



# BUNDESKARTELLAMT

Our Activities  
in 2001 and 2002









**Our Activities  
in 2001 and 2002**

**Dear Reader,**

Especially in times of low economic growth there are always calls for less stringent control of restraints of competition and a relaxation of the corresponding regulations. From this petitioners expect better conditions to avert economic difficulties. However, seen in overall economic terms, this view is too short-term. It would at best serve the interests of individual sectors at the expense of the consumer. The work of the competition authorities is based above all on the conviction that an economic system founded on the principle of competition can best satisfy the needs of consumers and ensure the international competitiveness of German industry as a whole, even in difficult times.



Our work is only then successful if a wide public is convinced of the importance of the principle of competition and supports the work of the competition authorities. And so it is my particular concern to make the Bundeskartellamt's decision-making transparent and to encourage discussion on competition law and policy beyond the professional public.

This brochure cannot illustrate the activities of this authority in the reporting period 2001 and 2002 in their full range and depth. Instead it has to limit itself to highlighting prominent aspects of the three traditional key areas of activity of the Bundeskartellamt – merger control, abuse control, cartel prohibition – and a new one, public procurement law. Not every individual case of significance can be dealt with here.

With the new legal framework for the application of European competition law by the European Commission and the competition authorities of the Member States much progress has been made in cross-border cooperation on competition within the European Community. The new legal framework comes into effect on 1 May 2004, the date of entry of the new Member States into the European Union. It is now necessary to put the new instruments of cooperation of the Network of European Competition Authorities into practice. Currently the Federal Ministry of Economics and Labour is working with the Bundeskartellamt on a reform of German competition law. The reform is necessary to ensure that the Bundeskartellamt, together with its partner authorities in Europe, can enforce the principle of competition in the best way possible.

However, in view of globalisation and the opening of markets it brings in its wake we cannot stop at European cooperation. Global cooperation between national competition authorities is increasingly gaining importance. Important steps have been made within the framework of the OECD, WTO and more recently with the establishment of the International Competition Network (ICN).

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

Dr Ulf Böge

President of the Bundeskartellamt

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## **1. Development of competition**

### **Worldwide reinforcement of the principle of competition**

The principle of competition continues to gain ground worldwide. This is evident at any rate from the significant number of more than ninety states which have already established a competition-law regime for their national economies.

However, the principle of competition will only be a complete success if it manages to determine the market and competitive behaviour of businesses and consumers in addition to providing a regulatory framework. The cartel agreements and defensive strategies by dominant companies against competition uncovered by the Bundeskartellamt prove that even in Germany with its decade-long regulatory experience and tradition the principle of competition does not automatically determine the activities of market players. This is why 'competition advocacy' is of crucial importance: Advocacy for the principle of competition which is not least an instrument to achieve freedom as an objective, must be further intensified. This already applies on the domestic front, but advocacy is even more necessary at international level. Against this background the Bundeskartellamt places great emphasis on bilateral and multilateral consultations and on the exchange of experience particularly with emerging economies which have only recently established competition regimes.

Globalisation, i.e. the merging and increasing integration of markets which were previously hardly connected at all, is a factor which tends to contribute to the establishment and practical implementation of competition regimes. At the same time globalisation requires more intensive worldwide cooperation between the competition authorities. Restrictions of competition which have a worldwide effect, e.g. mergers, cartels or abusive conduct by companies for which national boundaries practically cease to exist, cannot be effectively prevented solely by the isolated activities of individual national competition authorities. The increasing networking of competition authorities through international forums as provided e.g. by the OECD, ICN or the WTO is the essential answer to the globalisation of entrepreneurial activities.

### **Decline in merger activity**

In the period covered by the report worldwide merger activity cooled off noticeably. The main reasons for this are probably connected with the stock market slump of the past years. Although potential target companies have become cheaper due to the decline in stock prices, the value of an important acquisition currency, i.e. the acquiring company's own stocks, has diminished simultaneously. Moreover, as a countermovement to the merger euphoria of previous years, a certain scepticism has spread among investors, investment banks and fund managers who ask – possibly more insistently than in previous years – about the advantages to be expected from a merger.

With regard to the Bundeskartellamt's activity the general decline in merger activity has found expression in a slight decline in the number of notified merger projects. In the years 2001 and 2002 1568 and 1584 mergers, respectively, were notified as compared with 1687 in 1999 and

1735 in 2000. In terms of their competitive significance the decreasing number of notified merger projects is, however, only of limited relevance. A number of sectors revealed keen merger activity. In this respect in particular the network-based energy industry and the mineral oil industry should be mentioned as well as the chemical and pharmaceutical industry which are still undergoing profound restructuring. Furthermore the waste management industry and the sector of local public passenger transportation were characterised by strong merger activity. The total number of eight<sup>1</sup> merger projects which the Bundeskartellamt had to prohibit in 2001 and 2002 show the significance of merger control as a pillar of competition control.

### **Increasing significance of abuse control and combating of cartels**

Even though mergers again accounted for a particularly important part of the Bundeskartellamt's activities in the period covered by the report the other sectors of competition control, combating cartels and abuse control, have, in fact, at the same time gained importance both in absolute and relative terms. Above all, the Bundeskartellamt has intensified its abuse control activities in the network-based energy sector which was opened up to competition under the 1998 reform of the Energy Industry Act. Particular emphasis was placed on the electricity markets. This control primarily aims at ensuring that electricity providers have non-discriminatory access to the existing networks of the relevant supply companies. Abuse control also played a major role in other economic sectors, e.g. in the air traffic and waste management sectors.

The Federal Supreme Court reinforced the competition authorities' instruments for taking action against abusive conduct by dominant companies possessing a facility which is also essential for competitors (Scandlines decision). Essential facilities are networks (e.g. electricity and gas networks) or other infrastructural facilities which in practice cannot be duplicated by a competitor which makes their co-utilisation a precondition for market entry. Depending on the extent to which access is denied the Bundeskartellamt has a graduated spectrum of possibilities to remedy the restraint of competition. It can oblige the dominant company to start negotiating on the use of its facility in the first place. It can concretize this requirement to negotiate by referring to usual market conditions. And finally the Bundeskartellamt can set the appropriate fee directly.

In combating illegal cartel agreements it has become clear that the leniency programme introduced in April 2000 is an effective instrument for making use of the instability inherent in a system of agreements and breaking up cartels. In the period covered by the report the Bundeskartellamt intensified and extended its prosecution of cartels: Whereas in the past the Bundeskartellamt's cartel proceedings focused on the building sector, its activities during the last few years have clearly diversified with proceedings e.g. in the paper wholesale, logistics, insurance and pyrotechnics sectors. In order to further increase the quota of uncovered cartel

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<sup>1</sup> Formally the Bundeskartellamt issued eight prohibition decisions. Two of these decisions, E.ON / Gelsenberg and E.ON / Bergemann, however, referred to the same economic project, viz. the indirect acquisition by E.ON of a majority stake in Ruhrgas.

agreements and to speed up proceedings the Bundeskartellamt set up a Special Unit for Combating Cartels (SKK) in March 2002. This unit assists the relevant Decision Divisions in the Bundeskartellamt in uncovering cartel agreements by deploying specialised personnel and material resources.

