand”: Each company aiming to maximize its profits has to respond to the wishes and preferences of the opposite side of the market. Competition can therefore rightly be described as the driving force of the market economy.

Effective competition also prevents the creation or strengthening of power positions which are too influential in society and politics.

An economic system which is based on the competition principle and the resulting incentive mechanisms already mentioned, is the best for achieving economic aims, i.e. prosperity and technical advancement.

## 2. Act against Restraints of Competition (“ARC”)

Competition leads to considerable benefits for the economy as a whole. All market players – producers, traders, service providers and, in particular consumers – benefit from price and cost reductions, improvements in quality, possibilities of choice or technical advancement. However, for the individual entrepreneur who has to compete with other companies in his own market, competition is often inconvenient. Therefore there are always incentives for companies to impede or eliminate competition. These can, for example, take the form of agreements with competitors, abusive practices or the acquisition of other companies, which can in the extreme case completely eliminate competition. In order to prevent such restraints of competition and to safeguard the benefits of competition, a legal framework is required which limits economic activity wherever it impinges on the freedom of action of others and competitive structures are no longer maintained.

In Germany the Act against Restraints of Competition (“ARC”) provides the legal framework for this. With the fight against cartels, merger control and abuse control as its tools, the ARC serves to maintain competitive structures and to prevent anticompetitive practices by companies and their negative effect on the market opportunities of other companies. Because of the central importance of competition the ARC is also referred to as the “Basic Law of the Market Economy”.

Its object of protection is competition in the Federal Republic of Germany. Competition in Germany is to be protected against all kinds of restraints, irrespective of whether they are caused within or outside Germany (Section 130 (2) ARC). Although the ARC applies to all companies, it contains certain special regulations for some sectors, such as agriculture (see Chapter VII.).

Since 1 January 1999 the ARC has also protected bidders in the award of public contracts (see Chapter X.).

The ARC came into force on 1 January 1958. It has been amended seven times since then. The second amendment in 1973 is of particular significance in terms of competition policy because of the introduction of merger control. The last amendment of 1 July 2005 became necessary because of extensive changes to European law introduced by Council Regulation (EC) No. 1/2003 (“Regulation on the implementation of the rules on competition law”). These changes made it necessary to bring the ARC into line with European law. The necessary reforms were implemented into German law with the 7th Amendment to the ARC.

At the end of 2007 a further amendment to the ARC came into force. In order to more effectively combat abusively excessive prices in the energy sector, a new

norm (Section 29 ARC) was introduced. The prohibition of sales below cost price in the food sector was also tightened. The validity of these amendments to the ARC is limited to the end of 2012.



*Bundeskartellamt, building IV*

### 3. European Competition Law

The aim of the European Union is to establish a Common Market which allows for, among other things, the free movement of goods between the Member States. This aim will be undermined if companies engage in private market-sharing agreements and other restrictive practices when state barriers to trade have been removed. To prevent this happening and at the same time to create uniform conditions for companies, competition rules to combat cartels (Art. 101 of the Treaty on the Functioning of the European Union, TFEU) and abuse control (Art. 102 TFEU) were incorporated into EU law. These were complemented by various regulations, notices and recommendations of the European Council and the European Commission. In addition the Merger Control Regulation (“EMR”) was introduced at European level in 1990 as an instrument for examining concentrations. The European Commission has exclusive competence for applying the MCR (see Chapter IV.3.).

With the introduction of Regulation (EC) No. 1/2003 in May 2004 the Bundeskartellamt, as well as the other EU competition authorities, has been granted far-reaching competencies for the application of Art. 101 TFEU and Art. 102 TFEU in the prosecution of cartels and abuse control. The Bundeskartellamt applies these European rules in addition to the provisions of the ARC if the anti-competitive practices are likely to affect trade between the Member States (see Chapters III.2 and V.1.). The rules in the ARC and the TFEU are fundamentally very similar.

Chapter IX.1. illustrates under which circumstances the European Commission or the Bundeskartellamt (or another national competition authority) is competent for examining a cartel or abuse case under European law.

## II. The Bundeskartellamt

The Bundeskartellamt is an independent higher federal authority which is assigned to the Federal Ministry of Economics and Technology. In 1999 its official seat was transferred from Berlin to Bonn as part of the relocation programme of the government.

### 1. Tasks of the Bundeskartellamt

The Bundeskartellamt's task is first and foremost to apply and enforce the ARC. The Bundeskartellamt takes action against all restraints of competition which have effects in the Federal Republic of Germany. Its tasks include enforcing the ban on cartels, merger control, the control of abusive practices of dominant or powerful companies and (since 1999) the review of award procedures for public contracts. Since 2005 the Bundeskartellamt can also conduct sector inquiries in order to determine the competition situation in individual sectors if there are indications that there is no effective competition in these markets.

The Bundeskartellamt is generally always the competent authority for enforcing the ban on cartels and exercising abuse control if the anti-competitive effects of such practices extend beyond the territory of one federal Land. Otherwise the Land competition authorities become active (see Chapter II.2.). Under the ARC the Bundeskartellamt has exclusive competence for implementing merger control.

If anticompetitive cartel agreements or abusive practices are likely to affect trade between the EU Member States the Bundeskartellamt also applies European competition law (see Chapters III.2 and V.1.).

### 2. Other competition authorities

Apart from the Bundeskartellamt each Land has its own competition authority. Violations of the ban on cartels or abusive practices, the effects of which are limited to one Land, are prosecuted by the respective Land competition authority. In cases in which the effects of violations of the ban on cartels or abusive practices extend beyond one Land, the Bundeskartellamt is the competent authority. In order to ensure an appropriate division of responsibilities, the ARC provides for the possibility to refer cases between the authorities should the circumstances of the individual case require this.

In exceptional cases the Federal Ministry of Economics and Technology also functions as a competition authority by issuing a so-called “ministerial authorisation” (see Chapters II.3 and IV.6.).<sup>1</sup>

At European level the European Commission in Brussels is the competition authority. In accordance with the European Merger Regulation (“EMR”) it examines mergers between companies which exceed certain turnover thresholds (see Chapter IV.3.) and conducts abuse and cartel proceedings under European competition law (for the division of responsibilities between the EU Commission and the EU competition authorities, see Chapter IX.1.).

The Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway also deals with competition issues.<sup>2</sup> Its responsibility is to create effective competition in the above network-based markets (e.g. gas and electricity connections). A key feature of network-based markets is that companies wishing to sell their products or services to customers and do not have their own network infrastructure require access to the networks of other companies. This poses the problem that the network owner can refuse access to his network or demand excessive prices to hinder the competitor from entering the market. One of the responsibilities of the Federal Network Agency in this case is to ensure that the network owner allows his competitors non-discriminatory access to his network.

In addition the Monopolies Commission serves as an independent advisory body in the areas of competition policy and regulation.<sup>3</sup> It has the statutory responsibility to monitor effective competition in Germany in general and in specific sectors of industry and to prepare expert opinions on this.

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1 [www.bmwi.de](http://www.bmwi.de)

2 [www.bundesnetzagentur.de](http://www.bundesnetzagentur.de)

3 [www.monopolkommission.de](http://www.monopolkommission.de)

### 3. Importance of the Independence of the Bundeskartellamt

The Bundeskartellamt bases its decisions solely on competitive criteria. It processes and decides individual cases independently, i.e. without external instructions. The Federal Ministry of Economics and Technology only has the right to give it general instructions (Section 52 of the GWB). However, it rarely makes use of this, the last incident being almost 30 years ago. The Bundeskartellamt's independence is particularly important given that the competition system is not self-supporting but is constantly threatened by individual interests. Although the general public benefits from a competition system, there are always incentives for individual companies or sectors to avoid competition, especially in times of economic crises and to claim special rules for themselves. If in such situations the Bundeskartellamt were expected to base its decisions on criteria other than competition (e.g. social aspects), the competitive system would be in danger of being undermined.

It is beyond dispute that there are other important economic and social-political targets than ensuring competition. However, it is not the Bundeskartellamt's responsibility to realise these. Other important economic and socio-political objectives can, however, be considered within the scope of the so-called "ministerial authorisation". On request the Federal Minister of Economics and Technology can authorise concentrations which have been prohibited by the Bundeskartellamt if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole, or if the concentration is justified by an overriding public interest (see Chapter IV.6.).

The Bundeskartellamt's independence from political influence guarantees that its decisions are made solely on the basis of competition criteria. This makes the effects of competition restraints transparent and clearly distinguishes them from any other possible decision criteria which might play a role in e.g. a ministerial authorisation (cf. Chapter IV.6.).



*Bundeskartellamt, Axe Building*

#### 4. Organisation of the Bundeskartellamt

Decisions on cartels, mergers and abusive practices are taken by a total of twelve Decision Divisions at the Bundeskartellamt. These are mainly organised according to sectors of the economy. Since June 2005 one Decision Division and since October 2008 an additional Decision Division have dealt exclusively with the cross-sector prosecution of cartels. In January 2008 a Decision Division was set up which is charged exclusively with the prosecution of abuse and cartels in the energy sector. Each case is decided upon by a collegiate body consisting of the chairman of the respective Decision Division and two associate members. The decision must be a majority decision. The Decision Division decides independently.

The General Policy Department advises the Decision Divisions in specific competition law and economic issues, represents the Bundeskartellamt in the decision-making bodies of the European Union, is involved in competition law reforms at national and European level and coordinates cooperation between the Bundeskartellamt and foreign competition authorities as well as international organisations.

The Litigation and Legal Issues Division advises the Bundeskartellamt on legal matters, prepares court appeal proceedings before the Düsseldorf Higher Regional

Court and represents the Bundeskartellamt before the Federal Court of Justice (Bundesgerichtshof) in Karlsruhe. The Litigation and Legal Issues Division also includes the Special Unit for Combating Cartels (SKK). This assists the Decision Divisions in the preparation, execution and evidence assessment of search operations in cartel proceedings.

