BundesKartellamt

Our Activities in 2005 and 2006

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Our Activities in 2005 and 2006

Dear Reader,

Ludwig Erhard, the German Minister of Economics from 1949 to 1963, later to become Chancellor of the Federal Republic of Germany, referred to competition law as the Basic Law of our economic and social system. The competition system is founded on values which are elementary to our society. These include freedom, individual responsibility and own initiative. Competitive pressure and the freedom of choice of the consumer limit entrepreneurial power and lead to low prices, improvements in quality, a wider selection of offer and innovative products. The absence of effective competition on the merits, either in the form of price agreements, market sharing or the abuse of market power, leads to undesired consequences for the consumer as well, because prices are unilaterally raised or necessary investment in product improvement neglected.

It is the task of the Bundeskartellamt, which in 2008 will celebrate its 50th anniversary, to protect competition and to enforce the "Act against Restraints of Competition" (ARC). Since its relocation from Berlin in 1999 its approx. 300 members of staff have worked from Bonn towards achieving this goal. To this purpose the Bundeskartellamt has successfully cooperated with the Land competition authorities, at European level with the European Commission and the competition authorities of the Member States and at international level with other national competition authorities.

This brochure is intended to give you an overview of the activities of the Bundeskartellamt in the years 2005/2006. As a short version of our biennial activity report it cannot illustrate the many areas of activity of the Bundeskartellamt in their full range and depth but instead focuses on a number of major developments and prominent cases. The long version, comprising approx. 300 pages, is available on our website at www.bundeskartellamt.de or can be ordered directly from the Bundeskartellamt.

Wolfgang Kartte, President of the Bundeskartellamt from 1976 to 1992 once said: "Competition has no lobby". The work the Bundeskartellamt undertakes to protect competition can only be successful if the public at large is convinced of the importance of the competition principle and supports the work of the competition authorities. This brochure is therefore intended to encourage a more intensive consideration of competition issues and promote discussion

on competition law and competition policy beyond the circles of competition experts. I wish you interesting reading!

Dr Bernhard Heitzer

President of the Bundeskartellamt

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1. Developments in competition at national level

In protecting competition, competition policy must remain flexible in order to react to new market developments. Developments such as globalisation or a merging Europe require that legal framework conditions be continually adjusted, as recently witnessed in the 7th Amendment to the ARC and in new plans for further amendments to competition law and that necessary organisational changes be carried out within the authority applying the law.

a) Amendments to the Act against Restraints of Competition (ARC)

Entry into force of the 7th amendment of the ARC

On 1 July 2005 the 7th Amendment of the ARC came into force. The amendment was made in view of the far-reaching changes to European law by Regulation (EC) No. 1/2003 of 16 December 2002, which required that the ARC be brought into line with European law. In the amendment the principle of legal exception was incorporated into German law. This replaces the former notification and authorisation procedure. Now companies themselves have to assess whether their cooperation agreement is admissible under competition law. Furthermore, standard regulations on horizontal and vertical anti-competitive agreements are now in place which eliminate their differentiation under German law. The competition authorities' scope of action was brought into line with standards set by Regulation 1/2003. The new regulations not only simplify cooperation with other European competition authorities and the European Commission. They also provide the competition authorities with new instruments, such as the possibility, e.g. in the case of rigid price structures, to examine individual branches of industry for possible restraints or distortions of competition.

The regulations on the setting of fines were changed by raising the level of fines for violations of competition law to 1 million euros. In addition to this, under European law a fine of up to 10 per cent of the total turnover achieved can be imposed against a company. Finally, private antitrust enforcement was improved. For example, a claim for damages is not ruled out merely because goods or services purchased at an excessive price were resold (keyword: "passing-on defense"). If in a final decision a competition authority has established a violation of competition law, the private party claiming damages no longer has to prove the violation in itself but provide evidence of the damages incurred to him personally (so-called "follow on claim").

The Bundeskartellamt has swiftly implemented the amendments to the law into practice and has made use of its new competencies in several instances. However, some of the legal issues raised by the amendment such as the application of the "minor market clause" in merger control are still awaiting judgement by the Federal Court of Justice (see p. 35).

Planned amendments to German competition law – "Price abuse amendment"

The Federal Government intends to amend the ARC by introducing a "Law to combat abusive pricing in the areas of energy supply and food trade". At the end of 2006 the Federal Ministry of Economics and Technology presented a corresponding minister's bill, which envisages amendments to the ARC in three points:

In order to facilitate price abuse control in the energy sector the minister's bill proposes the introduction of a Section 29 to the ARC which would remain in force until the end of 2012. The envisaged norm comprises the following elements: An extension of the comparative market concept, the possibility of treating price components as separate entities under price abuse control, a reversal of the burden of proof, abandoning the requirement by court practice that deviation between cost and price must be substantial in determining an abusively excessive price and the explicit legalization of the possibility to conduct cost-based price control to determine a case of abuse. In addition to these amendments Section 64 (1) 1 of the ARC is to be abolished, meaning that in future all abuse decisions of the competition authorities will be immediately enforceable. In its comments the Bundeskartellamt welcomed the proposals for the new amendments. These modifications will not bring any radical changes. Rather, they will make the design of the instruments to combat abuses of competition law more effective. Abusive pricing in the energy sector, which is economically important yet especially problematic in competition terms, can thus be ended more quickly.

The prohibition of sales below cost price in the food sector is also to be tightened. The intention to amend the Competition Act was already announced in the Coalition Contract, the aim being to put a stop to cut-throat price competition, which harms small and medium-sized companies in the retail trade. The Minister's bill proposes tightening Section 20 (4), Sentence 2 of the ARC for the food retail sector. According to this the occasional sale of goods below cost price is also to be prohibited in future. An objective justification for this would only be possible in very limited exceptional cases. According to the draft of the legislative intent it is planned to protect smaller and medium-sized retail trading companies from price pressure from large retail trading

companies. Product quality is also to be improved. In its comments the Bundeskartellamt criticized the proposed regulation. Practical experience shows that the regulation in its current form is adequate to effectively counteract the predatory practices of powerful companies. It is not necessary to tighten the regulation. According to the Bundeskartellamt, doing so would restrict fair competition on the merits, possibly even to the detriment of the consumers, or, in anticipation of the vast number of complaints, would hardly be practicable due to the Bundeskartellamt's limited resources.

Ultimately the existing provision on administrative fines under Section 81 ARC is to be published and some clarifications and amendments viewed positively by the Bundeskartellamt incorporated into the law.

At the end of April 2007 the Federal Government presented a bill which deviated in a number of major points from the Minister's bill. The special provision in the Minister's bill for the treatment of price components as separate entities in Section 29 ARC was thus omitted from the government bill. Moreover the explicit deletion of the requirement by this provision that deviation between cost and price must be substantial no longer features in the government bill. In Section 20 (4) ARC the strict limitation of reasons for an objective justification of a sale below cost price was abandoned. The amendments to Section 81 ARC in the government bill now essentially represent a reinstatement of the norm.

b) New guidelines and information leaflets of the Bundeskartellamt

Amendments to the ARC and changes in European competition practice have made the adaptation of existing Bundeskartellamt guidelines and information leaflets to the amended law necessary. These guidelines and information leaflets are intended to make the Bundeskartellamt's work more transparent and raise legal security for the companies concerned. All guidelines and information leaflets are available on the Bundeskartellamt's website at www.bundeskartellamt.de .

Guidelines on the setting of fines

Section 81 (7) ARC empowers the Bundeskartellamt to set basic principles for the use of its discretionary powers in the setting of fines. The Bundeskartellamt made use of such a possibility in September 2006 by issuing guidelines on the setting of fines. The guidelines specify how the Bundeskartellamt is in future to apply the new provisions (see p. 7) for setting fines which were created in the 7th Amendment of the ARC. In setting these guidelines the Bundeskartellamt orientated itself to the European Commission's new guidelines

on the setting of fines which were published in June 2006 (see p. 15). The revised ARC provisions have eliminated the differences between the maximum levels of fines possible under German and European competition law.

Apart from horizontal and vertical competition restraints and unilateral anti-competitive conduct (abusive practices, unfair hindrance, boycott, etc.), the guidelines also cover infringements in the area of merger control. The basis for calculating a fine is the so-called basic amount. This can account for up to 30 per cent of the turnover which a company has achieved with the products or services forming the subject of the proceedings. The calculation of the exact basic amount takes into account the gravity and duration of the infringement. In a second step the final amount is calculated. This is achieved by increasing or reducing the basic amount on the basis of aggravating and extenuating circumstances.

In the case of price and quota cartels, territorial and customer agreements and other severe horizontal competition restraints, the basic amount is generally set in the upper range of the maximum possible basic amount. For deterrent purposes the basic amount can be raised by up to 100 per cent. Section 81 (4) Sentence 2 ARC stipulates that a fine imposed against a company may not exceed 10 per cent of its total turnover. In line with the long-standing practice of the European Commission and the European Court of Justice the Bundeskartellamt takes the turnover of affiliated companies into account when calculating the maximum limit of 10 per cent of a company's total turnover. The basis for calculation is the relevant norm in Section 36 (2) ARC or the interpretation thereof by the legislator, in conformity with European law.

New Leniency Programme of the Bundeskartellamt

On 15 March 2006 the Bundeskartellamt published a new Leniency Programme which replaces the previous one from 2000. With its Leniency Programme the Bundeskartellamt assures those cartel participants wishing to leave a cartel and cooperate with the Bundeskartellamt in its uncovering, immunity from or a reduction of their fines. During the last few years the Leniency Programme has become an important instrument in the fight against illegal agreements between competitors on prices, sales quotas and market sharing (see p. 43).

The new regulation is accompanied by endeavours of several competition authorities towards reform, which found expression in the ECN Model Leniency Programme of September 2006. The European Commission also took the ECN Model Leniency Programme into consideration when issuing its own new Leniency Programme in December 2006 (see p. 15).

The new Leniency Programme automatically grants immunity from fines to the first applicant to contact the Bundeskartellamt before this has collected sufficient evidence to obtain a search warrant. The requirement for this is that the applicant submits information and evidence which will enable the Bundeskartellamt to obtain a search warrant. In addition, the first applicant to contact and submit information and evidence to the Bundeskartellamt is generally granted immunity from fines if this enables the Bundeskartellamt to prove the offence. This is also possible if the Bundeskartellamt has already conducted a search or has sufficient material to do so. In view of the principle of proportionality the Leniency Programme rules out immunity from fines for the only ringleader of the cartel and the cartel member who has coerced others into participating in the cartel. Any applicant who does not fulfil the conditions for immunity but supplies information and evidence which makes a decisive contribution to proving the offence, can be granted a reduction in fines of up to 50 per cent by the Bundeskartellamt; in this case the value of the information, in particular, and the sequence of receipt of applications are to be taken into account in the discretionary decision.

The new Leniency Programme sets explicit rules for the obligation to cooperate (in particular with regard to the cessation of participation in the cartel, the handing-over of all available information and evidence, the confidential treatment of the applicant's cooperation with the Bundeskartellamt, the naming of the employees involved and ensuring their cooperation) and the procedure as such. The new Leniency Programme has adopted the "marker system" used by the US Department of Justice. This allows an applicant to set a marker to assure his status as first applicant by producing a little information about the type and duration of the cartel law violation, the identity of those involved, the relevant product and geographic markets and any applications lodged with other competition authorities. This is conditional upon his filing a complete application within a maximum period of eight weeks set by the Bundeskartellamt. A verbal application can be filed and a marker set verbally as a protection against "pre-trial discovery" which is possible under American civil procedures law. The applicant is given conditional assurance of immunity from fines. The final decision about any immunity from or reduction in fines is made in the order to impose the fine. The Bundeskartellamt shall generally use the statutory limits of its discretionary powers to refuse applications by third parties for inspection of the application documents and evidence submitted or for the supply of information in accordance with Sections 406 e, 475 of the Rules of Criminal Procedure, in conjunction with Section 46 (1) of the Administrative Offences Act. The new Leniency Programme essentially corresponds with the ECN Model Leniency Programme. The only relevant difference is that it also excludes the sole ringleader from immunity from fines.

Notice on agreements of minor importance (de minimis) and new information leaflet for small and medium-sized enterprises (SMEs)

In order to enable SMEs to compete with large enterprises the German competition law allows them to form cooperations under certain conditions, to compensate for their disadvantages. Since the entry into force of the 7th Amendment of the ARC on 1 July 2005 cooperations between competitors no longer have to be notified to the competition authorities (see p. 7). Rather, the companies themselves have to assess whether their cooperation agreement is admissible under competition law. The Bundeskartellamt has published a new de minimis Notice and a new leaflet to give the companies more legal security in assessing whether their cooperations are admissible.