### **Reform of German and European competition law**

The reform of the procedural rules of European competition law was concluded in late 2002. The new European regulation implementing the Articles 81 and 82 of the EC Treaty (Regulation 1/2003) which will become applicable from 1 May 2004 completely reforms the procedural law for cartel and abuse cases which so far has been determined by Regulation 17/62. The European Commission's power to exempt agreements from the prohibition of agreements restricting competition (Art. 81 (3) EC) now takes the form of a legal exception. This means that agreements will be exempted without an authority's decision if they fulfil the legal preconditions. Apart from this the relationship between Community law and national law will be reorganised. The reform will restructure not only cooperation between the European Commission and national competition authorities, but also the relationship between the national authorities. The new European procedural rules also make a reform of the German Act against Restraints of Competition (ARC) necessary. In early 2003 the Federal Ministry of Economics and Labour and the Bundeskartellamt thus began preparations for the 7<sup>th</sup> amendment to the ARC.

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

In 2001 and 2002 there was a distinct further development in the forms of cooperation and exchange between the competition authorities at European and international levels.

### **ECA (European Competition Authorities)**

In April 2001 the competition authorities of the countries within the European Economic Area, the European Commission and the EFTA supervisory authority jointly set up the "European Competition Authorities" (ECA) forum. ECA aims at an effective and more efficient enforcement of national and European competition law and sees itself as a platform for the exchange of experience and information among the participating authorities. Besides regular meetings of the heads of the authorities, the subject-related working groups on cooperation in leniency programmes in cartel cases, cooperation in merger cases which have been notified in several countries, and on the enforcement of competition law in the air traffic sector have already achieved concrete results. For instance, a Procedures Guide was drawn up for mutual information on multiple filings of merger projects which has significantly improved the exchange and cooperation between the authorities concerned. In combating cartels the cooperation within the framework of ECA has also led to initial experiences in the joint processing of cases.

This applies e.g. to the Bundeskartellamt's collaboration with the Netherlands Competition Authority in a cartel case in the fisheries sector as well as simultaneous investigations undertaken by the Bundeskartellamt and the Norwegian competition authority in the sector of special chemicals.

### **European Competition Network (ECN)**

Among other objectives, the new European Regulation 1/2003, aims at setting up a network of the Member States' competition authorities and the European Commission for the application of the European rules in respect of the prohibition of cartels and abuse control (Art. 81, 82 EC) – the “European Competition Network” (ECN). This new network will be able to benefit from the preparatory work done by way of cooperation within the framework of ECA. As of May 2004 Regulation 1/2003 will provide the competition authorities of the Member States and the European Commission with various instruments for cooperation in individual cases, e.g. legal bases for information exchange and mutual official assistance in investigations. These instruments are of great importance for the realisation of one of the Regulation's major concepts – decentralising the application of European competition law. In future the Member States' competition authorities will apply European law in many cases which they had so far been processing under national law or which had to be dealt with by the European Commission.

### **Global forums of cooperation**

Cooperation between the competition authorities has also been intensified beyond the European framework. Two new initiatives have been created:

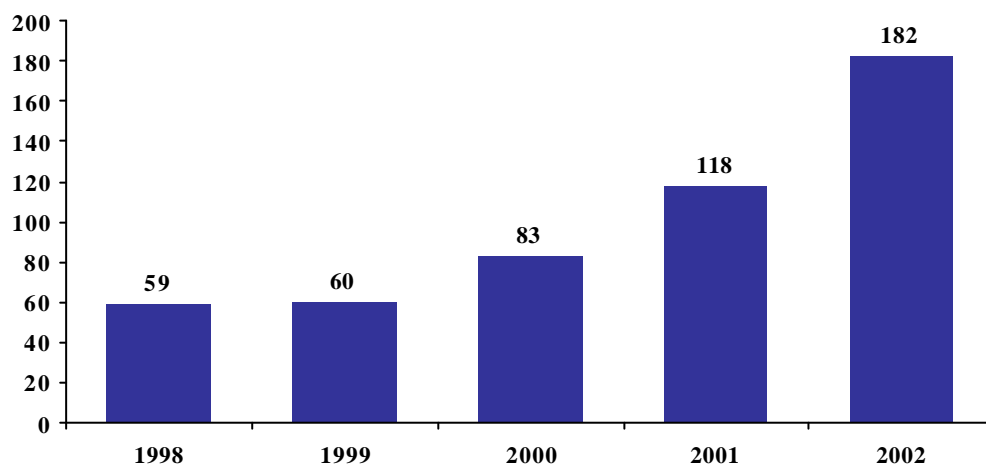
The first conference of the **OECD Global Forum on Competition** took place in October 2001, the second in February 2002; non-OECD members also participated in these conferences. Both conferences focused particularly on the interests of the developing countries of which more than 20 countries were represented.

Also in October 2001 the **International Competition Network (ICN)** was called into being in New York. The founding members were the competition authorities of Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the UK, the USA and Zambia. The ICN is to offer competition authorities from all over the world an informal forum which also embraces the developing countries in particular. Its objectives are to reach a better understanding of the different concepts of competition law and competition policy through the exchange of experience, to create possibilities for convergence in the treatment of substantive competition problems and procedural issues and to provide assistance to new competition regimes. The President of the Bundeskartellamt is a member of the Steering Group which is the supreme organ of the ICN. The first annual conference of the ICN took place in Naples in September 2002 with a total number of 58 participating authorities and numerous representatives of the private sector. The conference dealt in particular with such themes as competition advocacy as well as the different prohibition criteria and notification

procedures in merger control. The Bundeskartellamt will be hosting the annual conference of the ICN in 2005.

### **Bilateral consulting**

The Bundeskartellamt places great emphasis on fostering bilateral relations with other countries' competition authorities. In 2001 and 2002 a total number of 300 experts from 20 countries visited the Bundeskartellamt (not included in these figures are contacts within EU and to North America). The events and seminars, some of which took up several days, dealt with general and specific issues of competition law as well as issues relating to the implementation of country-specific competition rules. The Bundeskartellamt is also committed to providing advice on competition law abroad. Experts were sent to participate in seminars and workshops, for example in the People's Republic of China, Kenya, Malaysia, Hungary, Pakistan, Vietnam and central and eastern Europe.

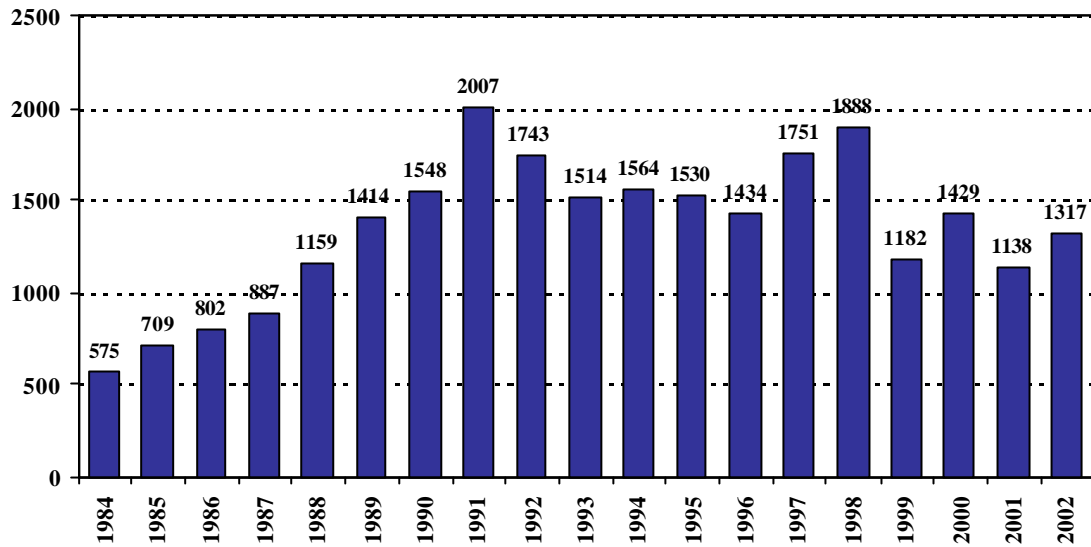


*Foreign visitors to the Bundeskartellamt (without EU countries and North America)*

## **3. Merger control**

### **Statistical overview**

Despite the worldwide decline in merger activity, the number of mergers notified to the Bundeskartellamt in 2001 and 2002, i.e. 1568 and 1584, respectively, remained at the constantly high average level recorded in previous years.



