BUNDESKARTELLAMT

Our Activities in 2003 and 2004

Activity Report 2003/2004

Abbreviated Version

June 2005

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Dear Reader,

Competition remains a fascinating and at the same time difficult topic. On the one hand it undoubtedly produces the best results for all market participants down to the consumer. On the other hand it constantly poses companies with new challenges and is thus often uncomfortable. For this reason a politically and economically independent institution is required to protect competition, partly against the short-term profit-making interests of individual companies and sectors, in order to ultimately secure the mid and long-term benefits of a competition system for all. In Germany this task is undertaken by the Bundeskartellamt and the competition authorities of the *Länder*. In view of continual change and developments within the markets, (international) framework conditions and also the "creativity" of companies, this is a permanent task which also constantly poses new challenges for the competition authorities.

In the years 2003 and 2004 the important cases examined and decided by the Bundeskartellamt concerned among others the energy sector, waste management industry, construction industry and the media sector. In addition the Bundeskartellamt's involvement in the amendment of the German Act against Restraints of Competition (ARC) and the Energy Industry Act (EnWG), the reform of the European procedural competition law and the European Merger Regulation played an important role. Besides combating competition restraints by companies the Bundeskartellamt has also actively promoted competition advocacy, namely promoting basic acceptance of the competition principle in industry and politics.

In 2003 and 2004, as in the last reporting period, a further area of focus of the activities of the Bundeskartellamt lay in international cooperation between the competition authorities. The European Competition Network (ECN) which was set up in May 2004 has proved successful in combating cross-border competition restraints within the European Union. At the same time significant progress was made in international cooperation between the competition authorities within the scope of the International Competition Network (ICN), of which the 4th Annual Congress of the ICN in Bonn was a further impressive example.

This brochure cannot illustrate the activities of this authority in the reporting period in their full range and depth. It has to limit itself to highlighting prominent aspects of areas of activity of the Bundeskartellamt in merger control, abuse control, cartel prohibition and public procurement law. Many significant individual cases and developments will therefore have to be left out of consideration. The more detailed full version of the Activity Report (in German) is available on our website at www.bundeskartellamt.de or can be ordered from the Bundeskartellamt.

All the work which the Bundeskartellamt undertakes to protect competition can only be 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 our work transparent and to encourage discussion on competition law and policy beyond the professional public. 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

Reinforcement of the principle of competition, “Competition Advocacy” and State Action

Competition is the best form of organisation to increase economic wealth and growth. Competition is not a zero-sum situation because competitiveness, growth and social advancement are interactive. However, for everyone to participate in competition clear rules of play are necessary such as set forth in the Act against Competitive Restraints (ARC). Their implementation is important in order for competition to control economic power and not the opposite where economic power determines market processes.

Therefore the central task of the competition authorities is to combat restraints of competition by companies. Merger control, the combat of cartels and abuse control are geared towards preventing competition restraints caused by private companies or, where restraints already exist, effectively prohibiting them.

Guaranteeing competition is an objective which cannot be undermined by other aspects. This is clear, for example from the discussion about whether mergers which prevent competition can be cleared purely on the basis of possible efficiency gains. However companies only have the incentive to actually realize efficiency gains and pass these on to the market participant if effective competition is in place. Competition is therefore a precondition for achieving efficiency advantages and the economic benefit associated with them.

Competition restraints in the broader sense are not initiated by private companies only. Often states themselves can cause them through laws, provisions or concrete administrative actions. Examples of this are the increase in state imposed regulations, state promotion of certain sectors, subsidies for individual companies or legally protected monopoly positions. Various sectors of the economy from agriculture to energy, post and telecommunications sector through to the free-lance professions such as lawyers, notaries and tax consultants are affected by state regulation provisions.

Competition restraints by the state raise the question of the justification of such intervention. Before state intervention is imposed it should be ascertained that the

services and work in question could not be more effectively performed in a competitive environment. Experience with de-monopolisation in the post and telecommunications sector shows that the competition principle also produces better results for consumers in the former traditional areas which fell under the responsibility of the state. Account of this should be taken in areas which are totally or partially exempt from competition. Competition releases innovative and growth potential and increases general wealth.

During the reporting period discussion intensified about the creation of national champions. Under competition law the same standards apply to national champions as for other companies. Size itself is no guarantee of success. According to experience only those companies will be successful who keep themselves fit by competing in the national markets. Only they are in a position to play an important international role in the long term. Hence competition in the national markets is not an obstacle but rather a precondition for global success.

Competition, growth and wealth are all the more interdependent in the global context. Only in competitive market structures can economic growth potential be released which contributes to national and international prosperity. Effective competition in the national markets is necessary to achieve welfare gains from free trade and direct investments.

Therefore the national competition authorities in the industrialized nations and also in the up-and-coming economies have a special role to play in reinforcing the competition principle. And the role of the state is to create a suitable regulatory framework in which market forces can develop freely and for the collective good.

The intensive efforts of the European Commission to analyse competition restraints in the free professions in the individual Member States and to forward the liberalisation process in this area are a step in the right direction. However insufficient attention is paid to the competition principle in practice. As in the words of the mentor of social market economy Franz Böhm, it has no lobby compared to single sectors, groups or companies. It is ultimately the responsibility of the state and its institutions to take account of the effects of its actions on competition and market mechanisms.

Even if the prosecution of competition violations by companies unquestionably remains the key task of the competition authorities, greater importance should be

placed worldwide in future on competition advocacy, that is promoting the competition principle beyond the confines of competition law, and with respect to state action.

7th Amendment of Act against Restraints of Competition (ARC)

The 7th Amendment, which was passed by the Bundestag and Bundesrat on 16/17 June 2005 will fundamentally change the ARC, which is the national working basis of the Bundeskartellamt and the competition authorities of the *Länder*. The amendment primarily implements the procedural adaptations to European law required by EU Regulation 1/2003 which came into force in May 2004. In addition it ensures the extensive adjustment of substantive German regulations to European competition law.

In German law, the current system of notification and authorisation of anti-competitive agreements will also be replaced by the principle of legal exception. Small or medium-sized cartels, however, will be granted special status. These will be granted entitlement to examination of their cooperation projects by the competition authorities over an interim period of four years as long as the agreement does not fall under Art. 81 EC. However, all agreements affecting cross-border trade will be excluded from this entitlement. In so far under this exemption provision smaller regional cooperations are expected to fall under the competence of the competition authorities of the *Länder*.

In addition, as under European competition law the ban on cartels is also to cover vertical competition restraints. The envisaged elimination of exemption areas (credit and insurance industry, copyright collection societies and sports) is also a direct result of the primacy and applicability of European law on the basis of Regulation 1/2003.

The 7th ARC amendment also creates preconditions for improved cooperation not only between the Bundeskartellamt and other competition authorities, especially within the European Competition Network (ECN), but also with the competition authorities of the *Länder*. The planned changes ensure that in applying Articles 81 and 82 the Bundeskartellamt receives the necessary capacity to act in order to fulfil

its role within the ECN; this applies for example in the area of information exchange and mutual assistance with investigations.

Changes to the area of competition law specific to the media sector were a further focal point in the amendment discussion. The amendment is basically aimed at harmonising national with European law and eliminating/reducing exemption areas. In the media area, however, the legislator intended to create a new provision for the exemption from the ban on cartels for cooperations in the areas of advertising, printing and subscription distribution. Mergers planned with a view to such cooperations are to be subjected to a press-specific merger control regime. In the legislative process the Bundeskartellamt advocated intensive and objective discussion about the planned exemption provisions for the press sector at an early stage and pointed out the negative effects on competition of these special regulations. The legislator recently refrained from introducing special exemption regulations for the press sector in the 7th ARC amendment and maintained the existing regulations.

The law will come into force on 1 July 2005.

Reform of the Energy Industry Act

A further important legislative project of the Federal Government in the reporting period was the amendment of the Energy Industry Act. The new Energy Industry Act (EnWG) comes into force with the ARC on 1 July 2005. This reform translates the so-called EU Acceleration Directives into national law. In view of the insufficient transmission competition in network based energies even six years after liberalisation the new law provides for comprehensive regulation of the network area.

In the electricity and gas markets this regulation will cover network access, fees for network use and network connections. From July 2005 the Regulatory Authority for Telecommunications and Posts (RegTP), under the new name “Federal Network Agency”, will be responsible for regulatory tasks. Abuse control in upstream and downstream markets in the networks as well as the prosecution of cartels and merger control will remain within the competence of the Bundeskartellamt or the competition authorities of the *Länder*. The regulation of the network area alone will

not be sufficient to create more competition in network based energies. Merger and abuse control in upstream and downstream areas in the network areas will play at least an equally important role in an overall approach.

2. International cooperation between the competition authorities

The extent of cooperation and coordination at both European and international level increased significantly during 2003 and 2004. Cooperation between the competition authorities within the EU was further intensified after the European Competition Network was established. The Competition Committee of the OECD has dealt with a range of competition law issues. The OECD annual Global Forum of Competition in which non-member states, especially developing countries, as well as OECD member states participate, has always enjoyed great popularity. The work of the International Competition Network established only in October 2001 has increased both in intensity and quality. At regular UNCTAD meetings the developing countries demonstrate an undiminished interest in competition policy and competition law. Only in the WTO has competition law experienced a setback with the failure of the WTO Ministerial Conference in September 2003 in Cancún. The positive development in international cooperation is a consequence of the phenomenon of globalisation since global market liberalisation involves the risk of an increase in cross-border competition restraints. The competition authorities have taken the appropriate consequences and increased cooperation and coordination worldwide.