The Public Procurement Tribunals provide legal protection for bidders in the award of public contracts falling within the Federal Government's area of responsibility. Bidders whose offers were not accepted and who claim the provisions governing the award of public contracts have been violated may file applications for the initiation of review proceedings.

The Bundeskartellamt has approx. 320 employees. Around 150 of these are public servants and employees in the higher civil service, half of whom are legal experts and the other half economists.

An organisation chart of the Bundeskartellamt showing the areas of competence of the individual Decision Divisions can be found in the annex of this brochure.

### III. Cartel Agreements

#### 1. What is a cartel?

If several enterprises co-ordinate their market conduct for the purpose of restricting or eliminating competition, this is called a cartel. Examples of cartels are agreements between competitors on prices, quantities, geographic areas or customer groups. The companies involved can achieve greater profits through these agreements because they are exposed to little (if any) competitive pressure. Such agreements generally lead to higher prices for consumers or a deterioration in offer and are insofar highly damaging to society.

In practice, cartels are often euphemistically referred to as "co-operations", "interest groups" or "strategic alliances", which, however, does not alter their restrictive character.

#### 2. Prohibition of Cartels

According to Section 1 of the ARC a general prohibition applies to cartels, i.e. agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, are prohibited. This prohibition covers not only the above classical cartels between competing companies (horizontal agreements) but also other anticompetitive agreements between companies which are in a supplier/customer relationship with one another (vertical agreements). An example of a vertical restraint of competition is when a producer tells a free trader the price at which he should sell the product.

Under European law a general prohibition of cartels is provided in Article 101 TFEU. The Bundeskartellamt applies this rule in addition to Section 1 ARC if the anticompetitive agreement is likely to affect trade between the Member States.

Agreements falling under the general prohibition of cartels are allowed only if certain strict conditions are satisfied.

#### 3. Exempted Agreements

Agreements between companies are exempted from the general prohibition of cartels under certain conditions. This applies, for example, if the so-called

“exemption requirements” in Section 2 ARC are fulfilled (see below). If the Bundeskartellamt applies European law (Article 101 TFEU), the case is examined to determine whether it fulfils the exemption requirements of the prohibition of cartels under Article 101 (3) TFEU, on which Article 2 ARC is modelled.

In order to help small and medium-sized enterprises compensate for structural - size-related - disadvantages in competition with powerful large-scale enterprises, the ARC also provides for specific co-operation facilities for such firms (“cartels of small or medium-sized enterprises”, Section 3 of the ARC).<sup>4</sup>

Until the entry into force of the 7th Amendment of the ARC on 1 July 2005, companies could notify cartels to the Bundeskartellamt and have them cleared if the results of the examination proved that the exemption requirements were satisfied. In the amendment the notification and authorisation system was replaced by one of so-called legal exception. The ARC was thus harmonized with the respective regulations under European law. As a result of the legal exception rule, cartels will no longer be formally cleared by the Bundeskartellamt but will be automatically authorized if the exemption requirements have been satisfied.

In practice this means that companies themselves have to check whether their agreements are compatible with competition law (so-called self-assessment). At best the Bundeskartellamt can decide within the meaning of Section 32c ARC that there are no grounds for action to be taken in a specific case. This offers the companies involved legal certainty. However, the companies are not generally entitled to such a decision.

Among the conditions for exemption mentioned above in accordance with Section 2 ARC is that the production of goods is improved or technical progress promoted and that consumers are allowed a fair share of the resulting profit. Such agreements should not impose on the companies concerned restrictions which are not indispensable to the attainment of these objectives or provide them with the possibility to eliminate competition in respect of a substantial part of the products in question.

Under Section 3 ARC cartels of small or medium-sized companies are exempt from the prohibition of cartels if their subject matter is the rationalisation of economic activities. This only applies, however, if competition in the market is not substantially impaired thereby and the agreement serves to improve the competitiveness

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<sup>4</sup> The exemption rule for small or medium-sized cartels is a special feature of the ARC, for which there is no equivalent in European law. Since within the scope of Articles 101, 102 TFEU practices which are prohibited under European law cannot be allowed under German law, Section 3 ARC can only be applied if the practices are not likely to affect trade between Member States of the European Union.

of small or medium-sized companies. As a consequence, some quite extensive cooperations between SMEs are admissible that under general competition law would be inadmissible.

The new system of legal exception places great demands on companies, who now have to themselves examine whether their forms of cooperation can be exempt from the prohibition. In order to give companies more legal certainty in assessing whether their cooperations are admissible the Bundeskartellamt has published a new so-called “de minimis Notice”<sup>5</sup> and its information leaflet on the possibilities of cooperation for small and medium-sized enterprises<sup>6</sup> (“SME Information Leaflet”).

In the “de minimis Notice” the Bundeskartellamt explains how it exercises its discretion in taking up a case, i.e. which agreements it considers to have such an insignificant effect on competition that it generally refrains from intervening. Of crucial significance in this aspect are certain market share thresholds which may not be exceeded. The SME information leaflet gives companies advice in particular on how small and medium-sized cooperations are assessed under Section 3 ARC.

#### 4. Possible sanctions and legal protection

There are two possibilities for the Bundeskartellamt to act against anticompetitive agreements. Firstly, by means of administrative proceedings the authority can impose an order to discontinue the conduct objected to. Secondly, it can impose fines within the framework of administrative offence proceedings (see Chapter VII.). The Bundeskartellamt opens administrative offence proceedings in particular in the case of cartel agreements which lead to particularly severe distortions of competition. These can take the form of agreements between competitors on prices, quantities, geographic areas or customer groups.

The companies can appeal against the Bundeskartellamt’s decisions (see Chapter VII).

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5 [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0703\\_Bagatellbekanntmachung\\_e\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0703_Bagatellbekanntmachung_e_Logo.pdf)

6 [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0711KMU\\_Merkblatt\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0711KMU_Merkblatt_Logo.pdf)

## 5. Course of action taken by the Bundeskartellamt against cartels

The Bundeskartellamt can receive information about existing cartels from competitors, customers, suppliers or from the members of a cartel. The Bundeskartellamt can grant cartel participants, who by their cooperation contribute to uncovering a forbidden cartel, immunity from or a reduction of fines. In the so-called “Leniency Programme” the Bundeskartellamt sets the conditions under which immunity from or a reduction of fines is possible.

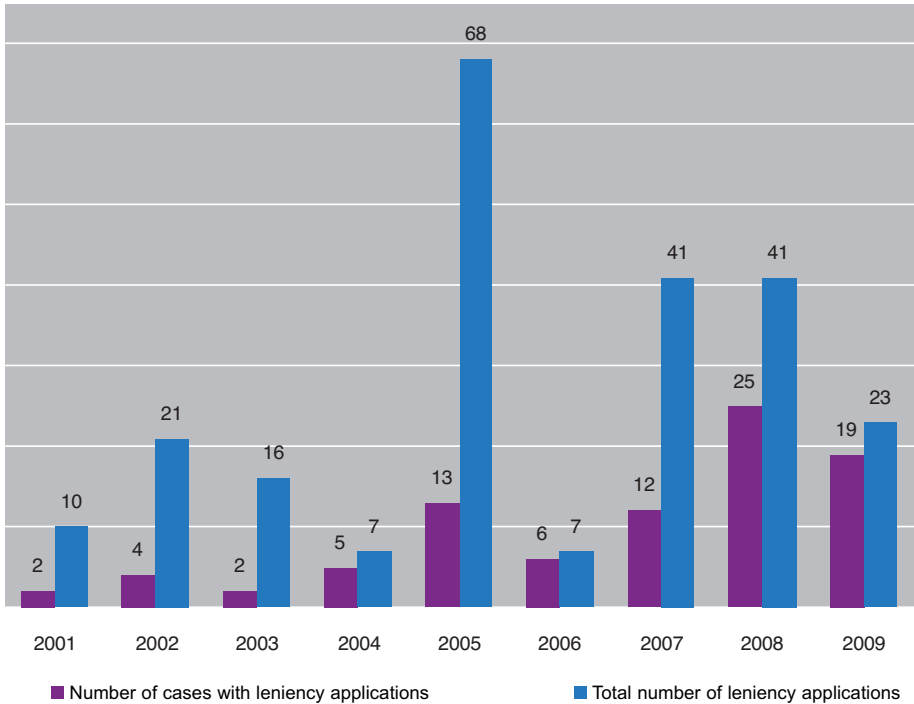
In 2006, as a result of the opportunities for cooperation and increased endeavours towards harmonisation within the European Competition Network (“ECN”, see Chapter IX.1.) the Bundeskartellamt revised its Leniency Programme. This has been published on the Bundeskartellamt’s website as Notice no. 9/2006.<sup>7</sup>

Depending on his contribution to uncovering the cartel, a cooperative cartel member can be granted a reduction of up to 100 per cent reduction of the fine imposed. However, immunity from fines can only be granted to the company which is the first to notify the Bundeskartellamt.

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<sup>7</sup> [http://www.bundeskartellamt.de/wEnglisch/download/pdf/06\\_Bonusregelung\\_e\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_Bonusregelung_e_Logo.pdf)

## Leniency applications filed with the Bundeskartellamt 2001 bis 2009



### 6. Prohibition of Cartels – Case Practice

#### *Liquefied Petroleum Gas (LPG)*

In 2007 and 2008 the Bundeskartellamt imposed fines totalling close to 210 million euros against 9 liquefied gas suppliers and their CEOs on grounds of so-called customer protection agreements (see below). The companies are active in the supply of private and commercial customers with liquefied gas in small tanks (up to 5.6 t) or bottled gas.

