Restricted **DAFFE/CLP(95)33/01**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

OLIS : 21-Sep-1995

Or. Eng.

DIRECTORATE FOR FINANCIAL, FISCAL, AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

DAFFE/CLP(95)33/01
Restricted

ANNUAL REPORT ON DEVELOPMENTS IN GERMANY

(1 July 1994 - 30 June 1995)

This report is submitted by the Delegate of Germany to the meeting of the Committee on Competition Law and Policy on 9 and 10 November 1995.

Or. Eng.

Changes to competition laws and policies adopted or envisaged

1. Neither the German Act against Restraints of Competition (ARC), which is enforced by the Federal Cartel Office (FCO), nor the Unfair Competition Act (UCA), which is enforced by the Civil Courts at the request of affected parties, was amended in the period under review.

2. As announced in its 1995 economic report (see Report 93/94, para 2), the Federal government decided that the ARC should be adjusted to European competition law. The changes are to take account of the new dimension of competition that results from the growing integration of European markets. In a single economic area, the different treatment of the same matters under national and European competition laws is no longer justifiable. Rather, it is necessary to harmonise the structure and contents of national and European competition laws as far as possible.

3. In view of the significance and the scope of the project, the Federal Ministry of Economics, with the participation of the Federal Cartel Office, has instituted a "Working Group Competition Act Amendment" which has the task of reviewing all the provisions of the ARC.

The Working group is to attain the following objectives:

- -- bringing about as much agreement as possible between national and European competition laws;
- -- reviewing the partial exemptions from German competition law, in particular transport, banking, insurance, areas which do not correspond with European law;
- -- simplification of the German Competition Act, which has become too complex and partly unclear;
- -- taking into account the further development of European law, in particular in view of the 1996 revision of the EC merger regulation.

4. The absence of legal uniformity is indeed a shortcoming of the European Union and the single European market. A lack of harmonisation cannot only be found in the area of competition law but also in nearly all the other fields of private and public economic law. However, it would not be appropriate to bring about harmonisation by simply giving up the various national legal traditions.

An adjustment of German competition law will therefore leave intact the central position of the protection of competition within the system of the social market economy, a principle which has been characteristic of the German economic order and has been a major contributing factor in its success.

5. In order to know the views of the trade associations about the issue of amending the ARC, the Working Group has asked them to submit their comments by the end of June 1995.

6. The reform of energy industry law and the ARC provisions on energy (so far a partially exempted area), which was also announced in the government's annual economic report, has reached a fairly advanced stage and will be probably submitted to the Federal Cabinet for decision-taking within the next few months, quite independently of the general amendment of competition law.

Regarding the economic and competition policy situation

7. The German economy is currently in a phase of rapid structural change which will result in a lasting transformation. This is not only true of the eastern part of Germany (the former GDR), where the production structure inherited from the planned economy stood no chance of survival under the conditions of open markets and world-wide competition. Here, after an adjustment process that is unparalleled in history and has been most painful for those affected by it, the profile of a new industrial and services economy is gradually taking shape which has a good chance of finding its place in a world economy based on division of labour.

8. But a structural change, if less obvious than in east Germany, is also taking place in the "old Federal Republic". The recession, which began in the early nineties and marked the end of a period of nearly ten years of growth, brought to light the long-standing inefficiencies and structural weaknesses of the west German economy. The reaction of the German economy to the changed competitive environment is now all the stronger. This environment is characterised by increasing globalisation of markets caused by world-wide mobility of goods, capital and technical know-how. On the whole, these factors have led to a considerably stiffening of competition between industrial countries as well as between the industrial and the so-called newly industrialising countries as regards the location of industries. Products which for decades have been sold as "made in Germany" are now, under the pressure of competition, being examined for whether their production can be shifted to low-wage countries either wholly or in part in order to reduce costs.

9. The relocation of production that has become inefficient in Germany must, however, also be seen as offering a chance, for insofar as German firms, for example in the shoe, textile, but also in the automobile industry, have themselves taken the initiative in transferring part of their production to neighbouring east European countries or the south European EU member states, there is reasonable hope that part of the resulting value added, to the extent that it is attributable to know-how, research and development as well as marketing, can in the long run be secured for Germany as an industrial base.

10. Of course, cost efficiency cannot be improved simply by shifting production as a whole or individual production stages to low-wage countries. The classic instruments of increasing efficiency, i.e. optimising the firms' organisational structure, production process or rate of in-house production, remain of primary importance. In a functioning competitive economy, by contrast to centrally planned economies, new decisions on the combination of inputs are taken all the time under cost considerations. The same applies to the question whether in-house production is preferable to buying from outside suppliers. In the Federal Republic of Germany there is currently a marked tendency towards outsourcing in many industries, for example in the automobile industry, which leads to an increase of competition in the markets of the hived-off product areas, because requirements that had until then been satisfied within the group are now covered by the market.