European Competition Network (ECN)

Regulation 1/2003 lays the basis for the improved enforcement of European competition regulations within the network of competition authorities in the European Union. It creates new competences for closer cooperation between these authorities for the application of Articles 81 and 82 EC. The exchange of information and mutual assistance in investigations play an important role in this respect. Furthermore the European Commission and the competition authorities of the Member States have also jointly compiled rules to simplify the application of Regulation 1/2003 e.g. case allocation criteria, rules for the flow of information between the competition authorities and rules for the handling of information received. By establishing the European Competition Network (ECN) considerable progress has been made in combating cross-border restraints of competition. Practice has shown that the

competition authorities of the Member States and the European Commission have used the cooperation possibilities offered by Regulation 1/2003 successfully.

By the end of 2004 a total of 301 cases were posted on the joint intranet of the competition authorities. The Bundeskartellamt itself notified over 34 of its own cases. Use has also already been made of the new competences on the exchange of information and official assistance. In one case the Bundeskartellamt carried out a search on behalf of the Italian competition authority. In this case, in which extensive market investigations substantiated the suspicion of price fixing and a sealing-off of the Italian market for baby milk, the Italian competition authority had asked for a search to be conducted in Germany as part of the cooperation outlined in Article 22 of Regulation 1/2003. In another case the Bundeskartellamt received official assistance from the Austrian competition authority (suspicion of anti-competitive agreements in the purchasing of waste paper). An exchange of confidential information took place between the Bundeskartellamt and other competition authorities in the ECN in this and other cases on the basis of Article 12 of Regulation 1/2003.

ECA (European Competition Authorities)

Within the scope of the forum of the European Competition Authorities (ECA), which has been in existence since April 2001 and unites the competition authorities of the states of the European Economic Area, the European Commission and the EFTA supervisory authority, meetings took place between the heads of the authorities in Oslo in September 2003 and Trier in May 2004. The Oslo meeting dealt inter alia with competition issues in air traffic, energy and health. In Trier the competition authorities of all the new member states which joined the EU on 1 May 2004 were represented for the first time in the ECA. Here it was decided to maintain the existing working groups “Multijurisdictional Mergers” and “Air Traffic” and also to create a joint platform for the organisation of the exchange of officials between the national competition authorities.

International Competition Network (ICN)

In the reporting period cooperation between the competition authorities in the International Competition Network (ICN) set up in the autumn of 2001, intensified. In comparison to other international fora the ICN has a number of special features: For example, the individual competition authorities make up its membership, not the respective states. Another special feature is the direct involvement of so-called non-governmental advisors, i.e. lawyers, professors, non-governmental organisations etc. which play an active role in the individual working groups. The structure of the working groups is to a great extent project-based. Another feature of the ICN is the equal participation of the development and transition countries, whose representatives work together in or even chair individual working groups. Currently 91 competition authorities from 81 jurisdictions worldwide are members of the ICN.

Following Naples (2003) two annual conferences were held during the reporting period, in Mérida/Mexico (2003) with approx. 230 participants and in Seoul/South Korea (2004) with approx. 250 participants. In June 2005 the Bundeskartellamt hosted the fourth ICN Annual Conference in Bonn with over 400 participants from more than 80 competition authorities. The Bundeskartellamt is active in nearly all working groups of the ICN, either as a member or chair of individual subgroups. In September 2004 the President of the Bundeskartellamt was elected Chairman of the ICN. A central aim of the work of the ICN will be to increase and consolidate the participation of the developing countries in its events and work.

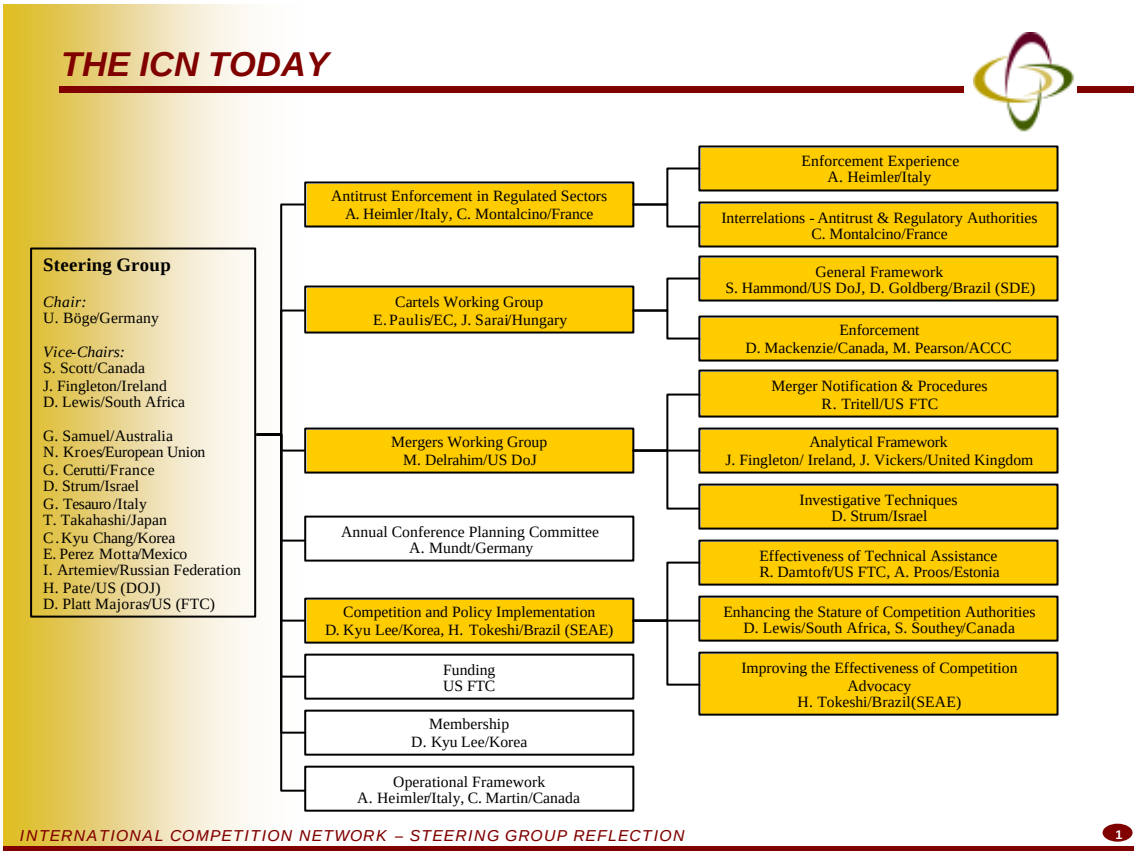
The ICN's work is currently distributed among four working groups.

- Merger control: Procedural issues, substantive issues, investigative techniques
- Combating cartels: Conceptual framework, investigative techniques
- Implementation of Competition Policy: Technical assistance, public relations work, competition advocacy
- Telecommunications: Regulation and application of competition law.

The working groups compile various practice-related reports, recommendations and manuals on these topics.

ICN Working Groups

(status May 2005)



OECD

In the period covered by the report the Bundeskartellamt and the Federal Ministry of Economics and Labour participated in the OECD meetings of the Competition Committee and its three working parties on “Competition and Regulation”, “International Cooperation” and “Trade and Competition”. One of the most important work results is the agreement reached on a new recommendation regarding merger control which is largely based on the “best practices” elaborated by the ICN working group on “Merger Control”. Another focus was the formulation of recommendations for the informal exchange of information during international cartel examinations.

Moreover the Competition Committee dealt with various competition law issues in roundtable discussions. Examples of such issues are obligations imposed in merger control proceedings, application and usefulness of economic expert opinions, sanctions in cartel prosecution, cartel prosecution through civil law proceedings, intellectual property, opportunities and limits of competition enforcement by means of competition-law instruments in regulated sectors (inter alia water supply, agriculture, health professions and public sector).