The leading liquefied gas suppliers had agreed, at least since 1997, not to poach customers from one another. Customers wishing to switch supplier were either not quoted a price at all or if so, an excessive “deterrent price”. The cartel agreement in the tank gas business was secured by a system of “notification of competition”: Information was exchanged reciprocally about enquiries from customers and compensation was mutually offered in the event of a customer’s deci-

sion to switch to another supplier. These activities were controlled by a transport company which was jointly operated by several cartel participants. In the case of bottled gas so-called bottle pools formed the basis of the customer protection agreement. As a consequence, the prices of the companies participating in the agreement, which accounted for approx. half of the German market, reached levels well above those of smaller suppliers. Although liquefied gas, like heating oil, is a product which always has homogenous product features, even when it is offered by different producers, there were price differences of up to 100 % as a result of the cartel.

The orders imposing the fines are not yet final. The individuals and companies concerned have lodged an appeal against the decisions. The proceedings are pending before the Düsseldorf Higher Regional Court.

### *Long-term gas supply contracts*

In 2005 the Bundeskartellamt initiated cartel administrative proceedings against 15 so-called gas transmission companies. Such companies import or produce natural gas and supply mainly to municipal utilities for onward supply to their customers. The proceedings were directed against the practice of long-term gas supply contracts between these gas transmission companies and municipal utilities, in particular. The gas supply contracts had very long periods of validity and covered a large proportion of the requirement of the municipal utilities. This combination – long-term contractual commitments and a high degree of requirement – had deprived the municipal utilities of the possibility of supply by rival gas suppliers. In January 2006, in test proceedings against the leading gas transmission company E.ON Ruhrgas, the Bundeskartellamt determined that such contracts violate the prohibition of cartels and abusive practices (see p. 19, 38 ff.). E.ON Ruhrgas was ordered to stop the infringement at the latest by the end of the 2005/2006 gas year. The decision also includes the obligation that future contracts up to 30 September 2010 may not run for a period exceeding four years if they cover more than 50 to 80 per cent of the total requirements. For contracts covering more than 80 per cent of the requirements, a maximum term of up to two years is envisaged. The Düsseldorf Higher Regional Court and the Federal Court of Justice have confirmed the Bundeskartellamt's decision against E.ON Ruhrgas.

The proceedings against the other gas transmission companies could be discontinued after these had adjusted their contracts in the form of commitments under Section 32b ARC in compliance with the Bundeskartellamt's decision and had pledged to observe the principles laid down in the decision when concluding future contracts. The cartel proceedings involving long-term gas supply

contracts are a good example of the Bundeskartellamt's work in breaking up encrusted market structures in general and in promoting competition in the energy sector in particular. The Bundeskartellamt has extensively analysed the effects of the measures imposed for a four-year period and found that there has been an adequate revival of competition. The municipal utilities have to a large extent changed their procurement practice. Consequently the Bundeskartellamt did not have to extend these measures beyond 2010.

## IV. Merger control

### 1. What is a merger?

Whereas companies participating in cooperations remain legally independent, those which were independent prior to corporate mergers are either merged into one new uniform enterprise or at least capital links are created as a result of a merger.

Corporate mergers are generally allowed in Germany and to a certain degree are also desirable. Through mergers companies can, for example, optimize or reorganize their areas of business.

At the same time corporate mergers can also have negative consequences. This can best be illustrated by a scenario, by no means merely hypothetical, in which all the suppliers in a market merge together, thereby obtaining a monopoly position. Such a position would, for one thing, allow them to demand higher prices. Secondly, there would be only limited incentive for the companies to push ahead with innovations because they would not have to fear any future competition from their rivals. Thus business concentration can restrict competition just as much as a cartel agreement.

The Bundeskartellamt does not examine every merger. The merger project only becomes subject to merger control by the Bundeskartellamt if the participating companies exceed certain turnover thresholds. The companies then have to notify the Bundeskartellamt of their merger project. The aim of merger control is to prevent the creation or strengthening of dominant positions of companies.

A general distinction is made between horizontal mergers (with the companies in competition with one another) vertical mergers (the participating companies are in a supplier/customer relationship) and conglomerate mergers (the participating companies are neither in competition with one another nor in a supplier/customer relationship).

## 2. Mergers examined by the Bundeskartellamt

Mergers between companies fall under the merger control of the Bundeskartellamt if they jointly achieve a worldwide turnover of more than 500 million euros and at least one participating company achieves a turnover in Germany of more than 25 million euros and if a further company achieves a turnover in Germany of at least five million euros. The calculation of the relevant turnover is based on the turnover achieved by the entire company group in the last business year preceding the merger.

In spite of reaching the turnover thresholds, mergers are not subject to notification if a company which achieved a worldwide turnover of less than ten million euros in the last business year, merges with another company (so-called “de minimis clause”) or if a market is concerned in which goods or commercial services have been offered for at least five years and in which in the last year less than 15 million euros turnover was achieved (so-called “minor market clause”).

The following transactions are deemed to be mergers within the meaning of the ARC (Section 37 (1) ARC):

- the acquisition of all or of a substantial part of the assets of another undertaking (“acquisition of assets”),
- the acquisition of direct or indirect control by one or several companies of the whole or parts of one or more other undertakings, whereby the control can be constituted by rights, contracts or any other means (“acquisition of control”),
- the acquisition of shares in another enterprise if the shares, either separately or together with other shares already held by the acquirer, reach 50% or 25% of the capital or voting rights of the other undertaking (“acquisition of shares”);
- any other combination of enterprises enabling one or several enterprises to directly or indirectly exert a competitively significant influence on another undertaking (“competitively significant influence”).

Until a notifiable merger project has been cleared by the Bundeskartellamt a prohibition on its implementation applies (Section 41 (1) ARC) which means that companies may not put a merger into effect which has not been cleared by the Bundeskartellamt.

### 3. European Merger Control

Any mergers found to have a so-called “Community dimension” are examined under the European Merger Regulation (“EMR”). The European Commission has exclusive competence for applying this regulation. A merger has a community dimension if the thresholds indicated in Article 1 (2) or (3) of the EMR have been exceeded.

If, for example, the companies participating in a merger jointly achieve a world-wide turnover of more than 5 billion euros and at least two of the companies achieve an aggregate community-wide turnover of more than 250 million euros, the merger is examined exclusively by the European Commission (Art. 1 (2) EMR); a parallel examination by the national competition authorities does not take place.

Even if the turnover thresholds indicated in Article 1 EMR have been achieved the European Commission is as an exception to the rule, not competent for examining a merger if the participating companies have each achieved more than two-thirds of their aggregate community-wide turnover in one and the same Member State (so-called two-thirds rule). In these cases competence falls to the competition authority of the territory in which the participating companies achieve more than two-thirds of their community-wide turnover. The two-thirds rule emanates from the subsidiarity principle embodied in European law and takes account of the national relevance of a merger.

Irrespective of the above regulations the EMR provides for the possibility to refer a case from the originally competent authority to another competition authority. For example, the Bundeskartellamt can request to have the whole or part of a case already notified to the European Commission transferred to it instead (Article 9 EMR).

Vice-versa, the Bundeskartellamt can request for a case which has been notified to it to be transferred to the European Commission on grounds of its effects on trade between Member States (Article 22 EMR). Since the beginning of May 2004 companies can also apply themselves to the Commission for referral to the competition authority of a Member State (Article 4 (4) EMR) or the European Commission (Article 4 (5) EMR) before notifying a merger project. These regulations offer a high degree of flexibility and ensure that the competition authority best placed to do so examines the merger project.

#### 4. Sequence of a merger control proceeding

After receipt of the complete notification documents at the Bundeskartellamt the competent Decision Division has one month to examine the project (so-called “pre-examination stage” or “1st phase”). If the merger project proves unproblematic, the Decision Division clears it informally before the expiry of the one-month time limit. The merger can then be put into effect. If the Decision Division considers further examination necessary, it will notify this to the companies in a so-called “one-month letter”. This measure introduces the “main examination proceedings” (the so-called “second phase”) and the time-limit for examining the merger project is extended. If main examination proceedings have been initiated, the Bundeskartellamt has to decide the case within four months of receipt of the complete notification. In the main examination proceedings the Bundeskartellamt decides by way of a formal decision whether the merger is to be cleared, where necessary subject to obligations or conditions, or prohibited. Clearance subject to obligations or conditions is a likely outcome if the merger project affects several different markets and there are competition concerns in only some of the markets.

Before the Bundeskartellamt makes a decision prohibiting a merger or clearing it only subject to obligations or conditions, it has to give the participating companies an opportunity to comment, that is, to inform them of the main grounds for the decision. This gives the companies an opportunity to put forward counter-arguments.<sup>8</sup>

The Bundeskartellamt has extensive investigatory powers under Sections 57-59 of the ARC in order to obtain a comprehensive picture of the market conditions. It may, for example, request information from competitors, suppliers and customers of the companies concerned and inspect business documents.

#### 5. Grounds for prohibiting a merger

The Bundeskartellamt prohibits a concentration which is expected to create or strengthen a dominant position unless the participating undertakings prove that the concentration will also lead to improvements in the conditions of competition, and that these improvements will outweigh the disadvantages of dominance (Section 36 (1) of the ARC).

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<sup>8</sup> Companies requesting to be admitted to the proceedings must be granted an opportunity to comment, even if there are plans to clear the merger in the main examination proceedings.

Dominance exists if a company has no competitors or is not exposed to any substantial competition, or if it has a paramount market position in relation to its competitors (Section 19 (2) ARC). In order to examine whether a merger will create or strengthen a dominant position, the relevant market has firstly to be defined according to product type and geographic area (and in exceptional cases also time-frame). An important criterion in market definition is the demand-side oriented market concept. According to this concept such products or services belong to the same market which the informed consumer considers equally suitable to satisfy a certain requirement on account of their properties, purpose of use and price.

In examining whether a company has a paramount market position in relation to its competitors, several criteria have to be taken into account. The examination is based on the market share held by the company concerned in the relevant market: A dominant position is presumed to exist within the meaning of the ARC if a company has a market share of one third ("single firm dominance", Section 19 (3) 1 ARC).