11. But whether the challenges of structural change can be met successfully depends not only on the flexibility of the firms; the regulatory framework set by economic policy also plays a special role (see paras 51 ff).

Enforcement of competition laws and policies

1) Increased application of EC competition law by the FCO

12. Increased and systematic decentralised enforcement of Articles 85 and 86 of the EC Treaty by the national competition authorities is a significant step nearer a harmonised European competition law,

which is the long-term goal. Effectiveness, proportionality and "nearness to the citizen" of the decision-making process, the arguments put forward in this connection, - as well as considerations of how to reach that goal - continue to be highly topical. Moreover, a fair distribution of powers between the EC Commission and the Member States, which themselves take responsibility for competition law enforcement, helps to implement the subsidiarity principle laid down in Article 3b (2) of the EC Treaty. Such sharing of powers also heightens acceptance of the competition rules within the European Union as a whole and contributes significantly to harmonisation of competition law enforcement within the EC. For just as the national authorities participate in the EC Commission's decision-making, so the Commission ought to have a say in the proceedings carried on by national authorities, whose outcome is ultimately subject to review by the European Court of Justice.

13. In the period under review, as in previous periods (see Report 93/94, para 31), the FCO initiated several proceedings based either exclusively or additionally on the European competition rules. One of those proceedings was closed by issuance of a prohibition (see para 23). In each case, the FCO had checked with the EC Commission beforehand whether the latter intended to initiate its own proceedings.

2) Action against anti-competitive practices

Violation of the ban on cartels

14. The ban on cartels, which is intended to safeguard the freedom of competitive action of independent market participants, continues to be one of the pillars of the German competition system. Only if individual economic decision-making is free and independent can competition function properly and increase prosperity. In the reporting period, the FCO therefore continued to act on a number of cases where illegal co-ordination of conduct was suspected to be present. (The FCO's power to base such proceedings not only on the provisions of the German ban on cartels, but on Article 85 of the EC Treaty as well is of no practical importance in the case of illegal horizontal agreements. This is mainly due to the fact that the substantive content of the German and European bans is largely identical and the national competition authorities have no power to impose fines under Community law.)

15. Having detected an anti-competitive price and rebate agreement of the five leading German manufacturers of fire engine superstructures and imposed fines in the amount of DM 3.8 million in 1993 (see Report 92/93, para 10), the FCO in the period under review imposed fines totalling DM 4.6 million on six fire hose manufacturers and their managing directors for having operated restrictive agreements. During a search in December 1993, the FCO seized comprehensive evidence which showed that, over a number of years, the enterprises involved had allocated quotas among themselves regarding the market for fire hoses and hoses for construction and industrial purposes, and had fixed list prices, discounts and customers as well as colluded regarding orders by local authorities and the Bundeswehr (German armed forces). Most of the administrative fine decisions have become unappealable, whereas appeals have been filed against the remainder.

16. Still pending are a number of other proceedings for violations of the ban on cartels, in particular in the form of prohibited collusive tendering in the south west German heating, air conditioning, ventilating and sanitary installations industry as well as in the market for road markings.

17. After the FCO had informed three leading German manufacturers of plastic case-shaped bottle containers that the proposed formation of a patent pool would raise competitive concerns, they abandoned their project. The three enterprises involved intended to make available to each other, and in particular cases also to third parties, a substantial part of their important property rights for bottle cases against payment of uniform lump-sum royalties. In view of the importance of industrial property rights to the production of modern bottle cases and the market leadership of the enterprises involved, it would have

been likely on the one hand that this project would have led to oligopolistic market domination. On the other hand, the joint fixing of royalties by leading competitors for granting their industrial property rights constitutes a prohibited horizontal agreement which is likely to restrict competition appreciably. The FCO was moreover able to demonstrate that the envisaged fixing of uniform royalties for plastic bottle cases would have raised prices by about 20 per cent on average.

Statistics of different types of legalised cartels

18. The number and types of cartels legalised by the FCO and the Federal Minister of Economics can be seen from the table below (see table 1).

Table 1.