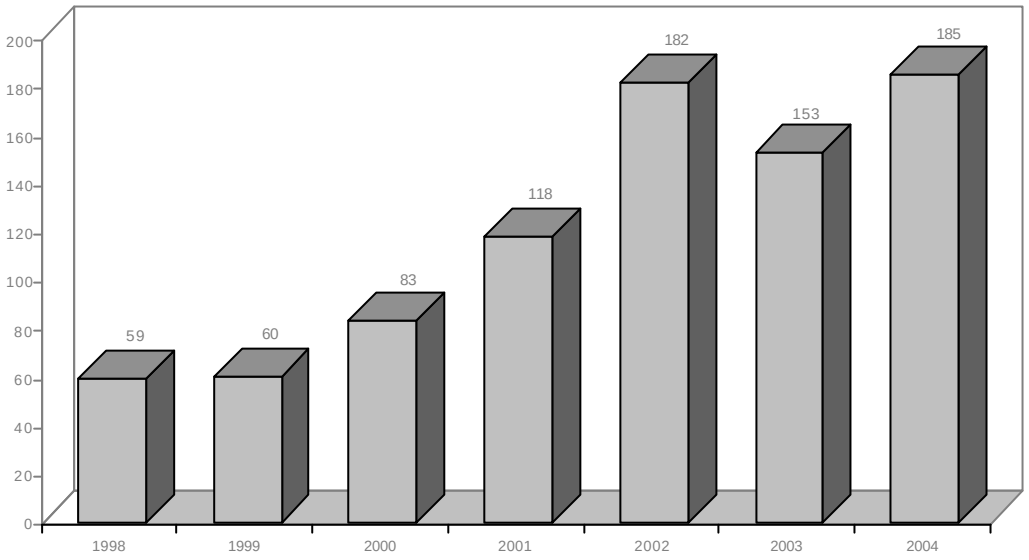
Two joint meetings were held with the Consumer Protection Committee in which the relationship between the protection of competition and consumer protection was discussed. In the area of trade and competition the WTO process in particular was underpinned. Within the framework of its "outreach programme" (cooperation with non-OECD member countries) the OECD again organized the annual "Global Forum on Competition" in February. The fora were also attended by a large number of developing countries.

Bilateral consulting

In the years 2003 and 2004 the Bundeskartellamt continued to place great emphasis on fostering bilateral relations with other countries' competition authorities. A total number of 338 experts from 29 countries visited the Bundeskartellamt. The events and seminars, some of which lasting 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 South Africa, Vietnam, Pakistan and central and eastern Europe.

Foreign visitors to the Bundeskartellamt

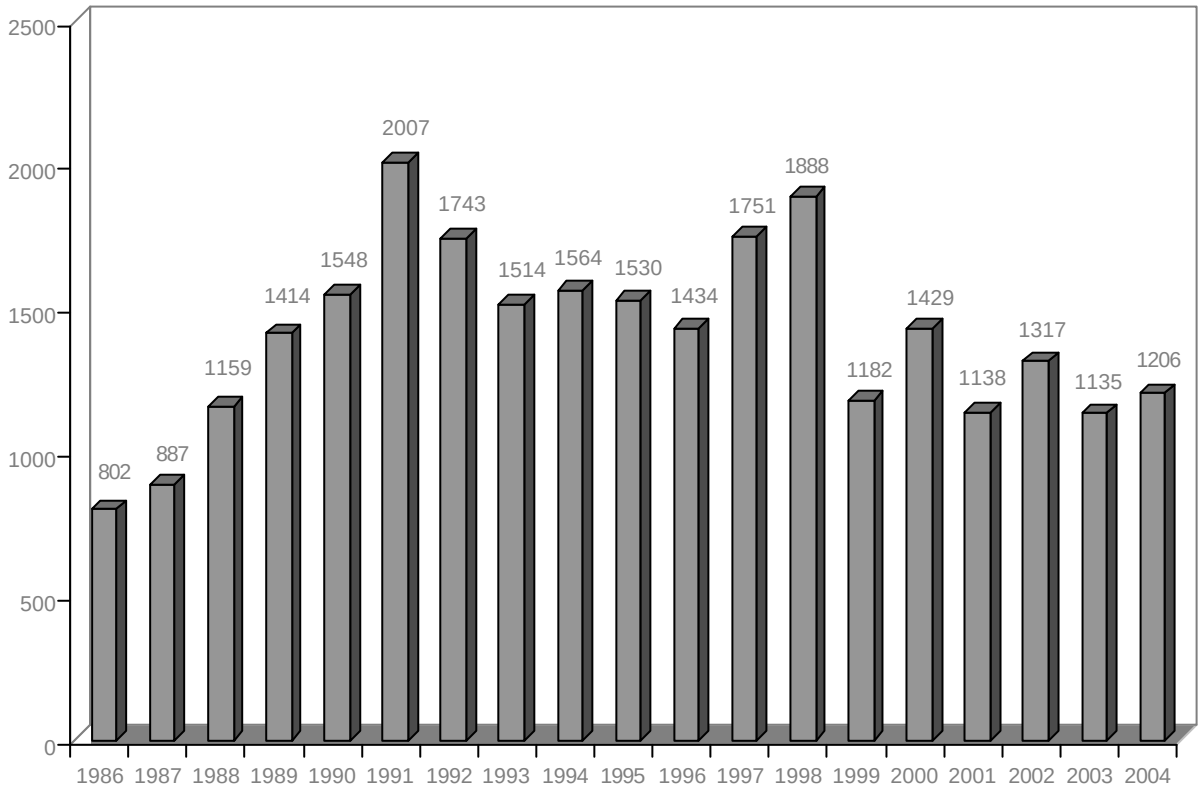


3. Merger control

Statistical overview

In comparison to the period covered by the previous report the number of mergers notified to the Bundeskartellamt in 2003 and 2004, i.e. 1366 and 1412 cases, slightly decreased. However, an upwards trend can currently be noticed. The number of notified and completed mergers developed as follows:

Completed mergers notified to the Bundeskartellamt 1986 -2004



In 2003 and 2004 the Bundeskartellamt concluded 59 merger cases by formal decision in the main examination proceedings, as compared to 95 cases in the period covered by the previous report. In 36 of the 59 cases a clearance decision was issued, 14 cases were prohibited and nine cases were cleared subject to conditions or obligations. In 25 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.

Prohibitions

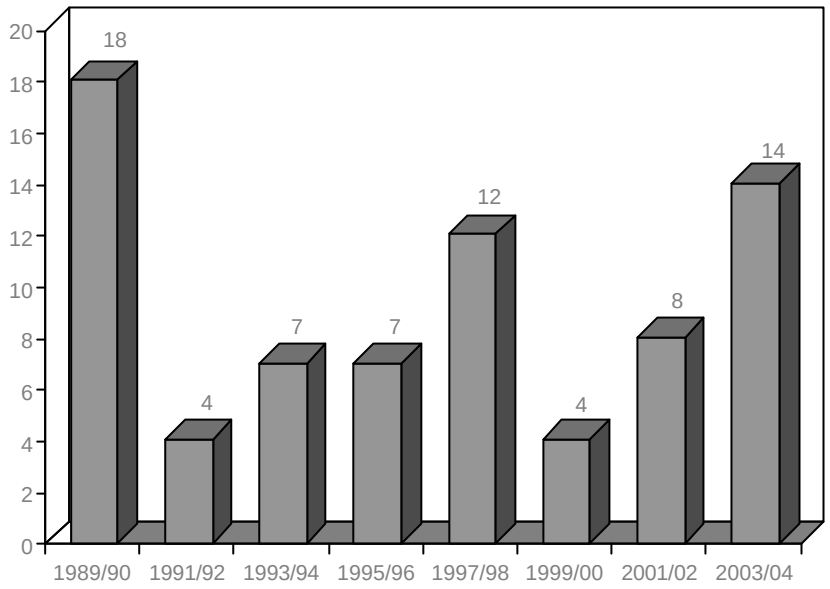
The Bundeskartellamt prohibited the following 14 proposed mergers during the period covered by the report:

(1) EAM Energie / Stadtwerke Eschwege Supply to electricity distributors and major customers (Appeal pending at Düsseldorf Higher Regional Court)
(2) E.ON Hanse / Stadtwerke Lübeck Electricity and gas markets (Prohibition final)
(3) Holtzbrinck / Berliner Verlag Reader market for regional subscription dailies in Berlin (Parties' appeal on points of law pending at Federal Supreme Court)
(4) Synthes-Stratec / Mathys Osteosynthesis products for trauma treatment (Settlement declaration at Düsseldorf Higher Regional Court)
(5) Lausitzer Rundschau / Wochenkurier Verlagsgesellschaft Advertising markets in Cottbus / Senftenberg / South Brandenburg (Prohibition final)
(6) Agrana / Atys Market for fruit processing (Parties' appeal on points of law pending at Federal Supreme Court)

(7) Radio Ton-Regional / Lokalradio Services Radio advertising market in Tübingen / Reutlingen / Zollern-Alb area (BKartA appeal against refusal to grant leave pending at Federal Supreme Court)
(8) Deutsche Bahn / KVS Local public transport in Saarland (Parties' appeal on points of law pending at Federal Supreme Court)
(9) Mainova / Aschaffenburger Versorgung Distribution of gas (Appeal to Düsseldorf Higher Regional Court pending)
(10) Gruner & Jahr / Licence for National Geographic Reader market for popular scientific magazines (BKartA appeal on points of law to Federal Supreme Court pending)
(11) Gruner & Jahr / RBA Reader market for popular scientific magazines (BKartA appeal on points of law to Federal Supreme Court pending)
(12) DuMont Schauberg / Bonner Zeitungsdruckerei Reader and advertising markets in Cologne and Bonn (Appeal to Düsseldorf Higher Regional Court pending)
(13) Leggett & Platt / AGRO Spring cores for mattresses and upholstered furniture (Prohibition final)
(14) Rethmann / Tönsmeier Collection and transport of residual waste / waste paper in Köthen (Appeal to Düsseldorf Higher Regional Court pending)

Number of prohibitions

(according to reporting periods)



Since merger control was introduced in 1973, a total of 153 concentrations have been prohibited. 95 prohibitions are valid, in 12 prohibition cases appeal proceedings or appeals on points of law are still pending. In 46 cases the prohibition was finally lifted or declared to have been settled.