The de minimis notice replaces the previous regulation of 1980 and explains when the anti-competitive effects of cooperation agreements are of minor importance. As a general rule, the Bundeskartellamt will not institute proceedings in these cases. Horizontal agreements without hardcore restrictions fall under this regulation if the aggregate market share is below 10 per cent. The threshold for vertical agreements is 15 per cent. These thresholds are in line with the European Commission's practice and are not limited to SMEs.

The information leaflet for SMEs, last published in 1999, was revised in view of the 7th Amendment of the ARC. Section 3 of the ARC contains a special national provision for the cartels of small and medium-sized enterprises, according to which an agreement can be exempted from the ban on cartels if it serves to rationalize economic activities. As a consequence, some quite extensive cooperations between SMEs are admissible that under general competition law would have to be prohibited. However, this provision only applies where the cooperation in question does not affect trade between Member States of the European Union. The information leaflet provides advice on the scope of application of Section 3 ARC and the classification of a company as an SME, and gives examples of admissible and inadmissible forms of cooperation. In addition, the leaflet contains information on so-called "purchase cartels". Irrespective of the size of the companies these are generally admissible if the joint market share of the participating companies in the purchase and sales markets affected does not exceed 15 per cent.

c) Reorganisation of the Bundeskartellamt

The Bundeskartellamt carried out several reorganisations during 2005/2006 to raise its own efficiency levels and to cope with the increasing amount of tasks in spite of limited manpower and budgetary resources.

In June 2005, in order to speed up cartel proceedings, the Bundeskartellamt transformed its 11th Decision Division, which hitherto was responsible for abuse control in the electricity sector, into a purely cartel division. This now prosecutes cross-sector administrative offences in conjunction with Section 1 ARC and Article 81 EC.

On 1 September 2006 the Bundeskartellamt carried out a further internal reorganisation. Competence for merger and abuse control was distributed among nine instead of previously ten Decision Divisions. As a consequence the sector competencies of the previous ten Decision Divisions were reorganized. The aim of this restructuring measure is to optimize division layout to take account of sectoral developments and to minimize unclarity about current areas of competence. There are plans to expand the 10th Decision Division at a later date to serve as a second cartel prosecution unit to the 11th Decision Division. In 2005, with the aim of setting up an Economic Issues Section at a later stage, the Bundeskartellamt dissolved the former Section E/G 3 (German and European Cartel Law) and assigned its responsibilities to section G1 (German and European Antitrust Law, previously E/G1, Harmonisation of Competition Law Practice) and the Special Unit for Combating Cartels.

2. Developments in competition at European level

a) Cooperation within the European Competition Network (ECN)

In view of the cooperation opportunities provided by Regulation 1/2003 within the so-called European Competition Network (ECN) the common fight against cartels at European level has gained increasing importance. Here the competition authorities are very eager to make the fight against cartels more effective by maximally standard regulations. To this end a Model Leniency Programme has been developed within the ECN by which the competition authorities have agreed on a uniform standard for processing leniency applications. In the programme the competition authorities pledged to bring their own regulations in line with the Model Programme or, in the absence of their own programme, to issue one based on this. Both the European Commission's new Leniency Programme (see p. 15) as well as the Bundeskartellamt's Leniency Programme (see p. 10) are modelled on the ECN Model Leniency Programme.

The cases of official assistance already rendered under Regulation 1/2003 bear witness to the effective and successful cooperation within the ECN. The Bundeskartellamt, for example, conducted a search on behalf of the Italian competition authority and took testimony from witnesses. It also assisted the European Commission in ten inspections.

b) Discussion about the application practice of Article 82 EC

A discussion is currently taking place within the ECN about rearranging the application practice of Article 82 EC. The European Commission plans to issue guidelines on Article 82 EC. Behind the discussions are endeavours by the European Commission to make abuse control more consumer-orientated and to take greater consideration of efficiencies. Advocating a "more economic approach" it proposes examining the effects of abusive conduct in the market and efficiencies in the competitive assessment of abusive conduct. In the Bundeskartellamt's view it is important to ensure the manageability of the abuse regulations for competition law enforcement as well as the predictability of competition authority decisions, to provide legal security for the companies involved. It therefore advocates a "likely effects based approach" which does not require proof of actual effects but of likely effects of the abusive conduct in the market.

In addition, the Bundeskartellamt has spoken out against the possibility of an efficiency defence because Article 82 of the EC Treaty does not provide for such a justification possibility. Any additional assessment and balancing of the concrete effects of procompetitive aspects in an individual case which

goes beyond the usual balance of interests under German law would also make the proof of abusive conduct substantively more difficult.

Finally the Bundeskartellamt has criticized the idea of restricting the protective purpose of Article 82 EC to consumer protection, which has been implied in comments by the European Commission. According to the case-law of the European courts, Article 82 EC serves to protect residual competition (ECJ judgment of 13 February 1979, para. 85/76 – Hoffmann-La Roche, report 1979, 461, para. 91, 123; judgment of 9 November 1983, para. 322/81 – Michelin/European Commission ("Michelin I"), report 1983, 3461, para. 70). Even if the protection of competition ultimately serves more far-reaching objectives (consumer protection, efficient factor allocation or freedom in competition) the focus in individual case assessment should be placed solely on protecting competition per se as this ensures the achievement of the set objectives. Statements on further aims based on individual cases must necessarily remain uncertain.

c) New European Commission guidelines on the setting of fines

In June 2006 the European Commission published new guidelines on the setting of fines. These replace the previous ones from 1998. It is the explicit aim of the European Commission to raise the deterrent effect of fines. In contrast to the previous regulation, under the new guidelines there is now a direct link in the calculation of fines between the infringement and the branch of industry affected. The fines are based on the annual turnover of the company concerned in the branch of industry affected by the infringement. According to the guidelines on the setting of fines the European Commission can set a basic amount of up to 30 per cent of the turnover achieved from the infringement. This amount is multiplied by the number of years of participation in the infringement. Irrespective of the duration of the infringement the new guidelines provide for an initial charge of 15 per cent to 25 per cent of the relevant annual turnover in addition to the basic amount. Of particular emphasis here is the harsher fining of repeat offenders.

d) New Leniency Programme

In December 2006 the European Commission decided to issue an amendment to its Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (Leniency Programme"). The objective of the new notice is to offer more legal security to companies willing to open themselves to investigation by the European Commission. The basis for this amendment is the ECN Model Leniency Programme on which the Bundeskartellamt's new Leniency Programme is also based. The European Commission's new notice and the Bun-

deskartellamt's Leniency Programme are therefore fundamentally very similar. The major difference is that in the German regulation the sole ringleader of the cartel, as well as the coercer, is exempted from immunity from fines. The European Commission's Leniency Notice only exempts the coercer from immunity.

e) Green Book on private antitrust enforcement

The European Commission would like to achieve greater involvement of private persons in enforcing EC competition rules, and in December 2005 presented a Green Book entitled "Damage Actions for Breaches of EU Antitrust Rules." This is supplemented by a so-called Commission Staff Working Document, which describes in greater depth the possible options of action presented in the European Commission's Green Paper.

The Bundeskartellamt dealt with the subject of private antitrust enforcement at its 2005 Annual Meeting of the Working Group on Competition Law. The Bundeskartellamt's discussion paper for the meeting is available on the Bundeskartellamt's website at www.bundeskartellamt.de. In addition, the Bundeskartellamt, in cooperation with the Federal Ministry of Economics and Technology, has delivered its comments on the European Commission's Green Book, which closely examine the European Commission's proposals and highlight the need for harmonisation at European level. Apart from expressing concern about the competence of the European Commission (subsidiarity) the Bundeskartellamt rejects in particular the introduction of the eligibility for punitive damages and a legal processing institution based on the American "discovery" rule. As regards the introduction of new possibilities to collectively seek compensation through private actions at national level, the Bundeskartellamt and the Economics Ministry take the view that experience with already existing forms of pooling (e.g. under the Act on Exemplary Proceedings in Capital Market Disputes) should be awaited. The Bundeskartellamt sees no cause for legislative action at Community level since the German legislator has significantly improved conditions for damage claims for breaches of competition law in the 7th Amendment of the ARC (see p. 7). Harmonising the regulations for compensation for damages at European level would also involve jeopardising coherence in general tort law in the Member states in the long term. At the end of 2006 the European Commission ordered a further study to gauge the economic and social effects of forcing claims for damages from infringements of competition law. A White Paper with concrete proposals of action has been announced for early 2008. This is likely to trigger an intensive public debate about the matter.

f) Draft Guidelines on the assessment of non-horizontal mergers

At the end of 2006 the European Commission presented the Member States with its first draft guidelines on the assessment of non-horizontal mergers. These complement the European Commission's Guidelines on the Assessment of Horizontal Mergers from 2004 and deal with the special features to be considered in the competitive assessment of vertical and conglomerate mergers.

In the view of the European Commission there are fundamental differences in the way in which horizontal and vertical/conglomerate mergers affect competition. Whereas in the case of horizontal mergers a competitor is eliminated, vertical mergers only affect upstream or downstream markets, and conglomerate mergers only normally affect at best neighbouring markets. The European Commission takes the view that vertical, and even more so, conglomerate mergers are normally less damaging to competition than horizontal mergers. In the opinion of the European Commission non-coordinated merger effects primarily occur in the case of non-horizontal mergers if the merger leads to squeezing a competitor out of the market, or foreclosure. The European Commission regards a non-horizontal merger as of little concern to competition if a market share of 30 per cent and a level of concentration of 2000 (HHI) is not exceeded in any of the markets affected.

The Bundeskartellamt welcomes the fact that the draft guidelines reflect the current state of economic theory. Its presentation in the draft is, however, very abstract, which is likely to make the text difficult to understand and the guidelines difficult to apply in practice. Finally, it is questionable whether the premise of the European Commission that distinct differences can be made between the different types of mergers (horizontal, vertical, conglomerate) is realistic. In many cases the distinction as to whether the merger is a horizontal, vertical or conglomerate one is dependent primarily on market definition. Another factor to be considered in the analysis is whether the proposed market share threshold is compatible with Recital 32 of the European Merger Control Regulation, according to which only market shares of up to 25 per cent are generally unproblematic. Finally, the draft is criticized for only considering whether existing market power is shifted to another market and taking inadequate account of an increase in existing market power in one market as a result of the merger.

3. International cooperation

The Bundeskartellamt cooperates intensively and successfully with other competition authorities at international level. This development is not least a consequence of globalisation since the likelihood of cross-border competition restraints has increased with the opening of international markets. International cartels such as the worldwide vitamin cartel, the graphite electrodes cartel or the memory cartel show just how real this danger is. The competition authorities have taken the appropriate consequences and increased cooperation and coordination worldwide. Cooperation in competition policy was further intensified in international organisations such as the Organisation for Economic Co-operation and Development (OECD), the International Competition Network (ICN) and the United Nations Conference on Trade and Development (UNCTAD). The only forum in which competition law has not been discussed further is the World Trade Organisation (WTO) due to the failure of the WTO Ministerial Conference in September 2003 in Cancun.

a) Cooperation within the International Competition Network (ICN)

In recent years cooperation between the competition authorities within the International Competition Network (ICN) has developed remarkably. The underlying feature of the ICN is that the individual competition authorities and not the respective member states make up its membership. The ICN takes a completely new approach to international competition policy, which is based exclusively on voluntary multilateral action. All its working results are non-binding for the competition authorities involved. The application and enforcement of this new approach is based on permanent exchange and the resulting incentive to conform with work results induced by the other competition authorities, i.e. peer pressure.

Alone the steady increase in its membership shows that the ICN's approach is successful. When the ICN was established in the autumn of 2001, it numbered 14 competition authorities. Today it has a membership of 99 competition authorities from 86 jurisdictions. The ICN is largely project-based. The ICN's executive committee operates under the guidance of the so-called "Steering Group", which is newly elected every two years. In 2005/2006 the President of the Bundeskartellamt at that time, Dr. Ulf Böge, chaired the Steering Group. Its conceptual work is prepared in working groups. These working groups operate independently and either disband on completion of individual projects or start on new issues. There are currently four working groups dealing with the themes merger control, cartels, issues involving the implementation of competition policy and abuse control. The Bundeskartellamt takes an active part in all the working groups. The Telecommunications

Working Group which was set up in 2005 was disbanded after successfully compiling a report and best practices list. All the working group's documents are available at www.internationalcompetitionnetwork.org.

In 2006 in Cape Town the Unilateral Conduct Working Group (abuse control) was set up. With this the ICN addressed what could be described as the most controversial area of competition policy today ("Climbing the Everest of Competition Policy"). The Bundeskartellamt heads the ICN Unilateral Conduct Working Group together with the US Federal Trade Commission and jointly steers the Dominance Subgroup with the Russian Competition Authority, FAS.