A dominant position held by several companies is presumed to exist if three or fewer companies reach a combined market share of 50 per cent or if five or fewer companies reach a combined market share of two-thirds ("oligopolistic market dominance", Section 19 (3) 2 ARC). In the latter case these presumptions can be refuted if the undertakings concerned prove that the competitive conditions between them are likely to result in substantial competition, or that the totality of the companies do not have a paramount position compared to the other competitors. An important factor for assessing the market share is not only the absolute but also the relative market share, i.e. the market share of the company under consideration in comparison with the market shares of its competitors.

In addition to the extent of market share the Bundeskartellamt conducts an extensive examination of the competition situation in the relevant markets to determine whether the merger can effectively be expected to create or strengthen a dominant position. Further criteria considered in the examination are financial power, access to supply or sales markets, links with other companies, legal or factual barriers to market entry, actual or potential competition from companies established within or outside Germany, the ability to shift supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other companies (Section 19 (2) 2 ARC).

In assessing whether a merger will lead to competition problems it is important that an overall appraisal of company and market-related factors be made.

In almost 40 years of practice in merger control the Bundeskartellamt has prohibited a total of approx. 180 proposed mergers. The majority of the prohibitions

have become final. Some of the decisions, however, were revoked by the courts. When in doubt, firms approach the Bundeskartellamt to discuss projects before they ever reach the notification stage. Many projects raising competition concerns are abandoned or modified by firms at this early stage, once Bundeskartellamt officials have signalled that prohibition is likely. In the years 2007 and 2008, for example, there were a total of 39 such cases which are not featured in prohibition statistics (see Chapter IV.9.) The particular significance of the withdrawal of a notification in the “run-up stage” of a (prohibition) decision is that the creation or strengthening of a dominant position can be prevented without a final decision by the Bundeskartellamt. It has to be noted that clearance decisions of the Bundeskartellamt that are tied to conditions or obligations can also significantly influence the effects of a merger on competition.

## 6. Legal protection and ministerial authorisation

The companies concerned can appeal against a Bundeskartellamt decision before the Higher Regional Court in Düsseldorf. Appeals on points of law against decisions of the Higher Regional Court can be lodged with the Federal Court of Justice (BGH) in Karlsruhe.

The ARC also provides for the possibility of the so-called “ministerial authorisation”. This means that companies, whose merger projects have been prohibited by the Bundeskartellamt, can apply to the Federal Ministry for Economics and Technology for authorisation. The requirement for the issue of an authorisation is that the restraint of competition in the particular case is outweighed by advantages to the economy as a whole resulting from the concentration, or that the concentration is justified by an overriding public interest (Section 42 (1) of the ARC). The fact that competition-based and politically motivated decisions are made in a two-stage process and that authorisations are the exception rather than the rule have both proved useful in practice. Since the introduction of merger control in 1973, by the middle of 2010 ministerial authorisation had been finally granted in only 8 cases (some of which were subject to obligations) in a total of 21 applications for ministerial authorisation.

## 7. Divestiture of companies

At present, the ARC does not provide for the divestiture of companies which have gained a dominant position not as a result of a merger but internal growth. These companies are subject to abuse control (see Chapter V).

Mergers which are subject to notification may not be put into effect before clearance by the Bundeskartellamt (Section 41 (1) ARC). If companies violate this prohibition or put into effect a merger which the Bundeskartellamt has prohibited or whose clearance it has revoked, the companies must dissolve the merger if the requirements for prohibition are fulfilled (Section 41 (3) ARC). In such a case, the Bundeskartellamt orders the measures necessary to dissolve the merger.

## 8. Special Provisions for Certain Sectors of the Economy

Special rules, particularly with regard to the calculation of the level of the turnover, on which the obligation to notify a merger depends, apply to the press and trade sectors.

In the case of mergers of press and broadcasting companies lower turnover thresholds are applied. For the publication, production and distribution of newspapers, magazines and parts thereof and for the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time the twenty-fold amount of the turnover shall be taken into account (Section 38 (3) of the ARC). This special regulation is necessary because only in this way can the tendency towards concentration be effectively prevented in these markets, which in terms of turnover are very small.

Special regulations also apply to companies in the trade sector as regards the calculation of turnover thresholds. For trade in goods, only three quarters of the turnover shall be taken into account (cf. Section 38 (2) of the ARC).

Credit institutions, financial institutions and insurance companies are exempt from merger control if they acquire shares in another undertaking for a limited period of time only in order to resell them within a year (Section 37 (3) of the ARC). However, they must not exercise the voting rights attached to those shares. Among other things, this provision is intended to prevent merger control from being triggered immediately by a bank or insurance company acquiring new shares when a joint stock company is created or its share capital is raised.

## 9. Mergers – Case Practice and Statistical Overview

### *Springer / ProSiebenSat.1*

In 2006 the Bundeskartellamt prohibited the merger of Axel Springer AG (“Springer”) with ProSiebenSat.1 Media AG (“ProSiebenSat.1”).

It had been the intention of the two enterprises to merge Germany’s largest newspaper publisher Springer, which is also internationally one of the leading media companies, with ProSiebenSat.1, the leading German TV company.

Both companies are active, inter alia, in the following markets: The core business of ProSiebenSat.1 is advertising-financed television via private channels (such as Sat.1, ProSieben, N24 and Kabel 1). Springer is mainly engaged in newspapers (esp. BILD, Welt), magazines, printing products and new media. In addition, Springer holds participations in publishing houses, companies in the electronic media sector and media distribution companies.

At the time of the notification there was already a high level of concentration in the relevant media markets. On the TV advertising market, which comprises the provision of advertising slots by TV programme providers to third parties, ProSiebenSat.1 held a market share of more than 40%. The RTL TV group, which belongs to the Bertelsmann group, held a market share of just below 40%. In contrast, the next-largest competitors, including the public service channels ARD and ZDF, had market shares of merely less than 5%.

With a market share of approx. 80%, Springer’s tabloid BILD-Zeitung had a paramount, permanent and unassailable market position on the nationwide reader market for over-the-counter newspapers, which has to be differentiated from the market for subscription dailies (such as Frankfurter Allgemeine Zeitung - FAZ).

On the nationwide advertising market for newspapers, which comprises subscription dailies, over-the-counter newspapers and advertising journals, Springer held a dominant position with a market share of more than 40%. In contrast, advertising revenues of its largest competitor in this area, the FAZ, have drastically diminished in the previous three years.

Consequently, the two enterprises held dominant positions in the relevant markets even before the merger:

- on the TV advertising market (ProSiebenSat.1 together with RTL/Bertelsmann, see below),
- on the market for over-the-counter newspapers (Springer),
- on the advertising market for newspapers (Springer).

The Bundeskartellamt had to examine whether the existing dominant positions would have been strengthened by the merger between Springer and ProSiebenSat.1. The Bundeskartellamt answered this question in the affirmative for all three markets:

ProSiebenSat.1 and the RTL TV group, which belongs to the Bertelsmann group, held a joint market share of more than 80% on the national TV advertising market. This high market share and the lack of any substantial competition from third parties constituted a joint market dominance of the companies, which led to a so-called uncompetitive duopoly. The merger would have further strengthened the dominant position of the duopoly. After the merger, both Springer/ProSiebenSat.1 and RTL/Bertelsmann would have been represented in all three media areas, namely newspapers, magazines and television. With ProSiebenSat.1, Springer's company structure would have more resembled that of RTL/Bertelsmann, i.e. a second large cross-media company group would have been generated. The two groups would have jointly dominated the market and would have been able to enforce their strategies in the market without being in competition with one another and without any significant competition from third competitors. In addition, Springer/ProSiebenSat.1 and RTL/Bertelsmann would have gained comparable financial power.

Furthermore, the merger would have enabled Springer/ProSiebenSat.1 to use cross-media strategies from one source (so-called "cross-media advertising") both for intercompany purposes and for third parties. Until now this has only been possible for RTL/Bertelsmann. Springer would have been able to advertise in its print media for its TV programmes ("cross-media advertising for group products") or to allude to the content of its TV programmes in its print media coverage ("media cross promotion"). In addition, Springer/ProSiebenSat.1 would also have been able to offer concerted, cross-media advertising campaigns from one source to third parties. Furthermore, the merger would have enabled each of the two enterprises to retaliate to the competitive actions of the other duopolist on the TV advertising market with competitive actions of its own on the newspaper and magazine markets. Such "retaliation potential" would have strengthened the duopoly because it could have induced the two companies to desist from competing against one another. In addition, the competitive pressure exerted by the tabloid BILD-Zeitung would have ceased after the merger. So far, the BILD-Zeitung has been the only alternative for advertisers to the TV advertising market.

As demonstrated, even before the merger Springer held a market share of 80% on the nationwide reader market for over-the-counter newspapers with its BILD-Zeitung and was therefore dominant. Also in this market there would have been the danger of Springer using cross-media advertising and media cross-promoti-

on for its own intercompany products, which would have further strengthened this dominant position.

The possibility of Springer using cross-media advertising campaigns would also have strengthened its dominant position on the nationwide advertising market for newspapers as described above.

The Bundeskartellamt's prohibition decision has been confirmed by the Federal Court of Justice.

### *E.ON / Stadtwerke Eschwege*

In September 2003 the Bundeskartellamt prohibited the E.ON group from acquiring a 33% participation in the Eschwege municipal utilities. The electricity markets in Germany, from which municipal utilities and major industrial customers procure their electricity, are dominated by the two large energy groups E.ON and RWE. E.ON and RWE hold a joint dominant position on these electricity markets and constitute a so-called dominant duopoly. In addition, both companies have pursued a long-term business strategy of gradually acquiring shares in municipal utilities and other electricity providers in order to secure the sale of the electricity which they generate to these providers in the long term and consequently to foreclose the electricity markets concerned to other competitors.