Types of cartels	Cartels 1994		Total number since 1958	Still effective as at December 1994
	Additions	Deletions		
Condition cartels Section 2	3	-	69	44
Rebate cartels Section 3	-	-	33	5
Combined condition and rebate cartels	-	-	15	3
Crisis cartels Section 4	-	-	2	-
Standardisation cartels Section 5 (1)	1	-	17	7
Rationalisation cartels Section 5 (2)	1	-	24	3
Rationalisation cartels Section 5 (2) and (3)	2	-	40	10
Specialisation cartels Section 5 a (1) Sentence 1	1	-	66	16
Specialisation cartels Section 5 a (1) Sentence 2	-	2	57	16
Co-operation cartels Section 5b	4	-	122	100
Purchasing co-operations Section 5 c	9	-	10	10
Export cartels Section 6(1)	2	2	115	40
Export cartels Section 6(2)	-	-	14	2
Import cartels Section 7	-	-	2	-
Emergency cartels Section 8	-	-	4	2
Total	23	4	590	258

19. There is no contradiction between the consistent enforcement of the German ban on cartels by the FCO and the provision of very wide-ranging possibilities of inter-company co-operation - in particular for small and medium-sized companies, but not only for them.

In the period under review, the number of cartels legalised by the FCO rose from 239 to now 258 (against an increase from 227 to 239 in the 1993-1994 period). In 4 cases so-called small business co-operation agreements were involved, which are expressly encouraged by the FCO to offer the co-operating companies better market chances when competing with powerful large enterprises. Such co-operation agreements account for some 40 per cent of all legalised cartels. The increase in the number of legal cartels recorded in the period under review is mostly due to 9 cases of purchasing co-operation agreements operated exclusively by small and medium-sized firms. While such agreements have been permitted under German co-operatives law since 1889, they have been explicitly exempted from the ARC since the 1990 amendment.

Vertical restraints

20. The legal view asserted by the FCO in a pilot proceeding to the effect that the exemption for publications from the ban on resale price maintenance did not apply to CD-ROM products with legal databases (see Report 1993/94, para 10) has been confirmed by the Berlin Court of Appeals. Since the case involves issues of fundamental importance, it is to be expected that the company concerned, the large German publishing house C.H. Beck, will file an appeal on points of law with the Federal Supreme Court.

21. In order to protect the free setting of prices, the FCO imposed fines (involving rather small sums) on several manufacturers of branded goods. By threatening to withhold supplies, they had in some cases tried to force retailers to adhere to recommended resale prices or a minimum price level.

22. The ARC not only protects the free setting of prices and terms of business, but also ensures that the parties to an agreement in principle are free to organise their business relationships with third parties as they wish. However, certain forms of exclusivity clauses may be declared to be of no effect by which a significant number of enterprises in terms of competition are similarly bound and unfairly restricted in their freedom of competition. This is illustrated by the following decision issued in the reporting period (a brief account of the intended decision was given in para 12 of last year's report).

23. The FCO prohibited the big (but not market dominating) German tour operators Touristik Union International GmbH & Co. KG (TUI), of Hanover, and NUR Touristic GmbH (NUR), of Frankfurt/Main, from operating restrictive exclusivity agreements with 15 Spanish hotel owners on the Balearic Islands and the Canary Islands regarding the purchase of room quotas for German tourists for the winter 1994/95 season and from implementing similar clauses in future agreements with those hotels.

The prohibited agreements required the Spanish hotel owners:

- -- not to sell room quotas for their hotels to certain other competing German tour operators;
- -- to either limit the number of German tour operators booking accommodation in their hotels or to extend the number of admitted operators only with the consent of the operator concerned.

Such exclusivity clauses served to exclude, in particular, German competitors offering lower-priced package tours such as the Kleve-based Alltours Flugreisen GmbH or the Mönchengladbach-based Allkauf Reisen GmbH from hotels in which TUI or NUR book accommodation. Alltours Flugreisen, for instance, was not able to purchase room quotas in 47 hotels on the Spanish islands for the winter 1993/94 season.

The freedom to contract of the Spanish hotels concerned was unduly restricted by TUI's and NUR's exploitation of their buying power. Those companies substantially hindered Alltours and other operators in purchasing room quotas, thus restricting price competition on the German market for air travel package tours.

The prohibited agreements had affected trade between the Member States of the European Community, and they had as their object and effect a restriction and distortion of competition within the common market. The prohibition decision was therefore based on Article 85 (1) of the EC Treaty, one of the first decisions to which the FCO applied exclusively European law.

The companies concerned have filed appeals against the decision.

Control of abusive practices by dominant firms

24. Most of the again relatively few abuse proceedings in the reporting period were directed against enterprises in sectors where market dynamics have been fully or partly eliminated as a result of government regulations. The control of abusive practices by - still - dominant firms in sectors which are in the process of deregulation (see paras 27 ff) has been developing into a new field of activity for conduct control by the FCO. On most industrial markets, however, competition, often also international competition, continues to be vigorous. This confirms the experience that interference in the behaviour of enterprises is seldom necessary where markets are open.