During the reporting period two ICN Annual Conferences took place, in Bonn in June 2005 and in Cape Town/South Africa in May 2006. With over 400 participants from more than 75 nations and representatives from international organisations, the ICN Conference in Bonn, which was hosted by the Bundeskartellamt in conjunction with the International Conference on Competition, was one of the major conferences on international competition policy.

b) OECD

The OECD Competition Committee and its three working groups meet three times a year. One of the most significant work results of the Competition Committee was the adoption in October 2005 of "Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations". In the light of the increasing number of international cartel cases the exchange of confidential data between the competition authorities is becoming ever more relevant. These best practices facilitate international cooperation by providing guidelines for the formal exchange of information in international cartel investigations. Moreover, the Competition Committee has dealt with a whole range of competition law issues in roundtable discussions. External experts were increasingly consulted in the discussions and were able to shed light on matters from the perspective of academia, judges or lawyers. The topics discussed range from private antitrust enforcement, the remedies practice of competition authorities in merger control, the relationships between climate protection and the protection of competition to the treatment under competition law of (formerly) regulated sectors of the economy providing services of general interest.

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

took part in numerous seminars and workshops arranged under the Outreach Programme as experts and tutors.

c) Bilateral relations and visitors

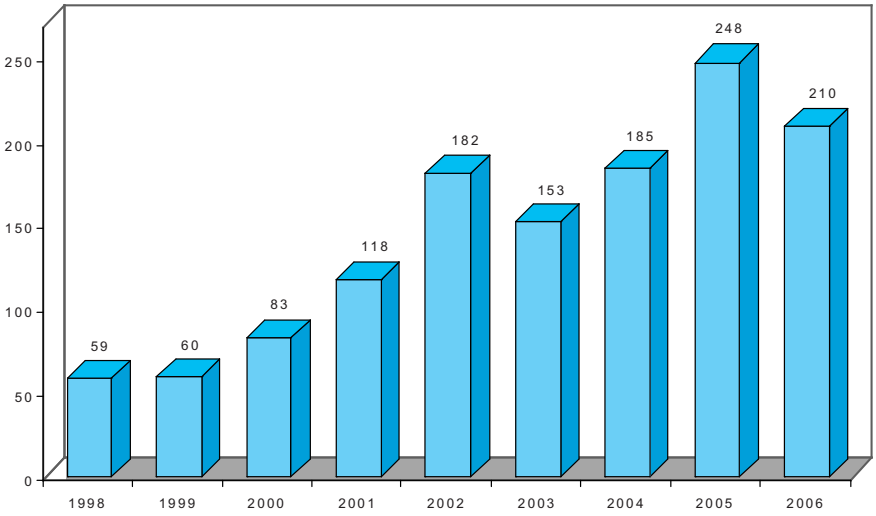
In the area of international cooperation the Bundeskartellamt maintains bilateral relations with foreign competition authorities. This not only includes processing enquiries from partner authorities from all over the world but also exchange visits. Due to the growing internationalisation of competition law these bilateral contacts have steadily increased in the last few years. The Bundeskartellamt looks after individual visitors as well as groups of experts. It organises informative events and short seminars on competition law issues or arranges study visits lasting several months. This makes longer study visits with practice-oriented training possible in the Bundeskartellamt's divisions and public procurement tribunals. Discussions are arranged between the visitors and the Monopolies Commission, the Federal Network Agency and the Cartel Divisions of the Düsseldorf Higher Regional Court and the Federal Court of Justice.

During the reporting period a total of 458 guests from 30 different countries visited the Bundeskartellamt, including EC Competition Commissioner Neelie Kroes and the heads of the Korean, Czech and Swiss competition authorities, to discuss above all practical matters concerning competition law enforcement. During this time an increasing interest could be observed among the Asian countries, above all China and Korea, in informative or study visits to the Bundeskartellamt.

d) Expert assignments and staff exchanges

The Bundeskartellamt is also committed to providing advice in competition law abroad and in 2005 sent out 15 and in 2006 18 temporary experts to assist in various Community or international programmes. In addition the Bundeskartellamt maintains regular staff exchanges with the French and British competition authorities and the European Commission.

Foreign visitors to the Bundeskartellamt



4. Developments in regulated special areas

a) New Telecommunications Act

In February 2007 an integral part of the law amending the regulations governing the telecommunications sector came into force. The Telecommunications Act now contains, inter alia, explicit requirements for the regulation of new markets.

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

The Bundeskartellamt had criticized these regulations during the legislative process. It is questionable whether this regulation is compatible with European law because it is not the task of the Member States but of the European Commission to stipulate which markets are to be considered for pre-regulation. Furthermore, the Bundeskartellamt, has, among others, pointed to the need to define new markets according to competition law principles, i.e. especially according to the demand-side oriented market concept, to prevent regulatory policy approaches from being considered in the market definition. Moreover, the Bundeskartellamt has suggested basing the question about the need for regulation on the stage of development in the market. Accordingly, any further technical development in products or services could not in itself automatically justify a "new market". Rather, a "new market", which might be exempted from regulation, is one for services or products which, from the buyer's perspective, are not interchangeable with other existing services or products, where, from the supplier's perspective, there is no flexibility of product adaptation and where the stage of development in the market is so new that statements on the stability of competitive conditions and foreclosure tendencies are not possible. The Bundeskartellamt has ultimately spoken out against extending special abuse control by which preventive abuse control is to be incorporated into regulatory law since general competition law already provides for preventive abuse control; therefore there is no need to additionally embody this in regulatory law.

The European Commission has opened advanced infringement proceedings against the Federal Republic of Germany for non-compliance with EU directives. It had already previously warned the Federal Government several times

not to issue legal provisions which would temporarily exempt Deutsche Telekom from competition regulation in spite of its dominant position in the German broadband market.

b) Postal services

Within the reporting period a further step was taken in the successive opening up of Germany's postal markets. Since 1 January 2006 the extent of the statutory exclusive licence held by Deutsche Post AG (DPAG) for letter services has been further limited. In accordance with Section 51 (1) Sentence 1 of the German Postal Act its area of exclusivity is now limited to the delivery of letters weighing up to 50 grammes. The exclusive licence had previously covered letters weighing up to 100 grammes. DPAG's exclusive licence expires on 31 December 2007 meaning that from 1 January 2008 Germany's postal markets will be fully opened to competition. At European level the provision of services in postal markets is regulated by Directive 97/67/EC of 15 December 1997. The Directive provides for the gradual reduction of the admissible reserved areas of the established postal administrations (exclusive licence) and is aimed at completely opening markets in Europe in 2009 without, however, making this last step binding. In 2006 the European Commission presented a draft directive by which all Member States are to phase out all reserved areas and open their postal markets completely to competition by the latest 1 January 2009.

c) Entry into force of Energy Industry Act

In July 2005 the amended Energy Industry Act (EnWG) entered into force. This invested the Federal Network Agency and the regulatory authorities of the Länder with far-reaching tasks. These involve in particular regulating access to electricity and gas networks and network use fees, developing incentive regulation, unbundling the network from upstream and downstream production stages in terms of information, organisation, accounting and legal specifications and practising abuse control in the network area. In fulfilment of the Energy Industry Act further provisions were adopted. The Bundeskartellamt had submitted extensive comments on the Act and the provisions during the legislative process.

Under national law the Bundeskartellamt's competency for abuse control in the network-based markets lapsed in accordance with Section 111 of the Energy Industry Act. In the gas and electricity sector the Bundeskartellamt continues to be responsible for abuse control under the ARC in the upstream and downstream markets of the networks (e.g. gas and electricity wholesale markets, generation and procurement markets, distribution of gas and electricity),

for abuse control under Art. 82 EC (also in the network sector) as well as for merger control and cartel proceedings under Section 1 ARC and Article 81 EC. In order to ensure that uniform assessment standards are maintained in sector-specific regulation under the Energy Industry Act on the one hand, and in general competition control under the ARC on the other, the Energy Industry Act provides for the right of the Bundeskartellamt to cooperate in, examine and comment on decisions taken by the Federal Network Agency.

The cooperation between the Bundeskartellamt and the Federal Network Agency was constructive during the reporting period. The Bundeskartellamt made intensive use of its rights of participation in Federal Network Agency proceedings. A particularly important case from a competition point of view was the Federal Network Agency's case concerning the cooperation agreement in the gas sector to implement the gas network access model adopted in the Energy Industry Act. The case materialized from objections by the Federal Association of New Energy Providers and Nuon Deutschland GmbH to the so-called "individual booking model" and to the number of 19 market areas. In its comments the Bundeskartellamt raised several considerable reservations about the individual booking model. The Federal Network Agency stated that the individual booking model was not applicable because this was not appropriate to ensure non-discriminatory, efficient and large-scale network access. In addition, reports during the reporting period were issued in accordance with Section 63 (5) of the Energy Industry Act by mutual agreement between the Bundeskartellamt and the Federal Network Agency and sent to the European Commission.

d) Transport

In April 2005 the new EU regulatory framework for the railway sector was implemented into German law in the form of the 3rd Amendment to the General Railway Act. Accordingly the Federal Network Agency, as the sector-specific regulatory body for the railways sector, has been responsible since 1 January 2006 above all for ensuring non-discriminatory access to railway infrastructure. As under the old legal framework, the tasks and competencies of the competition authorities under the ARC are unaffected by the sector-specific regulation - (Section 14 b (2) of the General Railway Act).

The provisions applying to the sector-specific regulation of the railways are primarily laid down in Sections 14 to 14 f of the General Railways Act. These regulate the right of access to railways infrastructure, track use contracts, as well as the pre- and post examination of measures taken by railways infrastructure companies by the Federal Network Agency. Detailed provisions on the regulation of access to railways networks and on the principles governing

the setting of fees for the use of rail track are contained in the Amended Railway Infrastructure Use Regulation which came into force on 1 August 2005. All public railway infrastructure companies, irrespective of their market position, are subject to the sector-specific regulation.

In the reporting period the Federal Network Agency informed the Bundeskartellamt about several planned regulatory decisions, e.g. revision of the conditions for the use of passenger railway stations, conditions for the use of service installations and for the use of railway network.

e) Health sector

On 1 April 2007 the "Act for the Enhancement of Competition in Statutory Health Insurance" entered into force. From a competition law point of view two amendments to the law are of particular significance.

Section 69 of the Code of Social Law (SGB V), was amended to make Sections 19-21 of the ARC applicable mutatis mutandis to single contracts between health insurance funds and service providers. In the version prior to the amendment, under Section 69 of the Code of Social Law (SGB V), the legal relationships between the health insurance funds and their service providers were exempted from competition law. During the legislative process the Bundeskartellamt advocated that Section 69 of the Code of Social Law (SGB V) be deleted. Whether the amendment substantiates the competency of the Bundeskartellamt or whether a violation of Sections 19-21 of the ARC can only be claimed before the social courts, is to be clarified in the forthcoming law-making process.

A further amendment concerns the examination under merger control of mergers between different types of health insurance funds. A newly introduced Section 171a of the Code of Social Law, (SGB V) allows different types of health insurance funds, i.e. local health insurance funds, company health insurance funds, trade guild health insurance funds, substitute health insurance funds and seamen's health insurance funds to voluntarily merge with one another. It is clear from the legal intent of the amendment that mergers between health insurance funds, even between different types, are subject to merger control under the ARC.

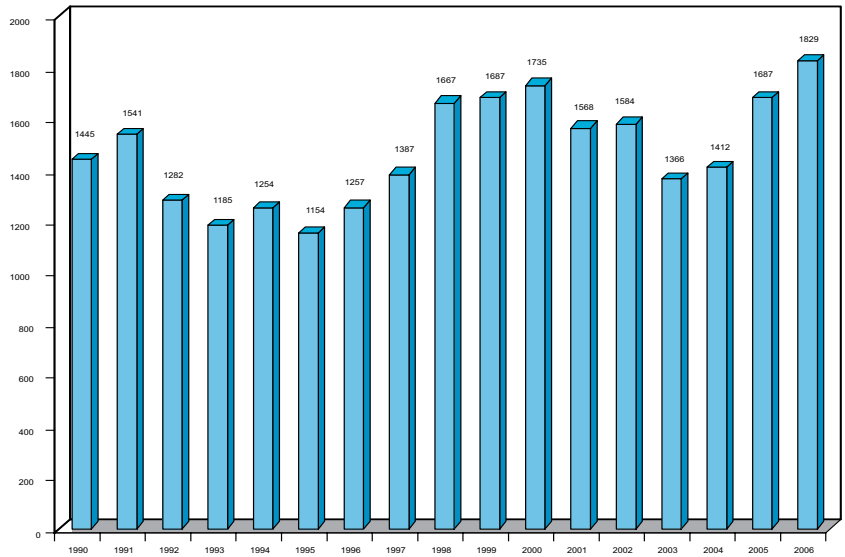
5. Merger control

As a means of structural control, merger control is intended to counteract the concentration of power in the markets. Merger projects, in which certain turnover thresholds have been exceeded, are therefore subject to notification. The Bundeskartellamt examines whether the merger would create or strengthen a dominant position. Since 1 August 2006 a form can be downloaded from the Bundeskartellamt's Internet pages. This is to serve as a guide for companies notifying a merger project. The object of the form is to request information from the company which is necessary or helpful for the examination of a merger project.

a) Statistical overview

In 2005 and 2006 3,516 mergers were notified. Compared with the reporting period 2003/2004 this represents an increase of 738 notifications. The number of notifications in 2006 even exceeded the previous record level of 1,735 attained in the stock-exchange boom period in 2000.