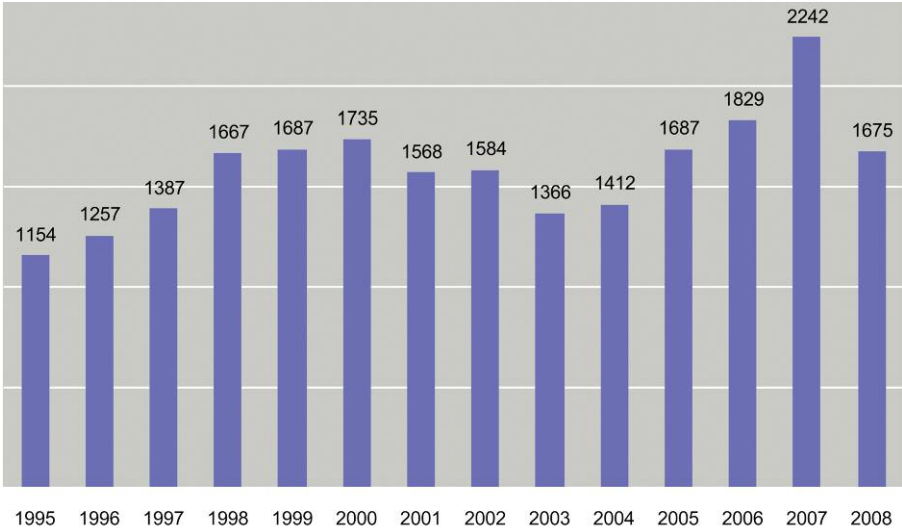
The Bundeskartellamt has prohibited this proposed concentration because the dominant position of the two companies would have been further strengthened by their investment in municipal utilities and other energy providers. In its examination proceedings the Bundeskartellamt found that over 60 per cent of the electricity consumed by industrial and household customers in Germany is generated, imported and distributed by the E.ON and RWE groups. Since electricity cannot be stored, these two companies, both at the generation and power transmission level, control the distribution of electricity down to the end consumer. This is possible for E.ON and RWE among other reasons because of their large power generation parks, which other energy supply companies do not have to the same degree.

In November 2008 the Bundeskartellamt's decision was confirmed in its entirety by the Federal Court of Justice, the court of last instance. This confirmation by the highest court has reinforced the Bundeskartellamt in the strategy it has adopted in other merger control and abuse proceedings involving the electricity duopoly E.ON and RWE.

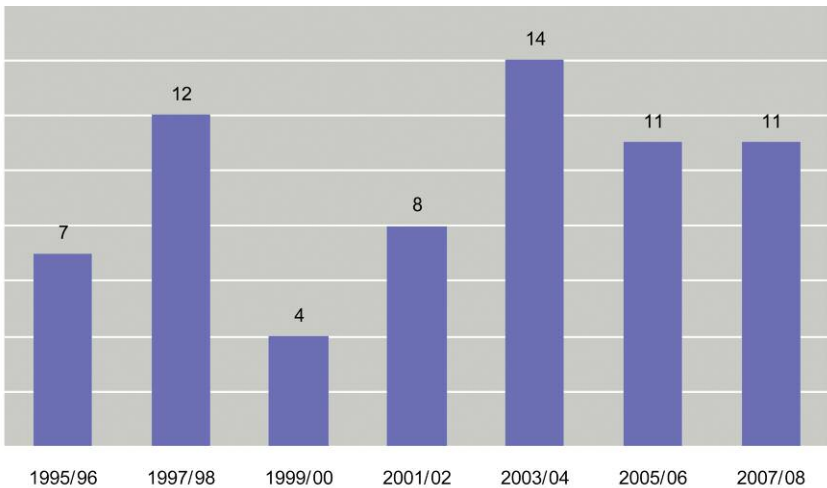


*Bundeskartellamt, building II*

### Mergers notified to the Bundeskartellamt from 1995 to 2008



### Number of mergers prohibited by the Bundeskartellamt (according to reporting periods)<sup>9</sup>



<sup>9</sup> The reporting period is based on the Bundeskartellamt's biennial activity report.

## V. Abuse control of dominant companies

### 1. What is market dominance?

The purpose of merger control is to prevent the creation or strengthening of dominant positions by means of concentrations, i.e. external growth. However, there are also companies which hold dominant positions resulting from internal growth, i.e. without merging with other companies, or because of former monopoly rights.

Companies holding a dominant position are not exposed to competitive pressure, or only to a minor extent. Their scope of action is thus not sufficiently controlled by competition. For this reason dominant companies are subject to a special control of conduct: abuse control under competition law. Abuse control of dominant companies therefore represents a regulatory tool of the state which compensates for the absence of substantial competition.

To check whether a dominant position exists the ARC provides for so-called presumption thresholds for the market shares of the companies concerned as well as further company and market-related evaluation criteria (s. Chapter IV.5.).

The abusive exploitation of a dominant position by one or several undertakings is prohibited (Section 19 (1) ARC). But even companies which do not hold dominant but powerful positions because small or medium-sized companies depend on them as suppliers or purchasers, are subject to a special prohibition of discrimination and unfair hindrance (Section 20 ARC).

If the abusive conduct is likely to affect trade between the Member States, the Bundeskartellamt also applies European law (Art. 102 TFEUV).

## 2. Abusive conduct by dominant companies

In principle, all practices that significantly and without any objective justification impair the scope of economic activities of other companies (competitors, customers or suppliers) constitute an abuse of economic power.

The evaluation as to whether a company abuses its market power requires a differentiated examination. Even if companies are dominant they may not be prohibited from engaging in purely competitive conduct. However, practices a company can only pursue because of its market power and which hinder or discriminate other companies in a way that would not be possible if effective competition existed, are abusive. Such other companies could be competitors, customers or suppliers.

The different forms of abusive conduct include the so-called exclusionary abuse and the so-called exploitative abuse.

Exclusionary abuse exists, for example, where a dominant company uses its superior position to deny its competitors access to its networks or other facilities essential for competitive activities (Section 19 (4) no. 4 ARC). Exclusionary abuse can also be established where a dominant company tries to squeeze its competitor out of the market by means of a specific cut price strategy. The sale of goods or commercial services below cost price is also prohibited under certain preconditions (Section 20 (4) 2 ARC). This rule was tightened at the end of 2007. Sales below cost price are generally prohibited in the food sector; objective justification for this is only possible in very limited exceptional cases.

Exploitative abuse can be established if a company imposes unreasonable prices or terms and conditions on its customers or suppliers. To ascertain whether a certain conduct is abusive the Bundeskartellamt applies *inter alia* the so-called “comparative market concept”. Possibly excessive prices are compared with prices that have formed in comparable competitive markets.

The control of price abuse by dominant companies in the energy and food retail sectors was tightened at the end of 2007. This amendment is limited to the end of 2012.

If companies induce other companies to refuse to sell or purchase with the intention of unfairly harming certain companies, this constitutes a boycott which is in violation of competition law (Section 21 (1) of the ARC).

Indications of possibly abusive practices pursued by a certain company are brought to the Bundeskartellamt's attention by competitors, suppliers and customers.

### 3. Possible sanctions and legal protection

There are two possible ways for the Bundeskartellamt to act against abusive conduct. Firstly, by means of administrative proceedings the authority can impose an order to discontinue the conduct objected to. Secondly, it can impose fines in administrative offence proceedings (see Chapter VII.).

The companies can appeal against the Bundeskartellamt's decisions (see Chapter VII.).

### 4. Abuse control – case examples

#### *Lufthansa / Germania*

In early 2002 the Bundeskartellamt prohibited Deutsche Lufthansa from charging prices on the Berlin/Tegel-Frankfurt route which were not at least 35 Euros above those charged by its competitor Germania on this route. Lufthansa had massively reduced its own ticket price for the Frankfurt-Berlin route immediately after Germania's market entry and thus in effect clearly undercut Germania's price. The Bundeskartellamt saw this conduct as an attempt by Lufthansa to squeeze this new competitor out of the market and therefore as an inadmissible exclusionary abuse. The reason for this was that Lufthansa's price did not cover the costs of the flight. If Germania had been squeezed out of the market, Lufthansa would have been able to raise its prices again. The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's prohibition decision.

#### *Gas prices for household customers*

In December 2008 the Bundeskartellamt terminated its abuse proceedings against 30 gas suppliers. According to the Bundeskartellamt's evaluation the case raised considerable competition law concerns that the companies involved had charged household customers abusively excessive prices in 2007 and 2008, thus abusing their dominant position in the market.

These proceedings were preceded by extensive price inquiries and investigations which were carried out by the Bundeskartellamt. For the purposes of the abuse proceedings it was decisive whether, even after the deduction of fees for network use, taxes and duties, the prices charged were more expensive than those of other gas suppliers while the companies involved in the Bundeskartellamt's proceedings were not able to provide any objective justification for such deviations. In these proceedings the Bundeskartellamt made use of the provisions of Section 29 ARC, introduced at the end of 2007 (cp. p. 11, 39), which make it easier for the competition authorities to prosecute excessive pricing in the energy markets.

The gas suppliers involved have agreed to make financial concessions for the benefit of consumers in the form of credits, price reductions and deferred price increases. In most cases the Bundeskartellamt made use of its powers of decision to declare the commitments to be binding on the companies as provided for by Section 32b of the ARC (cp. p. 43). All in all the companies involved have offered monetary compensation for consumers amounting to approx. 130 million euros. An examination of the concessions made by the companies also revealed that in 2008 and 2009 increases in gas procurement costs of more than 314 million euros net were not passed on to the final customers. Household customers were therefore spared costs totalling approx. 444 million euros in gas prices. In addition, they were spared the taxes and duties payable on the prices, of which value-added tax alone accounts for approx. 84 million euros.

## VI. Sector Inquiries

Since the 7th Amendment of the ARC in 2005 the Bundeskartellamt can conduct sector inquiries (also known as “enquêtes”) to gain information about the competition situation in individual economic sectors if rigid price structures or other circumstances give reason to assume that competition in these sectors may be restricted or distorted.

The focus of the examination is not an alleged infringement of competition law by individual companies but to gain extensive information about the markets concerned. For example, the Bundeskartellamt launched a milk sector inquiry to examine all market levels from the dairy farmer through the dairy to the trade. The inquiry was triggered by evidence that there was only limited competition at individual market levels of the milk sector.