25. In view of the methodical problems involved, but also because of the high requirements made by the German courts, the FCO continues to be very cautious when it comes to exercising control of abusive pricing as an instrument for interfering with the freedom of business to set their own prices.

In the period under review, price controls were considered necessary by the FCO only in the field of energy supply via networks, but no formal decisions were issued.

26. The number of proceedings conducted for hindering abuses was somewhat larger by comparison, although the number as such was small indeed. An essential goal of such proceedings is to keep markets open. Action against business strategies of sealing off markets and deterring market entry therefore proves to be an indispensable tool to supplement control of proposed mergers.

27. The railway reform and "Post Reform II" have been two very significant steps in Germany towards injecting more competition into these fields. Essentially, the two reform acts provide for the conversion of the various divisions of Federal enterprises into stock corporations, enabling the privatisation of postal and railway services and freeing them from the constraints imposed by the law governing the public service. Although the measures taken are welcome from a market economy point of view, the present stage of the deregulation process also poses risks which may hamper a development towards greater competition.

28. As regards the postal sector, there is on the one hand the danger of competitive operations being cross-subsidised by profits from monopoly services, which may be used to hinder private competitors or to squeeze them out of the market and, on the other hand, the unjustified denial of access to networks operated by the monopolist without holding a pertinent statutory exclusive right. Under the Post Reform Act it is in principle admissible to use profits earned with monopoly services to offset losses incurred in competitive services, unless the competitive chances of other enterprises are impaired without any factual reason by a lasting, perceptible non-recovery of full cost. The responsibility for identifying such situations lies with the Federal Ministry of Economics in consultation with the Federal Ministry for Post and Telecommunications. The Federal Ministry of Economics may request - and in some cases actually has requested - the assistance of the FCO for this purpose. For instance, the FCO for the first time submitted opinions regarding the Datex-P system pricing and the shipment of so-called Postgut (parcels of different weight classes shipped by firms at a reduced rate). In both cases, the FCO found that both services did not operate on a full cost-recovery basis to the disadvantage of private competitors.

29. In the abuse proceedings against the leading German pharmaceuticals wholesalers for hindering a German drug importer (see Report 92/93, para 18), the Federal Supreme Court has since affirmed the FCO's decision - in contrast to the Berlin Court of Appeals.

30. The FCO's decision in an abuse proceeding against Verbundnetz Gas AG (VNG) (see Report 93/94, para 13, and Report 92/93, para 19), the only supplier of long-distance gas operating in the new

Federal Länder and the only pipeline operator, which had refused to let another gas supply and distribution company feed natural gas to be purchased from Russia into its supply network, has been reversed in a final decision by the Federal Supreme Court in spite of some basically positive aspects. The Court of Appeals had already set aside the FCO's decision. The reasoning of the Federal Supreme Court was essentially based on the argument that VNG had met the price of the enterprise requesting third-party access. The energy industry goal of cheap energy supply of the consumer would be achieved in this case also without third-party access, the Court held.

31. Although individual case decisions even by the supreme German court - unlike those by Anglo-American courts - should not be overrated, one cannot overlook the fact that the efforts of the FCO to ensure that competition is left wider leeway in the field of energy supply via networks have so far not been very successful.

3) Mergers and acquisitions

Statistics and summary data on mergers within control provisions

32. In the reporting period, the number of mergers notified to the FCO slightly increased to 1,564 mergers (1992: 1,743; 1993: 1,514) (see tables 2 and 3). This figure again includes some 300 notifiable acquisitions of east German firms. The expectation expressed in the previous report (see Report 93/94, para 15) that but for the cases attributable to German unification there would be about 1,200 mergers annually has been confirmed.

Table 2**. Mergers Notified Pursuant to Section 23 of the ARC**

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
1 January 1995 - 30 June 1995	682

Table 3.

Number of Mergers Notified under Section 23 of the ARC in 1994 by:

(a) Form of the Merger		(b) Type of the Merger (1)		
Total	1 564	Total		1 564
Acquisition of assets	295	Horizontal of which		1 301
Acquisition of shares	698			
Joint ventures (incl. new establishments)	527	(a)	without product extension	1 053
		(b)	with product extension	248
Contractual links	15			
Interlocking directorates Section 23 (2) No. 4	-	Vertical Conglomerate		46 217
Other links	27			
Competitively significant influence	2			

(1) Horizontal merger without product extension = acquired enterprise operates on the same markets as the enterprise acquiring it (e.g. brewery acquires brewery).
Horizontal merger with product extension = acquired and acquiring enterprises operate on neighbouring markets of the same economic sector e.g. brewery acquires fruit juice manufacturer).
Vertical merger = in relation to the acquiring enterprise, the acquired enterprise operates at previous or subsequent stages of production (e.g. brewery acquires drinks wholesaler).