Mergers notified to the Bundeskartellamt between 1990 and 2006



In 2005 and 2006 the Bundeskartellamt concluded 64 merger cases by formal decision in main examination proceedings compared to 59 cases in the previous reporting period. In 43 of the 64 cases a clearance decision was issued (2003/2004: 36 cases), 11 cases were prohibited (2003/2004: 14 cases) and 10 cases were cleared subject to conditions or obligations (2003/2004: 9 cases). In 10 cases either the respective projects were given up by the parties concerned during the main examination proceedings or the proceedings were discontinued (2003/2004: 25 cases). All formal decisions are published on the Bundeskartellamt's Internet website at www.bundeskartellamt.de.

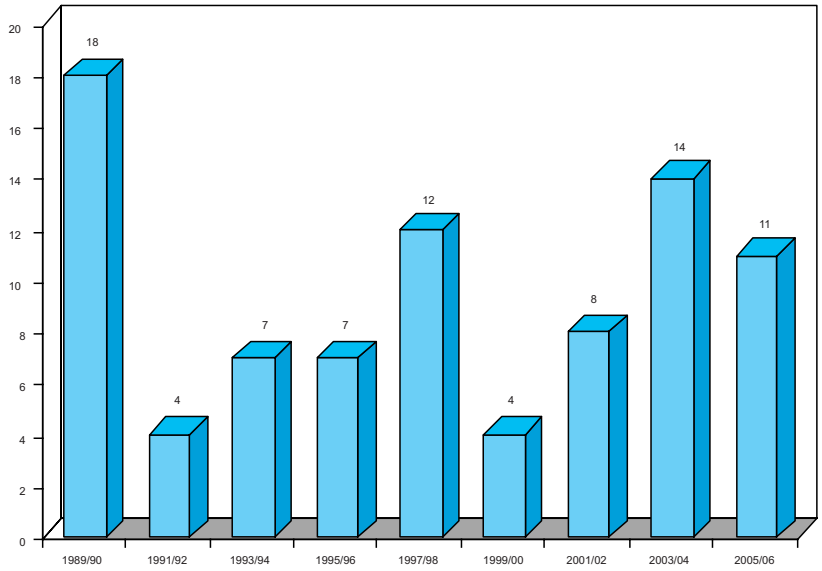
Prohibitions

In the reporting period a total of eleven mergers were prohibited because they were expected to create or strengthen a dominant position.

Concentration	Basis for decision
S-W Verlag/ Wochenspiegel (Mayen / Cochem-Zell)	Divestiture proceedings;strengthening of dominant positions held by Mittelrhein-Verlag in the regional advertising markets in the administrative district of Cochem-Zell and the Mayen area. The prohibition is final.
Rhön-Klinikum/ District Hospitals of Bad Neustadt, Mellrichstadt	Strengthening of the dominant position of Rhön in the regional markets for acute hospitals in Bad Neustadt / Bad Kissingen and Meiningen. The Düsseldorf Higher Regional Court rejected the appeal against the decision and granted leave for appeal on points of law to the Federal Court of Justice.
Rhön Klinikum / Eisenhüttenstadt Hospital	Strengthening of dominant position of Rhön in the hospital market in the Frankfurt/Oder region. Prohibition is final after withdrawal of appeal.
Volksfreund-Druckerei / TW Wochenspiegel	Divestiture proceedings; strengthening of dominant position of Volksfreund-Druckerei in the regional advertising market and entire circulation area of the "Trierischer Volksfreund" subscription daily. Securing of dominant position of Volksfreund-Druckerei in the relevant reader market. The prohibition is final.

RUAG Deutschland GmbH / MEN Metallwerke Elisenhütte GmbH	de facto monopolistic position of RUAG in the German market for small calibre ammunition (small arms ammunition) for customers in the authorities sector and military sector. The Düsseldorf Higher Regional Court rejected the appeal as inadmissible.
MSV Medien Spezial Vertrieb GmbH & Co. KG / Presse Vertrieb Nord KG	Creation of a dominant position of Bauer and Axel Springer in the press wholesale market (market level publishing houses / press wholesalers) for the Hamburg region as well as the strengthening of a dominant position of Axel Springer in the reader markets for over-the-counter newspapers and for regional subscription dailies in the greater Hamburg area and in the advertising market in Hamburg. The Düsseldorf Higher Regional Court reversed the prohibition decision in a final ruling.
Axel Springer / ProSiebenSat1 Media	Strengthening of duopoly of Springer/ProSiebenSat. 1 and Bertelsmann in the German TV advertising market. Strengthening of dominant position of Springer in the national reader market for over-the-counter newspapers and the national advertising market for newspapers. The Düsseldorf Higher Regional Court rejected the appeal as inadmissible. Appeal on points of law pending before the Federal Court of Justice.
Süddeutscher Verlag / "Südost-Kurier"	Creation or strengthening of dominant positions of the Süddeutscher Verlag in the sub-local advertising market (entire circulation area of Südost-Kurier) as well as in the local advertising market (City of Munich) and the regional advertising market (Munich region). Securing of dominant position of Süddeutscher Verlag in the relevant reader markets. Appeal filed at the Düsseldorf Higher Regional Court.
DuPont / Pedex	Strengthening of dominant position in the European market for filaments for oral care applications. The Düsseldorf Higher Regional Court reversed the prohibition decision in a final ruling. Appeal on points of law pending before the Federal Court of Justice.
Coherent / Excel Technology	Creation of a dominant position in the worldwide market for CO2 lasers. Appeal filed at the Düsseldorf Higher Regional Court.
Greifswald University Clinic / Wolgast District Hospital	Strengthening of dominant position of Greifswald University Clinic in the Greifswald regional market for acute hospitals. Appeal filed at the Düsseldorf Higher Regional Court.

Number of prohibitions
(according to reporting periods)



Clearance subject to remedies

Clearance decisions in the main examination proceedings can be made subject to conditions and obligations if these are appropriate and necessary to avert any possible prohibition. However, these must not aim at subjecting the conduct of the undertakings concerned to a continued control (Section 40 (3) of the ARC). During the period covered by the report ten merger cases were cleared subject to conditions or obligations.

Pre-notification cases

Cases classified as pre-notification cases involve projects which are either not notified or are modified because of competition concerns expressed by the Bundeskartellamt or which are withdrawn in the first phase or in the main examination proceedings. The number of relevant cases in the reporting period was 29. The particular significance of the withdrawal of a notification in the “run-up stage” of a (prohibition) decision is that the creation or strengthening of a dominant position can be prevented without a final decision by the Bundeskartellamt.

b) Significant cases in the reporting period

Axel Springer /ProSiebenSat.1

In January 2006 the Bundeskartellamt prohibited the acquisition of ProSiebenSat.1 Media AG by Axel Springer AG. Although the merger would not have led to an increase in market shares, its cross-market effects based on cross-media effects would have strengthened collective market dominance in the nationwide TV advertising market and Springer's dominant position both in the nationwide reader market for over-the-counter newspapers and the nationwide advertising market for newspapers. The proposed remedies were not appropriate to dispel existing competition concerns about the merger.

In the TV advertising market ProSiebenSat.1 and the RTL TV group, which belongs to the Bertelsmann group, together held a dominant position with a constant market share of approx. 40 per cent each over a number of years, a so-called "uncompetitive duopoly" without any substantial competition from outsiders. The merger would have led to a further assimilation of the corporate structures of the two conglomerates in the neighbouring markets for newspapers and magazines and a number of interlocks between Springer/ProSiebenSat.1 and Bertelsmann, which would have further secured and strengthened the duopoly. The interlocks resulted from mutual minority shareholdings of Springer and Bertelsmann in several private radio stations and press distribution companies and from their mutual control of the rotogravure company Prinovis. With the merger the newspaper *BILD* would have lost its imperfect substitute function as currently the only economic alternative to national TV advertising for advertising customers.

The merger would also have led to a strengthening of Springer's dominant position in the national reader market for over-the-counter newspapers. With its newspaper *BILD* Springer held a market share of approx. 80 % in this market. The merger would have enabled Springer to further secure and strengthen *BILD'S* position through cross-media promotional and editorial measures (cross-media promotion).

Finally the merger would also have led to a strengthening of Springer's market position in the national advertising market for newspapers. With its newspapers *BILD* and *Die Welt* the Springer publishing house already held a paramount market position with a share of approx. 40 %. The merger would have enabled Springer to offer from one source coordinated product advertising campaigns in several media and to launch cross-media advertising campaigns for third parties. Thus Springer's market dominance in the advertising market for newspapers would have been further secured.

The Düsseldorf Higher Regional Court rejected the appeal filed by Axel Springer against the prohibition as inadmissible. Springer has lodged an appeal on points of law with the Federal Court of Justice (BGH).

Mergers in the broadband cable market

After the Bundeskartellamt had issued a statement of objections in 2004 about the proposed acquisition by Kabel Deutschland GmbH of the broadband cable networks owned by Ish (North Rhine-Westphalia), Kabel BW (Baden-Württemberg) and Iesy (Hesse), and after the company had then withdrawn its application, the Bundeskartellamt examined further merger cases in the cable sector during the period covered by this report. During a bidding process for Ish, both Iesy and BC Partners filed a merger application. Both projects were cleared by the Bundeskartellamt. The concentrations affected the market for feeding in TV signals by programme suppliers into broadband cable networks (input market), the market for supplying TV signals to end customers (end customer market) and the market for supplying TV signals from network level 3 to network level 4 (signal supply market). In its evaluation the Bundeskartellamt came to the final conclusion that neither a merger of Ish and Iesy nor a merger of Ish and BC Partners would lead to the creation or strengthening of a dominant position held by the parties in the markets affected. The bidding process finally resulted in Iesy getting clearance to acquire Ish.

Energy

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

In early 2007 the Bundeskartellamt prohibited the RWE/SaarFerngas concentration. According to the Bundeskartellamt's findings the concentration would have led to significant market foreclosure effects. These would in particular

have resulted from the merging of the companies' participations in distributors which would have further secured electricity and gas sales. The concentration would in particular have strengthened the dominant position of Saar-Ferngas in the gas sector, because its gas sales would have been secured by RWE's participations in distributors. The merger would also have fulfilled the prohibition criteria with regard to the supply of end consumers in several local markets. In the electricity sector the acquisition of shares in distributors would have strengthened the dominant positions held by RWE together with E.ON on the national electricity markets. In addition, the concentration would have worsened competitive conditions in a number of local markets for household customers. Several commitments offered in the course of the proceedings were not sufficient to remedy the negative effects on competitive conditions in the gas and electricity markets. The Bundeskartellamt thus prohibited the concentration.

Hospital cases

In the period under review the Bundeskartellamt prohibited mergers in the hospital sector for the first time. The restructuring process in the hospital sector accelerated within this period. This affects hospitals of every size and all groups of hospital operators. Although the degree of representation of the large private hospital chains such as Fresenius/Helios, Rhön, Asklepios and Sana is disproportionate on the acquirers' side, public-law and non-profit operators have also increasingly strengthened their regional market positions.

In the period under review more than 40 hospital mergers were notified to the Bundeskartellamt. The mergers Rhön/Bad Neustadt district hospital and Rhön/Eisenhüttenstadt municipal hospital were prohibited in March 2005. The first prohibition decision on a merger between public-law hospital operators was issued in December 2006 in the Greifswald University Hospital/Wolgast district hospital case. The merger cases Asklepios/LBK Hamburg, Hamburg-Eppendorf University Hospital/Altona children's hospital and Humaine/Fresenius were cleared, but only after the competitive concerns about the proposed concentrations had been eliminated in the course of the proceedings or following their conclusion. Four further cases which were decided upon in the course of the Bundeskartellamt's main examination proceedings could be cleared without obligations. The definitions of the product and geographic markets and the decisions made were based in each case on comprehensive surveys of patient flows in the relevant markets.