*Completed mergers notified to the Bundeskartellamt 1984 - 2002*

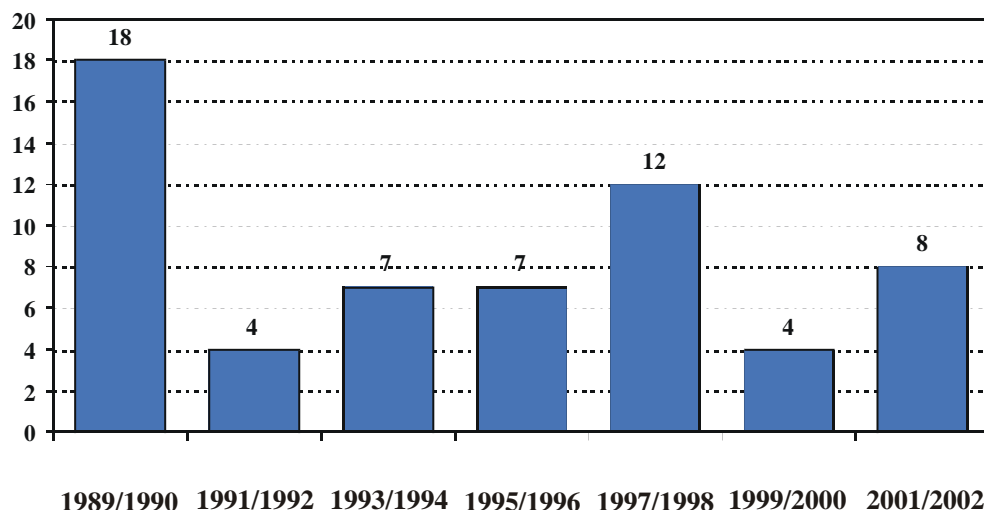
In 2001 and 2002 the Bundeskartellamt concluded a total of 95 main examination proceedings by formal decision, i.e. more than in the period covered by the previous report of 1999 and 2000 (89). In 62 of the 95 cases a clearance decision was issued, eight cases were prohibited and 25 cases were cleared subject to conditions or obligations. In 23 cases either the respective projects were given up by the parties concerned during the main examination proceedings or the proceedings were discontinued. All formal decisions are published on the Bundeskartellamt's Internet website at [www.bundeskartellamt.de/fusion.htm](http://www.bundeskartellamt.de/fusion.htm).

## Prohibitions

The Bundeskartellamt prohibited the following eight planned mergers during the period covered by the report:

1. Sanacorp / Anzag: Pharmaceutical wholesale business (Appeal on points of law pending before the Federal Supreme Court)
2. DPAG / trans-o-flex: Parcel delivery (Appeal filed at the Düsseldorf Higher Regional Court)
3. E.ON / Gelsenberg: Supply of gas and electricity  
(Granted ministerial authorisation final)
4. E.ON / Bergemann: Supply of gas and electricity (Granted ministerial authorisation final)
5. Liberty / KDG: Cable TV
6. Brunata/Viterra: Billing of heating costs
7. Holtzbrinck / Berliner Verlag: Subscription daily newspapers (Ministerial authorisation applied for)
8. Nehlsen / Rethmann / SWB / Bremerhavener Entsorgungsgesellschaft: Waste management

Since merger control was introduced in 1973, a total of 139 concentrations have been prohibited. 89 prohibitions were final, in five cases appeal procedures or appeals on points of law are still pending. In 45 cases the prohibition was finally lifted or declared to have been settled.



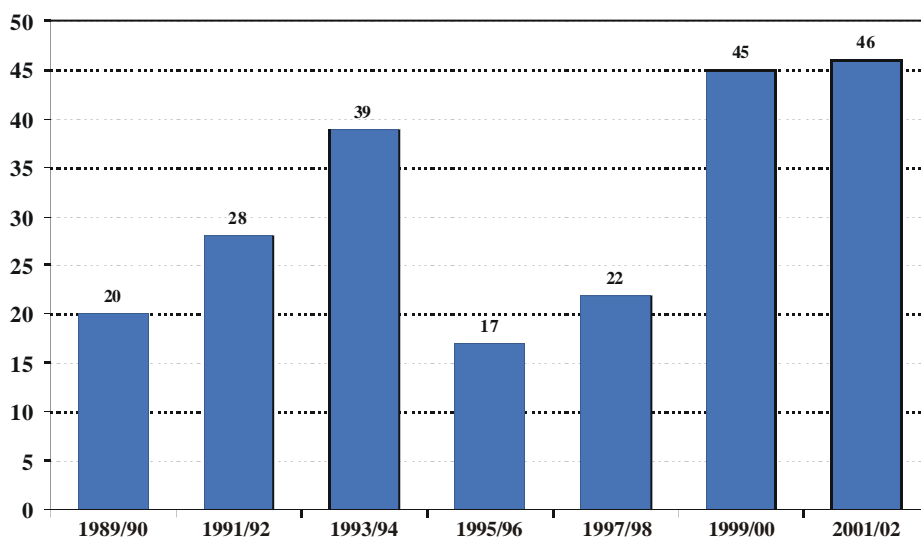
*Number of prohibitions (according to reporting period)*

### Clearances subject to conditions or obligations

During the period covered by the report 25 concentration cases were cleared subject to obligations or conditions. This marks a considerable increase in number compared with the previous reporting period 1999/2000 (ten cases). The relevant decisions are also available at the Internet address [www.bundeskartellamt.de](http://www.bundeskartellamt.de)

### Pre-notification stage cases

In the period covered by the report there were 46 cases which, on account of a preliminary examination by the Bundeskartellamt or after the notification, were abandoned, modified or terminated without a formal prohibition. The total number thus rose to 391. In the Bundeskartellamt's view these figures are a clear indication of the effectiveness of merger control as in all cases there were considerable competition concerns within the meaning of the prohibition criteria.



Number of pre-notification stage cases (according to reporting period)

### Mergers in the network-based energy sector

In 2001 and 2002, one area of focus of German merger control was once again concentrations in the energy-supply markets. During the period covered by the report the Bundeskartellamt examined a total of 82 acquisitions of shares in local electricity distributors amounting to 10 per cent or more by the three large grid companies (RWE, E.ON and EnBW).