33. As was the case in previous years, a vast majority of notified mergers was subject to the pre-merger notification requirement, accounting again for some 70 per cent of all notified mergers and just under 80 per cent of mergers subject to control. Most of the mergers notified to the FCO once more involved acquisitions of small and very small enterprises by large firms, which as a rule did not raise any

particular competition concerns. As in the past the number of truly large mergers having significant effects on competition was comparatively small. It has to be borne in mind, however, that in the reporting period some 50 large mergers subject to the EC Merger Regulation had effects on the German markets. They are not included in the figures given in this report, because they are neither subject to scrutiny by the FCO nor to the FCO notification rules.

34. Of the 1,564 mergers in 1994

1 086	(1 050 in 1993)	were mergers notified in the course of compulsory or voluntary notification prior to completion.
331	(310 in 1993)	mergers were notified after completion and found to be subject to control.
147	(154 in 1993)	mergers were not subject to control because they fell short of the turnover thresholds of Section 24 (8) of th ARC (de minimis clause).

35. From the beginning of merger control in 1973 to the end of 1994, a total of 19,224 mergers were notified and completed (see table 4).

Table 4

Number of Mergers Notified under Section 23 of the ARC from 1973 to 1994 by:

(a) Form of the Merger		(b) Type of the Merger (1)	
Total	19 224	Total	19 224
Acquisition of assets	4 256	Horizontal	14 286
Acquisition of shares	9 282	of which	
Joint ventures (incl. new establishments)	5 110	(a) without product extension	11 139
		(b) with product extension	3 147
Contractual links	333		
Interlocking directorates Section 23 (2) No. 4	12	Vertical Conglomerate	1 904 3 034
Other links	219		
Competitively significant influence	12		

(1) Horizontal merger without product extension = acquired enterprise operates on the same markets as the enterprise acquiring it (e.g. brewery acquires brewery).

Horizontal merger with product extension = acquired and acquiring enterprises operate on neighbouring markets of the same economic sector (e.g. brewery acquires fruit juice manufacturer).

Vertical merger = in relation to the acquiring enterprise, the acquired enterprise operates at previous or subsequent stages of production (e.g. brewery acquires drinks wholesaler).

36. Since the 1973 adoption of merger control, the FCO has prohibited 110 mergers by formal decisions. Of the total of 110 prohibition decisions 58 have meanwhile become unappealable. 22 decisions were reversed by the courts. 17 prohibition decisions were withdrawn or otherwise settled by the FCO. In 6 cases, the Federal Minister of Economics fully or partially authorised mergers that the FCO had prohibited, while in 9 cases the applications for ministerial authorisation were unsuccessful. The balance of 7 prohibitions has not yet become unappealable.

37. Apart from the four mergers prohibited in formal proceedings (see paras 43 ff) during the reporting period, 8 merger proposals were abandoned by the firms after informal talks (prior to notification) with the FCO. In another 7 cases, merger projects notified during the reporting period were withdrawn after the FCO had informed the firms involved of its intention to prohibit the project.

38. The following case may serve as an example:
After the FCO had expressed competition concerns, the large German firm Bayer AG abandoned its proposed acquisition of a majority stake in the Austrian firm Wolfram-Bergbau- und Hüttengesellschaft mbH (Bergla). Bayer withdrew the notification of the project.

Bayer and Bergla are the most important European suppliers of tungsten powder and cemented carbide. Owing to their excellent heat and electricity conductivity, hardness and resistance to wear, both materials are important commodities with many applications, particularly in the heavy metal and hard alloy industries. According to the FCO's findings, the two firms together would have obtained shares of more than 55 per cent and over 75 per cent respectively in the German market. Since the buyers of those high-tech tungsten products make great demands on quality and security of supply, imports from China, with 54 per cent of the world's tungsten resources, do not constitute a sufficient alternative source of supply. Also, many buyers had complained to the FCO about the project.

39. Over the last few years, there has been a steady increase in the number of those merger cases in which either no notification was filed or no formal prohibition was made after notification. In fact, formal prohibitions seem to be reserved for those cases where the participating firms stick to the proposed transaction because they believe that for factual or legal reasons they stand a good chance of prevailing in subsequent court proceedings. Therefore the effectiveness of merger control should not be judged only by the number of formal prohibitions, just as the number of notified mergers alone is no sufficient indication of the trend of concentration in a national economy.