In the Rhön/Bad Neustadt district hospital case the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's prohibition decision in April 2007. In its decision the court confirmed the applicability of merger control to

mergers between hospitals. The decision left open whether, in product market terms, the focus should be placed on a uniform market for acute hospitals, or whether the market for hospital services should continue to be divided according to specific medical areas of basic care, which include the two specialised areas of surgery and internal medicine as well as urology, gynaecology and ear, nose and throat medicine. The Rhön-Grabfeld administrative district has announced that it will file an appeal on points of law against the Higher Regional Court's decision. At the same time the administrative district applied for a ministerial authorisation which was refused by the Federal Minister of Economics and Technology. The appeal filed by the Rhön-Grabfeld administrative district against this decision was later withdrawn, so that the refusal to grant ministerial authorisation has become final.

Waste disposal

In the period under review consolidation in the waste disposal market has increased further. This development is reflected by an increased number of merger examinations in this sector. The proposed takeover of RWE Mecklenburg-Vorpommern by Alba AG was cleared by the Bundeskartellamt subject to obligations. Without these obligations the concentration would have resulted in the strengthening of dominant positions in Mecklenburg-West Pommerania and the northern part of Brandenburg in the collection and transport of residual waste, and collection and transport of light-weight packaging.

The Bundeskartellamt also cleared the takeover of Cleanaway Deutschland by Sulo subject to obligations. This merger had been referred to the Bundeskartellamt by the European Commission upon application by the companies. The merger concerned a large number of different product and geographic markets in Germany and would have led to the creation of dominant positions e.g. in the markets for the collection of residual waste and the collection and treatment of light-weight packaging in Rhineland-Palatinate/Saarland, Saxony and Hesse. The competitive problems were solved by the obligation to transfer activities to third parties, in proportion to the market share increase achieved by the merger. In the period covered by the report most of the obligations had already been fulfilled.

The Bundeskartellamt has cleared the proposed acquisition by Remondis of shares in AWISTA and ATG & Rosendahl from EGN Entsorgungsgesellschaft Niederrhein GmbH, which belongs to Stadtwerke Krefeld AG, without obligations. AWISTA was commissioned by the City of Düsseldorf with various waste management tasks, particularly the capacity utilization of the Düsseldorf incineration plant. The merger primarily affected the markets for the collection and transport of domestic waste, the disposal of domestic waste and

commercial waste incineration. It would, however, not have resulted in the strengthening or creation of a dominant position in these markets.

Alba's intention to acquire control of Interseroh was cleared by the Bundeskartellamt in preliminary examination proceedings. The Bundeskartellamt cleared the proposed acquisition by Remondis of a minority share in Schweriner Abfallentsorgungs- und Straßenreinigungsgesellschaft subject to a suspensive condition.

dba/Air Berlin

The Bundeskartellamt cleared the acquisition of dba Luftfahrtgesellschaft by Air Berlin. Air Berlin mainly offered flights to European metropolises and classic holiday areas whereas dba's range of offer primarily focused on domestic flights. Consequently, the route networks of the two airlines complemented each other, apart from a few overlaps that did not raise any competition concerns.

Volkswagen/Porsche

The Bundeskartellamt approved an increase in Porsche AG's share in Volkswagen AG to 25.1 per cent of its ordinary stock. After Porsche had already gained a competitively significant influence on Volkswagen by acquiring 19 per cent of Volkswagen's equity stock in the autumn of 2005, the plan to increase its share further to over 25 per cent fulfilled criteria for renewed examination under merger control. However, the activities of Porsche and Volkswagen only overlapped one another in their sports cars and all-terrain vehicle business, without creating or strengthening a dominant position. The concentration could thus be cleared during the preliminary examination stage.

Deutsche Börse/London Stock Exchange

In 2005 the Bundeskartellamt cleared the merger of Deutsche Börse AG and London Stock Exchange plc. However, as Deutsche Börse's takeover attempt failed, this concentration was not put into effect. The examination of the concentration project had shown that the participating parties' activities overlapped mostly in the sector of stock exchange infrastructure for equities trading. A deterioration of the competitive conditions was not to be expected in this sector. No market share additions would have occurred in the sector of listing services or in the organisation of stock exchange dealings, as the participating parties were active in separate geographic markets.

GZS/Telecash

The Bundeskartellamt cleared the acquisition of GZS Gesellschaft für Zahlungssysteme mbH by Telecash GmbH & Co. KG subject to the condition that GZS sell its subsidiary easycash. The concentration affected services covering the processing of card payments, from the point of sale to the debiting of the customer's account. The Bundeskartellamt examined the market relationships between the banks and customers to whom they issue cards ("issuing processing"), between the banks issuing the cards and outlets accepting card payments ("acquiring processing"), and the network operation. The merger would have created a dominant position in the market for network services, the connection of point-of-sale terminals, provision and loading of the relevant software and collection and transmission of payment data because the joint market shares of the parties to the merger would have added up to more than 50 per cent, and the market share lead over the closest competitors would have been significantly increased. In addition, legal and structural barriers to market entry existed in the market for network services, so that a market entry by potential competitors was not to be expected, at least not in the near future. The concentration could thus only be cleared subject to the condition that easycash be sold.

Minor market clause: E.I. du Pont/Pedex and Sulzer/Mixpac

The area of applicability of the minor market clause (Section 35 (2) sentence 1 no. 2 of the ARC) has been considerably restricted by the legislator and case-law. The provision under Section 19 (2) sentence 3 of the ARC, which was incorporated into law with the 7th amendment to the ARC, clarifies that the relevant geographic market can be larger than the territory of the Federal Republic of Germany. In its decision in the Melitta/Schultink merger case (vacuum cleaner bags) the Federal Court of Justice (BGH) stated that the relevant geographic market was to be defined according to economic criteria, and was thus not necessarily limited to the national territory. The Bundeskartellamt's view is that as a consequence of the case-law and the amendment to the law, foreign turnovers are to be included in the calculation of market volumes within the framework of the minor market clause if the market to be defined under economic aspects is larger than the national territory.

However, the Düsseldorf Higher Regional Court does not share this legal view. In the du Pont/Pedex merger case (toothbrush filaments) in which the Bundeskartellamt issued a prohibition decision in March 2006, the court held that the purpose and intent of the minor market clause, i.e. to exclude economically insignificant markets from merger control, require decision-makers to focus only on the domestic market volume. This view was again confirmed by the

Düsseldorf Higher Regional Court in the Sulzer/Mixpac case (manufacturers of cartridges). The Bundeskartellamt prohibited this merger and ordered its dissolution in February 2007 after the companies had put the concentration into effect although merger control proceedings were still pending at the end of 2006 in view of the Düsseldorf Higher Regional Court's interpretation of the minor market clause in the du Pont/Pedex case. In March 2007 the Düsseldorf Higher Regional Court ruled that the appeal filed in the Sulzer/Mixpac case was to have suspensive effect so that the companies could put the concentration into effect provisionally.

The Bundeskartellamt filed an appeal on points of law at the Federal Court of Justice (BGH) against both decisions of the Düsseldorf Higher Regional Court.

Fine for false information in notification

In the reporting period the Bundeskartellamt for the first time imposed a fine against a company for intentionally submitting false information in a merger notification. In its notification the company had provided false information on market volumes, market shares and the competitive situation in the relevant market. This was shown by the investigations and an assessment which had been available to the company already before the notification. The fine amounted to 250,000 euros. The setting of the fine in this case was based on the level of fines provided for under the ARC in the version prior to the 7th amendment as the administrative offence was committed in 2004. The ARC^{old} provided for a level of fines up to 500,000 euros.

Under the new law, fines of up to 1 million euros can be imposed in such cases. The company appealed against the order to impose the fine. The Bundeskartellamt discontinued its fine proceedings against the company's authorised representatives as no evidence could be found of their wilful participation in the competition law offence.

6. Abuse control

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 regarding the German Lotto and Toto Block, in the areas of carbonation systems and spice production, and in cases of sales below cost price.

a) Proceedings in the electricity and gas sectors

Long-term contracts

In the last reporting period the Bundeskartellamt had already initiated proceedings against 15 gas transmission companies on suspicion of the abuse of a dominant position. The proceedings were directed against the practice of long-term gas supply contracts concluded between gas transmission companies and distributors which, due to their combination of long-term supply commitments and a high degree of requirement satisfaction, foreclosed the markets to new market participants in the long term. After a consensus had failed in the autumn of 2005 due to resistance by E.ON-Ruhrgas, the Bundeskartellamt issued a prohibition decision in the E.ON-Ruhrgas case in January 2006 and established that these contracts violated Section 1 ARC and Articles 81, 82 EC. E.ON Ruhrgas was ordered to stop the infringement at the latest by the end of the 2005/2006 gas year. The decision also included the obligation that, for a period of four years, contracts were not to exceed a term of four years if they covered more than 50 to 80 per cent of the total requirements. For contracts covering more than 80 per cent of the requirements a maximum term of up to two years was envisaged. In expedited proceedings the Düsseldorf Higher Regional Court confirmed the immediate enforceability of the decision. The proceedings in the main action are still pending.

The decision serves as a model for the whole sector. Four of the proceedings against the other gas transmission companies could be discontinued after these had brought their existing contracts into line with competition law under Section 32b of the ARC and undertaken only to conclude contracts in future which were in compliance with competition law. Proceedings against other gas transmission companies which cannot be closed on the basis of commitments from the companies concerned, will be continued.

Reflection of the costs of CO_2 allowances in electricity prices

In the reporting period, upon massive complaints received from associations from the energy-intensive industrial sector, the Bundeskartellamt investigated

the suspicion that the companies RWE and E.ON were using the introduction of CO_2 emissions trading to artificially force up industrial electricity prices and, together with other suppliers, to achieve annual windfall profits running into billions. On 30 March 2006 the Bundeskartellamt conducted a hearing with the industrial associations, institutions and authorities concerned. In December 2006 it informed RWE of its preliminary evaluation that the industrial electricity prices charged by RWE in 2005 were abusive as the company had passed on more than 25 per cent of the value of its CO_2 emission allowances in its electricity prices. The Bundeskartellamt based its evaluation on the economic insight that opportunity costs are in principle taken into account in an internal business calculation. Nevertheless the preliminary evaluation showed that, under the aspect of CO_2 allowance trading, the electricity prices pushed through had to be described as excessively abusive. According to the Bundeskartellamt's investigations the prices charged by RWE differ from those that would have emerged if effective competition existed. Furthermore, for reasons relating to the electricity sector and emissions law, actual alternative uses and opportunities only existed for a small number of emission allowances. For factual reasons the Bundeskartellamt has initially examined RWE's pricing policy; the proceedings against E.ON will be continued after this.

Proceedings against gas providers on account of excessively high gas prices

As in the last reporting period, the Bundeskartellamt conducted proceedings against seven gas providers on suspicion of abusive pricing. The proceedings could be discontinued after the companies had undertaken to open up their gas networks to third parties already in spring 2006 within the framework of a provision scheme, i.e. before the introduction of a gas network access model under the Energy Industry Act.

In connection with the price abuse proceedings conducted by the Bundeskartellamt and the competition authorities of the Länder the competition authorities carried out a survey of the gas prices charged by 739 gas providers throughout Germany in order to establish a better basis for abuse control. In January 2007 the Bundeskartellamt published for the first time a national gas price comparison for household consumers on its website.

Threat of non-supply inadmissible

In the view of the Bundeskartellamt and the competition authorities of the Länder, the threat of non-supply or the refusal to supply by energy providers vis à vis consumers who refused to pay their bills, referring to their rights

under Section 315 of the German Civil Code, constitutes an inadmissible abuse of a dominant position. The same applies to the practice of some energy providers of cancelling special rate contracts with consumers and of downgrading customers to the more expensive standard supply rate. Abuse proceedings conducted in this context by the Bundeskartellamt against an energy provider could be discontinued after the company had ruled out the occurrence of any such violations in the future.

b) Further abuse proceedings

Deutscher Lotto- und Totoblock

In August 2006 the Bundeskartellamt took action against the German Lotto and Toto Block ("Deutscher Lotto- und Totoblock, DLTB") and the lottery companies of the German Länder on account of their conduct towards the so-called commercial lottery agents, which represented an abuse of their dominant position. The lottery companies jointly dominate the demand market for nationwide commercial lottery agency services. The lottery companies' refusal to accept cross-Länder lottery agreements concluded by commercial agents violates the prohibition of abusing a dominant position. The lottery companies are obliged to enter into business relations as they are the only buyers of the services provided by commercial lottery agents in the market for nationwide commercial lottery agency services. They can thus control access to this market and deny individual companies market access. The lottery companies and the DLTB have filed an appeal against the Bundeskartellamt's decision at the Düsseldorf Higher Regional Court. In October 2006 the Düsseldorf Higher Regional Court essentially rejected the additional request filed by the parties in expedited proceedings that their appeal have suspensive effect. The lottery companies lodged an appeal on points of law with the Federal Court of Justice (BGH) against the Düsseldorf Higher Regional Court's confirmation of immediate enforceability of the prohibition to limit internet distribution services to residents of the federal state in which the lottery company is based.