*It prohibited the planned indirect takeover of a majority stake in **Ruhrgas AG** by **E.ON AG** on account of the effects on competition likely to occur from this in various gas and electricity markets:*



*According to the Bundeskartellamt's evaluation the concentration will lead to a strengthening of the dominant position of Ruhrgas in supplying gas distributors (grid gas sector) and in supplying large industrial/commercial gas customers and local gas distributors. Ruhrgas is Germany's largest grid gas company. Its domestic gas sales account for nearly 60 per cent of the total domestic natural gas output. At the grid gas level Ruhrgas' market share in the supply of gas distributors is at least 88 per cent in the company's distribution area and approx. 58 per cent in the whole of Germany. Moreover, Ruhrgas is the only grid gas company with paramount access to all gas production sources relevant for supplying the German market. It has the largest grid gas network which gives it paramount access to both suppliers and buyers. An additional factor are storage capacities which are significant for balancing fluctuations in sales. The combination of Ruhrgas and E.ON will structurally secure Ruhrgas' sales to E.ON affiliates and holdings. This will considerably diminish the likelihood of any effective competition from other grid gas companies.*

*On the other hand E.ON's and RWE's joint dominant position in the German markets for supplying large industrial/commercial electricity customers and regional electricity distributors/suppliers as well as municipal utilities will be strengthened as the concentration gives E.ON considerable influence over the supplier of primary energy, Ruhrgas.*

*After the Bundeskartellamt had issued a prohibition decision the companies concerned filed an appeal at the Düsseldorf Higher Regional Court and applied to the Federal Minister of Economics and Technology for a ministerial authorisation.*

*On 5 July 2002 the ministerial authorisation was granted subject to obligations. The main reason the Ministry gave for the authorisation was that Ruhrgas' international competitiveness will be strengthened on the procurement side. According to the Ministry, the long-term purchase of inexpensive natural gas, particularly from Russia, will improve the security of supply in Germany. On 11 July 2002, following complaints filed by competitors of the participating companies against the ministerial authorisation, the Düsseldorf Higher Regional Court ruled that the authorisation was to be suspended. On 18 September 2002 the Ministry confirmed its authorisation subject to more rigid obligations. However, the Düsseldorf Higher Regional Court upheld its preliminary injunction in its ruling of 16 December 2002.*

*There was no decision on the merits after all appellants had withdrawn their appeal. This had happened against the background of negotiations between the parties concerned in which E.ON/Ruhrgas undertook a commitment to compensate the appellants.*

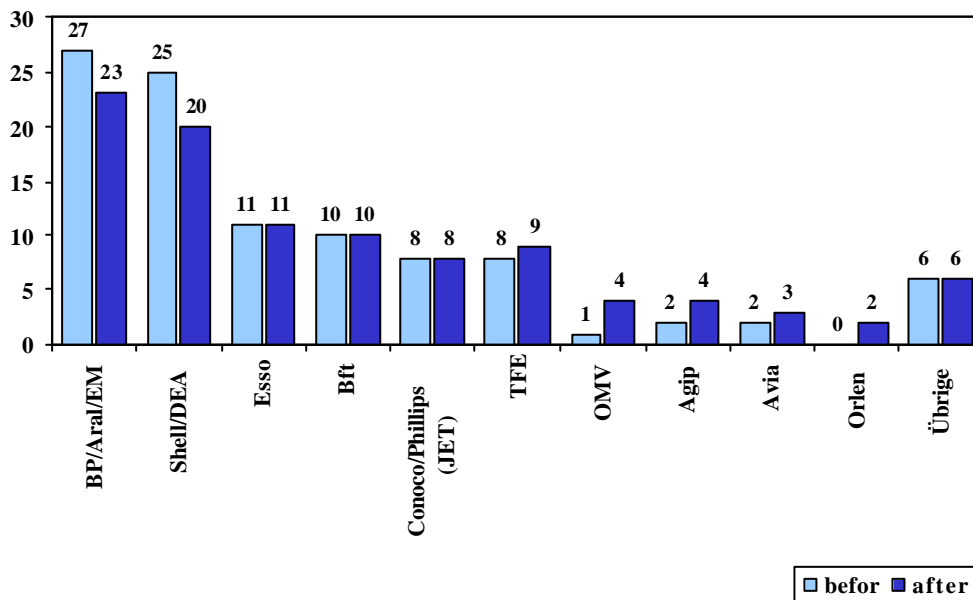
### **Mergers in the mineral oil sector**

Two mergers which could only be cleared subject to obligations resulted in the German petrol station market being extensively restructured.

*The planned mergers of **Deutsche Shell GmbH** with **DEA Mineralöl AG** and **Deutsche BP AG** with **Veba Oel AG (Aral)**, originally notified to the European Commission, were referred upon request to the Bundeskartellamt where these affected the mineral oil sector. Both projects in the form notified fulfilled the prohibition requirements as they were likely to create dominant*

positions particularly in the domestic petrol station market. Combined with another supplier, both Shell/Dea and BP/Aral would independently of the other merger have reached a market share of over 50 per cent thus fulfilling the elements of an oligopoly. Both mergers could nevertheless be cleared under the strict obligation that the market shares be reduced to a level below the threshold for collective market dominance through the sale of petrol stations. Shell/DEA and BP/Aral thus undertook to sell 5.3 per cent and 4 per cent, respectively, of the total sales volume of their domestic petrol stations to third companies. With a network comprising around 16,000 petrol stations, this involved the sale of approx. 1500 petrol stations. In order to give the buyers the possibility to establish a stable competitive position, the companies furthermore undertook to supply fuel to refinery-independent buyers on favourable terms for a period of up to five years.

The obligations relating to sales were fulfilled by Shell/Dea and BP/Aral within the specified time limit. The Polish company ORLEN and the Austrian OMV, which acquired approx. 500 and 280 petrol stations, respectively, from BP/Aral's pool of petrol stations were so far either not represented in the German petrol station business at all or only to a small extent. A third large acquiring company is TotalFinaElf which took over about 130 petrol stations from the Shell/DEA pool. In addition a large number of small and medium-sized mineral oil companies and petrol station operators took over smaller groups of or individual petrol stations from Shell/DEA.



Market shares in the German petrol station market  
(before / after imposition of obligations by the Bundeskartellamt)

### Newspaper mergers

Recently the market entries of “Frankfurter Allgemeine Sonntagszeitung” and “Financial Times Deutschland” have resulted in a positive development of competitive structures in the daily newspapers industry. This is now countered by an acceleration of the concentration process,

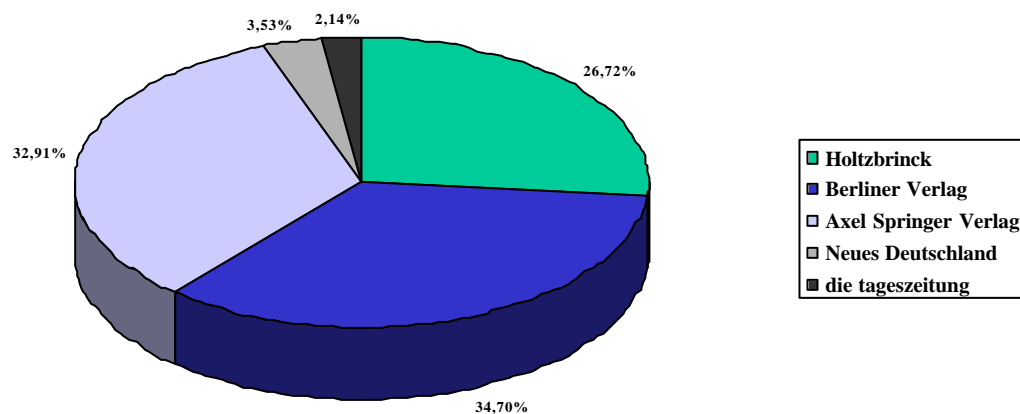
particularly in regional subscription dailies. In view of this development and its strategy to focus on its core business, Gruner + Jahr intends, inter alia, to part with the regional subscription daily "Berliner Zeitung".