Market knowledge acquired from a sector inquiry can also be useful to the Bundeskartellamt in other proceedings. A sector inquiry in the fuel sector, for example, has furnished evidence that there is a dominant oligopoly on the German petrol station markets consisting of Shell, BP, ExxonMobil, ConocoPhillips and Total. This knowledge was taken into account in various merger control proceedings in which acquisitions planned by individual members of the oligopoly were either prohibited or cleared only subject to conditions / obligations. If a sector inquiry finds evidence of a cartel agreement or abuse of market power under competition law, specific proceedings can be initiated.

## VII. Enforcement of competition law

The Bundeskartellamt has extensive investigatory powers under Sections 57 – 59 of the ARC in order to be able to access information necessary for the evaluation of a case. It may request information from undertakings, inspect business documents and, by judicial order, search undertakings and seize evidence.

By means of administrative proceedings the Bundeskartellamt can require companies to end an infringement of the ARC or of Articles 101, 102 TFEUV (Section 32 ARC). For this purpose it may impose on the companies all measures which are necessary to effectively bring the infringement to an end and at the same time are proportionate to the infringement established. Furthermore, in urgent cases the Bundeskartellamt may order interim measures *ex officio* if there is a risk of serious and irreparable damage to competition (Section 32a ARC). In proceedings under Section 32 of the ARC the companies may offer to enter into commitments which are capable of dispelling the Bundeskartellamt's concerns. The Bundeskartellamt may by way of a decision declare those commitments to be binding on the companies (Section 32b ARC).

Within the framework of administrative offence proceedings the Bundeskartellamt can impose fines for violations of prohibitions under the ARC. The 7th Amendment to the Act against Restraints of Competition of July 2005 raised the level of fines imposed for violations of competition law to amounts of up to 1 million €. In addition, certain violations can now be punished by a fine of up to 10 per cent of the company's total turnover. German law has thus been harmonised with European law, and the former level of fines, which was based on a maximum level of three times the additional proceeds generated by the infringement, has been abolished. The fines are allocated to the general public budget.

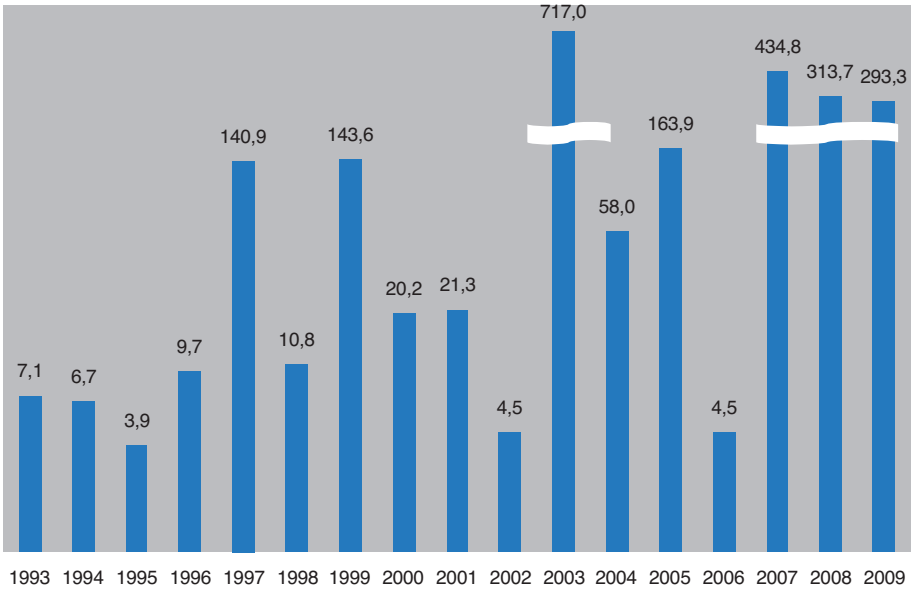
In 2006, with its notice no. 38/2006, the Bundeskartellamt issued guidelines on the setting of fines.<sup>10</sup> These specify how the Bundeskartellamt applies the new provisions on fines. In setting the amount of a fine both the gravity and the duration of the infringement must be taken into account. On this basis further criteria such as deterrence and aggravating or extenuating circumstances are also being considered.

Companies may file an appeal against decisions of the Bundeskartellamt with the Düsseldorf Higher Regional Court. Appeals on points of law against decisions of the Düsseldorf Higher Regional Court can be lodged with the Federal Court of Justice in Karlsruhe.

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<sup>10</sup> <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Bussgeldleitlinien-E.pdf>

### Fines imposed by the Bundeskartellamt from 1993 to 2009 (Total amount in million euros per year)



## VIII. Exemption areas under the ARC

Exemption regulations under competition law have increasingly been viewed in a critical light. Monopolies, which in the past were considered indispensable in some areas with regard to the provision of services of general interest, are now looked at in a more differentiated way. In the energy industry sector it has now become an accepted notion that gas and electricity can be supplied and purchased in a competitively organised market without jeopardizing the security of supply. The exemption for the network-based energy sector was therefore abolished in 1998. With the 7th amendment to the ARC the exemption areas for the credit and insurance industry, the sports sector and copyright collecting societies were abolished.

For some economic sectors, however, the ARC still includes special rules due to structural reasons or other special features. This applies to the publishing and agricultural sectors: For example, some forms of cooperation between agricultural producers are exempted from the ban on cartels under Section 1 of the ARC. Also some forms of cooperation in the publishing sector are exempted from the ban on cartels under Section 1 ARC.

The existing exemption rules of the ARC have also become less important since in some areas the European competition rules can be applied (see footnote 4 on p. 20).

A high level of public regulation, which exists e.g. in the hospital services or local public transport sectors, cannot per se justify exemptions from individual rules of the ARC. Although the scope for competitive action in these areas is highly restricted by public law provisions, the merger control rules are still applicable to these areas to ensure that competitive structures are maintained in these markets.

## **IX. International cooperation between the competition authorities**

As a result of globalisation markets are increasingly merging. This enables companies to organise cartels or engage in abusive conduct which affects several countries. Against this background a closer cooperation between the competition authorities is required not only in the European Union, but also worldwide, to fight the cross-border effects of cartel agreements and abusive practices more systematically.

### **1. European Competition Network**

The “European Competition Network” (ECN) is the network of the EU competition authorities which was created by EC Regulation 1/2003 with the aim to fight cross-border restrictions of competition more effectively. The Regulation applies if the facts of a case are examined under Articles 101, 102 TFEUV, i.e. if cross-border trade is affected.

The Regulation, which has been in force since May 2004, has considerably improved the possibilities for cooperation among the EU competition authorities and between the authorities and the European Commission. They can assist each other in searches, exchange confidential information and use these as evidence in proceedings.

The European Commission and the competition authorities have jointly compiled rules which serve the implementation of the Regulation, e.g. rules for handling information received, rules for the flow of information and case allocation criteria.

It is the objective of case allocation to ensure that the best placed authority deals with a cartel or abuse case. At the start of its proceedings each EU competition authority posts a case in which European law is (also) applied on the Intranet of the EU competition authorities. In this way the information is made available to all other competition authorities within the ECN.

Criteria for finding the best placed authority are the scope of the effects of a competition infringement, the possibilities for taking evidence and the means for putting an end to the infringement.

As a rule the European Commission is to be considered the best placed authority if, for example, an infringement affects competition in more than three Member States.

Against the background of the EU competition authorities' possibilities for cooperation the common fight against cartels at European level has gained increasing importance. Here the competition authorities are very eager to make the fight against cartels more effective by maximally uniform regulations. To this end a Model Leniency Programme has been developed within the ECN by which the competition authorities have decided on a uniform standard for processing leniency applications. In the programme the competition authorities agreed to bring their own regulations in line with the Model Programme or, in the absence of their own programme, to issue one based on this. Both the European Commission's Leniency Programme and the Bundeskartellamt's Leniency Programme (see Chapter III.5.) are modelled on the ECN Model Leniency Programme.

The cases of official assistance already rendered bear witness to the effective and successful cooperation within the ECN: For example, in spring 2004 the Bundeskartellamt searched several companies which were suspected of having coordinated their purchasing activities in an anti-competitive manner. The authority received assistance from the Austrian competition authority which conducted parallel investigations in Austria. Conversely, the Bundeskartellamt conducted a search in Germany on behalf of the Italian competition authority and took written testimony from witnesses. Furthermore the Bundeskartellamt regularly assists the European Commission in inspections.

## 2. European Competition Authorities

In April 2001 the national competition authorities within the European Economic Area founded the European Competition Authorities ("ECA") forum. This forum mainly focuses on horizontal cooperation between the authorities in specific cross-border competition issues such as merger control, imposition of fines or in general organisational issues.

## 3. International Competition Network

At the international level the International Competition Network ("ICN") was founded in 2001. The ICN is an informal, project-oriented network of competition authorities. A special feature of the ICN is the fact that the individual competition authorities and not the respective member states make up its membership. The ICN is therefore the only international forum whose members are competition authorities.

Currently the ICN comprises 112 competition authorities from 99 jurisdictions. The ICN's executive committee, the so-called "Steering Group", is newly elected every two years. In 2005/2006 the Bundeskartellamt chaired the Steering Group.

Another special feature of the ICN is the direct involvement of so-called non-governmental advisors, i.e. lawyers, professors and non-governmental organisations, which play an active role. Its conceptual work is achieved in working groups and is thus to a large extent project-oriented. The working groups operate independently and either disband on completion of individual projects or start on new issues. There are currently five working groups dealing with the themes merger control, cartels, agency effectiveness, abuse control and competition advocacy. In addition, there are two further groups dealing with organisational issues. The Bundeskartellamt is an active member of all working groups. Together with the US Federal Trade Commission it also heads the working group on abuse control.

