BundesKartellamt

Antitrust Enforcement by the Bundeskartellamt

Areas of Focus in 2007/2008

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Dear Reader,

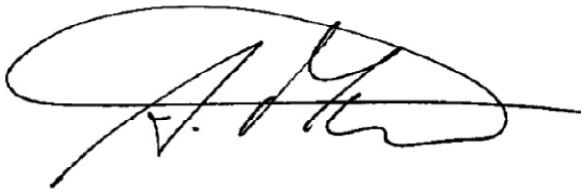
Ludwig Erhard, German Economics Minister from 1949 to 1963, later to become Chancellor of the Federal Republic of Germany, referred to the competition law as the Basic Law of our economic and social system. The competition system is founded on values which are elementary to our society. These include freedom, individual responsibility and 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, be it by way 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 is neglected.

It is the task of the Bundeskartellamt, which celebrated its 50th anniversary in 2008, to protect competition and to enforce the “Act against Restraints of Competition” (ARC). Since its relocation to Bonn in 1999 its approx. 320 members of staff have striven to realize this goal from here. 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 provide you with an overview of the activities of the Bundeskartellamt during the period 2007/2008. As a short version of our biennial Activity Report this brochure cannot convey the Bundeskartellamt’s wide scope of activities in their full range and depth and will instead highlight individual outstanding developments and cases. The full version of the

Activities Report, covering approx. 200 pages, is available on our website at www.bundeskartellamt.de or can be ordered from the Bundeskartellamt.

Wolfgang Kartte, President of the Bundeskartellamt from 1976 to 1992 once said: “Competition has no lobby“. All the activities 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 Bundeskartellamt’s work. This brochure is therefore meant to arouse an interest in a more intensive preoccupation with competition issues and, espe-cially in times of the global financial crisis where confidence in the power of competition is dwindling, promote discussion on competition law and competition policy outside the area of competition experts. I wish you interesting reading!



Andreas Mundt
President of the Bundeskartellamt

Content

1. Competition policy developments in Germany

a) Protection of competition as principle task of the Bundeskartellamt

It is the responsibility of the Bundeskartellamt to protect competition and with it a basic principle of our free social market economy. Well-functioning competition offers consumers a maximum of choice and product diversity, enabling them to satisfy their needs. Companies, in turn, are able to offer their products at optimal conditions and constantly improve them. Consequently, well-functioning competition ensures and promotes freedom and prosperity.

The Bundeskartellamt protects competition using the following antitrust tools:

- Prosecution of cartels (ban on cartels under Section 1 of the Act Against Restraints of Competition, ARC (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) and Article 81 of the EC-Treaty),

- Control of abusive practices by dominant companies (Sections 19 and 20 ARC, Article 82 of the EC-Treaty),

- Merger control (Sections 35 ff. ARC) and

- Legal protection for bidders in the award of public contracts under specific procedures (Sections 97 ff. ARC).

These tools are complemented by so-called “competition advocacy”: The Bundeskartellamt promotes the principle of competition by commenting on relevant economic and competition policy issues. For example, it has participated in the discussion on introducing legal minimum wages and has called on politicians and legislators during the financial crisis to observe competitive market economic principles.

b) The current competition policy situation

In many parts of society, confidence in competition as a driving force behind freedom and prosperity is dwindling. Occasionally, politicians and the legislator place the

competition principle secondary to factual and sometimes supposedly higher ranking constraints. One example is the fact that a commitment to free and undistorted competition has been deleted from the EU Reform Treaty and downgraded to a protocol note of the treaty. The industry-specific minimum wages that have been introduced are also problematic from a competition point of view. This applies in particular to the minimum wage for postal workers, since with its introduction the competitors of *Deutsche Post AG* lost their competitive advantage, i.e. lower labour costs. Representatives of other industries (such as sports or the milk sector) call for the specific interests of their sectors to be taken into consideration and would like to see competition law enforcement modified and weakened accordingly. In key areas of the health sector the non-application of competition law is even provided for by law. Also during the financial and economic crisis state interventions in markets have occurred to the detriment of the competition principle. Careful competition control by the competition authorities is therefore more important than ever in these difficult times. At the regulatory level as well, state interventions should be limited to the absolutely necessary and should only continue for as long as the crisis lasts. Direct state intervention always carries the risk of invalidating liability for entrepreneurial decisions and weakening other significant incentives for responsible economic activity. Further amendments to the competition law – which go beyond temporary regulatory measures to stabilise the financial markets - are not required nor called for. The state cannot take on the role freedom and competition play in structuring markets. Competitive markets, on the other hand, increase productivity, provide incentives for innovation and promote economic growth.

c) Amendments to the competition framework: the amendment on abusive pricing

Following the comprehensive 7th Amendment to the ARC in 2005, there have been several small, but effective amendments to competition legislation since 2007. Abuse control by the competition authorities has been further developed with the so-called price abuse amendment. With the Act on the Prevention of Price Abuse in the Areas of Energy Supply and the Food Trade (*Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels*) of 22 December

2007, price abuse control by the competition authorities has been tightened in the areas of electricity and gas supply and the food retail sector (cf. p. 27 ff. and p.31).

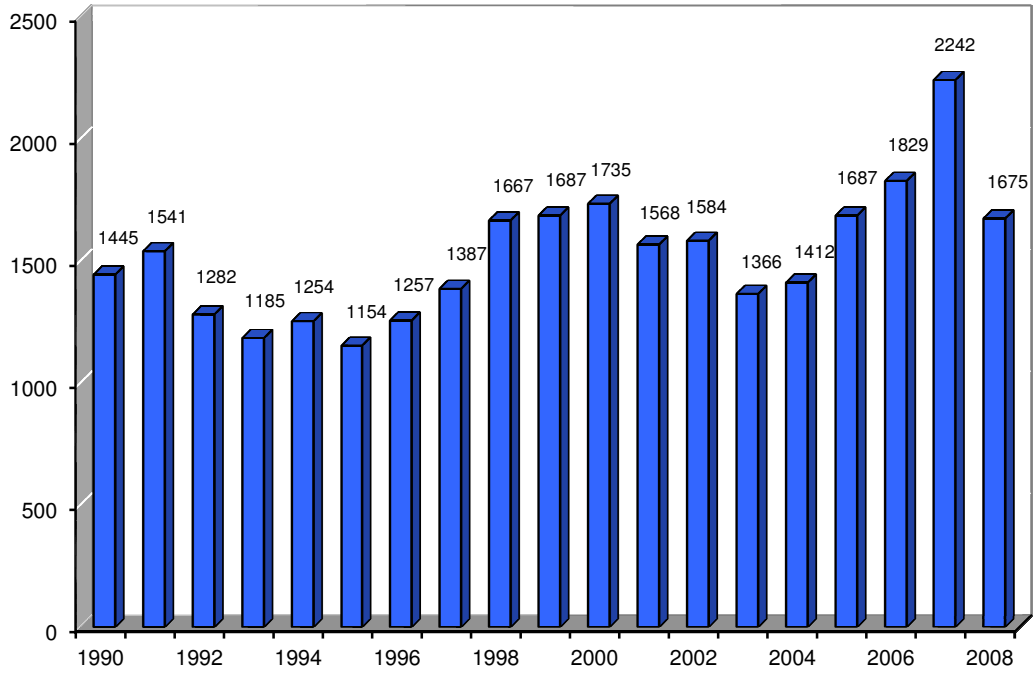
The Bundeskartellamt has complemented these amendments with an organisational reform and set up a division which, since the beginning of 2008, specifically deals with the control of abusive practices and cartel prosecution in the energy sector.

2. Protection of competitive structures through preventive merger control

a) Significance and area of application of merger control

A dominant company has only few, if any, competitors. Customers therefore have little or no opportunities to switch to other suppliers offering cheaper or better products. The same applies to a situation where several companies jointly hold a dominant market position (so-called oligopoly). In order to prevent a market from being dominated by one or more companies, the Bundeskartellamt examines ex ante whether a planned concentration will create or strengthen a dominant position.

However, the ARC stipulates merger control only for economically significant merger projects. In order for a merger project to be economically significant certain turnover thresholds have to be reached. In 2007 a total of 2 242 planned concentrations were notified for merger control purposes. This represented a peak number of notifications and in 2008 the number dropped to 1 675 (cf. Graph 1).