The Bundeskartellamt prohibited **Holtzbrinck KG** (Tagesspiegel, city magazine Zitty and other publications) from acquiring control of **Berliner Verlag KG** (among other publications, the daily newspapers Berliner Zeitung, Berliner Kurier and the city magazine Tip). The merger would lead to the creation of a dominant position held by Holtzbrinck in the reader market for regional subscription dailies in Berlin and the Berlin reader market for city magazines. With more than 60% Holtzbrinck would hold a market share almost twice as high as the one held by its closest competitor, Axel-Springer-Verlag. Holtzbrinck might secure or even further increase this advance by taking strategic measures such as designing newspapers specifically for the eastern and western parts of Berlin or by advertisement price strategies. This must be seen particularly against the background of the strong links between readers and "their" newspaper (reader-newspaper relationship). These are stronger in the case of regional subscription dailies than with other consumer goods.

Holtzbrinck would not obtain a leading position in the advertising market as a result of the merger. However, Axel-Springer-Verlag's continually stronger position in this market segment would be reduced in the long term in favour of Holtzbrinck due to the close connection between reader and advertising markets. Consequently, Holtzbrinck's dominant position in the reader market is not relativised by the market conditions in the advertising market.

After a merger Holtzbrinck would furthermore obtain a dominant position with the two clear city magazine leaders "Tip" and "Zitty".

After the Bundeskartellamt's prohibition decision the parties to the merger applied for a ministerial authorisation from the Federal Minister of Economics and Labour. The decision is pending.



Market shares in the reader market for regional subscription dailies in Berlin

## **Mergers in the waste management sector**

There was considerable merger activity in the waste management sector. The 78 planned concentrations notified during the reporting period involved above all the large market participants RWE Umwelt, Trienekens and Rethmann. This must be seen against the background of the partial privatisation of local waste management companies and plants, which offers private market participants the opportunity to secure contracts for the collection and transport of domestic waste in the long term and to gain access to scarce plant capacities.

*The Bundeskartellamt prohibited the planned **Nehlsen/Rethmann/swb/Bremerhavener/Entsorgungsgesellschaft** merger which had been referred by the European Commission under Article 9 of the EMCR. According to the Bundeskartellamt, the merger would have resulted in single or collective dominant positions in regional markets for the disposal, collection and recycling of domestic and commercial waste in the Bremen / Lower Saxony area. The project was also prohibited because it violated the ban on cartels.*

*The planned **Edelhoff / Lobbe / AMK Iserlohn** merger in its original form was abandoned by the participating companies following merger control concerns by the Bundeskartellamt. In the Bundeskartellamt's view, Edelhoff, by means of a complicated participation and contract arrangement, would ultimately have gained a competitively significant influence on the waste management company AMK ("Abfallentsorgungsgesellschaft des Märkischen Kreises") and thus on the operative disposal services business. An alternative arrangement without Edelhoff acquiring a share in AMK was considered by the Bundeskartellamt as not subject to notification although it still involved a certain number of contractual relations. A complaint filed against this decision by a third party admitted to the proceedings with the Düsseldorf Higher Regional Court is pending.*

## **4. Control of positions of economic power**

The significance of abuse control of powerful and dominant companies further increased during the reporting period. A clear focus was the network-based energy sector. In the electricity sector the first prohibition decisions on account of abusively excessive fees for network use were issued in early 2003. Further abuse proceedings conducted by the Bundeskartellamt related, inter alia, to the unfair hindrance or the squeezing out of competitors from the market and calls for boycotts against companies.

### **Network-based energy**

Having set up, with effect of August 2001, a separate Decision Division for enforcing non-discriminatory access to electricity networks, the Bundeskartellamt was able to considerably intensify its **control of abusive practices in the electricity sector**.

With regard to the enforcement of the principle of competition, the Bundeskartellamt's cooperation with the competition authorities of the *Länder* and the Federal Ministry of Economics and Labour, in particular with the latter's task force on network access, is also of great significance. The final report of the "**working group on electricity network use**" established by the Federal and *Länder* competition authorities proved a useful guidance not only for the competition authorities but also for market participants and courts dealing with network use issues.

Some of the central problems which arose after the opening up of the market no longer play an important role today. Practices such as the general denial of access to electricity networks now only occur in exceptional cases. A number of other obstacles to electricity network access such as the demanding of transfer fees and the so-called "double-contract model" could also be eliminated.

The main problem in Germany now is the excessive level of fees for network use. In view of the high fees for network use, alternative electricity providers have hardly any possibility to make attractive offers to end customers. In exercising its abuse control the Bundeskartellamt does not accept the reference to the Associations' Agreement on electricity II plus ("VV Strom II plus") by network operators to justify abusive conditions for network use or abusive fee-structuring. While the "Associations' Agreement on electricity II plus" did bring about improvements in terms of competition, one of its decisive weaknesses is that its principles on establishing prices threaten to perpetuate the calculation of excessive fees for network use.

Since the autumn of 2001 the Bundeskartellamt has examined the fees for network use of 23 electricity network operators, initially in informal preliminary proceedings. By the end of 2002 twelve formal abuse proceedings had been initiated. In two of these proceedings, i.e. against Stadtwerke Mainz and Thüringer Energie AG, formal prohibition decisions were issued in early 2003. The companies concerned have appealed against the decisions.

*In August 2002 the Bundeskartellamt issued a warning to **Stadtwerke Mainz AG** on the suspicion of excessive fees for network use. Investigations had shown that, based on the comparative market concept, the fees for network use charged by Stadtwerke Mainz were clearly higher than those of the comparative company RWE Net AG. The basis for this result was a comparison of the respective revenue from fees for network use in relation to the respective length of the distribution network (revenue per kilometre of transmission line). Such a revenue-based comparison is considerably more precise than comparisons based on single purchases because it allows for a complete quantity weighting of the fees for network use. Quantity weighting, which basically takes into account a network operator's customer structure, was not possible before as the necessary figures were not publicly available.*

*In the present case the Bundeskartellamt established that Stadtwerke Mainz as a municipal utility derived clearly higher turnovers from network use than RWE Net AG which was taken as a comparison. However, the level of the differences established in the turnovers achieved per km of transmission line is partly justified since the costs for laying and maintaining electricity lines (which due to its urban structure are higher in the Mainz supply area than in the RWE*

*supply area which has a predominantly rural structure) are to be taken into account, in favour of Stadtwerke Mainz. In addition, the higher fees charged by the upstream high voltage network operator in comparison to RWE Net were taken into account in favour of Stadtwerke Mainz. However, even taking into account these cost disadvantages in favour of Stadtwerke Mainz, its revenue per kilometre of transmission line is still higher than that of RWE Net.*

*In addition, even taking into account the fee reductions that had meanwhile been carried out the suspicion remained that the fees were abusively excessive. A prohibition decision was therefore issued to Stadtwerke Mainz in April 2003. The case is pending before the Düsseldorf Higher Regional Court.*