Clearances subject to conditions or obligations

During the period covered by the report nine concentrations were cleared subject to obligations or conditions as compared to 25 cases in the previous reporting period.

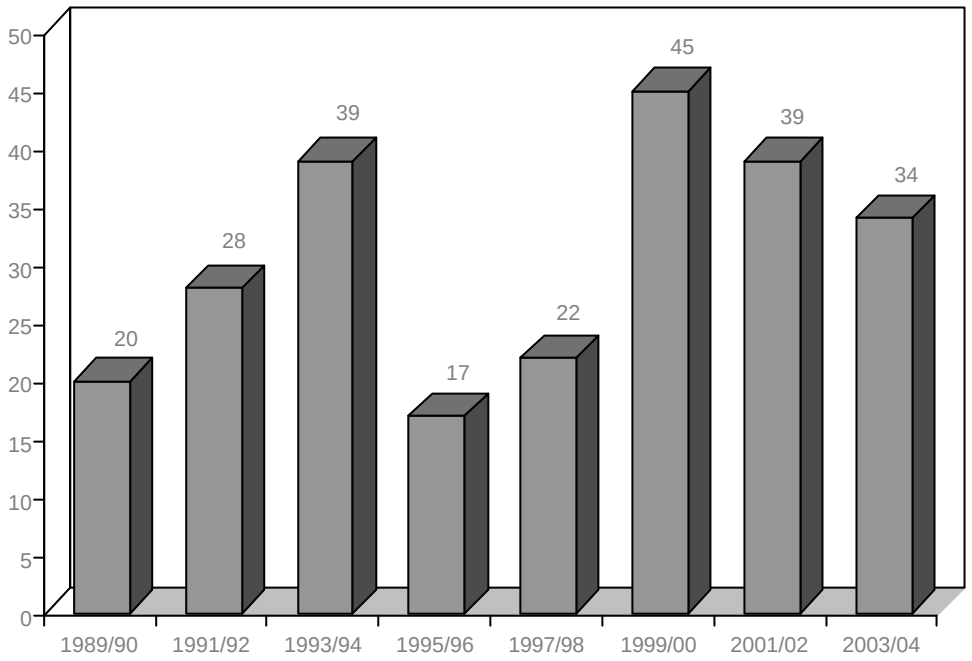
Pre-notification stage cases

In the period covered by the report 34 cases were abandoned, modified or terminated without a formal prohibition after the notification or on account of a preliminary examination by the Bundeskartellamt. Since the establishment of merger control the total number has thus risen to 425. In the Bundeskartellamt's view these figures are a further important element in assessing the effectiveness of merger

control as in all cases considerable competition concerns existed within the meaning of the prohibition criteria.

Number of pre-notification stage cases

(according to reporting period)



Daily newspapers

Already in 2002 the Bundeskartellamt prohibited Holtzbrinck Gruppe, which publishes the “Tagesspiegel” in Berlin, from acquiring Berliner Verlag which publishes inter alia “Berliner Zeitung”. Holtzbrinck withdrew its subsequent application for a ministerial authorisation in the course of the proceedings and sold “Tagesspiegel” as well as further participations to a former manager. The Bundeskartellamt cleared this sale in the preliminary examination proceedings. On the other hand the authority prohibited Holtzbrinck’s acquisition of Berliner Verlag which had been notified again at the same time. Under Section 37 (1) no. 3 sentence 2 of the ARC shares which are held by a a third party for the account of a company are still to be classified as belonging to this company. For this reason

“Tagesspiegel” still had to be classified as belonging to Holtzbrinck as, due to the form of the purchase contract and the overall circumstances, the economic risk involved in the “Tagesspiegel” acquisition was not borne by the private person in question, but still by Holtzbrinck.

The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt’s evaluation and rejected an appeal against the prohibition decision filed by the parties concerned. An appeal on points of law filed against this decision with the Federal Supreme Court is still pending.

Chronology of the “Berlin newspaper market” case

July 2002	First notification of proposed Holtzbrinck/Berliner Verlag takeover
December 2002	First prohibition of the proposed takeover by the BKartA
January 2003	Holtzbrinck applies for ministerial authorisation
April 2003	Monopoly Commission report opposes takeover
September 2003	Holtzbrinck withdraws its application for ministerial authorisation
October 2003	Sale of Tagesspiegel to former Holtzbrinck staff member notified Second notification of proposed Holtzbrinck/Berliner Verlag takeover
November 2003	Tagesspiegel sale cleared by the BKartA
February 2004	Second prohibition of proposed Holtzbrinck/Berliner Verlag takeover by the BKartA
October 2004	BkartA’s second prohibition decision confirmed by the Düsseldorf Higher Regional Court
2005	Decision by the Federal Supreme Court is still pending

Broadband cable networks

In the period covered by the report, apart from some smaller cases, the Bundeskartellamt had to decide on the jointly notified acquisition of the broadband cable networks owned by Ish (North Rhine-Westphalia), Kabel BW (Baden-Württemberg) and Iesy (Hesse) by Kabel Deutschland (KDG). Originally the European Commission had been in charge of examining the acquisition under merger control law. Upon request the proceedings were referred to the Bundeskartellamt.

Particularly affected by this concentration was the market for feeding in television programmes including the provision of technical services for free TV and pay TV. Extensive Bundeskartellamt investigations showed that the different transmission paths for TV signals (cable, satellite, terrestrial or DVB-T), are not interchangeable, but complementary. The suppliers of TV programmes thus cannot operate without feeding programmes into the broadband cable which reaches 56 per cent of all households. Moreover, under KDG's strategy of using its own digital platform for coding and decoding TV programmes, end customers could be forced in the future to acquire such a box, and the market could be foreclosed to other pay TV suppliers.

In a preliminary evaluation of the projects the Bundeskartellamt concluded that the concentrations were likely to strengthen KDG's dominant position as, on the one hand, they would lead to an extension of KDG's scope of action to other networks and, on the other, they would affect potential competition between KDG and Ish, KBW and Iesy. Clearing the proposed concentrations by applying the balancing clause could not be considered as the parties did not prove that the concentrations would have led to improvements on the markets for broadband Internet access or broadband Internet use dominated by Deutsche Telekom, or the end consumer market for pay TV dominated by Premiere.

After the Bundeskartellamt had informed the notifying parties of its preliminary evaluation of the concentrations they announced that they would give up the projects and withdrew the notifications.

Waste management sector

Towards the end of the period covered by the report Rethmann notified its plan to acquire 100 per cent of the shares of RWE Umwelt via its subsidiary Remondis. In February 2005 the concentration was cleared subject to conditions and obligations.

RWE Umwelt is the largest German waste disposal company, the Remondis group is the second-largest. Both companies are active almost nationwide in numerous waste disposal markets. Already before the proposed concentration was notified the RWE group had divested activities with a sales volume of approx. 400 million Euro. Furthermore, due to foreseeable merger control problems, RWE had decided to divest a number of subsidiaries which accounted for about 30 per cent of RWE's remaining sales volume already before the sale to Rethmann, and to sell these companies to third parties.

In the market for the area-wide disposal of waste from commercial sources (e.g. retail branches) the remaining concentration project would have resulted in the creation of a dominant oligopoly of Remondis / RWE Umwelt on the one hand and Interseroh on the other. To prevent this the merger was cleared subject to the suspensive condition that Remondis irrevocably transferred its shares in Interseroh to a trustee, sold them within a certain time limit and cut all further links with Interseroh, particularly management interlocks, before the merger was put into effect.

In the market for the collection and transport of recovered glass in the North Rhine-Westphalia area and the markets for recycling recovered glass and refrigerating and freezing equipment the merger would have resulted in Remondis holding positions of single firm dominance in the individual markets. For these markets the concentration was cleared subject to obligations under which Remondis had to sell collection contracts for recovered glass, glass reprocessing plants and recycling plants for refrigerating and freezing equipment within a fixed time limit. These obligations ensure that the market shares of the parties involved will not increase or, respectively, a market share of 30 per cent will not be exceeded.

Electricity und Gas

The Bundeskartellamt continues to take a critical view of the strategy of the grid companies E.ON and RWE to promote their vertical integration through participations in regional and local electricity and gas providers and to strengthen and consolidate their market positions in the various gas and electricity markets. The Bundeskartellamt considers „smaller“ concentration projects as part of an overall strategy to foreclose sales markets to competitors by means of participations. In view of the highly concentrated market structures and the low degree of residual competition even small strengthening effects are of considerable competitive relevance and lead to structural changes in the market conditions. In the reporting period several concentration projects concerning participations by E.ON or RWE in regional suppliers were thus prohibited by the Bundeskartellamt or only cleared subject to remedies.

Book publishing companies

At the end of 2003 the Bundeskartellamt cleared the acquisition of the book publishing company Heyne by the publishing group Random House which belongs to Bertelsmann. Originally Bertelsmann intended to acquire from Axel Springer the whole publishing group Ullstein Heyne List comprising, apart from the publishers mentioned, inter alia the publishing companies Econ, Propyläen, Marion von Schröder and several guidebook publishers. The Bundeskartellamt expressed concerns about this project and issued a warning letter. With the acquisition of the whole publishing group Ullstein Heyne List, Bertelsmann, whose publishing group Random House also comprises the book publishers Goldmann, C. Bertelsmann, Blessing, btb and Omnibus, would have gained a dominant position in the nationally defined market for German-language paperpacks in the general information literature and light fiction sectors.