Graph 1: Notified merger cases between 1990 and 2008

A further fall in numbers looks likely for 2009. Apart from the financial and economic crisis this is also due to the introduction of a further domestic turnover threshold

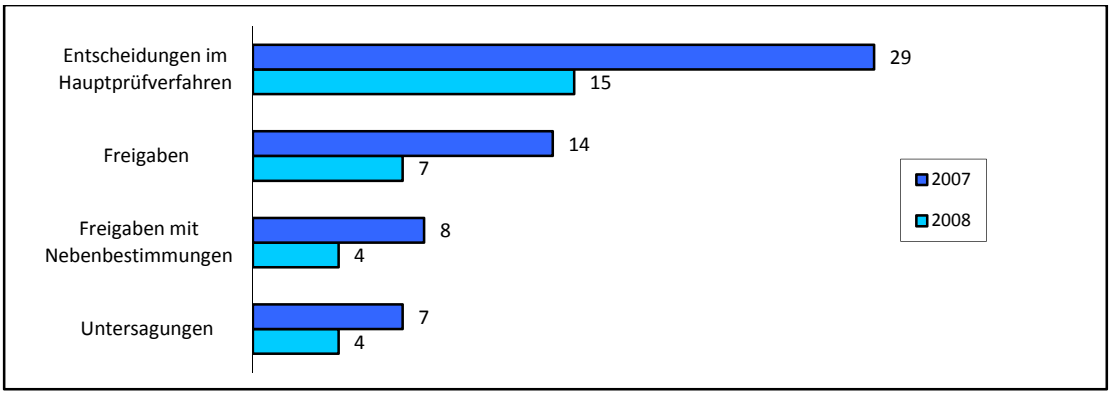
which came into force in March 2009. It is to be expected that this additional domestic turnover threshold will in particular lead to considerably less foreign concentrations falling under the notification requirement. However, protection against the creation or strengthening of dominant companies will remain ensured since the new provision only exempts merger projects from the obligation to notify that are hardly problematic from a competition point of view.

Decisions in main examination proceedings (2nd phase)

The vast majority of notified merger projects can be cleared within one month in preliminary examination proceedings (1st phase). Only where a merger causes competition concerns, are main examination proceedings initiated, which are concluded with a formal decision.

Where it is established in the main examination proceedings that a dominant position will be created or strengthened, the proposed concentration has to be prohibited. If the competition concerns can be dispelled, e.g. by divesting a subsidiary or a comparable commitment, the merger may be cleared subject to corresponding conditions. A planned merger that will not create a dominant position will be cleared.

Graph 2 provides an overview of decisions reached in main examination proceedings in 2007 and 2008.



Graph 2: Decisions reached in main examination proceedings 2007/2008

The following proposed mergers were prohibited in 2007/2008:

- Sulzer / Kelmix / Werfo

  Market for two-component cartridges for medical and industrial applications

  (Declaration that there was no need to adjudicate (*Erledigung*); proceedings terminated)

- RWE / SaarFerngas

  Gas and electricity markets

  (Appeal pending at the Düsseldorf Higher Regional Court)

- Phonak / Resound

  Production and sale of hearing aids via hearing aid retailers

  (Appeal on points of law pending at the Federal Court of Justice)

- LBK / Mariahilf

  Hospital market

  (Appeal at the Düsseldorf Higher Regional Court rejected; the decision is final)

- Cargotech / CVS Ferrari

  Market for reach stackers (for handling large containers) and straddle carriers (for transporting containers)

  (Appeal against denial of leave to appeal pending at the Federal Court of Justice)

- Faber / BAG / AML

  Asphalt mixes

  (Prohibition decision revoked by the Düsseldorf Higher Regional Court following rejection by the Federal Court of Justice (minor market); the decision is final)

- LRP / Lotto Rheinland-Pfalz

  Lottery market

(Decision revoked by the Düsseldorf Higher Regional Court; the decision is final)

- A-TEC Industries AG / Norddeutsche Affinerie AG

  Production and sale of oxygen-free copper billets

  (Appeal rejected by the Düsseldorf Higher Regional Court; the decision is final)

- Loose / Poelmeyer (amongst others)

  Sour milk cheese

  (Appeal before the Düsseldorf Higher Regional Court rejected; appeal against denial of leave to appeal pending at the Federal Court of Justice)

- Intermedia / H&B

  Reader and advertising market for cosmetic trade journals

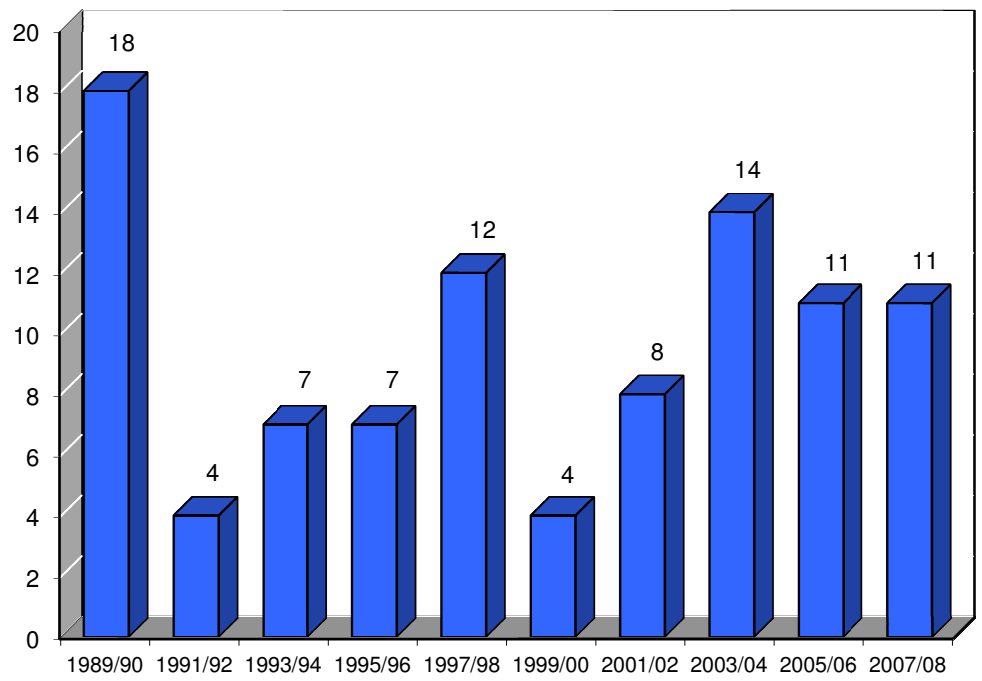
  (Prohibition decision is final)

- Assa Abloy / SimonsVoss AG

  Electronic and mechatronic locking cylinders

  (Appeal rejected by the Düsseldorf Higher Regional Court)

All formal decisions in main examination proceedings are available at www.bundeskartellamt.de. Information on selected merger control proceedings that have been terminated in the preliminary examination stage can be found in the case summaries published under the same address.



Graph 3: Number of prohibitions (according to reporting periods)

b) Major cases

Energy: E.ON / Stadtwerke Eschwege

In November 2008 the Federal Court of Justice confirmed the Bundeskartellamt's prohibition decision of 2003 in the E.ON/Stadtwerke Eschwege merger case. The Bundeskartellamt had prohibited the E.ON group from acquiring a 33 % participation in the Eschwege municipal utilities. E.ON and RWE hold a joint dominant position in the nationwide electricity markets, on which municipal utilities and major industrial consumers procure their electricity, and together form a so-called dominant duopoly. In addition, both companies have pursued a long-standing business strategy of gradually acquiring shares in municipal utilities and other electricity providers in order to secure the sale of the electricity which they produce to these providers in the long term and consequently to foreclose the electricity markets concerned to competitors.

This confirmation by the highest court has significance for future merger control and abuse proceedings involving the electricity duopoly E.ON and RWE.

Fuel sector I: Shell/Hanseatic Petrol

In March 2008 the Bundeskartellamt found evidence of joint market dominance in the fuel sector as well. This was discovered in the Shell/Hanseatic Petrol merger case: The mineral oil company Shell planned to acquire six petrol stations of the medium-sized company Hanseatic Petrol Vertriebs GmbH in east Germany. In its market inquiry the Bundeskartellamt found that Shell, together with the other integrated oil companies BP/Aral, ConocoPhillips/Jet, ExxonMobil/Esso and Total, holds a dominant position in the sale of Otto and diesel fuel at off-motorway petrol stations.

First of all, the oligopolists' market share allows for the assumption of dominance: The five dominant companies account for 73 % of fuel sales in Germany. Other factors also give reason to assume that there is no competition between the dominant companies: The petrol station markets are very transparent. Similar to electricity providers, oil companies are also interlinked. They jointly own refineries, pipelines and tank farms. Due to their similar company structures and processes, each petrol station company can assess the decisions of the other oligopolists and their consequences for the success of the company. Ultimately the oligopolists are dependent on each other as they exchange fuel with one another in order to avoid transporting fuel over long distances: If a company diverts from the standard procedure, it is easy for the other members of the oligopoly to punish it with economic sanctions.

The Bundeskartellamt did not, however, prohibit the Shell/Hanseatic Petrol merger. Petrol station markets are regional markets because consumers usually tank between their home and place of work. Competition conditions in the regional petrol station markets would not have worsened as a result of the merger. With the merger Shell would have increased its market shares in the regional petrol station markets only by significantly less than one percentage point. Neither did the Bundeskartellamt detect any strategy by the jointly dominant petrol station companies to acquire other petrol stations with a view to foreclosing the sales markets, as was the case with E.ON and RWE in the national electricity markets. Otherwise the Bundeskartellamt would have prohibited the merger.