Undertakings

40. As in previous reporting periods, some firms gave undertakings to the FCO or modified their proposed transactions in order to resolve the FCO's competition concerns. In their undertakings, the acquiring and/or acquired firms agreed to restructure the merger by selling part of their operations. However, such undertakings are only likely to be successful if the commitment to sell is met before completion of the notified merger project. Problems may arise if it is agreed that undertakings will be complied with only after the transaction has been completed.

41. Thus, at the end of 1993, an enterprise refused for the first time to comply with an undertaking it had given. Shortly before the expiry of an agreed deadline for the sale of one of its divisions, Fried. Krupp AG terminated its 1992 agreement to sell by the end of 1993 its automotive suspension springs division (see Report 93/94, para 26). After termination of the agreement by Krupp, the FCO issued an order to divest on the basis of the agreement. The firm lodged an appeal with the Berlin Court of Appeals, which allowed the appeal suspensive effect. The proceedings are still pending and may probably be taken to the

Federal Supreme Court, before effective divestiture can take place, if the FCO's order is upheld by the courts.

42. Undertakings, which are not specifically provided for in the ARC, were introduced in 1975 by the FCO with the explicit approval of the Federal Ministry of Economics as a tool enabling the FCO to not prohibit mergers in their entirety if they result in market dominating positions being created or strengthened only in some regional markets or product markets of minor importance. The use of undertakings was confirmed by the Berlin Court of Appeals. Since 1975, 47 prohibitions have thus been averted.

Merger prohibitions

43. In the period under review, the FCO prohibited four merger projects, the same number as in the preceding period. The four projects were the following (in chronological order):

44. The FCO prohibited Philips GmbH, Hamburg, from acquiring a majority interest in Lindner Licht GmbH, Bamberg. The merger would have further strengthened the market dominating position which Philips and OSRAM, a subsidiary of Siemens, together hold on the German market for general lighting service lamps.

Philips GmbH, Hamburg, is an affiliate of Philips Electronic N.V., Eindhoven/Netherlands, one of the major electronics firms world-wide and the leading supplier of electric lamps on both the European and the world market, with OSRAM ranking second in each case.

Lindner Licht GmbH, also a manufacturer of lamps, is one of the few existing competitors of Philips and OSRAM in Germany.

According to the FCO's findings, the German market for general service lamps is dominated by Philips and OSRAM, which together hold a market share of almost 80 per cent of the German market. There is a wide margin between the market leaders and the other competitors General Electric Lighting GmbH, Lindner Licht GmbH and SLi Lichtsysteme GmbH. Owing to links and agreements existing between Philips and OSRAM, competition between the two leading suppliers of lamps for general lighting service is structurally limited to a considerable extent.

Therefore, Philips and OSRAM fully met the statutory criteria for presuming oligopolistic market domination.

The acquisition of Lindner Licht GmbH by Philips would have deprived buyers of one of the few alternative sources of supply in Germany and would have further strengthened the market dominating oligopoly of Philips and OSRAM.

Philips has appealed to the Berlin Court of Appeals.

45. The FCO prohibited a Lower Saxony electricity supplier (HASTRA) and a gas producing municipal public utility in Lower Saxony from acquiring a shareholding in a new municipal utility, which was to be set up.
In the FCO's view, the acquisition would have helped HASTRA and the municipal utility to strengthen their existing market dominating positions as suppliers of electricity and gas respectively in a part of Lower Saxony.
The firms concerned have appealed to the Berlin Court of Appeals.

46. The FCO prohibited Hochtief AG (Hochtief), of Essen, from increasing its stake in Philipp Holzmann AG (Holzmann), of Frankfurt/Main, from 20 to 35 per cent on the ground that Hochtief would gain a market-dominating position as a result of the notified merger project.

Hochtief, with building work valued at DM 8,500 million, and its numerous domestic and foreign affiliates are mainly active in the building industry. RWE, Germany's largest electricity company, is Hochtief's largest shareholder.

Holzmann, with work performed worth DM 12,500 million, is the parent company of the Holzmann group, the largest German construction company, whose fields of activity, via significant domestic and foreign affiliates, include "general construction", "transport infrastructure and building materials" as well as "energy and environmental technology". Holzmann's largest shareholders are Deutsche Bank with more than 25 per cent, Hochtief with 20 per cent, Bank für Gemeinwirtschaft with 10 per cent and Commerzbank with 5 per cent.

The FCO found a separate domestic market for large industrial building projects, with contracts worth at least DM 50 million, which are so demanding in terms of technology, organisation and finance that their completion requires the capacities and resources available to large firms only.