The work results of the individual working groups are presented, discussed and adopted at the ICN's annual conferences<sup>11</sup>

#### 4. OECD and UNCTAD

The Bundeskartellamt also participates in the activities of further international organisations dealing with competition law and policy issues.

Under the umbrella of the **Organisation for Economic Co-operation and Development (OECD)** the Competition Committee and its two working groups "Competition and Regulation" and "International Cooperation" have met three times a year since 1967. At the meetings participants discuss issues relating to competition policy, competition law and competition economics at so-called round-table discussions and pass international recommendations. The Bundeskartellamt submits contributions in coordination with the Federal Ministry of Economics and Technology. The OECD Competition Committee's steering body is the Competition Bureau of which the President of the Bundeskartellamt, Andreas Mundt, is a member.

One of the most significant work results of the Competition Committee was the adoption in October 2005 of "Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations".

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11 All work results are available on the ICN's website at <http://www.internationalcompetitionnetwork.org>.

These best practices facilitate international cooperation by providing guidelines for the formal exchange of information in international cartel investigations.

In 2001, as part of the so-called Outreach Programme, the Global Forum on Competition was established with the aim of also including non-member countries of the OECD, in particular developing and transformation countries, in the debate about global competition issues and allowing them observer status for a limited period of time.

The **UNCTAD**, which devotes itself to specific problems faced by the transformation and developing countries in the world trading system, also deals with competition law and competition policy issues at its meetings. Together with the Federal Ministry of Economics and Technology the Bundeskartellamt regularly participates in the OECD and UNCTAD meetings.



*Bundeskartellamt, conference room*

## **X. Public procurement law**

Since 1 January 1999 rules relating to the procedures and legal protection associated with the award of public contracts have been incorporated into the ARC (Sections 97 to 129 of the ARC).

### **1. Scope of Application of Public Procurement Law**

There are several categories of contracting entities that have to observe the law on public procurement. These are above all the classical contracting authorities, i.e. the Federation, Länder and municipalities. Under certain circumstances the provisions relating to the award of public contracts must also be observed by companies operating in the areas of energy and drinking water supply and in the transport sector (so-called “sectoral contracting entities”).

Only contracts with a certain minimum order value are covered by the provisions of public procurement law. The thresholds for supplies and services are 193,000 euros for classical public contracting entities and, as a rule, 125,000 euros for supreme and higher federal authorities. In the sectoral area the minimum order value is 387,000 euros. In the case of building contracts a threshold of 4.845 million euros applies for both the classical public contracting entities and the sectoral contracting entities.

### **2. Award Procedures**

Public contracts have to be awarded under competitive conditions and through transparent and non-discriminatory procedures. Bids by foreign and domestic companies are to be treated equally. The bidders must meet certain requirements with regard to their expertise, efficiency and reliability. In principle the contract is awarded to the bidder submitting the most economically advantageous offer. Public contracts can be awarded in open procedures, restricted procedures or negotiated procedures.

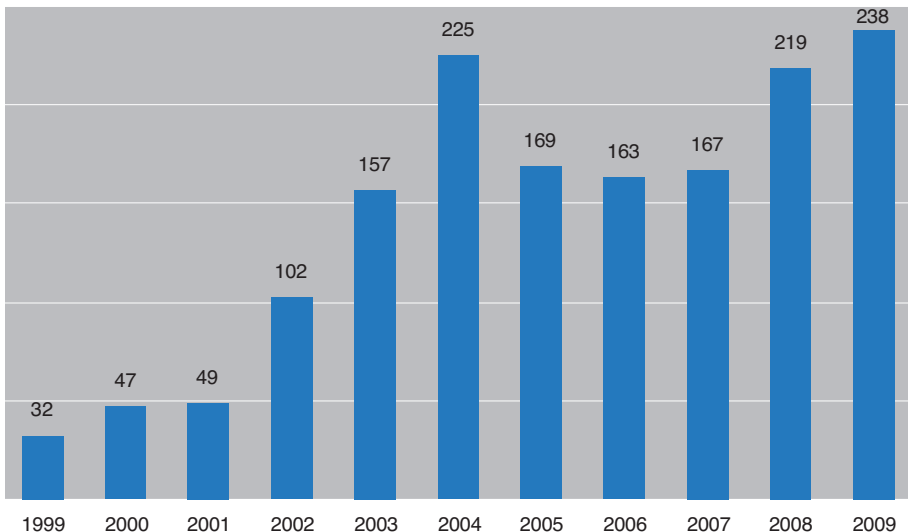
### **3. Review Procedures**

Participants in an award procedure are entitled to have the provisions on the award procedure observed by the public or sectoral contracting entity (Sections 97 ff. of the ARC as well as the Regulation on the Award of Public Contracts (VgV) and the Procedures for the Award of Contracts for Construction Services (VOB/A), for public supplies and services (VOL/A) and for professional services (VOF)).

Participants in an award procedure who claim that their rights have been violated through non-compliance with the provisions governing the award of public contracts, and who state that as a consequence of this alleged violation they have suffered or are likely to suffer a loss, can file a written application for review with the public procurement tribunals established by the Federation and the Länder. The federal public procurement tribunals, located at the Bundeskartellamt, are responsible for reviewing the award of public contracts falling within the area of responsibility of the Federation. The public procurement tribunals are independent and not accountable to another authority in their decision-making. Similarly to the procedure adopted by the Bundeskartellamt’s Decision Divisions, decisions are made by a chairperson and two associate members, one of whom serves in an honorary capacity.

The decisions of the Public Procurement Tribunals can be appealed against before the Düsseldorf Higher Regional Court.

### Applications for Review received by the Federal Public Procurement Tribunals from 1999 to 2009



## XI. The official seat of the Bundeskartellamt in Bonn

Today the official seat of the Bundeskartellamt in Bonn consists of the buildings I to IV in the Kaiser-Friedrich-Strasse on the Rhine, formerly the Office of the Federal President, and “Haus Axe” on the Konrad-Adenauer-Allee. The offices are located directly adjacent to Villa Hammerschmidt, the second official residence of the Federal President, and in vicinity to Palais Schaumburg and the former buildings of the Federal Chancellor’s Office, Bundestag and Bundesrat.

The buildings now standing on the premises were constructed between 1863 and 1933, beginning with Villa Hammerschmidt and ending with building III. Building II, a good example of the double villa typical of the style built at the turn of the century, has been a listed building under a preservation order since 1999.

In 1950, after the Federal Republic of Germany was founded and it was decided that Villa Hammerschmidt was to be the official residence of the Federal President, building I was erected as an office building. This not only housed the administration department of the Federal President but until President Scheel’s term in 1974 also the private office of the Federal President. Gradually, the Office of the President also took possession of buildings II to IV. At the end of 1999, in the wake of the government’s move to Berlin, the Bundeskartellamt transferred its official seat from the Platz der Luftbrücke (Airlift Square) in Berlin to the premises of the Office of the Federal President and also moved into “Haus Axe” on the west side of the street. Later a conference assembly hall was added to the south side of building II.



*Bundeskartellamt, building III*

## **XII. Further information**

### **1. Information Leaflets and Notices of the Bundeskartellamt**

#### **Merger control**

- Information leaflet on the German control of concentrations
- Notice on introduction of second domestic turnover threshold
- Notice on effects of the second domestic turnover threshold on the exemption regulations for the acquisition of real estate
- Form for the Notification of a Merger
- Model texts for Commitments and Trustee Mandate in Merger Control Proceedings
- Information Leaflet on Domestic Effect (currently under revision in view of the second domestic turnover threshold)
- Information Leaflet on Procedures for Post-Merger Notification (only available in German)
- Factsheet on the Scope of EU Merger Control
- ECA Principles

#### **Cartel prosecution and control of abusive practices**

- Possibilities of cooperation for small and medium-sized enterprises
- Notice of the Bundeskartellamt on the Non-Prosecution of Cooperation Agreements of Minor Importance (“de minimis Notice”)
- Guidelines on the setting of fines
- Leniency Programme for Hardcore Cartels
- ICN Anti-Cartel Enforcement Template
- Notice on Sale below Cost Price

#### **Legal protection in the field of public contracts**

- Information leaflet on the legal protection available in the field of public contracts
- Checklist for application for review

This and further information is available at [www.bundeskartellamt.de](http://www.bundeskartellamt.de)

## 2. Activity reports of the Bundeskartellamt

Year	Parliament printed papers	Date
1958	3 <sup>rd</sup> Electoral Term Printed Paper 1000	-
1959	3 <sup>rd</sup> Electoral Term Printed Paper 1795	-
1960	3 <sup>rd</sup> Electoral Term Printed Paper 2734	-
1961	IV/378	-
1962	IV/1220	-
1963	IV/2370	-
1964	IV/3752	-
1965	V/530	-
1966	V/1950	-
1967	V/2841	-
1968	V/4236	-
1969	VI/950	11. June 1970
1970	VI/2380	28. June 1971
1971	VI/3570	19. June 1972
1972	7/986	5. Sept. 1973
1973	7/2250	14. June 1974
1974	7/3791	18. June 1975
1975	7/5390	16. June 1976
1976	8/704	4. July 1977
1977	8/1925	-
1978	8/2980	20. June 1979
1979/80	9/565	25. June 1981
1981/82	10/243	13. July 1983
1983/84	10/3550	26. June 1985
1985/86	11/554	25. June 1987
1987/88	11/4611	30. May 1989
1989/90	12/847	26. June 1991
1991/92	12/5200	24. June 1993
1993/94	13/1660	14. June 1995
1995/96	13/7900	19. June 1997
1997/98	14/1139	25. June 1999
1999/2000	14/6300	22. June 2001
2001/2002	15/1226	27. June 2003
2003/2004	15/5790	22. June 2005
2005/2006	16/5710	15. June 2007
2007/2008	16/13500	22. June 2009