Fuel sector II: Total/OMV

Total Deutschland GmbH, in contrast, was prohibited in the spring of 2009 from acquiring 59 filling stations owned by OMV Deutschland GmbH in Saxony and Thuringia. This merger project would have strengthened the joint dominant position held by Total and the four above-mentioned oil companies. The regional markets affected most by the project were Chemnitz, Dresden, Erfurt and Leipzig. Even before the concentration the joint market shares of the dominant companies reached 72 % on the Otto fuel market and 80 % on the diesel fuel market. These shares would have risen depending on the market area up to 76% - 81% in the sale of Otto fuel and to 83% - 88% in the sale of diesel fuel. In single markets gains in market shares would have amounted to over 10 %. In addition, if Total had acquired the east German petrol station network from OMV, with OMV it could have eliminated one of the strongest competitors of the dominant oligopoly from the market.

Collective market dominance in the sugar market: Nordzucker/Danisco

The merger between Nordzucker and Danisco was cleared subject to a divestiture condition. The German company Nordzucker AG ("Nordzucker") had planned to acquire the sugar business of the Danish company Danisco. This affected the German market for industrial sugar for the food sector, on which Nordzucker and Südzucker hold a collective dominant position (duopoly).

With the acquisition of Danisco, Danisco‘s German production site, the sugar factory in Anklam, would have passed to Nordzucker. As a result, the duopolists Nordzucker and Südzucker would have been able to substantially increase their market shares. The merger could therefore only be cleared under the condition that a suitable independent purchaser be found for the sugar factory in Anklam in Mecklenburg-West Pomerania.

Grocery trade: EDEKA/Tengelmann

In the summer of 2008 the Bundeskartellamt examined and cleared subject to conditions a joint venture mutually controlled by EDEKA and Tengelmann. The undertakings intended to merge their discount chains ‘Netto Marken-Discount’ and ‘Plus’ and to operate them under the name ‘Netto Marken-Discount’. As a result of

the merger the two undertakings have also merged their supermarket businesses, i.e. EDEKA and Kaiser's Tengelmann.

EDEKA and Tengelmann offered the following commitments in order to avoid a prohibition of the merger: Around 400 retail outlets were to be sold before completion of the merger in order to prevent an increase in the market shares of the parties to the merger in those regional markets in which the merger raised competition concerns.

The concentration affects the German food retail market. The planned concentration entails the merge of the number 1 and 5 in the German food retail trade. EDEKA not only acquires a close competitor (in terms of its sales concept), but is also in a position to considerably expand its regional and nationwide market coverage. Like hardly any other trading company, Edeka is able to target various customer groups, whereby the company's strength lies in particular in the brand product range. Without Tengelmann the only noteworthy competitors remaining in the sector would be REWE and, with some restrictions, the Schwarz group (Kaufland, Lidl). The existing price competition would not be sufficient to effectively restrict EDEKA's competitive scope of action as the market leader.

Furthermore, the merger project in its original form would have enabled EDEKA to further concentrate its procurement power, leading to an even greater dependence of the suppliers. This, vice-versa, would have further strengthened EDEKA's position on the sales markets. Therefore an additional planned purchasing cooperation between EDEKA and Kaiser's Tengelmann was also considered problematic under competition law. The combination of outlet divestment and the continued separate purchasing arrangement for Kaiser's supermarkets will make any increase in the volume of goods purchased by EDEKA insignificant.

Cable TV: Kabel Deutschland/Orion

Under certain conditions a merger can also be cleared although it leads to the creation or strengthening of a dominant position. For this the parties to the merger must prove that the concentration will directly lead to improvements in the conditions of competition which outweigh the disadvantages of dominance (so-called balancing clause).

The Bundeskartellamt applied the balancing clause when Kabel Deutschland GmbH (KDG) intended to acquire parts of the Orion Group network. KDG is the leading provider of broadband cable networks in Germany. The merger had a negative impact on the market structures in the markets affected in the area of cable TV transmission, i.e. the input market, end consumer market and signal supply market. The merger was cleared, however, since the parties were able to show that it brought about improved competitive conditions in the markets for broadband connections (Internet) and narrowband connections (telephony). Deutsche Telekom AG (DTAG) is dominant on both markets.

Only factors affecting market structure can be considered as improving competitive conditions. These must have become possible as a result of the merger and be sufficiently likely to occur. All of these preconditions were fulfilled in the case at hand. As a result of the integration of the cable networks of the Orion Group and KDG, KDG was able for the first time to offer over 800,000 households Internet and telephony via broadband cable. Two network levels, namely the regional cable distribution network level and the so-called last mile, were integrated which facilitated the sale of interconnecting products. This redressed a structural disadvantage which the competitors had vis à vis DTAG. In the final analysis the improvements brought about by the merger (intensification of infrastructure competition) had to be weighed against the significance of a deterioration of the situation in the cable markets. Ultimately the improvement effects predominated, in particular because their structural significance for intensifying competition in the markets affected was greater than the negative impact on the cable markets.

3. Special area of focus: combating cartels

Cartels are anti-competitive agreements or concerted practices between companies on parameters which are relevant for competition, such as agreements on prices or supply areas. They are highly damaging to society because they aim at eliminating competition. For this reason the legislator has imposed a general ban on cartels in the ARC. Cartels are also banned under European competition law in Article 81 of the EC Treaty. Under certain conditions a cartel may exceptionally be exempted from

the general ban. [1] The core requirement for such an exemption is that the cartel creates advantages which would not have been possible without it. At the same time consumers must have a fair share of the resulting benefit (Section 2 ARC, Article 81 (3) EC).

a) Fine proceedings against cartel offenders

Combating violations of the ban on cartels is a key area of the Bundeskartellamt's activities. This applies in particular to so-called hardcore cartels, i.e. price, market-allocation and quota cartels. Such hardcore cartels represent a severe violation of the ban on cartels and can be punished with heavy fines, amounting to up to 10 % of the total turnover of a company involved. The Bundeskartellamt regularly prosecutes uncovered hardcore cartels with fine proceedings. The exemption clause does not apply to hardcore cartels.

In recent years the Bundeskartellamt has equipped itself well for cartel prosecution:

- As early as 2000 it introduced a Leniency Programme for penitent cartel members. Under the Leniency Programme cartel members can be entirely or partly exempted from a fine if they make a decisive contribution to uncovering a cartel and cease their anti-competitive behaviour. This facilitates the uncovering of cartels. In March 2006 the Leniency Programme was revised and harmonized with the regulations of the other European competition authorities.[2]

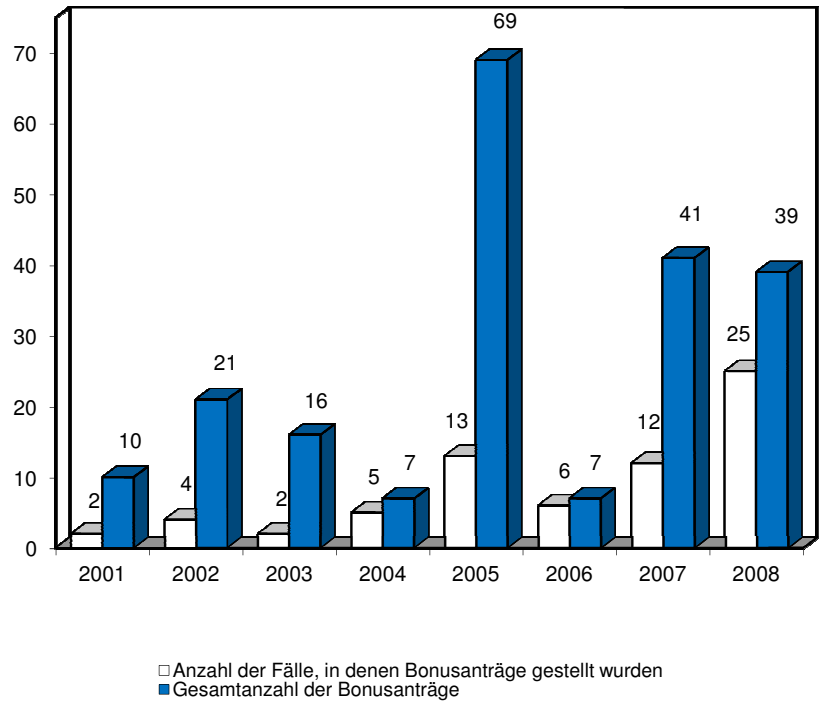
- In September 2006 the Bundeskartellamt issued new fine guidelines based on the revised fine regulations introduced in the 7th Amendment of the ARC in 2005, thus laying down in concrete terms its fines setting practice. The application of the new regulations and fine guidelines has shown that the problems of proof resulting from the previous, very complex scope for setting fines have been overcome and that the companies are likely to face higher fines than before.

[1] See case example under e).
[2] Cf. p. 34 f.