Offers below cost price

In application of Section 20 (4) of the ARC the Bundeskartellamt imposed a fine on the Dirk Rossmann and Anton Schlecker drugstore chains on account of their offering services and products below cost price.

The Bundeskartellamt imposed a fine on Schlecker on account of its offer of digital photo processing services below cost price. The subject of the proceedings were periods between April and October 2004, during which Schlecker

nationally advertised special offers for its digital photo processing services. These were not merely occasional offers. Whereas the first offer was for a period of 11 weeks, the second and third offers in September and October 2004 were only for 3 weeks at a time. However, as only one week lay between these offers, customers were given the impression that Schlecker had special and lasting price competence in digital photo processing, which indicated that this was not to be seen as a merely occasional offer of services below cost price. The imposition of the fine is final.

The proceedings against Rossmann on account of sales of drugstore products below cost price, which ended with a fine of 300,000 euros in February 2007, were unusually complex. Extensive investigations were required at Rossmann and its suppliers to determine the cost price of 55 products. To determine the cost price, not only the charged net price had to be taken into account but also all relevant purchase conditions that were agreed between Rossmann and its suppliers. All conditions, including advertising subsidies and other lump-sum payments, had to be calculated as a proportion of turnover and added to the price of all products delivered by the supplier. Rossmann has appealed against the order to impose the fine at the Düsseldorf Higher Regional Court.

Soda-Club

The Bundeskartellamt has prohibited Soda-Club GmbH from preventing the filling of CO_2 cartridges by competitors. Carbonation systems with CO_2-cartridges are used by end consumers to add carbon dioxide gas to tap water. The market for the filling of cartridges for use in home carbonation systems had been based for many years on an exchange system: The end consumer exchanged the empty cartridges from any manufacturer at a filling station for filled cartridges and paid for this service. Soda-Club GmbH, however, distributed its cartridges to end consumers via a "rental system" and set special conditions for the filling of cartridges. Distributors were thus exclusively tied to Soda-Club and had to commit themselves to have empty cartridges filled exclusively by Soda-Club. Independent retailers and filling companies were barred from filling Soda-Club cartridges, and violations of Soda-Club GmbH's alleged property right to Soda-Club cartridges were prosecuted.

In its decision the Bundeskartellamt ordered that independent retailers could fill Soda-Club cartridges and that end consumers were allowed to have their Soda-Club cartridges exchanged or refilled by competing filling companies. Soda Club opposed the Bundeskartellamt's immediately enforceable decision by applying to the Düsseldorf Higher Regional Court. In provisional proceedings the court confirmed the Bundeskartellamt's decision in all material respects. In August 2006, following Soda-Club's appeal on points of law, the

Federal Court of Justice (BGH) reversed the Düsseldorf Higher Regional Court's decision on procedural grounds and ruled that the appeal was to have suspensive effect.

Fuchs spices

The Bundeskartellamt imposed a fine of 250,000 euros against TEUTO Gewürzvertrieb GmbH (TEUTO), which belongs to the Fuchs group, for violating a prohibition decision of the Bundeskartellamt dating back to July 2002. In 2002 the Bundeskartellamt prohibited the company which sells dried spices under the brand names Fuchs, Ostmann, Ubena and Wagner, from unfairly impeding the business activities of Hartkorn, one of the few remaining medium-sized spice producers. The impediment amounted to systematically forcing competitors out of the market by paying retailers large advertising subsidies, which induced them to agree to stock exclusively Fuchs products.

Thereafter further violations of the prohibition decision were committed by TEUTO's sales representatives. They no longer enforced exclusivity upon the retailers they supplied on a written basis but either agreed this verbally or de facto enforced it by the manner in which the conditions in the supply agreements were formulated. As an incentive for granting exclusivity the retailers received large advertising subsidies in the form of payments and/or services in kind such as in particular the free supply of basic fittings, i.e. shop shelves filled with spices. The Bundeskartellamt punished the violations by a fine amounting to 250,000 euros. TEUTO has appealed against the decision at the Düsseldorf Higher Regional Court.

Boycott

The call by the German Association of Plastic, Reconstructive and Aesthetic Surgeons (Deutsche Gesellschaft der Plastischen, Rekonstruktiven und Ästhetischen Chirurgen, DGPRÄC) and its subdivision, the Association of German Aesthetic Plastic Surgeons (Vereinigung der Deutschen Ästhetisch-Plastischen Chirurgen, VDÄPC) for their members (free-lance and hospital plastic and aesthetic surgeons) to break off cooperation and business relations with discount suppliers was seen by the Bundeskartellamt as an illegal call for boycott within the meaning of Section 21 (1) of the ARC. As the associations discontinued the conduct objected to and corrected their behaviour towards their members, the proceedings could be discontinued.

Vertical distribution agreements

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

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

7. Ban on cartels and cooperation

As regards horizontal cooperation between 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.

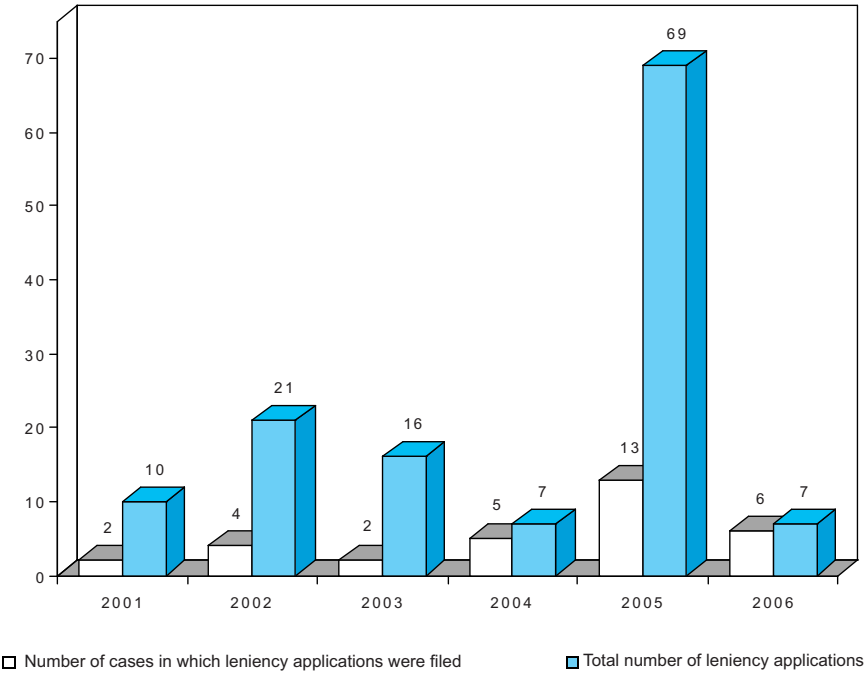
a) Administrative fine proceedings

In the last few years the Bundeskartellamt has attached great importance to the prosecution of price, market allocation and quota cartels. In June 2005 the 11th Decision Division was transformed into a division dealing exclusively with cartels. The Special Unit for Combating Cartels (Sonderkommission Kartellbekämpfung, SKK), which was founded in 2002 and supports the authority's Decision Divisions in uncovering cartel agreements, has successfully continued its work. 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 with supervisory responsibilities in the companies. In several cases fines were imposed against the companies concerned. The total amount of fines imposed in 2005 was 163.9 million euros, of which 160.7 million euros were imposed against companies. In 2006 fines amounted to 4.5 million euros, of which 3.4 million euros were imposed against companies.

The reporting period witnessed a marked increase in the number of applications for the Leniency Programme. The Bundeskartellamt received a total of 76 applications concerning 19 different proceedings.

In the period covered by the report the Bundeskartellamt carried out 10 searches at a total of 79 companies and 6 private homes on the suspicion of hard core cartel agreements. Six searches took place in 2005 (51 companies and 2 private homes) and four in 2006 (28 companies and 4 private homes).

Leniency applications submitted to the Bundeskartellamt between 2001 and 2006



The following administrative fine proceedings were of significance during the reporting period:

In September 2005 fines totalling over 20 million euros were imposed on seven public insurance companies and the directors involved. Ten private insurance companies and their directors involved had already been punished by fines amounting to about 130 million euros in the March of that year. The cartel law violations involved above all the industrial property insurance sector (in particular fire, fire consequential loss, EC and all risk insurance, and technical insurance), the buildings monopoly insurance sector and property insurance in the hospital sector. Two of the administrative orders imposing the fines are final; appeals have been lodged against the remaining orders.

In the reporting period the Bundeskartellamt imposed fines totalling 1.8 million euros against six small and medium-sized haulage contractors on account of price agreements regarding removal services for US soldiers under the deployment programme of the US military authorities in Germany. In the case

of three of the companies involved the Bundeskartellamt applied its Leniency Programme as a mitigating measure in calculating the level of the fines. In parallel proceedings the American antitrust authorities opened investigation proceedings against the prime contractors operating in the USA and imposed fines totalling more than 10 million Dollars. Three of the administrative orders imposing the fines issued by the Bundeskartellamt are final; appeals have been lodged against the remaining orders.

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

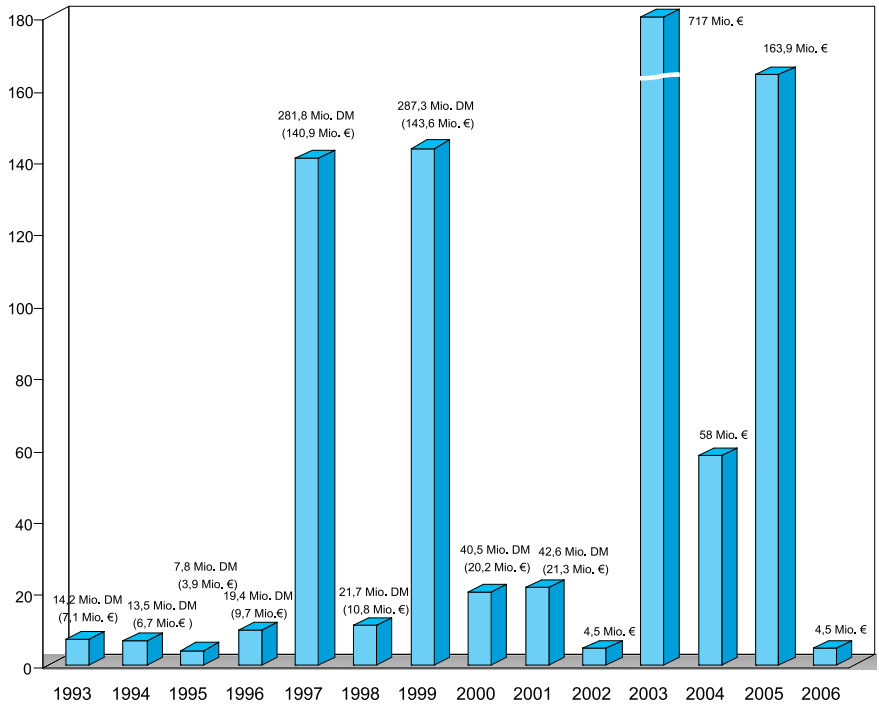
In the cartel proceedings against ready-mixed concrete manufacturers on account of quota agreements in the market areas of Munich, Nuremberg, Leipzig/Halle, Thuringia along the German motorway A4, Ludwigshafen/Mannheim, Kiel/Neumünster and in several regional markets in Mecklenburg-Western Pommerania, fines totalling 8.68 million euros were imposed on 35 companies. The orders imposing the fines are final. The remaining proceedings against a further approx. 40 companies, mainly small and medium-sized enterprises, have not yet been concluded.

On 1 September 2006, following searches conducted in 2003 and 2004, the Bundeskartellamt imposed fines amounting to approximately 2.6 million euros against four companies and seven persons responsible in the pharmaceutical wholesale sector on account of anti-competitive agreements. The subject of the cartel agreement was a quota cartel which aimed at returning the market shares to the level before the start of a discount battle in early 2003. The fines were comparatively low due to the fact that the Bundeskartellamt had to apply the rules for calculating fines applicable at the time of the competition infringement and cartel-induced additional proceeds could ultimately not be established with certainty.

In May 2005 the Bundeskartellamt searched the premises of twelve companies active in the liquid gas sector on the suspicion of customer protection agreements in the tank and bottled gas sector. Written charges were served on eight companies concerned and their directors who were accused of wilful violations of German and European competition law.

Fines imposed by the Bundeskartellamt

(Total amount in € per year)



b) Cooperations

Apart from its investigations in fine proceedings the Bundeskartellamt also followed up the suspicion of horizontal competition restraints in several proceedings and dealt with a number of different anti-competitive practices.

