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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**POTENTIAL PRO-COMPETITIVE AND ANTI-COMPETITIVE ASPECTS OF TRADE/BUSINESS  
ASSOCIATIONS**

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## GERMANY

### 1. Introduction

In Germany, about 2000 associations are active nationwide<sup>1</sup>. The major German associations of undertakings include in particular the Federation of German Industries (*Bundesverband der Deutschen Industrie, BDI*) which represents 37 member associations and thus the interests of more than 100,000 companies<sup>2</sup>, the Association of the German Chambers of Industry and Commerce (*Deutscher Industrie- und Handelskammertag, DIHK*) which operates as an umbrella organisation of the 81 German chambers of industry and commerce<sup>3</sup>, and the German Confederation of Skilled Crafts (*Zentralverband des Deutschen Handwerks, ZDH*) which includes inter alia 54 chambers of crafts and 38 confederations of skilled crafts<sup>4</sup>. It is the central task of these associations to represent the joint interests of their members, in particular within the framework of legislative projects. Furthermore trade associations often fulfil self-regulation tasks, above all in the area of technical standardization and quality assurance (see II.1). An important self-regulation case in Germany was the implementation of the first package of EU-directives concerning the liberalisation of the electricity and gas markets which was carried out through the so-called negotiated network access model on the basis of the Associations' Agreements on electricity and gas (see II.2). On the one hand the trade associations' activities often contributed to improving the competitive conditions, on the other the Bundeskartellamt conducted several cartel proceedings in which trade associations were involved. They were either directly involved, i.e. the associations themselves had organised restraints of competition or facilitated agreements between their members (see III.1), or indirectly, i.e. members had used the associations' activities to enter into illegal agreements without the associations' knowledge (see III.2).

### 2. The associations' self-regulation process

#### 2.1 Technical standardization and quality assurance

Technical standardization and quality assurance are important areas where self-regulation tasks are fulfilled by trade associations. However, they rarely become active on their own responsibility. Above all they participate in the standardization work of the German Institute for Standardization (*Deutsches Institut für Normung e.V., DIN*) and the German Institute for Quality Assurance and Certification (*Deutsches Institut für Gütesicherung und Kennzeichnung e.V., RAL*).

In Germany technical standardization is almost exclusively carried out by the non-profit institute DIN. Under Section 1 (2) of its statutes the DIN pursues the objectives to establish and publish German standards and other results of standardization work which serve to advance rationalisation, quality assurance, environmental protection, safety and communication in industry, technology, science,

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<sup>1</sup> Cf. the "Public list on the registration of associations and their representatives" available at <http://webarchiv.bundestag.de/archive/2007/0206/wissen/archiv/sachgeb/lobbyliste/lobbylisteaktuell.pdf>

<sup>2</sup> cf. [www.bdi-online.de/de/bdi/72.htm](http://www.bdi-online.de/de/bdi/72.htm)

<sup>3</sup> cf. [www.dihk.de](http://www.dihk.de)

<sup>4</sup> cf. [www.zdh.de/der-zdh.html](http://www.zdh.de/der-zdh.html)

administration and the public sector through the common efforts of the interested parties in the public interest.<sup>5</sup> Currently the DIN has 1693 members<sup>6</sup> which, apart from companies and authorities, include many trade associations. As can be seen from the number of the so-called DIN standards established by the institute (2006: 30,046)<sup>7</sup> these standards meanwhile cover all areas of economic life. However, the DIN's activities are carried out on a voluntary basis. Its standards are therefore not necessarily binding and have merely recommendatory character. The standardization work is carried out within more than 70 standardization committees, which are organised according to specialist areas, and to which about 3,300 work committees are assigned. Interested parties can send their experts to participate in these committees in which agreement on the content of standards is reached in a consensus-building process.

As regards quality assurance, the system of quality associations (*Gütegemeinschaften*) is of particular importance in Germany. The objective of these associations is to contribute to safeguarding production and quality standards among their members by awarding legally protected quality marks. The RAL is the umbrella organisation of all German sector-specific quality associations. Among the members of the executive committee of the non-profit organisation RAL, the board of trustees (*Kuratorium*), are 14 leading trade associations.<sup>8</sup> The RAL is responsible for creating quality marks and assigning them to the specialised quality associations. The precision work of quality assurance, however, is carried out by the RAL member organisations, i.e. by the individual quality associations. The principle of self-commitment also applies in this context: Companies may not be forced to comply with the quality standards associated with the individual quality marks. However, membership in a quality association is subject to compliance with these standards.