This success is reflected in the following statistics:

- In 2007 the Bundeskartellamt received 41 applications for leniency from 33 companies in twelve different cartel proceedings.

- In 2008 it received 39 applications from 37 different companies in 25 proceedings. These figures show that the Leniency Programme is of central importance for effective cartel prosecution (see graph 4).



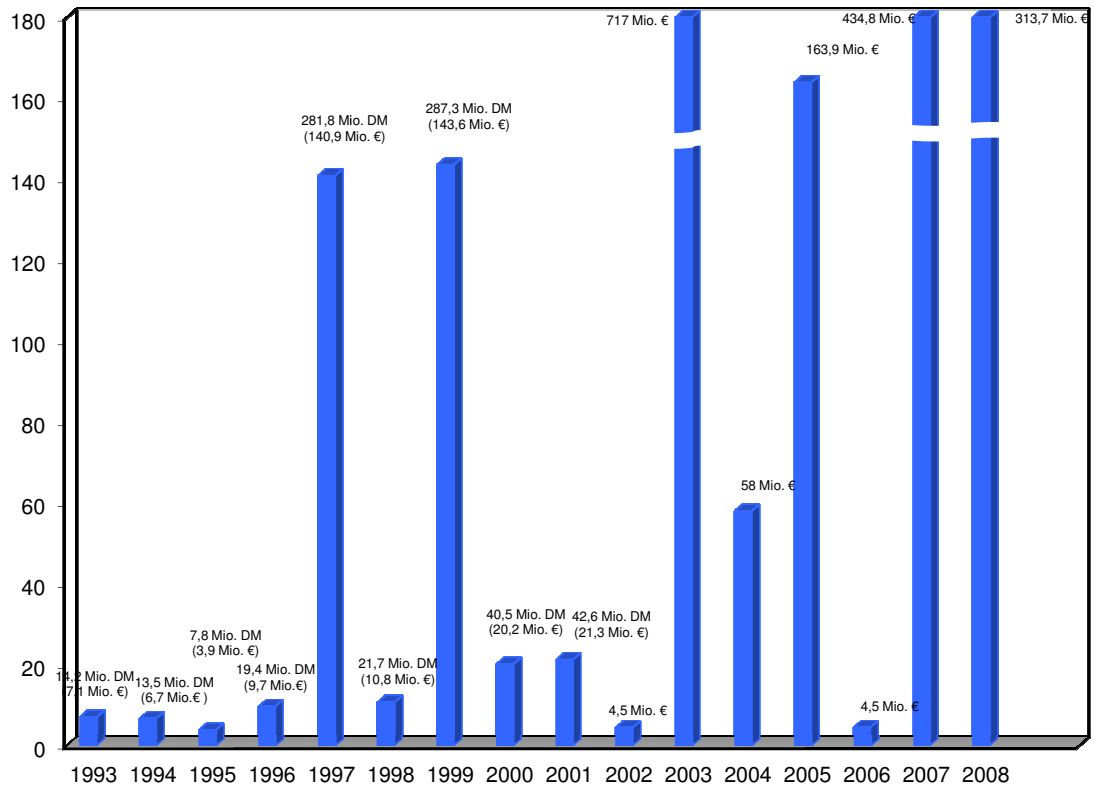
Graph 4: Leniency applications received by the Bundeskartellamt between 2001 and 2008

The Leniency Programme's success made personnel and structural changes necessary at the Bundeskartellamt, which have in turn increased the authority's effectiveness in cartel prosecution.

- In 2002 the Special Unit for Combating Cartels (SKK) was established. This unit is the main contact for all those wishing to avail themselves of the leniency programme. The SKK also assists the decision divisions in uncovering and prosecuting illegal cartel agreements.

- In 2005 the 11th Decision Division was established which, in contrast to the other decision divisions, has exclusive competence for the prosecution of hardcore cartels, irrespective of the economic sector concerned. The creation of such a cartel division has allowed for the specialisation of cartel prosecution and the concentration of expertise. In late 2008 the 12th Decision Division, a further dedicated division, was created to also deal exclusively with the prosecution of hardcore cartels.

These measures have enabled the Bundeskartellamt to uncover, end and punish a great number of cartels. The level of fines imposed by the authority continues to be very high: In 2007 fines totalling approx. € 434.8 million were imposed (€ 433 million of which were imposed on companies) and in 2008 fines amounting to approx. € 313.7 million were imposed (€ 311 million of which were imposed on companies), see graph no. 5.



Graph 5: Fines imposed by the Bundeskartellamt (total amount in euros per year)

b) Major fine proceedings:

The Bundeskartellamt has prosecuted hardcore cartels in numerous fine proceedings. The most important of these may be used as good examples of the developments illustrated above. In 2007/2008 the following price, quota and customer protection agreements were prosecuted:

Décor paper

Following a search in November 2007 fines totalling € 62 million were imposed at the end of January 2008 on three manufacturers of décor paper and five individuals. The companies and persons were found to have been involved in price and capacity shutdown agreements at least during the period of 2005 to 2007. The fines are final.

Brand drugstore products

In 2008 the Bundeskartellamt also imposed fines totalling approx. € 37 million on seven brand manufacturers of drugstore products and their sales managers for coordinating price increases (€ 18 million) and exchanging information about the state of the annual talks with retailers (€ 19 million). At the turn of the year 2005/2006 the companies had agreed to increase the list prices for dishwashing detergent, shower gel and toothpaste by around 5 per cent. The brands concerned are at comparable price levels and are therefore in close competition with one another. In order to more effectively enforce the price increases at the retail level, recommended retail prices were raised accordingly in order to offer the retail trade the possibility to pass on the price increases to the end consumer. The orders to impose the fines are final.

Quota agreements in the ready-mixed concrete sector

As early as 2005/2006 the Bundeskartellamt had conducted fines proceedings against a total of 92 companies in greater Munich, Nuremberg/Fürth, Leipzig, Halle and the area along the A4 motorway in Thuringia, Ludwigshafen/Mannheim, Kiel/Neumünster, Rendsburg and in several regional markets in Mecklenburg-Western Pomerania on account of quota agreements in the ready-mixed concrete

sector. The last of these fines proceedings were concluded in 2007/2008 with orders imposing fines totalling approx. € 4.1 million against 23 companies and one individual. This brings the total amount of fines imposed in these proceedings to approx. € 12.7 million. In the spring of 2009 the Düsseldorf Higher Regional Court decided on the appeals of ten of the companies and the individual and imposed fines of approx. € 900,000 on nine companies and the individual. Three of the companies have appealed against the court's decision.

Liquefied Petroleum Gas (LPG)

One of the Bundeskartellamt's biggest cartel proceedings was against companies in the liquefied petroleum gas sector, which was concluded in 2007/2008 with heavy fines. At the end of 2007 the Bundeskartellamt imposed fines totalling approx. € 208 million on seven companies in this sector and their directors on account of so-called customer protection agreements. The companies had agreed, at least since 1997, not to poach customers from one another. Customers wishing to switch supplier were either not quoted a price, or if at all, only an excessive "deterrent price". The cartel agreement in the tank gas business was secured by a system of "notification of competition". As a consequence the companies were able to achieve price levels well above those of smaller, so-called independent suppliers. Only some of the orders imposing the fines are final; the companies concerned have appealed against a number of fine decisions.

Road salt

In June 2007 the Bundeskartellamt gained knowledge via a leniency application of agreements between suppliers of road salt in southern Germany. Since the mid 1990s manufacturers of road salt in Baden-Württemberg and parts of Bavaria had agreed on and implemented a customer protection and territorial cartel for the sale of road salt to the public sector. Prices were also agreed and sensitive market information exchanged. Major buyers of road salt are the motorway maintenance authorities, road construction authorities, rural district offices and local authorities, whose requirements account for more than 80 % of total turnover in the market. Road salt is also sold to commercial and private customers. In August 2007 the Bundeskartellamt and Munich's public prosecutor's office searched the companies

concerned and several private homes. In November 2008 a fine of € 15.6 million was imposed on one of the companies involved. This decision is final; the parallel criminal proceedings conducted by Munich's public prosecutor's office against individuals involved on account of possible collusive tendering are still ongoing. During the investigations indications of similar agreements in Germany's northern states also emerged. As a result, in October 2007 several production sites of a further road salt manufacturer were searched by the Bundeskartellamt and Munich's public prosecutor's office. This proceeding is still in progress.

c) Anti-competitive market information systems

Brand drugstore products

The exchange of competition-relevant information between competitors can also restrict competition and constitute a violation of the ban on cartels. The Bundeskartellamt has found evidence of such a violation in the brand drugstore products case already mentioned.

The fine proceedings against the manufacturers of brand drugstore products concerned not only agreed price increases but also the reciprocal exchange of information about the state of annual talks with retailers. The brand product manufacturers, along with further companies in the sector, have for years been involved in a regular exchange of information about negotiations with retailers. At regular meetings of the Trademark Association's (Markenband e.V.) working group on "body care, cleaning agents and detergents" (KWR), information was exchanged on the following:

- demands for additional rebates from retailers at the annual talks or at other talks during the year,
- resulting additional rebate offers by the suppliers,
- current state of the negotiations and
- imminent or concluded agreements on specific additional rebates.