To avoid a prohibition Bertelsmann then reduced the concentration project to the acquisition of Heyne, after this publishing company had furthermore parted with some individual sectors, and withdrew its notification regarding the other publishing companies and sectors. This acquisition could be cleared by the Bundeskartellamt as

its investigations had proved that the concentration would not lead to any relevant deterioration of the existing conditions of competition.

Those publishing companies and sectors which are part of the Ullstein Heyne List publishing group and have not been taken over by Bertelsmann have been acquired by Bonnier Media Deutschland which owns inter alia the publishing companies Piper and Carlsen and is part of the Swedish media group Bonnier. In addition to the Holtzbrinck publishing group, the Deutscher Taschenbuchverlag (dtv) and the publishing company Bastei-Lübbe, another strong competitor has thus emerged on the relevant product market for paperbacks. A complaint against the clearance decision filed by a competitor was withdrawn already in advance of the oral proceedings before the Düsseldorf Higher Regional Court.

Local public transport sector

In December 2003 the project by Deutsche Bahn (DB) and üstra Hannoversche Verkehrsbetriebe to combine their local public transport activities in the greater Hanover area in the joint venture üstra intalliance was only cleared by the Bundeskartellamt subject to dissolving conditions with the aim to intensify appreciatively the competition for market access. Upon an appeal filed by the participating parties the Düsseldorf Higher Regional Court revoked the dissolving conditions in December 2004. The Bundeskartellamt has lodged an appeal on points of law with the Federal Supreme Court.

In the summer of 2004 the Bundeskartellamt prohibited the planned project of Deutsche Bahn AG (DB) to acquire a 30 per cent participation in Kreis-Verkehrsbetriebe Saarlouis GmbH (KVS) via its affiliate company RSW Regionalbus Saar-Westpfalz GmbH. RSW provides services for ten regional bus routes in Saarland as well as several other bus routes at district and municipal level, thus achieving a market share of more than 40 per cent in the relevant transport area. DB Regio held an almost 90 per cent share in the local rail public transport sector. The concentration would have led to DB gaining a substantial market share. Furthermore, after the acquisition it would have been unlikely that in future the merged companies would enter into competition with each other in the case of concessions to be granted or new contracts to be awarded in the local public transport sector. Clearing the

project subject to remedies was ruled out not least due to the fact that the participating companies had not proposed any measures to the Bundeskartellamt which could have eliminated the reasons for the prohibition.

In May 2005 the Düsseldorf Higher Regional Court rejected an appeal by the participating parties against the prohibition. The parties have lodged an appeal on points of law with the Federal Supreme Court.

4. Control of positions of economic power

In the period covered by the report abuse control again clearly focused on the network-based energy sector. Further abuse control proceedings were conducted by the Bundeskartellamt inter alia in the areas of telecommunications, postal services and retail trade.

Gas

As to end customer prices for gas, formal abuse control proceedings were initiated at the end of 2004 / beginning of 2005 against seven gas providers on suspicion of abusive pricing. The proceedings focused inter alia on the question of whether the price increases carried out in the course of the linkage of gas prices to oil prices merely reflected the increase in natural gas procurement costs or whether additional surcharges had been included. In June 2005 the Bundeskartellamt still actively conducted one of the proceedings inititated. Four proceedings could be discontinued after some of the companies had agreed either not to impose certain price increases or to offer a fixed price tariff in the future that was independent of the development of oil prices. One of the proceedings could be discontinued after the company had made similar commitments. One of the proceedings which had been referred to the *Land* competition authority of Baden-Württemberg was discontinued by this authority.

In the case of some companies which in a nationwide comparison proved to be less expensive, the Bundeskartellamt refrained from initiating formal abuse proceedings after some of these companies had announced their intention to reduce planned price increases or not to implement any further increases in the current heating period and to reimburse their customers if the proceeds from the price increases carried out exceeded their own increased procurement costs.

Electricity

In April 2003 the Bundeskartellamt prohibited Stadtwerke Mainz (municipal utilities of the city of Mainz) from demanding abusively excessive fees for network use and ordered it to reduce its current fees for network use by a total of just under 20 per cent.

In contrast to the proceedings against TEAG Thüringer Energie the Bundeskartellamt applied the comparative market concept in this case instead of cost evaluation. For this purpose Stadtwerke Mainz was compared with RWE Net. As an essential comparative standard the Bundeskartellamt chose the revenue per kilometre of transmission line as the length of the transmission line necessary for the supply of customers is an essential factor determining costs and thus prices. At the same time the revenue reflects the electricity sales actually achieved via the network and thus automatically integrates into the comparison differences in local structures which exist in this respect. Further differences in local structures between the companies (e.g. higher costs for laying electricity lines in urban areas) were taken into account by granting allowances in favour of Stadtwerke Mainz.

In the Bundeskartellamt's view the reduction of abusively excessive fees for network use will not result in Stadtwerke Mainz's statutory service mandate being threatened. Stadtwerke Mainz contended in the proceedings that such a reduction of fees for network use would affect the service quality in its network area. However, as the comparison with the network operator RWE Net has shown, the potential for reducing fees by about 20 per cent is not based on differences in local structures, i.e. on inevitable cost differences in the operation of networks. The comparison rather leads to the conclusion that there is a considerable savings potential in Stadtwerke Mainz's operation management. Even in view of the fact that it co-financed local public transport from its electricity business Stadtwerke Mainz's contention did not seem plausible either.

Upon a complaint by Stadtwerke Mainz the Düsseldorf Higher Regional Court revoked the Bundeskartellamt's ruling on abusive practices in March 2004. Upon an appeal on points of law filed by the Bundeskartellamt the Federal Supreme Court referred the case back to the Higher Regional Court at the end of June 2005.

Telecommunications

In close coordination with the Regulatory Authority for Telecommunications and Posts (RegTP) the Bundeskartellamt initiated abuse proceedings against Deutsche Telekom in 2003 on account of abusive fees for relinquishing subscriber data to providers of information services and publishers of telephone directories.

The proceedings were discontinued after Deutsche Telekom agreed to base its calculation of costs for providing subscriber data merely on annual costs amounting to a total of 49 million Euro with retrospective effect from 1 January 2003. This corresponded to a reduction of fees by approx. 45 per cent. With the new Telecommunications Act (TKG) which came into force in June 2004 the responsibility for subscriber data was transferred to the RegTP.

Mail preparation services

In the period covered by the report the Bundeskartellamt initiated abuse proceedings against Deutsche Post examining whether Deutsche Post's practice of granting access to so-called mail preparation services was compatible with provisions under European and national competition law (Section 20 (1) of the ARC, Article 82 EC). In the course of its investigations the Bundeskartellamt came to the conclusion that Deutsche Post hindered competing providers of postal services in the sector of mail preparation services or discriminated against them. In February 2005 the authority thus prohibited this conduct by Deutsche Post and ordered immediate enforceability of its ruling.

Deutsche Post filed a complaint against this decision at the Düsseldorf Higher Regional Court and requested that the suspensive effect of the appeal be restored. With its decision of 13 April 2005 the Düsseldorf Higher Regional Court rejected this request to restore the suspensive effect. The decision on the merits is pending.

Retail trade, offers below cost price

In application of Section 20 (4) of the ARC the Bundeskartellamt imposed a fine on the Dirk Rossmann drugstore chain on account of its offering photographic services below cost price. In several regionally defined markets Rossmann offered photographic services not merely occasionally below the price it had to pay itself to the photographic laboratories commissioned. Rossmann holds a superior market position vis-a-vis small and medium-sized photographic shops. The order to impose the fine is final.

In the summer of 2003 the Bundeskartellamt revised its principles of interpretation on offers below cost price by companies with superior market power (Section 20 (4) of the ARC). Following the Federal Supreme Court's leading decision in the Wal-Mart, these principles take into account the findings from proceedings conducted so far and the relevant practice of the courts. The revised principles of interpretation make it clear that the prohibition of offers below cost price requires neither the existence of predatory intent nor proof of a tangible restraint of the competition conditions for small and medium-sized companies. The revised principles also make it clear that an offer below cost price may also be the case if a constant offer price is exceeded by an increasing cost price. Nevertheless, in individual cases and in the event of unexpected price increases by the supplier, it may be objectively justified to temporarily maintain the offer price, provided the dealer in question establishes a new supply source.

Distribution of flight tickets

After an examination lasting several months the Bundeskartellamt decided in June 2004 not to initiate prohibition proceedings against Deutsche Lufthansa for cancelling the basic commission paid to travel agencies.

As the leading provider of air travel services in Germany Lufthansa is subject to abuse control, particularly as regards the dependence of the IATA travel agencies on the sales of Lufthansa flights. However, Lufthansa's decision to change its sales system to save costs cannot be considered as an unfair hindrance of its travel agency partners. For this assessment it was important that Lufthansa allowed the

travel agencies an adequate readjustment period and that the travel agencies would have the chance to charge their customers directly for their services. The Bundeskartellamt found that under these preconditions Lufthansa did not violate the prohibition of abuse of power under competition law.