Basic encryption in satellite TV

The Bundeskartellamt examined plans by the Pro7Sat.1 and RTL TV broadcasting groups to encrypt their advertising-financed programmes which are broadcast via satellite (RTL, Vox, Sat.1, Pro7 and further programmes). Under this model access to the programmes of both groups would only have been granted jointly and for a recurring fee, of which the broadcasting groups would have received a share (so-called “Dolphin” project, later “entavio” project). The original plan was to establish a joint venture of the two broadcasting groups. After the Bundeskartellamt had expressed concerns about the

project the broadcasting groups abandoned their plan, but went on to negotiate (formally separate) contracts under the law of obligations with the satellite operator SES Astra on the realisation of a model whose key elements were identical to those of the first one. RTL actually concluded such contracts. The structure of the contracts or drafts, the economic conditions and the developments that led to the contracts suggest that there would be horizontal coordination between Pro7Sat.1 and RTL. The Bundeskartellamt considered the business model envisaged, i.e. coordinated introduction of encryption with joint provision of reception, collection of fees from viewers and sharing the fees received with the broadcasting groups, to be problematic from a competition law perspective. It announced that a warning was being considered whereupon Pro7Sat.1 stated that the group had given up on the project.

Insurers' pool for pecuniary loss liability risks (Versicherungsstelle für Vermögensschadenhaftpflichtrisiken)

The Bundeskartellamt is examining the admissibility under competition law of the co-insurance group "Versicherungsstelle". Several insurance companies had established this pool to jointly insure pecuniary loss liability risks for internationally active auditors and chartered accountants. According to the current stage of investigation several aspects of the insurance pool are in violation of Section 1 of the ARC and Article 81 EC respectively. The insurance pool proposed to undertake commitments under Section 32 b) of the ARC which, in the Bundeskartellamt's view, are not sufficient to eliminate the established violation of competition law. The Bundeskartellamt therefore informed the insurance pool and its members of its intention to prohibit this activity.

Disposal of waste electrical and electronic equipment

Since 24 March 2006 consumers can dispose of their waste electrical and electronic equipment free of charge with their local council under the German Electrical and Electronic Equipment Act (Elektro- und Elektronikgerätegesetz, ElektroG). Under the ElektroG the manufacturers are responsible for the provision of containers, logistics, sorting and recycling. They commission these services with disposal service companies. The waste electrical equipment register foundation (Elektro-Altgeräte-Register, EAR) has dealt with overall tasks such as the registration of manufacturers and the non-discriminatory organisation of the order in which full containers are collected.

While in the period covered by the previous report competition law concerns focused on the cooperation possibilities for manufacturers, the Bundeskartellamt has now mainly been concerned with competition problems caused by the

behaviour of waste disposal companies. The waste disposal companies intended to implement a logistics model under which ultimately only one company would be responsible for providing containers at each municipal collection site. Every service company commissioned by a manufacturer with the collection of a full container would thus be forced to enter into an agreement with this locally responsible disposal company on the way the services are to be carried out and the relevant conditions. This model would have led to a monopoly position held by the locally responsible disposal company and, for all manufacturers, to an extensive standardisation of waste disposal conditions for electrical waste equipment. Due to the competition concerns the waste disposal companies and their associations abandoned this model. However, it appears that the implementation of this model has been developed further in practice. The Bundeskartellamt has thus initiated administrative proceedings in order to establish the facts of the case and will intervene if anti-competitive conduct is found.

Savings banks' "lighthouse products"

In 2006 the German savings banks (Sparkassen) launched a nationwide advertising campaign for so-called "lighthouse products" which essentially included the savings banks' consumer credits, housing loans and savings schemes. In some parts of the campaign minimum prices were mentioned. The Bundeskartellamt examined whether these lighthouse products resulted from an inadmissible cartel agreement. Savings banks are independent companies with independent business policies which, in some areas, may well act as competitors. A joint marketing strategy would not only have made it possible to agree on prices and conditions for consumer credits, housing loans and savings schemes, but also to prevent the emergence of other products. The Bundeskartellamt informed the German Savings Banks' Association (Deutscher Sparkassen- und Giroverband), the creator of these uniform products, that the launch of these "lighthouse products" would not meet with competition law concerns under Section 1 of the ARC and Article 81 EC if the savings banks' joint standard course of action essentially referred to advertising the products and did not include any features relevant to the price. Any forced participation in this strategy would not be admissible either. It would also have to be ensured that, if they participated, savings banks would not have to comply with "best practice" proposals but would generally be able to use and implement these individually in consideration of their own entrepreneurial freedom. The German Savings Banks' Association was informed that it would have to adequately monitor that its provisions on the lighthouse products were correctly and legitimately applied (in accordance with competition law). This would include asking its users to comply with the relevant provisions, thus preventing any application that would violate (competition) law.

8. Public procurement law

Since 1 January 1999 the Bundeskartellamt has been responsible for reviewing the award of public contracts by the German Federation. The three public procurement tribunals set up at the Bundeskartellamt review, upon request, whether the contracting authorities have 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 a contract is awarded to the bidder submitting the most economical offer.

a) Reform of German public procurement law

On 12 May 2004 the Federal Government decided on criteria for streamlining public procurement law. By the end of 2004 the Federal Ministry of Economics and Labour had presented a draft bill and regulation on the basis of these criteria. This was to implement at the same time the EU public procurement directives 2004/18/EC (so-called "Basic Directive") and 2004/17/EC (so-called "Utilities Directive"). The proposals in draft bill and regulation provide for the abandonment of the former cascade principle, i.e. the reference in the ARC to the public procurement regulation, which in turn refers to the award rules, by merging the award regulations with the public procurement regulation. The legislative proposals could not be implemented before the re-elections in September 2005 which resulted in discontinuity. Solely the possibility to conduct a competitive dialogue as provided for in Article 29 of the Directive 2004/18/EC was implemented into law with the "Act to accelerate the Establishment of Public Private Partnerships and to Improve the Legal Framework for Public Private Partnerships", dated 1 September 2005.

After the Bundestag elections the coalition partners agreed on new key features for the reform of public procurement law. The reform was to be based on the existing system, with a continuation of the cascade system. The award rules and the procurement regulation were to remain in place. Firstly a minor amendment to the public procurement regulation was passed to implement the EU Public Procurement Directive to avoid an infringement proceeding. In this Third Regulation to Amend the Public Procurement Regulation of 23 October 2006 the mandatory components of the Basic and Sector Directives were implemented into law. These amendments brought the thresholds in Section 2 of the Procurement Regulation into line with the EC Directives. The thresholds were newly set to achieve harmonization between the Directives and the WTO Public Procurement Agreement for the period up to

31 December 2007. Furthermore the Public Procurement Regulation was adapted in respect of the provisions on the estimation of the contract value, with a reference to the award rules for services (VOL/A) and freelance services (VOF) and the Contract Procedures for Building Works (VOB/A). These have since been adapted in substance by the award committees to the provisions of the Basic and Sector Directives and been republished. The new award rules provide, among others, for precisely defined regulations on prequalification proceedings; the criteria for exclusion from participating in a public contract were tightened in the event of conviction by final judgement, and technical specifications in the description of services introduced. In addition, the notification provisions were adapted for use via electronic channels of communication, the information/data specified in the award documents was extended (e.g. valuation of award criteria, minimum requirements) and the documentation requirements in the report about the contract awarded tightened.

At the end of 2006 the Federal Ministry of Economics and Technology presented its first draft bill to amend the public procurement provisions in the ARC for coordination with the other ministries. The bill allows, among others things, for a so-called "de facto award" to be rendered ineffective in review proceedings. If a public contracting authority has placed a contract directly with a company without inviting other companies to participate in the award proceedings and without this being expressly allowed by law, the conclusion of the contract can be rendered ineffective. The draft also provides for amendments to the requirement to make a complaint. An application for review is inadmissible if a bidder fails to object to the contracting agency about an infringement of the public procurement regulations which was already apparent in the award documents without undue delay after their receipt, at the latest on expiry of the deadline for submitting bids. An application is also to be inadmissible if more than 14 calendar days have expired since receipt of notification from the contracting authority that it is unwilling to redress the complaint. The draft is also aimed at improving protection for smaller and medium-sized companies.

b) Developments in European public procurement law

In the reporting period discussions also took place about the reform of the so-called Remedies Directive 89/665/EEC and the Utilities (Sector Procurement) Directive 92/13/EEC. In 4 May 2006 the European Commission accordingly presented an amendment to create a level playing field in legal protection for the award of public contracts within the European Union in order to uniformly enforce the substantive procurement directives. The European Commission had established that the absence of coordinated provisions on time limits for review proceedings before the conclusion of a contract had meant that it was not possible in most Member States to prevent in good time the conclusion of

a contract in the event of an objection to award decisions. In the view of the European Commission the illegal and discretionary award of contracts, i.e. without prior notification or invitation to compete (so-called de facto award) and thus in violation of the public procurement regulations, is either not or insufficiently regulated in the Member States. In both cases, due to the irreversibility of the award, an unsuccessful or potential bidder can no longer attain primary legal protection for the granting of an award and has to resort to damage claims. In order to improve legal protection the European Commission therefore proposes the introduction of a standstill period between the notification of an award decision to the unsuccessful bidders and the signing of the contract, combined with a suspensive effect on the review proceedings. In the case of so-called de-facto awards it proposes the obligation of the awarding authority to notify the parties of the intended award of contract, combined with a standstill period. Any contract awarded in violation of the standstill periods is to be rendered invalid.

With the current Section 13 of the Procurement Regulation Germany already implements a standstill period with a declaration of nullity in the case of violation. This legal situation will also be maintained in the amendment to the procurement regulation by adopting the obligation of the contracting authority to inform in the ARC (Section 101a of the draft ARC). In its amendment to the Procurement Regulation the German legislator has also anticipated the Commission's proposal by introducing the condition rendering de-facto awards ineffective. The new remedies directives are to be adopted during the German Council Presidency in the first six months of 2007.

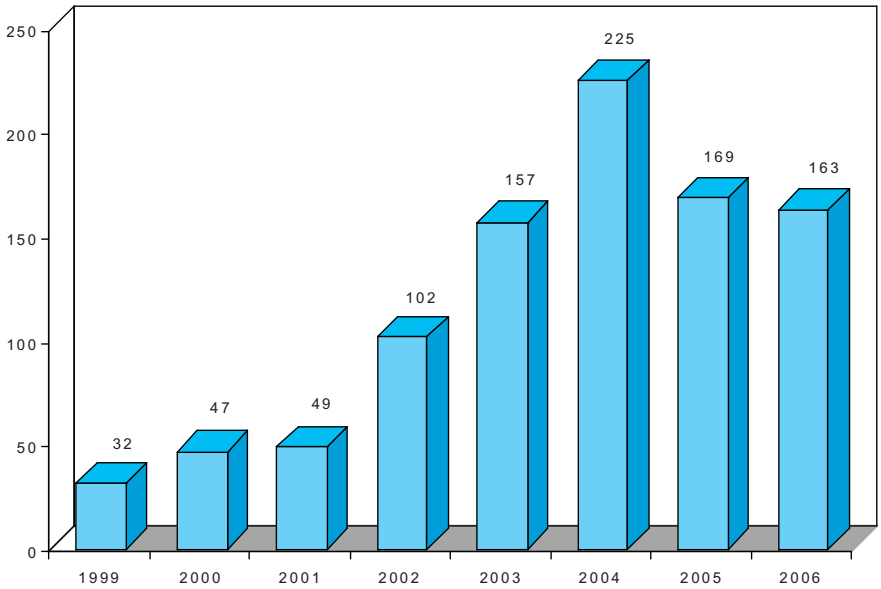
c) Decision practice of the public procurement tribunals

The trend of a steadily increasing number of review proceedings since 1999, which in 2004 peaked with 225 applications for the review of reward procedures, did not continue in the reporting period. In 2005 and 2006 there was a slight fall in the number of review proceedings conducted by the public procurement tribunals of the Federal Government. In 2005 the first, second and third federal public procurement tribunals received a total of 169 applications for review, in 82 of which a formal decision was issued. In 2006 the number of review proceedings, involving 163 applications, remained constant in comparison with 2005. In 85 of these a formal decision was issued; 14 review proceedings were only conducted in 2007. In a great number of cases the review proceedings were settled before the procurement tribunal stage. In 2005 63 and in 2006 57 applications for review were withdrawn by the respective applicants. This can be explained by the fact, among others, that the applicants only became aware of the little prospect of success during the review proceedings.