This information exchange between the brand product manufacturers on the state of the annual talks with retailers restricted competition with regard to the secrecy of an essential price element. This runs contrary to the principle of autonomy in market behaviour and violates German and European cartel law. Information about the extent to which competitors will yield to additional rebate demands by the retail trade is of interest to every market participant for setting his own negotiation strategy in a competitive situation. The information exchange at least carried the risk of a coordination of the brand product manufacturers' market behaviour.

Some of the orders imposing fines in the case are final. No fine was imposed on the leniency applicant. The proceedings against other members of the KWR are still pending. The Trademark Association's KWR working group has since been disbanded.

Perfumery and cosmetic products

Another case in which competition was restricted by an information system, concerned the market for high-quality perfumery and cosmetic products:

The Bundeskartellamt imposed fines totalling approx. € 10 million on nine manufacturers of high-quality perfume and cosmetic products and 13 individuals. At least since 1995 the individuals and companies concerned had exchanged a whole range of intercompany data such as price increases, turnover statistics, advertising expenditure, returned goods and planned product launches. Some of the orders imposing fines are final, some have been challenged.

d) Market foreclosure due to rebate contracts of media agencies

The Bundeskartellamt also imposed heavy fines in proceedings against two major companies marketing TV advertising time. It was successful in uncovering the practices of these marketing companies which foreclosed the TV advertising market to smaller, less powerful broadcasters. The Bundeskartellamt imposed fines totalling € 216 million on the TV advertising time marketing companies of the broadcasting groups RTL and Pro7Sat.1.

The companies had concluded discount agreements with media agencies or the advertising industry for the broadcasting of TV advertising spots. Under these agreements the media agencies were granted substantial discounts and other refunds if they placed certain large proportions of their advertising budget with the respective broadcasting group. Due to these discounts the media agencies had a strong economic incentive to place their advertising budget with the two large marketing companies and not with smaller broadcasters. Moreover, the discounts were granted retrospectively for the entire budget and not only for the part in excess of the discount thresholds. As a result this created a pull effect which foreclosed the TV advertising market to smaller, less powerful broadcasters and generally made access to the market more difficult. The discount contracts, as so-called vertical agreements, violated German (Section 1 ARC) and European competition law (Article 81 EC Treaty). The orders to impose the fines are final. Since then both broadcasting groups have introduced new discount systems.

e) Central marketing of broadcasting rights to German Football League games for the 2009/2010 season

Cartels can be punished not only in fine proceedings. In particular, in the case of restraints of competition other than hardcore cartels, it is possible to examine in administrative proceedings whether agreements between the companies violate the ban on cartels. In the summer of 2008, for example, the Bundeskartellamt examined whether the central marketing of TV broadcasting rights to German Football league games violates the ban on cartels. The central marketing scheme prevents TV stations from acquiring broadcasting rights to individual matches or to the games of an individual club (individual marketing).

The German Football League (DFL) had presented a concrete concept for the central marketing of all the games of its clubs. The Bundeskartellamt considered this concept to be a cartel.

Above all, the Bundeskartellamt examined whether the central marketing model submitted by the DFL could be exempted from the ban on cartels.[3] However, in the Bundeskartellamt's view the model did not qualify for exemption. One of the main advantages of central marketing is the combined TV coverage of the highlights of the matchday of the German Football League. This enhances product diversity by allowing the TV viewer to gain a general picture of the individual match results in a manageable timeframe. The prompt free-to-air coverage of the highlights of the games also offers the TV viewer an opportunity to choose (between pay TV live coverage and prompt free-to-air coverage) and limits the scope of broadcasters acquiring live broadcasting rights from the DFL and broadcasting the games in pay TV for charging excessive prices for TV subscriptions to the detriment of the viewer.

The tendering procedure proposed by the DFL would most probably have restricted the possibilities of providing prompt (free-to-air) highlight coverage. This would have proved detrimental to the viewer: Broadcasters which would have acquired the broadcasting rights packages could have charged viewers excessive subscription fees for broadcasting football games.

The Bundeskartellamt had informed the DFL about its assessment of the situation and explained why the concept submitted was not compatible with competition law. The DFL was at any time free to develop alternative marketing concepts to meet the exemption requirements. The central marketing concept submitted by the DFL was not implemented. The Düsseldorf Higher Regional Court rejected the DFL's appeal against the action taken by the Bundeskartellamt. The DFL's award of the TV broadcasting rights at the end of 2008 took account of the Bundeskartellamt's recommendations, making any further action unnecessary.

[3] Cf. p. 15 f. for the exemption requirements.

4. Control of the abusive practices of dominant companies

Economic life in Germany is organised according to the principle that everyone has the fundamental right to freely develop his economic potential and achieve his entrepreneurial ambitions. However, if a company has such a paramount market position that it is not exposed to any substantial competition, i.e. its behaviour cannot be contained by residual competition in the market, the competition law sets the specific rules to prevent such powerful companies from abusing their positions of dominance. Companies can become dominant e.g. through their own growth or for historical reasons (energy supply, telecommunications sector). Market dominance per see is not prohibited. However, the abuse of such dominance is prohibited, e.g. if the companies demand excessive prices or hinder other, rival companies. This requires special control of the conduct of dominant companies to prevent them from abusing their market power.

The control of abusive practices under competition law serves to protect competition and not primarily the consumer. The Bundeskartellamt's task in this is first and foremost to take action against infringements of competition in order to maintain competitive structures in the long term. This is ultimately for the benefit of all market players, including private end consumers, allowing them to best manage their economic resources.

a) Energy markets

In 2007/2008 the Bundeskartellamt focused on the energy markets in its control of abusive practices. This focus has sharpened as a result of the price abuse amendment[4] with which the legislator has tightened existing provisions in the ARC for the energy sector.

A new Section 29 ARC applying to the energy sector was introduced, which is to remain in force until 2012. This provision makes it easier for the competition authorities to prosecute abusively excessive pricing in the electricity and gas markets. In particular, the burden of proof for excessive pricing was placed to a certain extent on the companies involved.

[4] cf. p. 5 f.

Supply of household customers with gas

With this sharpened tool of price abuse control the newly established decision division has examined in particular the supply of household customers with heating gas. In 2007 and 2008 a considerable rise in gas prices and in some cases substantial differences in price between individual suppliers were observed. In addition, in contrast to the electricity sector, consumers are still not able everywhere to switch to another gas supplier.

In 2008 the Bundeskartellamt launched a large-scale investigation of 35 gas suppliers. The competition authorities of the *Länder* have also begun corresponding proceedings in their area of competence. Only the smaller number of the gas suppliers falls within the Bundeskartellamt's competence. The gas suppliers were suspected of charging abusively excessive prices in 2007 and 2008 in the markets for the supply of household customers with heating gas. The proceedings concerning the year 2008 were based on the new Section 29 ARC which could be applied for the first time during this period. The proceedings concerning the year 2007 were based on the general prohibition of the abuse of a dominant position (Section 19 ARC).

In the investigation the Bundeskartellamt examined whether the gas prices differed considerably from those of comparable companies. To account for the legal requirement of a **considerable** deviation (*Erheblichkeitserfordernis*), a specific surcharge was added to the benchmark prices. As postulated in case law, such a surcharge can be calculated proportionate to the degree of competitive pressure remaining in the market. The relevant criterion used to measure the degree of competitive pressure was the number of consumers switching to another supplier, which varied according to region, as this indicated the intensity of the remaining competition.

Accordingly, the control of abusive practices could be abandoned in areas with a high level of competitive intensity (e.g. Berlin or Hamburg). This means that in more competition intensive markets the barriers for classifying prices as abusive are higher. Furthermore the Bundeskartellamt ensured that in such cases commitments were made which are appropriate to stimulate local competition (e.g. access to a detailed gas system map to make it easier for new suppliers to win customers).

In the Bundeskartellamt's proceedings many of the companies have tried to justify their high gas prices with the argument that they would otherwise not be able to cover their costs. The Bundeskartellamt took this into consideration in cases where all rationalisation reserves had been exhausted. For reasons of proportionally the suppliers could not be forced to offer their services at prices that are not cost-covering.

By the end of 2008 the Bundeskartellamt had successfully concluded the proceedings. The Bundeskartellamt held the prices of 30 of the companies as abusively excessive. The companies pledged financial commitments to the benefit of their respective customers totalling almost € 130 million (price reductions, deferred price increases). The consumers will also be spared approx. € 230 million because the gas suppliers have refrained from passing on increased gas procurement costs. The suppliers are not allowed to compensate for the price cuts with subsequent price measures in 2009. The reimbursements have either already been or are still being paid out to customers. This is monitored by the Bundeskartellamt. From the data submitted the Bundeskartellamt concludes that none of the companies have "recouped" the credits paid out to their customers by way of deferred price rises and are not likely to do so in the future.