However, the requirements for the award of quality marks have already given rise to the suspicion of unfair hindrance of suppliers of similar products. For example, the quality and test regulations of the *Gütezeichengemeinschaft Acrylwanne e.V.* (Quality Mark Association Acrylic Bathtub) for sheets made from cross-linked cast sanitary acrylic were examined by the Bundeskartellamt. Under these regulations solely manufacturers of cast acrylic could bear the quality mark at all. Manufacturers of semi-finished products made from other types of acrylic and suppliers of bathtubs made from this were excluded from bearing the quality mark. With regard to the product concerned, the establishment of such high technical requirements was not objectively justified and appeared to serve the purpose of making market entry for suppliers of other plastics more difficult. Ultimately however, the Bundeskartellamt did not prohibit the further use of these quality provisions as no significant effects on market success could be established in sales of plastic bathtubs which did not bear the quality mark. As to the development of quality assurance criteria for finished products in the future, the Bundeskartellamt has called on RAL to solely take into account objectively measurable characteristics which are relevant according to the generally received opinion.

## 2.2 *Liberalisation of the electricity and gas markets*

The associations' self-regulation process became particularly important in Germany within the context of the liberalisation of the electricity and gas markets. Under the European Union's so-called first

<sup>5</sup> The statutes are available at [www.din.de/cmd?level=tpl-unterrubrik&menuid=47391&cmsareaid=47391&cmsrubid=47514&menurubricid=47514&cmssubrubid=47522&menusubrubid=47522&languageid=de](http://www.din.de/cmd?level=tpl-unterrubrik&menuid=47391&cmsareaid=47391&cmsrubid=47514&menurubricid=47514&cmssubrubid=47522&menusubrubid=47522&languageid=de)

<sup>6</sup> Cf. [www.din.de/cmd?jsessionid=6D3C53E624380B474726BA218AFAD11D.3?level=tpl-rubrik&menuid=47391&cmsareaid=47391&menurubricid=47514&cmsrubid=47514&languageid=de](http://www.din.de/cmd?jsessionid=6D3C53E624380B474726BA218AFAD11D.3?level=tpl-rubrik&menuid=47391&cmsareaid=47391&menurubricid=47514&cmsrubid=47514&languageid=de)

<sup>7</sup> Cf. [www.din.de/sixcms\\_upload/media/2896/zahlenundfakten.jpg](http://www.din.de/sixcms_upload/media/2896/zahlenundfakten.jpg)

<sup>8</sup> Cf. [www.ral.de/de/ral\\_guete/organisation/kuratorium.php](http://www.ral.de/de/ral_guete/organisation/kuratorium.php)

package of directives<sup>9</sup> Member States could choose between opening the networks for third parties via negotiated network access, which means that providers and “eligible customers” themselves negotiate the contracts on network access in observance of the principle of good faith, or opting for regulated network access, which grants third parties the right of network access on the basis of published tariffs and other conditions and obligations for network use. Germany was the only EU Member State to choose negotiated network access, i.e. it was left to the market participants to formulate conditions and tariffs for network access. For this purpose, both for the electricity and gas sectors, different trade associations which represented producers, suppliers and major industrial customers and purchasers entered into agreements on the establishment of fees for network use and network use principles, the so-called Associations’ Agreements.

In May 1998, the German Electricity Association (*Verband der Elektrizitätswirtschaft, VDEW*), which represents the suppliers’ side, the Association of Industrial Energy and Power Management (*Verband der Industriellen Energie- und Kraftwirtschaft, VIK*), which represents industrial customers, and the Federation of German Industries (*Bundesverband der Deutschen Industrie, BDI*) decided upon an Associations’ Agreement for the electricity sector (*VV Strom I*) which included criteria to establish transmission fees, but no detailed prices. The Bundeskartellamt agreed to tolerate this Agreement until September 1999 so as not to block the network operators’ first pro-competitive measures. However, some of the Agreement’s criteria for calculating transmission fees met with criticism. They were therefore replaced in December 1999 by a revised and, from a competition point of view, clearly improved version (*VV Strom II*) in the formulation of which the Association of Municipal Utilities (*Verband kommunaler Unternehmen, VKU*) also participated. The updated version of the Agreement (*VV Strom II+*), which was completed in December 2001 due to pressure resulting from proceedings conducted by the Bundeskartellamt, and in which a consumer association participated for the first time, represented a further improvement. However, significant obstacles to competition continued to exist in the electricity sector. The main problem was the generally excessive level of fees for network use.