*In the proceedings against **Thüringer Energie AG (TEAG)** the adequacy of its fees for network use were assessed under economic aspects on the basis of a cost evaluation. The basis for cost control are first of all the criteria laid down in the report by the “working group on electricity network use” of the Federal and Länder competition authorities.*

*If non-accountable cost items are deducted, TEAG’s network costs, which form the basis for calculating its fees for network use, are reduced by about 10 per cent. In February 2003 a prohibition decision was issued. The case is pending before the Düsseldorf Higher Regional Court.*

*In early 2003 the Bundeskartellamt issued a ruling on abusive practices against the electricity network operator RWE Net AG on account of excessive metering and billing prices. In addition the Bundeskartellamt has been working towards creating a more competitive environment for the procurement of balancing energy. The Bundeskartellamt was thus able to discontinue its proceedings against several electricity network operators, suspected of charging inappropriate and in some cases fictitious costs for balancing energy to companies requesting network access, without issuing a ruling after the network operators had agreed to introduce tendering systems for the procurement of balancing energy which are conform to the principles of competition.*

In contrast to the development in the electricity sector, the competition situation in the **gas sector** has hardly improved as a result of liberalisation. Although progress has been made on some individual issues, the “Associations’ Agreement on natural gas II”, passed in May 2002, is not appropriate for removing existing deficits in the area of network access. The negotiations on a further improvement of the Associations’ Agreement in terms of competition failed in the spring of 2003. If at all, there have only been first signs of effective transmission competition in the gas sector.

In the Bundeskartellamt’s experience the course Germany has taken in opening up competition in the network-based energy sector by opting for negotiated network access backed by effective abuse control under competition law has, despite some remaining problems, proved to be the right one, at least in the electricity sector. In view of the market structures in the German network-based energy sector with hundreds of network operators at different network levels, this approach to liberalisation is superior to a comprehensive and detailed ex-ante price

regulation of all network operators. The amendment of the **Energy Industry Act**, passed in April 2003, embodied the immediate enforceability of rulings in abuse cases against energy network operators in law as a general rule, thus strengthening the competition authorities' instruments. In addition, it acknowledged the legal presumption of the "good professional practice" of the Associations' Agreements on gas and electricity. These private law agreements at association level have thus been "juridified" to a certain extent. However, competition law remains fully applicable. The "juridification" of the Associations' Agreements does not create an area where competition law does not apply.

The new **European Internal Market Directives for the energy sector** and the new Regulation on cross-border trade in electricity set important new rules on the unbundling of transmission and distribution network operators, the supervisory authorities' areas of responsibility and consumer protection. These rules require regulatory adjustments of the German legal framework for the energy sector. The aim is to create an effective European internal energy market. As part of the implementation of the European directives into national law the regulatory framework for the network-based energy sector must be fundamentally revised and the current competition regulatory regime restructured.

### **Telecommunications**

In the area of abuse control in the telecommunications markets the Bundeskartellamt does not take action under the ARC if there is a legal basis under the Telecommunications Act (TKG) for the Regulatory Authority for Telecommunications and Posts to take action with regard to a specific conduct. Competence for merger control and the enforcement of the ban on cartels, on the other hand, lies with the Bundeskartellamt. In addition, the Bundeskartellamt can directly apply the competition rules under European Community law.

In order to ensure that uniform assessment standards are maintained in sector-specific regulation under the Telecommunications Act on the one hand and general competition control under the ARC on the other, the current Telecommunications Act provides for the **Bundeskartellamt' cooperation** in decisions taken by the Regulatory Authority: The Bundeskartellamt has a veto right on the definition of product and geographic markets and on establishing the existence of a dominant position. In addition, it is to be given an opportunity to comment on measures in regulating dominant firms (regulation of fees and network access as well as specific abuse control).

The Regulatory Authority's proceedings in which the Bundeskartellamt was involved concerned in particular the following issues: Market definition of fixed networks (separate market for business customers in Berlin, separate market for international calls to individual target countries), cost-price squeeze (increase of fees for analog fixed-network connections), leased line services (market definition, supply times, contract penalties), bundle products (option tariffs), rebates, mobile communications markets and cost deficits in broadband Internet connections.

As a result of the new legal framework for the telecommunications sector at EU level, regulation of telecommunications at national level will have to be thoroughly restructured. The new **EU telecommunications law**, in force since early 2002, comprises four directives (universal service, access, licensing and framework directives) which are to be implemented into national law by mid-2003. The directives aim at a more flexible application of regulatory instruments with national regulatory authorities having more leeway in selecting measures, and at giving the European Commission greater influence on individual regulatory proceedings.

### **Waste management sector**

*In the market for the recovery and recycling of sales packaging discarded by private end consumers, **Der Grüne Punkt – Duales System Deutschland AG (DSD, “The Green Dot”)** holds a dominant position with a market share of over 95 per cent. The Bundeskartellamt initiated proceedings against DSD on the suspicion of its calling for refusals to sell and refusals to buy, and in October 2001 searched DSD’s business premises as well as further companies and trade associations. The investigations substantiated the suspicion that DSD together with the Confederation of German Trade Associations (BDH), the trademark association, Metro AG and the German Waste Management Association (BDE) had called for a boycott against suppliers of alternative waste management solutions. The Bundeskartellamt subsequently imposed administrative fines totalling approx. 4.4 million Euro on persons responsible at DSD and on DSD as a party indirectly concerned as well as on persons responsible at the associations and companies concerned and on these associations and companies as parties indirectly concerned. The accused have filed appeals against the administrative fines at the Düsseldorf Higher Regional Court.*

### **Air Traffic**

*In February 2002 the Bundeskartellamt prohibited **Deutsche Lufthansa AG** from demanding a price for a one-way ticket on the Frankfurt-Berlin/Tegel route which is not at least € 35 above Germania Fluggesellschaft mbH’s price on this route, as long as Lufthansa does not have to charge more than € 134 as a result. The decision was declared to be immediately enforceable. Lufthansa filed an appeal against this decision at the Düsseldorf Higher Regional Court. In November 2001 Germania started operating flight services on this important German domestic route where it is Lufthansa’s only competitor. After Germania’s market entry Lufthansa introduced a new tariff only on this route, which represented a dramatic price reduction compared to its previous, fully flexible economy tariff. The Bundeskartellamt sees Lufthansa’s pricing strategy as an attempt to squeeze its new competitor out of the market and fears that emerging competition will be substantially impaired as a result. In a preliminary ruling the Düsseldorf Higher Regional Court largely confirmed this evaluation. In addition, the court made it clear that, contrary to Lufthansa’s viewpoint, the decision does not amount to active market structure control by the Bundeskartellamt. Instead, the Bundeskartellamt was protecting the*



*newcomer Germania from being hindered by the dominant Lufthansa in a way which cannot be objectively justified. Such protection was the primary task of abuse control. The freedom in price-setting which existed in principle reached its limits where dominant companies applied pricing strategies which were aimed at and actually resulted in competitors being squeezed out of the market. The decision on the merits of the case is pending.*

## **5. Ban on cartels and cooperation**

### **Fines proceedings**

During the reporting period the Bundeskartellamt intensified its prosecution of price and quota cartels and submission agreements and focused its activities particularly on fighting cartels. It uncovered a number of cartel agreements and conducted several administrative fine proceedings. The proceedings are directed both against those directly involved in such agreements and those exercising supervisory functions in the companies. Moreover, in several cases fines were imposed on the companies concerned. The total amount of fines imposed was approx. DM 42.6 million or EUR 21.8 million in 2001 (of which DM 42.1 million or EUR 21.5 million were imposed on companies) and approx. EUR 4.5 million in 2002 (of which EUR 4.2 million were imposed on companies). Among others, the following administrative fines proceedings were of significance during the reporting period:

*In July 2002 the Bundeskartellamt conducted a nationwide search of 30 companies in the **cement sector** on suspicion of a quota cartel. In April 2003 fines amounting to a total of approx. 661 million Euro were imposed on the six largest German cement producers. Five of the six accused companies have filed appeals at the Düsseldorf Higher Regional Court.*

*Proceedings were also conducted against manufacturers of **ready-mixed concrete** in the Lower Bavaria area on account of violating cartel law. Fines totalling approx. EUR 1.6 million were imposed on seven companies and those responsible. Most of the decisions are final.*

*Further proceedings were conducted against eight companies in the **ready-mixed concrete sector** in the north-east Westphalia and Osnabrück area on account of illegal price and quota agreements. Fines totalling approx. EUR 2.7 million were imposed on the companies and those responsible. The decisions are final.*

*In December 2001 proceedings were initiated against companies in **the ready-mixed concrete and ready-mixed concrete pump sectors** by searching companies and private premises in the Dresden area. The investigations on the suspicion of continuing price and quota agreements have not yet been concluded.*

*Having conducted searches of companies in the **paper wholesale sector** in April 2000, the Bundeskartellamt meanwhile served written charges on nine companies and 54 persons on suspicion of their involvement in illegal price agreements.*

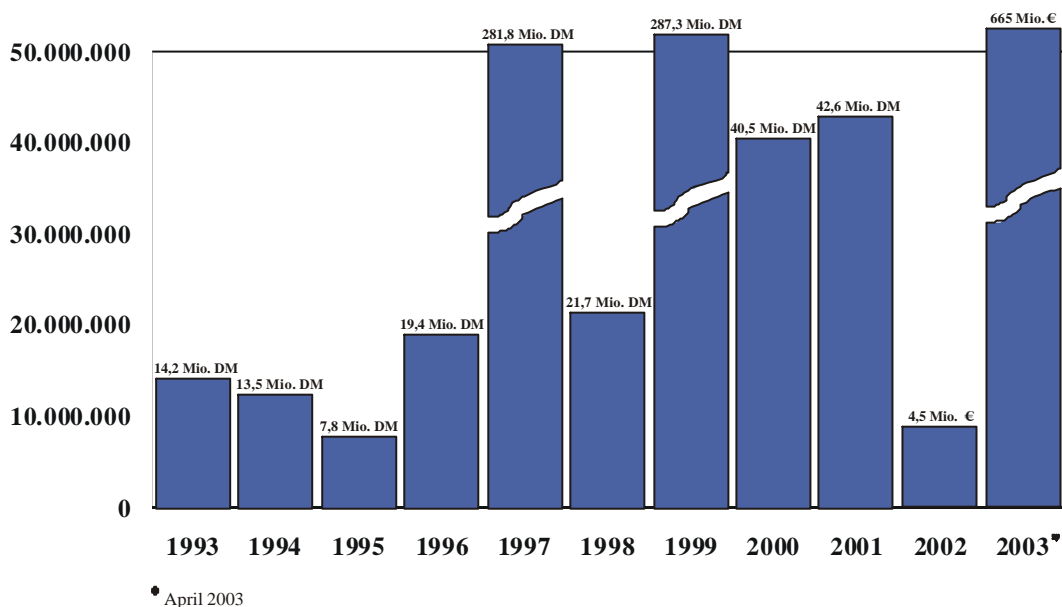
*Parallel to investigatory measures by the US competition authorities, the Bundeskartellamt conducted a search operation in July 2002 on the suspicion that **removal firms** for several years concluded and operated price-fixing and market allocation agreements in the case of US*

contracts for shipping household effects of members of the US armed forces based in Germany. These proceedings are still pending.

Together with investigating officers from the public prosecutor's office the Bundeskartellamt in August 2002 searched several companies and private premises in the sectors of **pyrotechnic products** and small fireworks on the suspicion of cartel and submission agreements. The first written charges have been served upon those concerned.

At the end of 2002 the Bundeskartellamt searched nine companies and two private premises on suspicion of price and customer agreements between **paper plate** manufacturers. These proceedings are still pending.

In July 2002 the Bundeskartellamt conducted a search operation on the suspicion that several companies in the **insurance sector** had agreed premium increases in the industrial property and liability insurance business. Investigations are still in progress.



Fines imposed by the Bundeskartellamt

### Creation of the Special Unit for Combating Cartels (SKK)

In order to further improve the prosecution of cartels thus preventing anti-competitive agreements, if possible in their initial stages, the Bundeskartellamt set up a Special Unit for Combating Cartels (SKK) in March 2002. This new unit combines special material and personnel resources necessary for effectively preparing and carrying out on-the-spot cartel investigations and processing their results. The SKK is the central contact partner for all those wishing to inform the Bundeskartellamt about illegal agreements. This also applies to persons involved in illegal agreements, wishing to give up their cartel activities and make use of the Bundeskartellamt's leniency programme published in April 2000 ([www.bundeskartellamt.de/-bonusregelung.html](http://www.bundeskartellamt.de/-bonusregelung.html)). This programme has meanwhile proved to have considerable effect in the prosecution of cartels. Since its establishment in March 2002 until the end of 2002 the SKK carried out on-the-spot investigations in eight fine proceedings involving the search of 149

companies and 20 private premises. Some of these were cross-authority investigations, i.e. they were carried out in close cooperation with the prosecuting authorities and other cartel authorities.

### **Other cartels (Section 7 of the ARC)**

The Bundeskartellamt's application practice during the reporting period has confirmed that only a limited number of business cooperations can be considered for examination under Section 7 of the ARC. This provision, in force since 1999, allows for the exemption of cartels not fulfilling the preconditions of standards and types cartels, specialisation cartels, cartels of small and medium-sized enterprises, rationalisation cartels or structural crisis cartels, if they contribute, among other things, to improving the development, production, distribution, procurement, taking back or disposal of goods and services. During the reporting period one formal decision was issued on the basis of this exemption provision.

*In the proceedings "job market for Germany" the Federal Supreme Court found that the preconditions for an exemption under Section 7 of the ARC were fulfilled. In August 1999 the Bundeskartellamt had rejected an application by three national newspaper publishers (Süddeutsche Zeitung GmbH, Axel Springer Verlag AG, Druck- und Verlagshaus Frankfurt am Main GmbH) for the exemption of a combination of job advertisements under the title "job market for Germany". The Berlin Court of Appeals had confirmed this decision. The parties involved had subsequently lodged an appeal on points of law with the Federal Supreme Court. In the appeal proceedings on points of law Axel Springer Verlag AG withdrew from the "job market for Germany" advertisement combination. The two remaining publishers subsequently applied for an assessment to have the proceedings continued; the application was successful. The Federal Supreme Court states in its decision that decisions under Section 7 of the ARC on the exemption from the prohibition of cartels requires a comprehensive assessment of proportionality. In the case of the "job market for Germany" advertisement combination, the cooperation would have resulted in an improved and extended range of services offered. The court held that the planned combination of job advertisements not only had the advantage of making it easier for advertising customers to combine job advertisements but it also constituted national job advertising space which was perceivable as such and thus created an additional product in the market. The Federal Supreme Court thus essentially focused on the special features of the job advertising market.*

*The two publishers Süddeutsche Zeitung GmbH and Verlagshaus Frankfurt am Main GmbH subsequently filed another application for exemption under Section 7 of the ARC for a combination of job advertisements under the title "job market for Germany". On the basis of the evaluation criteria and findings of the Federal Supreme Court, the Bundeskartellamt considered the requirements for an exemption to be fulfilled and granted the request for the duration of five years. FAZ GmbH has lodged an appeal against this decision.*

## 6. Vertical Agreements

During the reporting period the Bundeskartellamt conducted several proceedings on account of violations of the prohibition of abusive price recommendations and the prohibition of vertical resale price maintenance agreements.