Electricity markets I: Electricity production, wholesale

In the electricity sector the Bundeskartellamt's activities focus on the production and wholesale level. The dominant position of RWE and E.ON at the production level and their joint dominant position in the national electricity markets, from which municipal utilities, electricity traders and major industrial customers procure their electricity,[5] is still a great obstacle to effective competition. In addition, foreign electricity producers have insufficient access to the market, with the result that the electricity wholesale sector is also predominantly dominated by the established national producers, above all RWE and E.ON. The Bundeskartellamt is therefore analysing the production level and also the national electricity wholesale sector in a so-called general sector inquiry.

[5] cf. p. 11 f.

In the electricity production/wholesale sector inquiry the Bundeskartellamt is examining the pricing mechanisms on the wholesale markets and the situation regarding German imports and exports of electricity. It is also examining whether there are indications that electricity producers are abusively withholding capacities and in this way forcing up electricity prices. This inquiry is open-ended as regards its outcome and is not targeted at individual companies. However, should there be any indications of violations of competition law by individual market participants, the Bundeskartellamt can initiate proceedings under competition law.

Electricity markets II: Supply of household customers with electricity

In the markets for the supply of household and small commercial customers (so-called standard load profile customers) with electricity the established suppliers, often municipal utilities, are generally dominant. However, the Bundeskartellamt does not consider intervention in this segment as desirable for the following reasons:

Firstly, consumers of electricity, unlike gas customers, can take their own initiative and switch supplier if they are dissatisfied with their previous one. Unfortunately customers have as yet made much too little use of this opportunity with the result that the proportion of customers changing their supplier is still very minimal. As rival electricity suppliers align their prices to those of the respective local basic provider, an intervention by the competition authority can even prevent instead of promoting competition. At a high price level new competitors have a greater incentive to become active as suppliers. This gives them the possibility to undercut the high prices of the established provider, win customers who are willing to switch provider and in this way maintain their position in the market. If the dominant provider is ordered by the competition authority to cut his prices, the new suppliers lose their competition advantage.

Secondly, the Bundeskartellamt's scope for ordering price reductions and intervention is limited. The electricity costs are made up of approx. 41 % taxes and state duties and approx. 31 % network costs (which are regulated by the Federal Network Agency). 72 % of the costs are therefore state imposed or regulated. A further 4 % of the electricity costs are allotted to metering and billing, leaving only a proportion of 24 % of the electricity price which can be influenced by the companies

themselves (so-called margin). The competition authorities can only examine this part of the electricity costs for households. The Bundeskartellamt is therefore concentrating on the upstream production level of the household electricity market in order to ensure more competition in the energy markets.

b) Groceries

Offers of food below cost price

The amendment to the ARC on abusive pricing of 22 December 2007 has also brought with it changes to the control of abusive practices in the food trade. [6]

Food retail traders with a superior market position in relation to small and medium-sized competitors are generally prohibited from selling goods below its cost price. In other words, companies may not sell goods at a price lower than the price at which they purchased the goods. This provision serves to protect competitive structures. Sales below cost price can result in smaller competitors being squeezed out of the market and in market structures being profoundly damaged.

Until December 2007 only offers of goods under cost price of indeterminate duration, i.e. “not merely occasionally”, had been prohibited. One-off promotional campaigns such as introductory prices when a business opens or sporadic special offers or lost-leaders were therefore allowed. This has changed following an amendment to the law in 2007: Even the short-term sale of food below cost price is now prohibited. Exceptions are only possible under certain circumstances,[7] for example if the deterioration of the goods is imminent, if the business is expected to go bankrupt or is closing down.

Since the new provision came into force, the Bundeskartellamt has had to deal with numerous complaints in which trading companies were alleged to have violated the ban on sales below cost price. The products mainly affected were milk products, beverages and meat products. However, in most of the complaints the Bundeskartellamt found no indications which would justify the initiation of

[6] cf. p. 5 f.
[7] As specified under Section 20 (4) 3 ARC

proceedings. The accused companies were able in most cases to prove that their cost prices were below their offer prices by presenting invoices. Some of the investigations are still ongoing.

Milk boycott

In November 2008 the German Dairy Farmers Association (Bundesverband Deutsche Milchviehhalter e.V. (BDM) had called on their dairy farmers to boycott dairies as part of its "2008 Milk Price Offensive". Under the ARC, undertakings and associations of undertakings are prohibited from requesting other undertakings to refuse to supply or purchase. With its call for boycott the BDM has therefore violated the boycott prohibition under Section 21 (1) of the ARC.

The BDM had called on dairy farmers in Germany not to supply dairies and to demonstrate in front of selected dairies. With these and other measures it planned to achieve nationwide a standard minimum price of 43 cent/kg for milk and to force the dairies to cut back the quantity of milk produced in order to cause a shortage of supply and to force up the price. As a result of the call for boycott many dairies throughout Germany were not supplied with milk by the dairy farmers. In some cases milk and milk products could not be supplied to and from the dairies due to the blockades. The dairies have suffered economic damage as a result.

The BDM could not justify the call for boycott with reasons which are acceptable under competition law. The enforcement of a nationwide standard price would have led to a cartel at all market levels (dairy farmers, dairies and the trade). This would have eliminated competition and led to higher prices for the consumer.

In this case the Bundeskartellamt established that the call for boycott was a violation of the ARC. Should the BDM violate competition law again in a similar fashion in future, the Bundeskartellamt shall initiate fines proceedings. The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision.

5. Cooperation within the Network of European Competition Authorities

a) Five years of the European Competition Network

For five years now the European competition authorities have been integrated in the "European Competition Network" (ECN).

This network enables the European Commission and the national competition authorities to coordinate their activities in the areas of cartel prosecution and control of abusive practices under competition law. Within the ECN, a case which affects several Member States (possibly in varying degrees) can be allocated to the authority which is best placed to examine it. Furthermore, the competition authorities engage in a comprehensive exchange of information and cooperate with each other in searches. In the 2007/2008 period the Bundeskartellamt e.g. took written and oral testimony from witnesses on behalf of the competition authorities of the Czech Republic and the Netherlands. The Bundeskartellamt also sent out requests of information to companies on behalf of other national competition authorities.

In 2007 and 2008 a total number of 205 cases were coordinated within the ECN network of competition authorities. There have been hardly any problems relating to case allocation between the European Commission and the Bundeskartellamt. One case was referred by the Bundeskartellamt to the European Commission, another case by the European Commission to the Bundeskartellamt, and in one further case the Bundeskartellamt and the Commission took the preliminary decision to take parallel action. Furthermore, the Bundeskartellamt closely coordinated its activities relating to several proceedings with other ECN authorities. A large number of contacts within the ECN took place on an informal level. In many cases this involved inquiries regarding the decision-making practice or legal opinion of other competition authorities. In 2007 and 2008 more than 130 such inquiries were received by the Bundeskartellamt.

In April 2009, the European Commission presented a report on the basis of which the European Commission and the Member States will be able to discuss any potential need for improvements to the underlying European regulation on the implementation of the rules on competition (Regulation (EC) No 1/2003).

Against the background of the EU competition authorities' possibilities for cooperation, the common fight against cartels at European level has gained increasing importance. Here the competition authorities strive to make cartel prosecution more effective by maximally uniform regulations. To this end an ECN working group has developed a model Leniency Programme by which the competition authorities have agreed on a uniform standard for processing leniency applications.[8] In the programme the competition authorities have pledged to bring their own regulations into 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 and the Bundeskartellamt's new Leniency Programme are designed on the ECN Model Leniency Programme.

b) Control of abusive practices

In 2007 and 2008 the assessment under competition law of abusive strategies impeding competition as applied by dominant companies continued to be the subject of discussions on competition policy. In 2005 the European Commission published a discussion paper on the application of the prohibition of abusive practices under Article 82 of the EC Treaty. Originally the discussion paper was to result in guidelines on the interpretation of the European prohibition of abusive practices which were meant to provide an orientation both for the companies and the national competition authorities. However, in view of the controversial discussion of the Commission's proposals within the ECN, a notice was finally published instead of guidelines in which the Commission explains its enforcement priorities in applying the prohibition of abusive conduct, i.e. the question under which preconditions the Commission would take up cases of abusive conduct and take action against the respective

[8] For the Leniency Programme, see also p. 16 f.

dominant companies (guidance paper).[9] The Bundeskartellamt assumes that the guidance paper has no binding effect on the Member States' competition authorities and courts either in terms of their exercise of discretion or in view of the objectives and interpretation of Article 82 EC.