In July 2000, the BDI, the VIK, the VKU and the Association of German Gas and Water Industry (*Bundesverband der deutschen Gas- und Wasserwirtschaft, BGW*) agreed upon an Associations’ Agreement on network access for the natural gas sector (*VV Erdgas I*). However, even after taking into account the supplements added in March and September 2001, the Bundeskartellamt did not consider this Agreement to be suitable for formulating practicable conditions for non-discriminatory network access in the gas markets. Above all the Agreement did not include sufficiently detailed regulations for network access. Furthermore, the model of distance-related fees for network use conflicted with effective transmission. These points of criticism could not be eliminated by the second Associations’ Agreement (*VV Erdgas II*) which was adopted by the associations in May 2002. However, the associations’ negotiations on the further development of the Agreement failed.

The implementation of network access on the basis of the Associations’ Agreements was supported by the competition authority’s effective abuse control under the Act against Restraints of Competition (ARC). Against this background the Associations’ Agreements system was supported in principle by the Bundeskartellamt although it included elements that were problematic from the point of view of competition law. Constant efforts were made to improve the system and to achieve a more pro-competitive design<sup>10</sup>, by, inter alia, the “Report of the Working Group on Network Use in the Electricity Sector of the

<sup>9</sup> Consisting of Directive 96/92/EC concerning common rules for the internal market in electricity (OJ L 27 of 30 January 1997, p. 20) and Directive 98/30/EC concerning common rules for the internal market in natural gas (OJ L 204 of 21 July 1998, p. 1).

<sup>10</sup> Dr Ulf Böge, Wettbewerb in der leitungsgebundenen Energiewirtschaft – Ist der ordnungspolitische Rahmen zufriedenstellend?, in: Aktuelle Entwicklungen im deutschen und europäischen Energiewirtschaftsrecht, ed.: Jürgen F. Baur, Baden-Baden, 2003, p. 21.

*Competition Authorities of the Federation and the Länder*” of 19 April 2001<sup>11</sup>. The legal presumption of “good professional practice” in the case of compliance with the Associations’ Agreements on gas and electricity, which to a certain extent “juridified” these private law agreements at association level, and which was introduced with the amendment of the Energy Industry Act (*Energiewirtschaftsgesetz, EnWG*) in May 2003 for a limited period up to 31 December 2003, was therefore viewed with criticism. According to the Bundeskartellamt’s assessment, in view of the anti-competitive provisions still included in the Associations’ Agreements, above all concerning the gas sector, “good professional practice” could not be generally established.

According to the Bundeskartellamt’s findings, the model of negotiated network access supported by abuse control under competition law generally proved successful, at least in the electricity sector, although improvements were still required.<sup>12</sup> However, after the adoption of the so-called Acceleration Directives<sup>13</sup> in June 2003, which made the model of regulated network access and the establishment of a regulation authority mandatory, the system could no longer be continued.

### **3. Cartel proceedings with the participation of trade associations**

Since the sixth amendment of the ARC in 1998 the prohibition of cartels stipulated in Section 1 covers, as well as “agreements between undertakings” and “concerted practices” also “decisions by associations of undertakings”, in conformity with Art. 81 (1) sentence 1 EC. In the course of investigations conducted by the Bundeskartellamt on the grounds of violations of competition law, associations of undertakings have consequently often been the target of searches. Since 2004 the Bundeskartellamt has carried out a total of 49 searches and in six of these examined a total of 13 trade associations. One of the searches involved three associations and another, five associations. Furthermore, the Bundeskartellamt conducted a number of cartel proceedings in recent years, in which trade associations were involved (inter alia). Their involvement was either direct (i.e. the associations organized the violation themselves) or indirect (i.e. the association members used the association’s activities to conclude anticompetitive agreements).