*Proceedings against a manufacturer of baby, children and youth furniture, **PAIDI Möbel GmbH**, resulted in the imposition of fines amounting to EUR 110,000 on PAIDI and a high-ranking member of staff. Between 1999 and the end of 2001 PAIDI applied economic pressure on three authorized dealers known for their “active pricing” strategies, to induce them to raise their sales prices for PAIDI products. The administrative order for imposing a fine became final after PAIDI had withdrawn its appeal.*

*The Bundeskartellamt imposed a fine totalling DM 100,000 on **Detlev Louis Motorrad Vertriebs-GmbH** as a party indirectly concerned on account of violating the prohibition of abusive price recommendations. During the 1990s the company, a well-known specialised dealer for motorcycle clothing, spare parts and accessories, sold its products through several branch stores and a number of franchise operations. Among other things, Detlev Louis Motorrad Vertriebs-GmbH failed to indicate in circulars sent to its franchisees between 1997 and 2000 that the prices stated were only price recommendations and non-binding. The order to impose an administrative fine is final.*

## 7. Public Procurement Law

Since 1 January 1999 the Bundeskartellamt has been responsible for reviewing the award of public contracts. The two public procurement tribunals set up at the Bundeskartellamt review, upon application, whether public contracting entities are meeting their obligations. Public contracts principally have to be awarded under competitive conditions and through transparent procedures. The bidders must meet certain requirements with regard to their expertise, efficiency and reliability. Other or more far-reaching requirements may only be demanded from bidders if federal law or the laws of a *Land* provide for this. In principle a contract is awarded to the bidder submitting the most economical offer.

The number of proceedings conducted by the public procurement tribunals has increased significantly. Compared to the 1999/2000 period (80 cases) the number of cases almost doubled in the years 2001/2002, i.e. to 150. There was also a steep upward tendency within the last two-year period. The two Federal Public Procurement Tribunals received 49 applications for review in 2001 and 101 in 2002. Of these, 106 proceedings were concluded by formal decisions.

*The public procurement tribunals’ biggest case related to the tender for the **toll system for heavy goods vehicles** put out by the Federal Ministry of Transport, Building and Housing (contract awarding authority). The contract awarding authority intends to replace the current*

*time-related vignette system for heavy goods vehicles by a distance-related system in line with the “user pays principle”, the so-called “HG V toll”. The subject-matter of the award proceedings was the tender for a comprehensive service contract comprising the procurement, funding, establishment and operation of a fee-levying and control system for the distance-related HG V toll on German motorways.*

*The 2nd Public Procurement Tribunal received three applications for review regarding the “HG V toll”. What was ultimately deciding was the decision on the third application filed by AGES Maut System GmbH & Co. KG (partners including Vodafone, Aral, Shell) in July 2002. Basing its position on several expert opinions, AGES held that the bidding syndicate ETC (Deutsche Telekom, Daimler Chrysler Services, Cofiroute) did not fulfil the minimum technical requirements set out in the tender specifications and thus was to be excluded from the further proceedings. On account of the special economic significance of the HG V toll for the Federal Government, the contract awarding authority applied for a premature award which at the end of July 2002 was rejected as unfounded by the 2<sup>nd</sup> Public Procurement Tribunal.*

*In September 2002 the Public Procurement Tribunal finally rejected AGES’s application for review in the main issue as unfounded. The accusations brought by AGES against ETC’s system both with regard to the efficiency of its manual log-in system and the efficiency and security of its control system did not prove to be sound. The complaint filed with the Düsseldorf Higher Regional Court was withdrawn.*

## **8. Prospects**

The **prosecution of cartels** will continue to be a particular focus in the Bundeskartellamt’s activities. Cartel investigations will be considerably intensified through the deployment of the Special Unit for Combating Cartels (SKK). In addition, a decisive improvement is that the SKK is the central contact partner for any informant as well as for companies and company representatives wishing to take advantage of the leniency programme and give up their participation in a cartel. The Bundeskartellamt’s positive experience with the leniency programme and the increasing cooperation with public prosecutors in Germany and foreign competition authorities in prosecuting cartels have shown that the risk of being uncovered and prosecuted has greatly increased for those participating in illegal price and quota agreements.

Since liberalisation in 1998 the **control of abuse practices in the network-based energy sector**, particularly in the area of fees for electricity network use, has become a special focus of the Bundeskartellamt’s work. The abuse proceedings conducted by the Bundeskartellamt in this area prove how important this task is. The coming months will show how the future regulatory framework for the energy sector will be shaped by the provisions under European legislation and what new tasks have to be taken up by the Bundeskartellamt.

In spite of the general decline in the number of mergers the number of main examination proceedings and prohibitions increased during the reporting period. The Bundeskartellamt’s vigilance in **merger control** is of central importance to the protection of competition. The

number of planned mergers which could be cleared subject to conditions or obligations shows that the Bundeskartellamt does not stand in the way of company acquisitions if, in the event of competition problems, the parties involved are able to find a solution which is compatible with competition.

The reform of the procedural rules of European competition law will have far-reaching effects on German competition law. The discussions on the **7th amendment to the ARC** will thus have to deal with the consequences for the existing notification and authorisation system as well as for the substantive rules. In applying the EC competition rules (Articles 81 and 82 EC), it will be crucial for the Bundeskartellamt's capacity to act that it adequately fulfils the role destined for a national competition authority within the new network of competition authorities (ECN) in the EU. Here, the criterion should be that the Bundeskartellamt receives all the procedural powers explicitly granted to national authorities under Regulation 1/2003. In addition, it will have to be examined whether the existing national fine provisions are appropriate to allow for cooperation with other Member State authorities.

Furthermore, the possibilities for cooperation with other competition authorities should not be limited to the application of EC competition rules. Under German law, the Bundeskartellamt's possibilities for exchanging information and mutual support in investigations are limited to the rather complicated judicial assistance procedures. Various European countries such as France, the Netherlands, Denmark and Norway meanwhile incorporated the rules on cooperation with foreign competition authorities directly in their competition laws. This facilitates cooperation. A similar solution should also be considered in Germany.

The Bundeskartellamt deems **intensified cooperation** necessary, particularly between the EU competition authorities and even beyond the EU, in order to ensure the effective enforcement of competition rules. It will therefore continue its active involvement in establishing and extending European and international networks.







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The Bundeskartellamt's Activity Report 2001/2002 in its full version is available on the Internet as a Bundestag publication.

Detailed information can be found on the Bundeskartellamt's website at  
[www.bundeskartellamt.de/tatigkeitsbericht.html](http://www.bundeskartellamt.de/tatigkeitsbericht.html).

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