In June 2005 the Bundeskartellamt conducted a search operation following tipp-offs from travel agencies and the specialist press claiming that the four major tourist airlines coordinated the termination of their agency agreements and the allegedly intended elimination or reduction of the commissions paid by them.

5. Ban on cartels and cooperation

As regards horizontal cooperation of competitors, one has to differentiate between so-called hardcore cartels, which are prosecuted by the Bundeskartellamt by way of fine proceedings, and other forms of cooperation which are examined in administrative proceedings.

Fine proceedings

In the period covered by the present report a major focus of the Bundeskartellamt's activities was again the prosecution of price, area and quota cartels as well as submission agreements. Again, the leniency programme introduced in April 2000 and the Special Unit for Combating Cartels (SKK) established in March 2002 played a significant role in these activities. Until May 2005 a total of more than 100 leniency applications have been submitted by natural and legal persons.

In 2003 and 2004, 18 national searches in altogether 337 companies and 24 private premises were conducted. The Bundeskartellamt uncovered a number of cartel agreements and conducted several administrative fine proceedings. The proceedings were directed both against those directly involved in the agreements and those having supervisory duties in the companies. In several cases fines were also imposed against the respective companies. The total amount of fines imposed was just over 717 million Euro in 2003 and approx. 58 million Euro in 2004. Among others, the following administrative fine proceedings were of significance during the period covered by this report:

In 2003, following a nationwide search of 30 companies in the **cement sector** which was conducted in July 2002, the Bundeskartellamt imposed fines totalling 702 million Euro against twelve companies and those responsible within the companies. This was the highest amount of fines imposed in the Bundeskartellamt's history so far. The accused companies had operated anti-competitive market allocation and quota agreements, some of them since the 1970s, and had continued to do so until 2002.

The majority of the companies and persons fined have lodged appeals against the administrative orders imposing the fines. The evaluation of documents seized in a further search of companies in the cement sector in spring 2004 has not been concluded yet.

On the basis of information gathered from the cement cartel case the Bundeskartellamt initiated fine proceedings against 70 manufacturers of **ready-mixed concrete** on suspicion of quota agreements in several regional markets. The authority conducted searches of seven companies in Mecklenburg-Western Pommerania in May 2004. So far, fines totalling 2.5 million Euro have been imposed in eight cases. The administrative orders imposing the fines are final, the remaining proceedings are still pending.

In the proceedings initiated against companies in the **ready-mixed concrete and ready-mixed concrete pump sector** the Bundeskartellamt imposed fines totalling 1.14 million Euro against twelve parties directly and indirectly involved. Of these, fines of just under 1 million Euro are final.

On account of illegal price agreements, the Bundeskartellamt imposed fines totalling 8.8 million Euro on the three leading German manufacturers of **pyrotechnical products** and responsible staff members. In August 2002, the Bundeskartellamt together with investigating officers from the public prosecutor's office searched several companies and private premises. According to the Bundeskartellamt's findings the companies had for years coordinated their prices for small firework devices. Two of the companies had also coordinated their prices for light signal and simulating ammunition for the German Armed Forces. The orders to impose the fines are final.

In May 2004 the Bundeskartellamt imposed fines totalling 57.6 million Euro against twelve companies and 46 persons responsible in the **paper wholesale sector** for illegal price agreements between 1995 and 2000. Already in April 2000 the

Bundeskartellamt had searched companies in the paper wholesale sector and had served written charges on nine companies and several persons in the reporting period 2001/2002. Ten regional cartels were uncovered. The sales volume affected by the price agreements amounted to approximately 1 billion Euro. A decisive factor for the successful completion of the investigations was that a number of small companies involved in the cartel were willing to cooperate with the Bundeskartellamt in applying the leniency programme and that several individuals made full confessions. The parties concerned have lodged appeals against most of the administrative orders imposing the fines.

In March 2005, following searches in 2002 and 2003, the Bundeskartellamt imposed fines totalling just under 130 million Euro against ten companies active in the **industrial property insurance sector** and against responsible persons within the companies. The parties concerned were accused of agreements and concerted practices violating competition law, in particular in the area of industrial property insurances, to push through premium increases and/or alignment of conditions (complex cartel). Appeals against all fines imposed have been lodged. Administrative orders imposing further fines are in preparation.

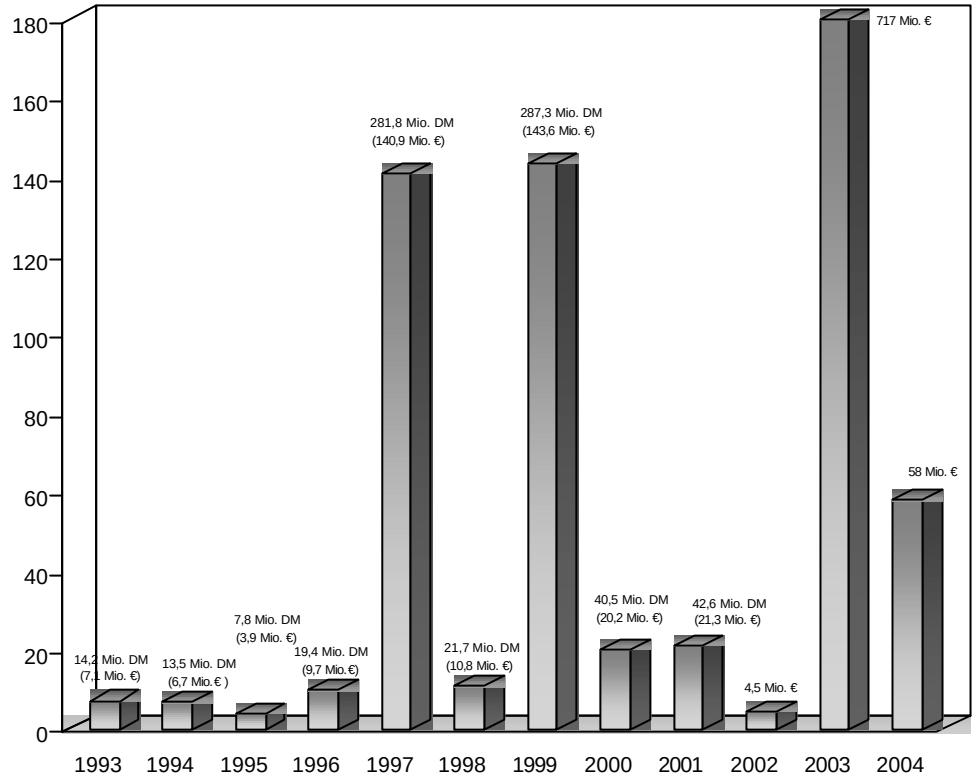
In May 2004 the Bundeskartellamt searched nine companies on the suspicion of anti-competitive agreements in the **purchasing of used paper** between several paper and cardboard packaging manufacturers. The proceedings are still pending. The Bundeskartellamt's search operation was supported by parallel investigations conducted by the Austrian competition authority. This is the first case in which European competition authorities have used the new possibilities of cooperation provided by the European Competition Network (ECN). In separate proceedings the European Commission simultaneously carried out inspections on the premises of paper manufacturers in several Member States (including Germany) and Norway on suspicion of anti-competitive agreements.

In the cartel administrative offence proceedings against **paper plate** manufacturers on suspicion of anti-competitive price and customer agreements nine companies and eleven persons in charge received written charges.

In September 2003 the Bundeskartellamt together with the Cologne Public Prosecutor's Office searched approximately 140 companies in the **waste management sector** on suspicion of coordinating bids for service contracts put out to tender by the company Der Grüne Punkt – Duales System Deutschland (DSD). In addition to the administrative offence proceedings initiated by the Bundeskartellamt under the ARC the Cologne Public Prosecutor's Office instituted proceedings on account of bid rigging (section 298 of the German Criminal Code). The proceedings are still pending.

In November 2003 and July 2004 the Bundeskartellamt searched several companies in the **pharmaceutical wholesale business** on suspicion of anti-competitive agreements. First written charges were sent out in early 2005.

Fines imposed by the Bundeskartellamt



Horizontal cooperation

Apart from the administrative fine proceedings, in the period covered by this report the Bundeskartellamt has also been concerned with a number of further horizontal competition restraints under Section 1 ARC and Article 81 EC. These administrative proceedings concerned inter alia the taking back of used sales packaging and cashless payment at cash terminals.

Take-back and disposal of sales packaging

To avoid a prohibition decision by the Bundeskartellamt under Section 1 ARC the Duales System Deutschland (The Green Dot – DSD) has implemented far-reaching restructuring measures. As a consequence, the competitive conditions on the market

for the taking back and disposal of sales packaging were significantly improved. The case raised competition concerns because DSD's shareholders came mainly from those trade and industry sectors which under the Packaging Ordinance are obliged to take back and dispose of the sales packaging they have brought into circulation. In the past, executive bodies and other committees of DSD were staffed by representatives of the respective trade associations. These bodies determined, inter alia, the licence fees payable by the entire sector. On the basis of this cartel-like corporate structure of DSD, the companies obliged under the Packaging Ordinance bundled their demand according to the respective disposal services. In addition, the participation of representatives of the disposal sector in the supervisory board as silent partners led to the coordination of most of the disposal fees of DSD.