#### **3.1 Cartel proceedings with the direct participation of trade associations**

The Bundeskartellamt is currently investigating several pharmacy associations on suspicion of their call for boycott under Section 21 ARC and in this connection searched the premises of regional associations in the federal states of Mecklenburg-West Pomerania, North Rhine Westphalia, Berlin, Baden-Württemberg and Thuringia in July 2007. According to information from the market, there are indications that these associations have called on their members to cease their supply relationship with the pharmaceutical wholesaler Gehe Pharma Handel GmbH (Gehe). A possible reason for this call for boycott could be the acquisition of the internet pharmacy DocMorris by Celesio AG (Celesio), the parent company of Gehe. With this acquisition Celesio paved the way for the creation of a national pharmacy outlet

<sup>11</sup> The report is available (in German) at [www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter\\_deutsch/01\\_Netznutzung.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/01_Netznutzung.pdf).

<sup>12</sup> Cf. Report by the Federal Ministry of Economics and Labour to the German Bundestag on the effects of the Associations’ Agreements under energy and competition law (*Bericht des Bundesministeriums für Wirtschaft und Arbeit an den deutschen Bundestag über die energiewirtschaftlichen und wettbewerblichen Wirkungen der Verbändevereinbarungen*), p. 31 ff.

<sup>13</sup> Directive 2003/54/EC concerning common rules for the internal market in electricity (OJ L 176 of 15.7.2003, p.37) and Directive 2003/55/EC concerning common rules for the internal market in natural gas (OJ L 176 of 15.7.2003, p. 57).

network and has now become the direct rival of the pharmacies. Although in Germany it is forbidden to set up pharmacy chains with more than four outlets, this regulation could possibly be lifted by an ECJ judgement expected in the coming year. Celesio already operates a large number of pharmacies abroad, namely in Great Britain, Norway, Italy, the Netherlands, Ireland, Belgium and the Czech Republic. Statements which could be understood as a call to cease supply relationships have been found inter alia in internal circulars of the associations.

### 3.2 *Cartel proceedings with the indirect participation of trade associations*

In addition the Bundeskartellamt has, for example, conducted two cartel proceedings in which the participants used association committee meetings to conclude anticompetitive agreements.

#### 3.2.1 *Pharmaceutical wholesale sector*

In August 2006, in cartel proceedings against pharmaceutical wholesalers (B3 – 129/03)<sup>14</sup>, the Bundeskartellamt imposed fines totalling 2.635 million euros against the four major companies active in Germany and against seven persons on the grounds of agreements on market share reduction.<sup>15</sup> The companies involved were Andreae-Noris Zahn AG (Anzag), Sanacorp Pharmahandel AG (Sanacorp), Phoenix Pharmahandel AG & Co. KG (Phoenix) and Gehe Pharma Handel GmbH (Gehe). The Bundeskartellamt qualified the agreements as a quota cartel bordering on a price-fixing cartel as their purpose was to limit rebate and discount competition between the wholesalers.

An underlying feature of the pharmaceutical wholesale sector is that there are only a few major suppliers which are active throughout the whole country and that their shares of the national market have remained stable over the years. Another feature of the market is its high degree of transparency. This transparency is created, inter alia, by the Federal Association of Pharmaceutical Wholesalers (*Bundesverband des Pharmazeutischen Großhandels e.V., Phagro*), which provides a forum for the lively exchange of information, e.g. in the form of regular circulars, statistics, cooperation within the data transmission network *Datenfernübertragungsgeräte Gesellschaft mbH (DATEG)* and meetings at director, regional director and sales representative level. The most significant competition parameters after the regularity and reliability of supply are the rebates (and discounts) granted to the pharmacies.