Nonetheless, the Bundeskartellamt considers the guidance paper to be an important contribution to the ongoing discussion on the "correct" interpretation of Article 82 EC and supports in principle the European Commission's efforts to safeguard the consistent application of Article 82 EC. On some points, however, the Bundeskartellamt has taken a critical view. This applies in particular to the approach to focus abuse control very strongly on consumer protection, i.e. to investigate comprehensively in each case the positive and negative effects of competitive behaviour on consumers. This approach clearly involves higher standards for the proof of abusive conduct than those previously required under the established practice of the European Court of Justice. In the Bundeskartellamt's view and in European case law, the protection of competition is the predominant aspect, and it is not required to examine each individual case for negative effects on consumers.

c) White Paper of the European Commission on damages actions for breach of the EC antitrust rules

On 3 April 2008 the European Commission presented a White Paper on damages actions for breach of the European antitrust rules. This includes proposals for the improved prosecution of violations of competition law by means of private actions for damages. The European Commission's project is based on the assumption that the level of private antitrust enforcement in its Member States is insufficient.[10]

However, this does not apply to Germany. Already with the 7th amendment to the ARC, which entered into force in 2005, the legal framework conditions were substantially improved. During the past few years the number of private actions for

[9] "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", available on the internet at http://ec.europa.eu/competition/antitrust/art82/index.html.
[10] White Paper on damages actions for breach of the EC antitrust rules of 2 April 2008, COM(2008) 165 final, p.2

damages have clearly increased in Germany. As shown by Bundeskartellamt surveys, more and more victims of antitrust infringements are taking action against the companies involved and enforcing their rights by means of civil law proceedings. A total of 1,057 private antitrust actions were filed between 2004 and 2007, 301 of which were claims for damages. Therefore there is no need for further legislative measures at European level.

Private damages claims within the framework of civil antitrust proceedings play a complementary role in antitrust enforcement, but cannot replace cartel prosecution by the competition authorities. In principle the White Paper pursues the right objective, i.e. to compensate for harm suffered by individuals as a result of a breach of the antitrust rules. However, in its White Paper the European Commission calls for a profound reorganisation of civil antitrust procedures, and thus of the well-proven national civil law systems. The Bundeskartellamt considers some of the proposals to be incompatible with fundamental concepts underlying the German legal system. An anonymous representative action as proposed by the European Commission deprives individual victims of the opportunity to bring a claim for damages themselves. This is inconsistent with the principle of private autonomy. The White Paper's proposal on pre-trial discovery involves a high potential for abuse, e.g. for the unauthorized disclosure of business secrets. It is thus for good reasons that Germany has barred the discovery process from civil law proceedings. A further important argument against the European Commission's proposals is that the planned amendments considerably damage the effectiveness of cartel prosecution by the competition authorities. A company will think twice before volunteering as a principal witness to uncover a cartel in which it has participated itself, and before applying for leniency with the competition authorities. An application for leniency would hardly be worth the effort if the company hereby risks damage claims under private law which would possibly reach or even exceed the fine waived.

In a joint statement, the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt have therefore spoken out against the planned special rules for national tort law. The European Commission's approach has even met with criticism from within the European Parliament. The discussion on whether

and how the European Commission's proposals should be implemented and incorporated into a directive for implementation by the parliaments of the Member States is still ongoing.

d) Expiring block exemption regulations

The Bundeskartellamt also reviewed a number of so-called block exemption regulations. This type of regulation exempts certain categories of anti-competitive agreements from the ban on cartels because it can be assumed that their benefits will ultimately outweigh the disadvantages caused by the restraint of competition. The regulations thus specify the requirements for exemptions contained in the German and the European ban on cartels in identical form.

The Block Exemption Regulation on vertical agreements[11] which will expire in May 2010 is of particular relevance. The term vertical agreements refers specifically to distribution or purchase agreements between companies which are not in competition with each other (e.g. agreements between a manufacturer and his distributors). The ECN Working Group "Vertical Restraints" is charged with the review of the block exemption regulation and the relevant guidelines on vertical agreements issued by the European Commission.

A number of further block exemption regulations are also due to expire. These include inter alia the block exemption regulation for agreements in the insurance sector and the block exemption regulations for agreements in the motor vehicle sector. The Bundeskartellamt and the Federal Ministry of Economics and Technology are involved in the relevant discussions at the European level.

[11] Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

6. International cooperation between the competition authorities

a) International cooperation

With the increasing globalisation of markets, cross-border cooperation between the competition authorities is becoming more and more important. Apart from bilateral cooperation there are some outstanding multilateral fora and networks in which competition authorities discuss competition enforcement issues and exchange information. These are in particular the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD).

Cooperation within the International Competition Network (ICN)

The International Competition Network (ICN) is an informal network of competition authorities. Set up in 2001 by 14 competition authorities (including the Bundeskartellamt), the ICN's membership has steadily grown to now include 107 member authorities. Cooperation between the ICN's member authorities takes place in working groups whose activities are project-oriented and mainly focus on the key sectors of competition control (prosecution of cartels, control of abusive practices by dominant companies and merger control). There are also working groups on cross-sectoral issues such as competition advocacy or the effectiveness of antitrust enforcement. So-called Non-Governmental Advisors (NGAs) provide assistance in this project-oriented work (NGAs are experts on competition law and competition economics such as e.g. professors and lawyers). The work results achieved by the working groups are discussed and adopted at the ICN's annual conferences[12]; they are available on the internet at: www.internationalcompetitionnetwork.org. The Bundeskartellamt takes an active part in all the ICN's working groups. Together with the US Federal Trade Commission (FTC) it chairs the ICN Unilateral Conduct Working Group. This working group initially dealt with the objectives pursued by the member authorities in the area of abuse control. The working group went on to formulate recommendations regarding examination criteria for market dominance.

[12] The 2007 Annual ICN Conference was held in Moscow/Russia, the 2008 Conference in Kyoto/Japan.

The issue mainly discussed during the last few years was the authorities' practice of dealing with certain types of potentially abusive behaviour.[13]

The Cartels Working Group[14] has dealt with several issues including the calculation of fines and has also continued its work on the ICN Anti-Cartel Enforcement Manual)[15].

The Mergers Working Group[16] e.g. dealt with the threshold criteria for initiating merger control proceedings. Furthermore, the working group focussed on certain issues concerning the substantive merger control provisions which led to recommendations on merger control principles, the role of market shares in merger control and the role of barriers to market entry.

Cooperation within the OECD

The Bundeskartellamt and the Federal Ministry of Economics and Technology also regularly participate in the meetings of the OECD Competition Committee and its working parties on "Competition and Regulation" and "International Cooperation". These meetings, which have been held three times a year since 1967, deal with issues relating to competition policy, competition law and competition economics. Since 2001 the "Global Forum on Competition" has been held in conjunction with one of these annual meetings. This conference brings together OECD members and non-member countries, in particular developing and transformation countries, to debate global competition issues.

During the period under review the OECD Round Tables, which are prepared by means of written contributions by the OECD Secretariat and the member states, focussed on general issues relating to the competition authorities' activities, e.g. the presentation of complex economic theories in court proceedings or the interface between competition and consumer protection. Further Round Tables dealt with individual competition law aspects (e.g. the consideration of minority shareholdings

[13] In 2009 a workshop was held on this in Washington, DC.
[14] 2007: Workshop in San Salvador/El Salvador; 2008: Workshop in Lisbon/Portugal.
[15] The gradually compiled manual now includes chapters on cartel case initiation, conduct of proceedings, examination of witnesses, searches, leniency programme and access to electronic data.
[16] 2007: Workshop in Dublin/Ireland; 2008: Workshop in Brno/Czech Republic.

and interlocking directorates under competition control) and sector-specific issues (e.g. the oil sector).

Cooperation within UNCTAD

The United Nations Conference on Trade and Development (UNCTAD) supports the developing countries in their integration into the world trade system and deals with issues concerning competition law and policy. The Bundeskartellamt regularly participates in the annual UNCTAD Conference of the Intergovernmental Group of Experts on Competition Law and Policy.

b) Bilateral relations and international consultation

The Bundeskartellamt also maintains close bilateral contacts with the partner authorities active in multilateral cooperation within the OECD, ICN and UNCTAD. There have been meetings and consultations on competition issues of topical interest with a number of partner authorities from Europe and abroad.

For many years the Bundeskartellamt has also been active in the area of international technical assistance to promote the establishment of competition law regimes. These are mainly projects set up by the Federal Ministry of Economics and Technology (BMWi), the international cooperation enterprise Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), the Gesellschaft für Internationale Weiterbildung und Entwicklung (Inwent-Capacity Building International) and the Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit (German Foundation for International Legal Cooperation, IRZ). In the last few years the Bundeskartellamt has sent out short-term and long-term experts to Poland, Macedonia, Croatia, Romania, Jordan and Morocco to assist in support projects. Serbia is also receiving assistance in setting up a competition authority. The Bundeskartellamt also participated in a number of expert seminars organised by the

OECD and the European Union's Technical Assistance Information Exchange Unit (TAIEX) in several Central and East European countries.

c) International events hosted by the Bundeskartellamt

A ceremony was held on 15 January 2008 in Bonn to celebrate the 50th anniversary of the German Act against Restraints of Competition (ARC) and the Bundeskartellamt. After years of discussion and dispute, the ARC had entered into force on 1 January 1958 whereupon the Bundeskartellamt took up its work. More than 500 participants from Germany and abroad participated in the ceremony and looked back on 50 years of the German competition law system.