The positive effects of a competitive market behaviour which is not burdened by vested interests could already be witnessed in the new invitation to tender for service contracts put out by DSD. In order to allay the competition concerns of the Bundeskartellamt the new board of directors of DSD decided in early 2003 to implement for the first time a transparent and non-discriminatory system of awarding service contracts to the waste disposal companies. As a result, as of 2005 the costs of collecting and sorting the "yellow sacks" were reduced by approx. 200 million Euro in comparison to the charges paid up to 2003, which corresponds to a reduction of more than 20 per cent.

In 2003 the dormant equity holdings of companies in the waste management sector were dissolved and the representatives of the sector abandoned their seats in the supervisory board. In December 2004 the American financial investor Kohlberg Kravis Roberts & Co. (KKR) acquired more than 75 per cent of the shares in DSD. The proportion of original shareholders was thus reduced to below 5 per cent. All the major companies from trade and industry resigned as shareholders of DSD.

Despite these measures the dominant position of DSD on the market for the taking-back of sales packaging will continue in the foreseeable future. Therefore DSD continues to be subject to abuse control under competition law. However, the Bundeskartellamt assumes that with the changes in shareholder structure the structural conditions for competition in the market concerned will be considerably improved. For it is now to be expected that customers will base their decision on which system to choose for household-oriented collection of used sales packaging on

purely economic grounds. The function of DSD's shareholders with their possibilities of taking influence and thus pursuing their own interests will no longer play a role in the future. As a consequence newcomers to the market find greatly improved opportunities for competition. The prohibition proceedings initiated against DSD in October 2002 could therefore be discontinued in January 2005.

Cashless payment at cash terminals

In the issue of the revoked agreement on the POZ-system (Point of Sale without payment guarantee) notified by the Central Credit Committee (ZKA) the Bundeskartellamt achieved an extension of the time limit. The POZ-System is a method for cashless payment at cash terminals with the "EC card". The method utilises the data from the card, which are read in at a retail terminal, to process a direct debit which the retailer adds to the regular payment transactions. Via a connection to the financial institution which has issued the card or to an authorisation centre the retailer is able to verify whether the card is blocked due to loss or theft. The system provides no payment guarantee by the credit sector so that the retailer has to bear the risk of any deficit in payment.

The POZ-System was notified to the Bundeskartellamt in 1992 and is supported by the credit sector. The credit sector now intended to discontinue the POZ-System as of 1 July 2005. The Bundeskartellamt has worked towards an extension of this time limit until 31 December 2006. The payment system which is in particular important for small and medium-sized retailers can now be continued until that date. Thus it has been ensured that the companies affected are able to adapt to the new situation. Therefore the Bundeskartellamt considered the conditions for an exemption of the agreement fulfilled.

6. Vertical Agreements

During the reporting period the Bundeskartellamt initiated, inter alia, proceedings against long-term gas supply contracts, and conducted several proceedings on account of violations of the prohibition of abusive price recommendations and the prohibition of vertical resale price maintenance agreements.

Long-term gas supply contracts

In late 2003 the Bundeskartellamt instituted proceedings under Article 81 EC against 16 gas transmission companies on suspicion of market-foreclosing gas supply contracts with municipal utilities. In the Bundeskartellamt's view the common practice of binding gas transmission companies with long-term contractual commitments constitutes a significant impediment for effective competition in the gas market because it makes it considerably more difficult for domestic and foreign competitors to enter the market.

In early 2005, after extensive investigations and discussions with the companies concerned, the Bundeskartellamt published a discussion paper on the assessment of long-term gas supply contracts. In the paper the authority assumes, inter alia, that supply contracts with terms of more than two years and a requirement satisfaction of over 80 per cent are just as inadmissible as supply contracts with terms of over four years and a requirement satisfaction of over 50 per cent.

The discussion paper has met with strong resonance in the sector and the professional public. The Bundeskartellamt has received in total more than 90 comments on the issue from gas transmission companies, municipal utilities, trade associations and experts. The results are currently being discussed with the European Commission and, in particular, with the parties to the proceedings.

Resale price maintenance for batteries

The Bundeskartellamt has imposed fines totalling 100.000 Euro against a manufacturer of batteries and storage battery chargers. Subject of the proceedings was the fact that the company had threatened to cease supplying trading companies

unless they worked towards adhering to a certain price structure for sales via the Internet platform “eBay”. This threat was issued on the one hand to traders who sold their products directly via eBay and on the other hand to suppliers of eBay traders. The threat aimed at prompting traders to conclude illegal price maintenance agreements. In addition, the company concerned issued price recommendations which were not expressly labelled as non-binding. The parties concerned have completely admitted to all charges. The orders to impose the fines are final.

Resale price maintenance agreements for paging equipment

In administrative proceedings against a manufacturer of paging equipment the Bundeskartellamt issued a fine totalling more than 100.000 Euro. From February 2001 to April 2003 the company concerned made the supply price charged to its traders conditional upon them maintaining the recommended minimum sales prices. Those traders who did not undercut the minimum sales prices were granted additional discounts. In order to receive the additional discount traders had to disclose the orders received by their final customers, mostly public contracting entities. By using this discount policy, strong economic pressure was exerted on the traders which significantly restricted the free determination of prices. This constituted a violation of the prohibition of resale price maintenance agreements laid down in the ARC. The orders to impose the fines are final; the company concerned admitted to most of the charges.

7. Public Procurement law

Since 1 January 1999 the Bundeskartellamt has been responsible for reviewing the awarding of public contracts of the Federal Republic of Germany. The three public procurement tribunals set up at the Bundeskartellamt review, upon request, whether public contracting entities met 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 the *Land* concerned provide for this. In principle the contract is awarded to the bidder submitting the most economically advantageous offer.

Reform of European and German public procurement law

On 30 April 2004 European public procurement law was reformed by means of the so-called legislative package consisting of two directives. On the one hand the „Directive on coordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors" replaces the utilities directive. On the other hand the „Directive on coordination of procedures for the award of public supply contracts, public service contracts and public work contracts" regulates as a uniform directive on public procurement coordination the classical areas of public procurement law and thus merges the previously existing three public procurement Directives on public service contracts, supply contracts and public work contracts into one Directive. Main objective of the legislative package is to simplify public procurement law and to adjust procurement procedures to the requirements of a modern administration. Those provisions of the Directives which are not directly binding for contracting entities and bidders must be implemented into the respective national legal systems until 31 January 2006 at the latest.

In 2003, almost simultaneously to the reform of European public procurement law, a discussion emerged in Germany on how to reform German public procurement law which is considered too complex and intransparent due to its multi-layer cascade principle. The revised working draft of the Federal Ministry of Economics and Labour,

which was published in March 2005, envisages amendments to part four of the ARC to the effect that open procedures are no longer given legal priority over non-open procedures and that “new” procedures of the EU procurement Directives, i.e. competitive dialogue, electronic auctioning and dynamic, electronic procedures, are incorporated into the ARC. The obligation to inform bidders who have been turned down, so far laid down in the award regulation, is introduced into the ARC. An explicit rule on „de facto awarding“ renders the contract ineffective if the contracting entity has not issued an invitation to tender or has failed to meet its information obligation and if the invalidity of the contract is put forward in review proceedings by a potential bidder within 30 days upon being informed of the violation but at the latest six months after completion of the contract.

In addition, the working draft envisages pooling the provisions of the award rules (VOB/A, VOL/A and VOF) in a new award regulation (“Verordnung über die Vergabe öffentlicher Aufträge (VgV)”, regulation on public procurement). The introduction of a pre-qualification procedure is meant to facilitate tendering for public contracts for companies. Finally, the working draft contains a provision for the establishment of a central corruption register at the Federal Office of Economics and Export Control (Korruptionsregistergesetz (KorrRegG), “Act on the Corruption Register”).

Decision practice

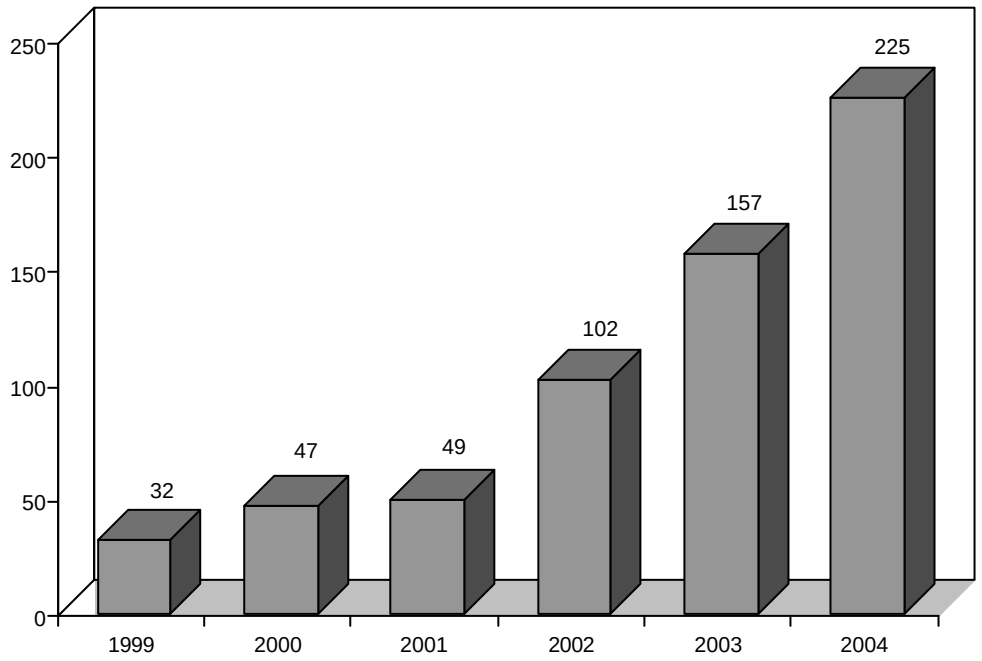
In 2002 the number of review proceedings significantly increased, adding up to 102 cases which corresponded to a doubling of proceedings compared to 2001. This tendency has continued in the reporting period. In 2003 the first and the second federal public procurement tribunal received a total of 157 applications for review, in 86 of which a formal decision was issued. In view of the numerous proceedings which already in 2003 had rendered it impossible to meet the five-week decision deadline (in 65 cases the deadline was extended) a third federal public procurement tribunal was set up on 15 February 2004. With 225 applications the number of review proceedings significantly increased once more in 2004. In 116 cases a formal decision was issued.