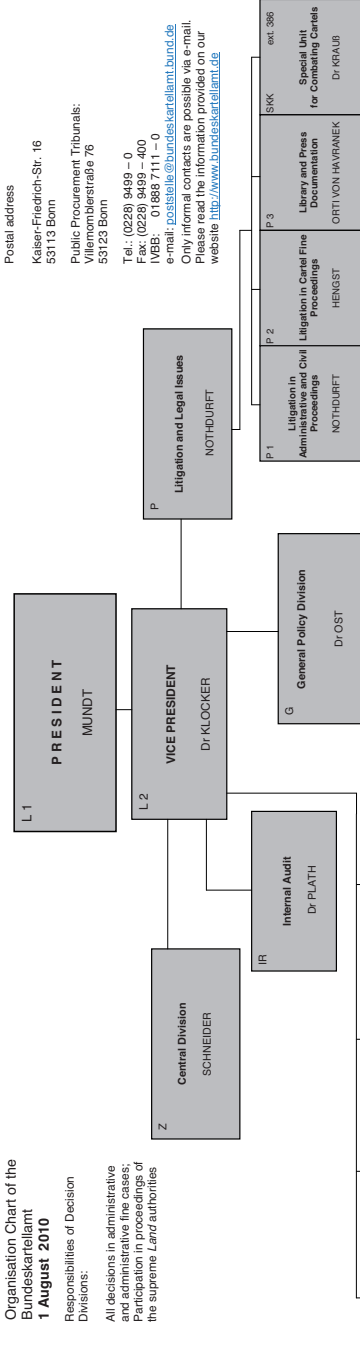
The printed papers of the parliament are available from the Bundesanzeiger Verlagsgesellschaft mbH, Amsterdamer Str. 192, 50735 Cologne, Phone: +49-221-976680. The activity reports since 1974 are also available at the Bundeskartellamt's homepage; the current activity report can be directly ordered from the Bundeskartellamt against a nominal charge of 6 euros.

### 3. Addresses

Bundeskartellamt	Kaiser-Friedrich-Str. 16 53113 Bonn
telephone	0228-9499-0
internet	<a href="http://www.bundeskartellamt.de">www.bundeskartellamt.de</a>
e-mail	<a href="mailto:info@bundeskartellamt.bund.de">info@bundeskartellamt.bund.de</a>
(Only informal contacts are possible via e-mail)	
Vergabekammern des Bundes	Villemomberstr. 76 53123 Bonn
telephone	0228-9499-0
internet	<a href="http://www.bundeskartellamt.de">www.bundeskartellamt.de</a>
e-mail	<a href="mailto:info@bundeskartellamt.bund.de">info@bundeskartellamt.bund.de</a>
Federal Ministry of Economics and Technology	Scharnhorststr. 34 – 37 10115 Berlin
telephone	030-2014-0
internet	<a href="http://www.bmwi.de">www.bmwi.de</a>
e-mail	<a href="mailto:info@bmwi.bund.de">info@bmwi.bund.de</a>
Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway	Tulpenfeld 4 53113 Bonn
telephone	0228-14-0
internet	<a href="http://www.bundesnetzagentur.de">www.bundesnetzagentur.de</a>
e-mail	<a href="mailto:Poststelle@BNetzA.de">Poststelle@BNetzA.de</a>
Monopolies Commission	Heilsbachstr. 16 53123 Bonn
telephone	0228-338882-30
internet	<a href="http://www.monopolkommission.de">www.monopolkommission.de</a>
e-mail	<a href="mailto:info@monopolkommission.bund.de">info@monopolkommission.bund.de</a>
Competition authorities of the <i>Länder</i>	Cf. list of addresses on the Bundeskartellamt's website under "Links and Addresses"
European Commission Directorate General for Competition	Rue Joseph II 70 B-1000 Brüssel
telephone	00322-2957522
internet	<a href="http://ec.europa.eu/comm/competition/index_de.html">http://ec.europa.eu/comm/competition/ index_de.html</a>

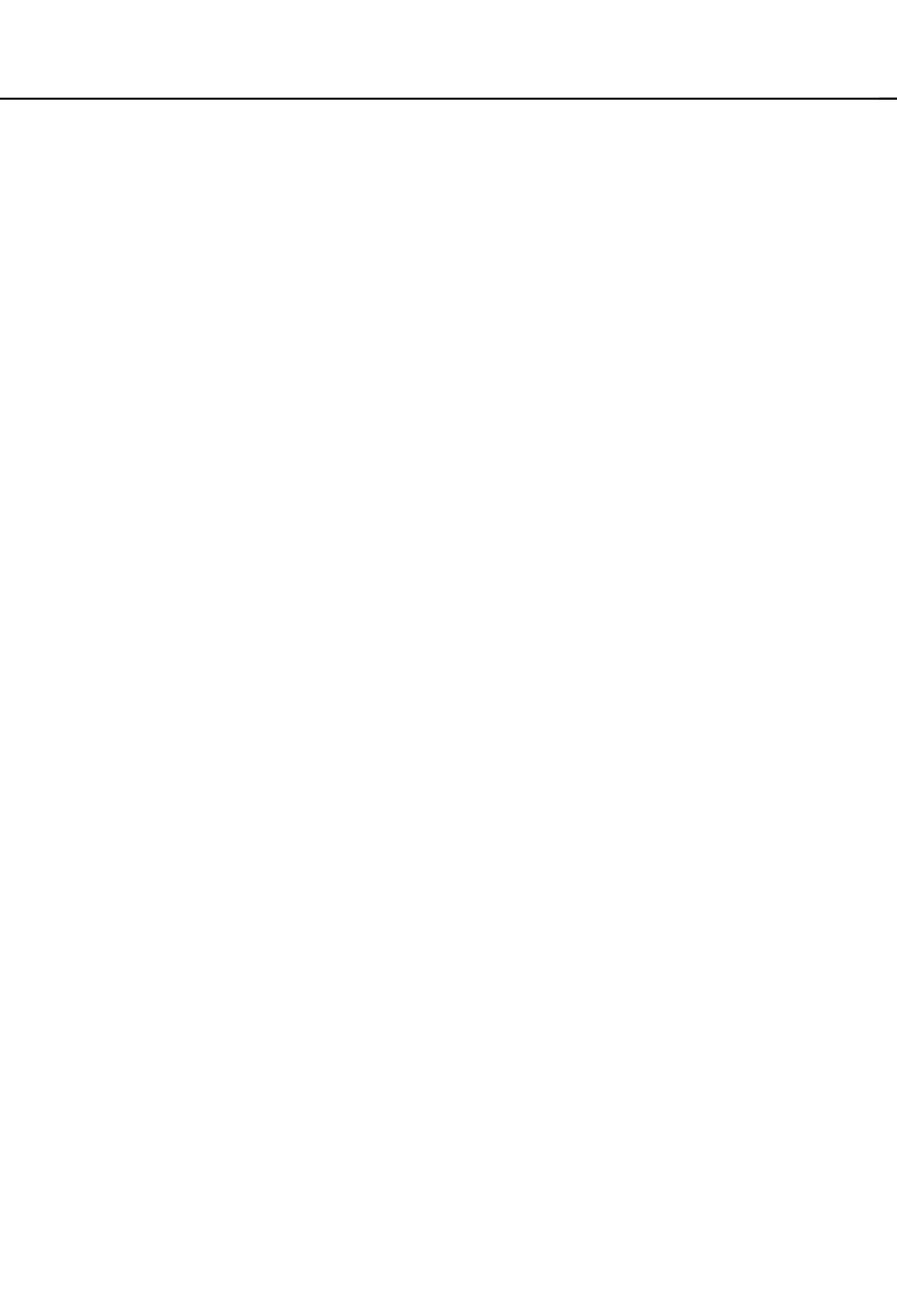
Organisation Chart of the Bundeskartellamt  
**1 August 2010**  
 Responsibilities of Decision Divisions:

All decisions in administrative and administrative fine cases; Participation in proceedings of the supreme Land authorities



Postal address  
 Kaiser-Friedrich-Str. 16  
 53173 Bonn  
 Public Procurement Tribunals:  
 Villemomberstraße 76  
 53123 Bonn  
 Tel.: (0228) 9499 - 0  
 Fax.: (0228) 9499 - 400  
 IVBB: 01888 7111 - 0  
 e-mail: [poststelle@bundeskartellamt.bund.de](mailto:poststelle@bundeskartellamt.bund.de)  
 Only informal contacts are possible via e-mail.  
 Please read the information provided on our website <http://www.bundeskartellamt.de>

VK1	1st Public Procurement Tribunal Review Procedures BEHRENS	VK2	2nd Public Procurement Tribunal Review Procedures REH	VK3	3rd Public Procurement Tribunal Review Procedures DR-HERLEMANN	B 1	1st Decision-Division HEISTERMANN	extraction of ores and other non-metallic minerals construction industry and related services (including materials, glass, ceramics)	B 2	2nd Decision-Division KRUEGER	agriculture and forestry wood products food industry textile industry other consumer goods	B 3	3rd Decision-Division TEIME	health sector (incl. medical technology, pharmaceuticals, health insurance and hospitals) chemical industry	B 4	4th Decision-Division HOSSENFELDER	waste management industry financial services other services	B 5	5th Decision-Division NOTHOURFT	mechanical and plant engineering metal industry iron and steel measurement and control technology	B 6	6th Decision-Division DR-LANGHOFF	media culture, sports, entertainment advertising industry trade fairs paper industry	B 7	7th Decision-Division TOPEL	telecommunications broadcast engineering EDP	B 8	8th Decision-Division DR-BECKER	mineral oil gas* electricity district heating*	B 9	9th Decision-Division PAETOW	tourism and hotel and catering industry transport postal services automotive industry (incl. rail, air and water vehicles)	B 10	10th Decision-Division DR-ENGELSING	gas electricity district heating abuse control and prosecution of hardcore cartels	B 11	11th Decision-Division DR-WAGEMANN	prosecution of administrative offences in connection with violations of Art. 81 EC	B 12	12th Decision-Division TESCHNER	prosecution of administrative offences in connection with violations of Sec. 1 ARC and Art. 81 EC
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