It is in this market for large projects that Hochtief and Holzmann would gain a paramount position. According to the FCO findings, both firms together would account for 34 per cent of that market, thus reaching the threshold beyond which the German Competition Act presumes market domination to be present. Hochtief/Holzmann's combined market share would be more than twice the second-ranked competitor's share (Walter group), and higher than the combined share of the five next-ranked competitors. In the high rise, cooling tower and tunnelling (shield driving method) sectors, the supply structure would narrow considerably.

Moreover, the paramount market position in terms of market shares would be secured by the two firms' superior financial resources in relation to their competitors. The synergies resulting from the merger would strengthen RWE group's "construction" and "waste disposal" operations. As a result of the diverse intra-group links RWE would be able to establish a presence in every single sector of construction like no other German firm could.

The paramount market position of the firms involved in the merger project is also a consequence of their being embedded in a dense network of links with other firms.

Ultimately, the conditions of the German Act's presumption of market domination for mergers of very large firms are satisfied, if each firm participating in the merger records a turnover of at least DM 1,000 million, and two firms record a combined turnover of at least DM 12,000 million. If it cannot be ruled out, upon overall appraisal of all aspects relevant to the analysis of the merger, that a market-dominating position will be created, then such a merger can be presumed to meet the conditions for prohibition. To that extent, the burden of proof is reversed; therefore the onus of resolving any remaining doubts as to whether a market-dominating position will be created lies with the firms concerned.
The acquiring firm has lodged an appeal.

47. The FCO prohibited RWE AG, the largest German electricity supply company, from acquiring a shareholding in a North Rhine-Westphalian electricity supply company (Stromversorgung Aggertal). As a result of the proposed acquisition RWE would have further strengthened its already existing market-dominating position in Stromversorgung Aggertal's supply area. The decision has not yet become unappealable.

48. At the end of the period under review, the FCO also raised objections against two further merger proposals.

Number and extent of international mergers

49. As in earlier reporting periods, the FCO examined a number of mergers in which foreign firms were involved either directly or indirectly. Owing to a slight decrease in the number of purely German mergers, the share of mergers involving foreign companies rose slightly and regained the pre-unification level (see table 5).

50. In the period under review, the FCO continued its practice of submitting its comments to the EC Commission regarding a number of cases that are subject to European merger control. In two instances, the FCO requested the referral of a case under Article 9 of the EC Merger Regulation, but the Commission again refused to do so.

Table 5. **Statistical coverage of mergers involving foreign parties**
A breakdown of mergers notified in 1993 and 1994 is as follows:

	1993		1994	
1. Completed on the national territory (domestic mergers) of which:		1 330 (88 %)		1 367 (87%)
(a) with direct involvement of foreign party/parties	133 (7%)			
(b) with indirect involvement of foreign party/parties	325 (22%)		352 (22%)	
(c) without any foreign involvement	892 (59 %)		893 (57%)	
2. Completed abroad (foreign mergers) of which:		184 (12%)		197 (13%)
(a) with direct involvement of domestic party/parties	76 (5 %)		74 (5%)	
(b) with indirect involvement of domestic party/parties	15 (1%)		22 (1%)	
(c) without any domestic involvement	93 (6%)		101 (7%)	
Total		**1 514**		**1 564**

Definitions:
Place of merger is the registered office of the enterprise whose shares or assets are acquired.

A foreign enterprise is involved in a domestic merger provided at least one direct participant is a foreign enterprise (direct) or an enterprise linked with a foreign controlling enterprise (indirect).

This applies to foreign mergers accordingly.

Privatisation and deregulation

Privatisation

51. In the field of privatisation the Federal government has an impressive track record. Since 1982 the number of government shareholdings and special assets has been cut by more than half from 958 to under 400 as of the end of 1994. Receipts from privatisation over that period amounted to DM 12.5 billion. In the reporting period there were no spectacular privatisations.

52. The three postal enterprises Telekom, mail service and postbank (see report 93/94, para 51) were converted to legally independent stock corporations on 1 January 1995. Subsequent partial privatisation of those companies is envisaged. Shares in Deutsche Telekom AG are intended for sale as early as 1996. Details of the Federal government's other privatisation projects are contained in the Federal government's 1995 Annual Economic Report.

53. At the end of 1994 (see Report 93/94, paras 36 ff) Treuhandanstalt successfully completed its task of restructuring and privatising the formerly state-owned firms in the new Federal Laender. Via the privatisation of firms Treuhandanstalt obtained investment pledges from the new owners worth more than

DM 207 billion and guarantees for 1.5 million jobs. Since 1 January 1995 Treuhandanstalt's remaining tasks have been carried out by several successor agencies. The assets of the few remaining units held by Treuhandanstalt were transferred to the newly founded limited liability company Beteiligungs-Management-Gesellschaft Berlin mbH (a holding and management company that is to look after the still unsold Treuhand firms and subsequently privatise them).