In 2003, immediate complaints were filed against 21 decisions of the federal public procurement tribunals. Eight decisions of the two public procurement tribunals were

reversed by the Düsseldorf Higher Regional Court. In six cases the immediate complaint was dismissed. In seven cases the complainants' motion to extend the suspensive effect of the immediate complaint in accordance with Section 118 (1) sentence 1 was dismissed for lack of a reasonable probability of success.

In 2004, immediate complaints were filed against 32 decisions. So far twelve of the decisions taken by the federal public procurement tribunals in 2004 have been appealed against at the Düsseldorf Higher Regional Court. Out of these twelve proceedings two were decided in favour of the complainants. The Düsseldorf Higher Regional Court has dismissed immediate complaints in five cases and in five other cases has dismissed motions of the complainants to extend the suspensive effect of the immediate complaint. All formal decisions of the public procurement tribunals are published on the Bundeskartellamt's Internet website at www.bundeskartellamt.de/fusion.htm.

Number of applications for review from 1999 until 2000



Public procurement procedures of the Federal Employment Agency

In the period covered by this report the Federal Employment Agency conducted several public procurement procedures for and discretionary awards of contract lots for the conception and realisation of several employment services. The procurement procedures included in particular awards for the execution of vocational training measures to prepare for entry into the job market, the conception and realisation of aptitude tests, training measures, as well as awards for the placing of job applicants, trainee applicants and unemployed persons. After the Federal Agency had begun in late 2003 to combine the implementation of a new purchasing policy with the carrying out of the procurement procedures several (potential) bidders filed applications for review proceedings at the public procurement tribunals.

On 1 September 2004 the Federal Employment Agency revoked the invitation to tender for the lots still under dispute before the federal public procurement tribunals. It justified this step by claiming that the federal public procurement tribunals saw an exceptional risk in the proceedings and therefore ordered the revocation. Since the tendering documents had the same wording for all lots, the Federal Agency applied this decision to all other lots under dispute as well. Afterwards the Federal Agency for Employment entered into negotiations with those companies that would have been awarded the contracts in the revoked award proceedings and awarded the contracts to them by means of discretionary awarding on grounds of urgency.

Hereupon several (potential) bidders again filed various applications with the public procurement tribunals.

The federal public procurement tribunals considered the contracts placed in the meantime with the companies originally chosen in the revoked award proceedings to be legally valid. Applications for a review filed against this decision were therefore rejected as inadmissible. The public procurement tribunals did not consider the awarding of the contract as void either. Finally, the federal public procurement tribunals did not consider the use of discretionary awarding unlawful since the urgency of the awarding was to be affirmed. The measures of preparation for entry into the job-market had to be implemented without delay due to their significance for the professional and personal development of the young people affected. The

Düsseldorf Higher Regional Court had also stressed the importance of the young persons' interest to end their apprenticeship regularly.

8. Prospects

Implementation of the new version of the ARC

With the 7th amendment to the ARC German competition provisions on combating cartels and abuse control will be brought in line with European provisions in various points. This means on the one hand that several procedural questions that have arisen since May 2004 when Regulation No 1/03 came into force are resolved with the coming into force of the 7th amendment to the ARC in July 2005. Furthermore, the adaptations enable the Bundeskartellamt to make full use of the cooperation opportunities offered by the European Network of Competition Authorities (ECN). On the other hand, as is the case with every amendment, the new provisions of the ARC pose new challenges to the competition authorities as regards their application and implementation. This applies to the new fine levels as well as to the new decision possibilities, such as provided for in Section 32 b of the ARC (commitments) or in Section 32 c (no cause to take action). Although most anti-competitive agreements will no longer be subject to an ex-ante examination by the competition authorities, the Bundeskartellamt will continue to offer advice by means of an informal discussion to companies which are in doubt about possible competitive concerns raised by a planned transaction.

Prosecution of illegal cartel agreements

Combating agreements between competitors on prices, quota, areas or customer groups – so-called hard-core cartels – continues to be a particular focus of the Bundeskartellamt's activities. The leniency programme, which was introduced in April 2000, and the Special Unit for Combating Cartels (SKK) set up in March 2002 have significantly contributed to improve the effectiveness of the Bundeskartellamt's actions in this field in recent years. In addition, the strong interest of the media and the general public in the prosecution and sanctioning of cartel agreements has led to a heightened awareness of the damaging effect of such violations of the law, not only among consumers but also among companies. Notwithstanding, the estimated number of undetected cartel agreements remains completely uncertain.

In June 2005 a decision division was established in the Bundeskartellamt which deals exclusively with the prosecution of cartel agreements. Before, the respective decision division competent for the industry affected by a cartel had been responsible for the course of action taken in the particular cartel proceedings. The new decision division takes on cases from different sectors and carries out the proceedings in cooperation with the respective decision division and the SKK. These restructuring measures make it possible to conduct cartel proceedings in a faster and more efficient way independent of the difficulties with time limits that arise in other areas of competition protection (in particular merger control).

Promotion of competition in the network-based energy sector – cooperation with the Federal Network Agency.

With the coming into effect of the new Energy Industry Act on 1 July 2005 the course is set for future regulation in the electricity and gas sector and thus for the activities of the Regulatory Authority for Telecommunications and Posts – as of 1 July 2005 the Federal Network Agency. The competence of the Federal Network Agency is exclusively confined to the regulation of networks, whereas merger control in all upstream or downstream markets of the network sector will remain within the competence of the Bundeskartellamt and the competition authorities of the *Länder*. Furthermore, the competence for merger control and cartel proceedings in the energy sector as a whole remains with the competition authorities.

As in the telecommunications sector, future cooperation between the Bundeskartellamt and the Federal Network Agency will be based on coordination between the two authorities. In issues and statements which concern the activities of both authorities an agreement must be reached or a comment must be requested from the other authority.

In any case, to promote competition in the network-based energy sector a holistic approach is needed which ensures non-discriminatory transmission competition, while at the same time taking into consideration the prevention of horizontal or vertical market concentrations and the opening up of contracts with foreclosure effects for new competitors.

International cooperation

The significance of cooperation with other competition authorities in Europe and worldwide will continue to increase in the coming years. To keep pace with globalisation and the ensuing possibilities of cross-border restraints of competition the competition authorities, too, need to coordinate their cross-border activities. The objective here is not a compulsory harmonisation of all regulations and procedures or even the establishment of a world competition agency. Particularly at the international level it is our aim to develop, on the basis of an exchange of information and professional discussions, best practices and recommendations which not only protect competition but often also reduce bureaucratic obstacles faced by the companies concerned. The great interest shown by almost all existing competition authorities (including the developing countries) in the International Competition Network (ICN) proves the importance and necessity of this cooperation. The next Annual Conferences of the ICN will take place in South Africa in 2006, Russia in 2007, Japan in 2008 and Switzerland in 2009.

Competition Advocacy

Promoting the competition principle beyond the confines of competition law will also be an important task in the years to come. Particularly in times of economic difficulty in which the companies' call for public support becomes stronger and the state is more inclined to combat economic power by means of regulation instead of competition, a fundamental return to the positive effects of the free market and competition system is urgently required.

Apart from industry, associations and the political and academic world, the competition authorities are also called upon to point out in time any anticompetitive developments, and this also applies to anticompetitive effects of legislative projects. As the current example of the energy industry shows, once the principles of market and competition have been given up it takes a considerable effort to re-establish them. The Bundeskartellamt will continue to see it as its task to comment on such developments at an early stage and to promote a broad objective discussion on this.

The Bundeskartellamt's Activity Report 2003/2004 in its full version in German is available on the Internet as a Bundestag publication at:
http://www.bundeskartellamt.de/wDeutsch/publikationen/Taetigkeitsbericht.shtml

Contact:

Bundeskartellamt
E/G 2 Section
Kaiser-Friedrich-Strasse 16
53113 Bonn

Internet: www.bundeskartellamt.de
e-mail: info@bundeskartellamt.bund.de