In view of the large number of proceedings, their complexity and the limited personnel resources available, it was not possible to observe the decision deadline of five weeks in all the cases within the reporting period. In 2005 the decision deadline was extended in 38 proceedings and in 2006 in 30 proceedings. The tribunals always endeavoured to make prompt decisions. Where deadlines were extended, these were normally for no longer than seven days. In other cases decisions could be issued before expiry of the five-week deadline.

In 2005, immediate appeals were filed against 38 decisions of the federal public procurement tribunals. Six decisions of the three public procurement tribunals were revoked by the Düsseldorf Higher Regional Court; one of them partially and one appeal proceeding was ended by settlement. In twelve cases the immediate appeal was dismissed. In the other cases the appeals were withdrawn. These included several cases in which the complainant's motion to extend the suspensive effect of the immediate complaint was dismissed in accordance with Section 118 (1) sentence 1 ARC for lack of reasonable prospects of success. In 2006, immediate appeals were filed against 18 decisions. So far twelve of the decisions taken by the federal public procurement tribunals in 2006 had to be reviewed by the Düsseldorf Higher Regional Court. Of these twelve proceedings two were decided in favour of the complainants. Two proceedings were concluded by settlement in court. The Düsseldorf Higher Regional Court dismissed immediate appeals in six cases and in two other cases the complainant withdrew his appeal, among others because the court division had dismissed the motion of the complainant to extend the suspensive effect of the immediate appeal. The formal decisions of the public procurement tribunals are published in anonymised form in the Internet: (www.bundeskartellamt.de).

Applications for review received by the Federal Public Procurement Tribunals from 1999 to 2006



9. Statistical overview

a) Tabular graphs on merger control

Note:
Other than in earlier activity reports the current report statistically records the number of notifications and not the number of notifications of mergers put into effect. By focusing on the day of the receipt of the complete notification distortions can be prevented in future which previously resulted from mergers not being statistically recorded in the year of their notification but in the year in which the companies informed the Bundeskartellamt that they had been put into effect (see the 15th Main Opinion of the Monopolies Commission – 2002/2003 – marginal note 597). In this way the Bundeskartellamt's actual workload can be reflected much more precisely than in the past. This will also ensure comparability with the European Commission's statistics on merger control, which are also based on notification.

Mergers notified to the Bundeskartellamt

Year	Mergers
1990	1 445
1991	1 541
1992	1 282
1993	1 185
1994	1 254
1995	1 154
1996	1 257
1997	1 387
1998	1 667
1999	1 687
2000	1 735
2001	1 568
2002	1 584
2003	1 366
2004	1 412
2005	1 687
2006	1 829
Total 1990 – 2006	25 040

Notifications to the Bundeskartellamt of mergers put into effect in accordance with Section 23 ARC (old version) (1973 to 1998) and Section 39 (from 1999)

Year	Mergers
1973	34
1974	294
1975	445
1976	453
1977	554
1978	558
1979	602
1980	635
1981	618
1982	603
1983	506
1984	575
1985	709
1986	802
1987	887
1988	1 159
1989	1 414
1990	1 548
1991	2 007
1992	1 743
1993	1 514
1994	1 564
1995	1 530
1996	1 434
1997	1 751
1998	1 888
1999	1 182
2000	1 429
2001	1 138
2002	1 317
2003	1 135
2004	1 206
Total 1973 - 2004	33 234

Note:
The table refers to completed mergers as notified to the Bundeskartellamt. The completed mergers were published by the Bundeskartellamt in the German Federal Gazette until the entry into force of the 7th Amendment to the ARC. The table will be discontinued in future.

Mergers notified to the Bundeskartellamt and Descisions in 2005 and 2006

	2005		2006	
I. Notifications	**1687**		**1829**	
II. Decisions	**1579**		**1684**	
(1) Clearances	1573		1679	
of which: in the first phase		1550		1649
in the second phase without remedies		19		24
in the second phase with remedies		4		6
(2) Untersagungen	6		5	
III. settled/completed before conclusion of the proceedings				
(1) Withdrawals	40		44	
of which: in the first phase		34		40
in the second phase		6		4
(2) No subject to control	10		91	
IV. Uncompleted cases from the previous period as per 31 December 2004	108			
Decisions	77			
(1) Clearances	75			
of which: in the first phase		69		
in the second phase without remedies		2		
in the second phase with remedies		4		
(2) Prohibitions	2			
settled/completed before conclusion of the proceedings				
(1) Withdrawals	7			
of which: in the first phase		5		
in the second phase		2		
(2) keine Kontrollpflicht	24			
V. Uncompleted cases as per 31 December 2006				118

Note:
Section I of the table restates the number of notifications received by the Bundeskartellamt in 2005 and 2006. In Sections II and III of the table give an overview of all the decisions made in the two years of the reporting period or other outcomes/types of completion of cases, irrespective of the year of notification. Section IV of the table provides information about cases which, although notified in 2004, were only decided in 2005; these cases are already taken into account in sections II and III.

b) Overview of other cases

The amended version of the ARC entered into force on 1 July 2005. The notification and authorisation system was replaced by the principle of legal exception. The current Activity Report therefore does not contain an overview of the cartels which had been notified, applied for or already existed as in the 2003/2004 Activity Report

1. Fines proceedings, abuse proceedings, prohibition proceedings Table 1.1 at the Bundeskartellamt

Fines, abuse proceedings, prohibition proceedings				new cases			
			[also] application of Art. 81, 82 EC		termination- of proceedings under old low (clearance granted, no objection, effective by law)	order of interim remedies	commit-ments
a) cartels:							
Sect. 1 ARC	prohibition of cartels (total)	2005	25	99	28		
		2006	38	78			
	hardcore cartels**	2005	1	1			
		2006	4	6			
	cartels of small or	2005		4	4		
	medium-sized enterprises	2006		4			
	other horizontal cooperations	2005	24	84	24		
		2006	31	62			
	vertical agreements	2005		10			
		2006	3	6			
b) dominance, anticompetitive conduct (abusive practices)							
Sect. 19 ff. ARC	abuse proceedings (total)	2005	13	65			
		2006	9	56			
Sect. 19	abuse of dominant position	2005	11	39			
		2006	6	27			
Sect. $20^{I,II}$	prohibition of discrimination,	2005	2	14			
	prohibition of unfair hindrance	2006	3	15			
Sect. 20^{III}	prohibition of granting of	2005		5			
	special terms	2006					
Sect. 20^{IV}	prohibition of sale below cost price	2005		1			
		2006		1			
Sect. 20^{VI}	prohibition of discrimination by trade	2005					
	and industry associations	2006					
Sect. 21^{I}	prohibition of boycott	2005		4			
		2006		4			
Sect. 21^{II-IV}	other anticompetitive conduct	2005		2			
	Verhalten	2006		9			

(2003/2004 Activity Report, p. 234 ff.). The same applies to recommendations regarding condition, standards and types cartels (2003/2004 Activity Report p. 262 ff.) (Fines, abuse proceedings, prohibition proceedings at the Bundeskartellamt/ at the Land competition authorities). The clearance of cartels which are subject to notification or cleared by formal decision under Section 131, paras. 1, 2 shall become ineffective as of 31.12.2007. No transition period is required in the case of recommendations regarding condition, standards and types cartels.

completed cases								
conclusion by prohibition/measures to end infringement (Sect. 32 ARC)	order to-impose fine*	skimming off of economic benefit	discon-tinuation of objected conduct	no need for action		termination for other reasons	withdrawal of legal-advantage of block exemption regulation	referral to another authority
				total	decision according to Sect. 32 c ARC			
2 2	3 2		11 10	13 48	1	99 20		1
	3 2					1		
			1	5	1	8 3		
2 2			7 5	12 38		82 15		1
			4 4	1 5		9 1		
3	1 1		24 15	4 25		126 26		5 1
1			14 7	1 15		84 12		5 1
2	1		4 3	3 5		13 5		
			4 1	2		1 2		
	1					21		
				1		2 1		
			2 1			4 3		
			3	2		1 3		

Table 1.1 at the Bundeskartellamt

Fines, abuse proceedings, prohibition proceedings			new cases			
			[also] application of Art. 81, 82 EC		termination- of proceedings under old low (clearance granted, no objection, effective by law)	order of interim remedies	commit-ments
c) exemption areas for specific sectors of industry							
Sect. 28 ARC	producer associations, agriculture sector	2005					
		2006					
Sect. 30 ARC	resale price maintenance for newspaper and magazines	2005					
		2006					
Sect. 131 (6) ARC in conj. with Sect. 103 (5) of 6th amendment to the ARC-	abuse control of water supply companies	2005					
		2006					
Total		**2005**	38	164	28	0	0
		2006	47	134	0	0	0

* Fines proceedings against several parties concerned are deemed concluded with the issuance of the first order imposing a fine.
** Normally clandestine agreements between companies on the setting of prices, sales quotas.
market sharing

completed cases								
conclusion by prohibition/measures to end infringement (Sect. 32 ARC)	order to-impose fine*	skimming off of economic benefit	discon-tinuation of objected conduct	no need for action		termination for other reasons	withdrawal of legal-advantage of block exemption regulation	referral to another authority
				total	decision according to Sect. 32 c ARC			
						1		
2 5	4 3	0 0	35 25	17 73	1 0	226 46	0 0	6 1

Table 1.2 at the Land competition authorities

Fines, abuse proceedings, prohibition proceedings				new cases		
			[also] application of Art. 81, 82 Ec		order of interim remedies	commitments
a) cartels:						
Sect. 1 ARC	prohibition of cartels (total)	2005		101		
		2006	1	52		
	hardcore cartels**	2005		6		
		2006		9		
	cartels of small or medium-sized enterprises	2005				
		2006				
	other horizontal cooperations	2005		95		
		2006	1	43		
	vertical agreements	2005				
		2006				
Sect. 32e ARC***	sector investigation	2005				
		2006		1		
b) dominace, anticompetitive conduct (abusive practices)						
Sect. 19 ff. ARC****	abuse proceedings (total)	2005	1	752		20
		2006	1	465		7
Sect. 19	abuse of a dominant position	2005	1	725		20
		2006		435		6
Sect. $20^{I,II}$	prohibition of discrimination, prohibition of unfair hindarance	2005		20		
		2006	1	23		1
Sect. 20^{III}	prohibition of granting of special terms	2005				
		2006				
Sect. 20^{IV}	prohibition of sale below cost price	2005		2		
		2006		1		
Sect. 21^{I}	prohibition of boycott	2005		5		
		2006		3		
Sect. 21^{II-IV}	other anticompetitive conduct	2005				
		2006		3		

completed cases								
conclusion by prohibition/ means ures to end infringement (Sect. 32 ARC)	order to impose fine*	skimming-off of economic benefit	discontinuation of objected conduct	no need for action		termination for other reasons	withdrawal of legal advantage of block exemption regulation	referral to another authority
				total	decision according to Sect. 32 c ARC			
1 1	10 4		14 8	5 4	3 2	84 42		21 7
	6 2					23 25		1
			1			1		
1 1	4 2		11 4	5 4	3 2	61 15		20 6
			3 3			1		
			433 180	14 10	7 4	286 247		54 26
			408 167	13 7	7 4	279 240		50 24
			20 11	1 3		4 5		3 1
			2			1		
			2 1			3 1		1
			1 1					1

Table 1.2 at the Land competition authorities

Fines, abuse proceedings, prohibition proceedings				new cases		
			[also] application of Art. 81, 82 Ec		order of interim remedies	commitments
c) exemption areas for specific sectors of industry						
Sect. 28 ARC	producer associations, agriculture sector	2005 2006				
Sect. 30 ARC	resale price maintenance for newspapers and magazines	2005 2006				
Sect. 131 (6) in conj. with. Sect. 103 (5) of 6th amendment to the ARC-	abuse control of water supply companies	2005 2006		9 7		1
Total		**2005** **2006**	1 2	862 525	0 0	20 8

* Fines proceedings against several parties concerned are deemed concluded with the issuance of the first order imposing a fine.

** Normally clandestine agreements between companies on the setting of prices, sales quotas. market sharing

*** In a sector investigation conducted by the Land competition authorities a request for information to 107 gas providers was based on

**** The large number of abuse proceedings in 2005 and 2006 resulted from the many proceedings in the energy sector.

completed cases								
conclusion by prohibition/ means ures to end infringement (Sect. 32 ARC)	order to impose fine*	skimming-off of economic benefit	discontinuation of objected conduct	no need for action		termination for other reasons	withdrawal of legal advantage of block exemption regulation	referral to another authority
				total	decision according to Sect. 32 c ARC			
			3	3		6 5		1
1 1	10 4	0 0	450 188	22 14	10 6	376 294	0 0	75 34

Sect. 32 e ARC.

The full version of the Bundeskartellamt's report on its activities in 2005/2006 is available on the Internet as a Bundestag publication at:

http://www.bundeskartellamt.de/wDeutsch/publikationen/Taetigkeitsbericht.shtml

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