54. The reduction of Federal real estate, particularly in the new Laender, forms an integral part of the Federal government's privatisation policy. The reporting period saw an acceleration in the sale of such real estate.

55. However, the Federal Laender and municipalities have the greatest potential for privatisation. To the extent possible, tasks in the fields of environmental infrastructure, surveying, planning of construction projects and approvals procedures and compulsory inspection of motor vehicles should be transferred to the private sector and the professions.

Deregulation

56. The existing web of government regulations in Germany still exceedingly narrows down the scope for private initiative and entrepreneurial creativity, burdening citizens and the business community with avoidable costs. The Federal government will therefore continue its policy aimed at simplifying legal and administrative procedures in all areas. The independent "Commission for Simplifying Federal Legislation and Administration" submitted a first report at the end of 1994 containing recommendations to reduce administrative obligations on enterprises, citizens and administrative bodies. It is envisaged that those recommendations will be implemented in the course of forthcoming revisions of legislation.

57. A shortening of planning and licensing procedures is of critical importance. In the context of its "Immediate Action Programme for More Growth and Employment" of January 1994 (see Report 93/94, para 44), the Federal government therefore set up an independent commission of experts to simplify and speed up those procedures (Schlichter Commission). In December 1994, the group submitted its recommendations to the Federal government, which dealt, in particular, with the subjects of general law on administrative procedure and environmental law (mainly immissions control law). A coalition working group has since been considering the question of which proposals contained in the final report should be implemented. It has advocated realising almost all of the 86 proposals of the Schlichter Commission. The legislative procedures required for implementation will now be initiated as speedily as possible.

The role of competition authorities in the formulation and implementation of other policies

58. As in earlier reporting periods, the FCO followed requests by the Federal Ministry of Economics and other Federal Ministries and institutions to comment, from the competition point of view, on a number of existing regulations as well as on proposed laws and regulations. In addition, the FCO submitted, on its own initiative, opinions on questions of trade, industrial and structural policy to the Federal Ministry of Economics.

59. In the period under review, the FCO rendered an opinion on :

- -- the Council directive concerning the legal protection of data banks;
- -- the assessment under competition law of common purchasing arrangements of medical doctors;
- -- the opening of the German telecommunications services market;
- -- the relationship between private and public rescue services in some of the new Federal Länder;

-- the Recycling Industry Act and individual regulations;
-- cross-subsidisations of the Telekom Datex-P network;
-- the Energy Industry Act;
-- the agreement between the Federal Länder on broadcasting;
-- a draft amendment of the Packaging Ordinance.

60. The Federal Public Procurement Control Tribunal, which was set up at the FCO in June 1994 (see report 93/94 para 55) and has the task of reviewing the decisions taken by bodies that supervise the awarding of contracts by government agencies, reviewed 12 complaints and took six decisions in the period under review. Some complaints were made by bidders who had not been awarded a contract although they had submitted the lowest bids, or because the public procurement agencies had infringed other provisions of the law governing public procurement.

New studies relevant to competition policy

1. EECKLOFF, Johann
   Industriepolitik im Widerstreit mit der Wettbewerbspolitik
   Berlin: Duncker & Humblot 1994
   (Industrial policy versus competition policy).

2. HÄRTEL, Hans Hagen/Krüger, Reinarld (u.a.)
   Die Entwicklung des Wettbewerbs in den neuen Bundesländern
   Baden-Baden: Nomos 1995
   (Development of competition in the new Federal Länder).

3. HANSEN, Knud
   Wettbewerbsschutz in Mittel- und Osteuropa. Zum Beitrag des Kartellrechts für den Übergang zur Marktwirtschaft
   in: Wirtschaft und Wettbewerb H. 12, 1994, S. 1002 - 1012
   (Protection of competition in central and eastern Europe. On the role of competition law in the transition to a market economy).

4. MOLITOR, Bernhard
   Ist Marktwirtschaft noch gefragt?
   Eine ordnungspolitische Bilanz der Jahre 1982 bis 1992
   Tübingen 1993
   (Is the market economy still desirable? A review of the years 1982 to 1992 under the free-market aspect).

5. SCHMIDT, Ingo/Binder, Steffe,
   Wettbewerbspolitik im internationalen Vergleich. Die Erfassung wettbewerbsbeschränkender Strategien in Deutschland, England, Frankreich, den U.S.A. und der EG Stuttgart: Univ. Hohenheim 1994(A country-by-country comparison of competition policies. The treatment of anti-competitive strategies in Germany, Great Britain, France, the U.S.A. and the EC).