Against this background and according to the findings of the Bundeskartellamt, Anzag launched a so-called push forward strategy at the beginning of 2003, with the aim of increasing its market share. Under this strategy Anzag increased its rebates to pharmacies. However, its competitors in turn also began to increase their rebates and this resulted in an all-out “discount battle” which ultimately brought about a worsening in the earnings position of the wholesalers. In the middle of 2003, in reaction to this and after a change of board, Anzag decided to end the price war and agreed with Gehe, Phoenix and Sanacorp to restore the “calm” which had prevailed for years in the pharmacy wholesale sector and in particular to return the market shares it had gained through its “push forward strategy” (hereafter: basic agreement). To this effect “balance lists” were exchanged which indicated how many pharmacies in a particular region, 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 less favourable purchasing conditions to induce them to switch back to the partner to the agreement which had been their previous supplier. Further measures agreed by the pharmaceutical wholesalers to restore calm to the market, which, however, were not the subject of the fine proceedings,

<sup>14</sup> The German version of the decision is available at [www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B3-129-03.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B3-129-03.pdf).

<sup>15</sup> Fines up to a total of 2,185 million euros are now final. In two cases the Bundeskartellamt discontinued its proceedings against the individuals personally involved.

were the reduction of rebates at the end of 2003 and the collective agreement not to grant rebates on prescription medicines from January 2004 onwards but at most a discount of 2 per cent.

In the course of the search operation carried out by the Bundeskartellamt the wholesaler association Phagro was also searched and evidence seized. According to this evidence the rebate reduction had been planned at association level by means of statements in a circular to the pharmacies: These stated that they could not be granted rebates from 1 January 2004 because of amendments to the law, which would reduce the wholesale margin. According to the findings of the Bundeskartellamt, it is also very likely that the “basic agreement” was made at a Phagro trade association meeting in September 2003 which was attended by director-level representatives of all the wholesale companies concerned. This is evident from the fact that only two days after the association meeting Anzag launched a new company strategy which, above all, focussed on an acquisition stop and a rebate increase.

### 3.2.2 *Industrial insurers*

The importance of association committee meetings and the possibility they offer of communication between competitors is all the more clear from cartel proceedings against industrial insurers (B 4 – 82/02)<sup>16</sup> on grounds of agreements on measures to increase premiums and align conditions and to offer one another portfolio protection. In these proceedings the Bundeskartellamt first imposed fines totalling 130 million euros against ten insurance companies and board members personally affected in September 2005 and in September 2005 more fines against seven public-law insurance companies and the board members of these companies totalling approx. 20 million euros.<sup>17</sup> The violation of cartel law involved above all industrial property insurance, which had nationwide and cross-sector repercussions.

According to the Bundeskartellamt’s findings, in the middle of 1999 the relevant insurers agreed to put an end to the intense competition at that time in premiums and conditions in order to cause a “turnaround in the market” and to induce company-specific measures to improve revenue. To this effect they agreed on standard principles (so-called FIS Principles) for their future contracting policy and in particular for the renewal of contracts. Within the framework of these “FIS principles” the parties concerned agreed inter alia not to reduce insurance contributions during terms of contract, not to make any backdated premium adjustments, to conclude new contracts only with opt-out and adjustment clauses and to consult each other more in “competition problem cases”. These principles were supplemented over time by further agreements on premium and retention level increases as well as on the adjustment of contract conditions. It was also agreed not to disrupt the “restructuring measures” of their rivals and not to undercut the adjusted premium demanded. By making enquiries with the previous insurer about the planned contract renewal measures and premium increases and by refraining from submitting competitive offers the insurers were generally to offer each other “portfolio protection”.

All these agreements were concluded by the directors of the industrial companies participating in the cartel at meetings of the Special Committee for Industrial Property Insurance of the German Insurance Association (*Gesamtverband der deutschen Versicherungswirtschaft, GDV*). The cartel agreement was implemented, however, at director and head of department level. The regionally active working and discussion groups and regular meetings of the representatives of the various rival companies were the major platforms for this cooperation. The objective of these meetings was to exchange in-depth information on company-specific restructuring criteria and revenue improvement measures and to constantly manifest mutual reliability as regards market behaviour and non-competition.

<sup>16</sup> The decision has not been published.

<sup>17</sup> The companies appealed against all but one order imposing the fines. One appeal has meanwhile been withdrawn. The oral proceedings before the Düsseldorf Higher Regional Court are expected to take place in October 2007.

Although the findings provided indications that the GDV had knowledge of the conduct of its members, it was not fined itself because the agreements could not unequivocally be qualified as the “decision by an association of undertakings” within the meaning of Section 1 ARC or Art. 81 (1) EC.