Every two years the Bundeskartellamt hosts its International Conference on Competition. In 2007 the conference was held in Munich together with the European Competition Day. The theme of the conference was "Competition as a Cornerstone of a Free Economic and Social Order". The conference materials are available at: www.ecd-ikk-2007.de. Apart from representatives of numerous competition authorities, the Conference was also attended by high-ranking representatives from politics, academia, the courts, the legal profession and the business sector, representatives of regulatory authorities and industrial and consumer protection associations as well as competition experts of the OECD, UNCTAD, WTO and the World Bank.

7. The development of public procurement law and legal protection in the award of public contracts

Since 1 January 1999 the Bundeskartellamt has been responsible for reviewing procedures for the award of public contracts by the Federal Republic of Germany. This possibility for legal protection in the award of public contracts has been introduced by the legislator in accordance with Community law for award proceedings which are of particular economic significance. Reviews by the Bundeskartellamt are therefore only possible for award proceedings exceeding certain contract values.

The three Public Procurement Tribunals set up at the Bundeskartellamt review, upon request, whether public awarding entities of the Federation have met their statutory obligations to ensure competitive, transparent and non-discriminatory award procedures. 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 imposed on bidders if federal law or the laws of the respective *Land* provide for this. In principle a contract is awarded to the bidder submitting the most economical offer.

The provisions on the procedure to be followed in awarding contracts and on the legal protection in the award of public contracts are laid down in Part IV of the ARC (Sections 97ff. ARC) and in the Regulation on the Award of Public Contracts (*Verordnung über die Vergabe öffentlicher Aufträge*) and the Contracting Regulations (*Verdingungsordnungen*) which are based on the ARC's provisions.

a) Modernisation of German public procurement law

During the last few years, developments in Germany in this area were marked by efforts to modernize public procurement law and make it less bureaucratic. At the same time the European public procurement directives, Directive 2004/18/EC and Directive 2004/17/EC, as well as the relevant guidelines on legal protection in the award of public contracts, had to be implemented into German public procurement

law (see para. c). A first step has been taken by the German Act on the Modernisation of Public Procurement Law (*Gesetz zur Modernisierung des Vergaberechts*) of 20 April 2009 by which the legislator partly amended Sections 97 ff. ARC. In addition to this, a review of the so-called Contracting Regulations (*Verdingungsordnungen*), which have to be observed in award proceedings, was begun in 2008.

b) Public procurement law, statutory health insurance funds and rebate contracts for pharmaceuticals

Another key aspect in the development of public procurement law and the work of the Public Procurement Tribunals were amendments to the German social legislation. These clarified some important unsolved questions relating to legal protection in the award of public contracts in the case of statutory health insurance funds inviting tenders for contracts for the supply of pharmaceuticals and medical aids. In legal practice it had initially been disputable whether statutory health insurance funds have to apply public procurement law when they intend to conclude rebate contracts on the supply of pharmaceuticals or contracts for the supply of medical aids with the providers of such services. Since 2007, the Federal Public Procurement Tribunals and the Public Procurement Tribunals of the *Länder* have thus focussed on reviewing under public procurement law the initiation of such (rebate) contracts on pharmaceuticals or medical aids to be concluded between statutory health insurance funds and service providers. These review proceedings had to clarify in particular whether statutory health insurance funds are public contracting entities and whether the contracts in question are public contracts in the sense of so-called framework agreements (*Rahmenvereinbarungen*). The review proceedings also dealt with the question whether, for the purpose of review under public procurement law, the Public Procurement Tribunals as special reviewing authorities, or the social courts are competent (due to the social law aspect of the contracts on pharmaceuticals/medical aids).

In December 2008, the legislator ultimately clarified by amending the relevant social law provision, Section 69 of Book V of the German Social Code (SGB V), that public

procurement law was generally applicable to the procurement of the (rebate) contracts and that the Public Procurement Tribunals were competent. In June 2009 the European Court of Justice also ruled that in the procurement of pharmaceuticals or medical aids for their contributors, statutory health insurance funds must generally observe public procurement law.

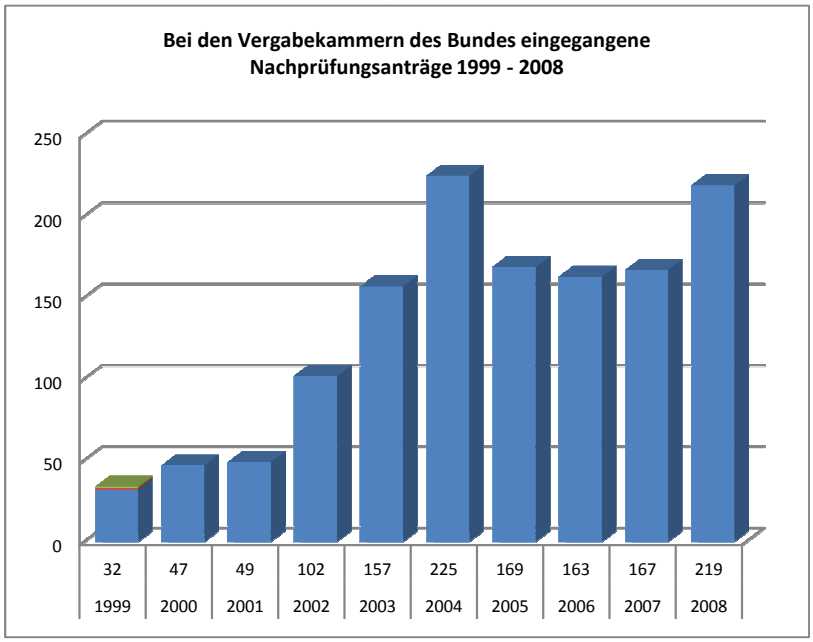
c) Developments in European public procurement law

In 2007/2008, developments in the area of public procurement law at European level were shaped by the revision of the public procurement remedies directives. Work on this revision had already begun in 2006. The directives include provisions for the Member States' legislations to create a level playing field within the European Union for legal protection in award procedures for public contracts, which, after the implementation of the previous directives in the Member States, had not been fully achieved. It remains to be seen whether the reviewed directives will be more successful in this respect. For their implementation into national law the Member States can choose between a number of different alternatives which enables them to take into consideration national characteristics of the individual review proceedings or sanction mechanisms. In Germany, the provisions included in the remedies directive were already implemented into national law by the Act on the Modernisation of Public Procurement Law of 20 April 2009.

Apart from the revision of the public procurement remedies directives, the framework governing provisions on the award of public contracts was also improved. In August 2009 the Directive on defence and security procurement entered into force. For the first time special rules were created within the European Union for the public procurement of defence and security equipment and works and services in the areas of defence and security. The application of Article 296 of the EC Treaty to defence and security procurement is generally subject to national rules. The new Directive now makes it easier for Member States to apply European procurement law in the sensitive area of national security and to increasingly issue invitations to tender for contracts in the areas of defence and security on a Europe-wide basis.

d) Decision practice of the Public Procurement Tribunals

The Federal Public Procurement Tribunals have received a new record number of 386 applications for review. This is the highest number of applications received since the Public Procurement Tribunals were set up in 1999:



Graph 6: Applications for review proceedings received by the Federal Public Procurement Tribunals

This significant increase is due to a considerable number of applications for review proceedings against the statutory health insurance funds on account of several public procurement law issues relating to contracts on pharmaceuticals or medical aids. At the end of 2008, the 3rd Public Procurement Tribunal alone had to deal with 13 review proceedings of this type which were referred for decision to the Federal level by the Procurement Tribunals of six different *Länder*. In early 2009, 13 further cases of this type were referred from the Düsseldorf Public Procurement Tribunal, so that this increase in case numbers can be expected to continue in the future. In 2008 in particular, the large number of cases pending during the same period led to a situation in which the statutory five-weeks time frame for decisions had to be extended in an above-average number of cases (in 2008 in a total of 82 cases as compared to 31 cases in 2007).

In these review proceedings the Public Procurement Tribunals decide whether the rights of the bidders who applied for review have been violated. In such cases they have taken suitable measures to eliminate the violation of rights.

The decisions of the Public Procurement Tribunals can be appealed against before the Düsseldorf Higher Regional Court (Public Procurement Division). In 2007/2008, in a number of decisions, the unsuccessful parties to the review proceedings made use of their right of appeal (a total of about 50 appeals had been filed by the end of that period). Some of the Public Procurement Tribunals' decisions were confirmed (in a total of 10 cases), some were revoked (8 cases), and some appeals were withdrawn or declared as settled (13 cases). The outcome of the remaining proceedings was still pending at the end of the reporting period.

The full version of the Bundeskartellamt's report on its activities in 2007/2008 is available on the Internet as a Bundestag publication at:

www.bundeskartellamt.de

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