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COMMITTEE ON COMPETITION LAW AND POLICY

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ANNUAL REPORT ON COMPETITION POLICY IN GERMANY (1 July 1995 - 30 June 1996)

This report is submitted to the Committee on Competition Law and Policy FOR CONSIDERATION at its meeting on 22, 23 and 24 October 1996, under Item V of the Draft Agenda.

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ANNUAL REPORT IN COMPETITION POLICY IN GERMANY

(1 July 1995 - 30 June 1996)

A. Changes to competition laws and policies, proposed or adopted

I. Summary of new legal provisions of competition law and related legislation; and II. Government proposals for new legislation

1. Neither the German Act against Restraints of Competition (ARC), which is enforced by the Bundeskartellamt, 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 already announced in its 1993/21994 report, the Federal Government has decided to examine the ARC.

3. The Federal Government set up a "Working Group Competition Act Amendment" comprising officials from the Federal Ministry of Economics and the Bundeskartellamt. In May 1996 the Federal Ministry of Economics submitted cornerstones for a 6th amendment. With this revision, the Federal Government intends to strengthen the competition principle as a whole and harmonise national law with Community law wherever considered necessary. At the same time, the ARC, which has been in force since 1954 and has lost clarity as a result of being amended five times, is to be revised and streamlined.

4. This concept reflects the economic and political needs arising from the transformation of Europe into a single economic area. Both German law and Community law pursue an identical goal of protecting competition. Differences do, however, exist as regards substance and structure. In both legal systems in a single economic area, it is in the long run not desirable for national and European legislators to make different assessments under competition law when the situations involved are comparable.

5. National law and Community law are therefore to be harmonised as far as possible wherever necessary. What has proved successful at national level will be retained.

6. This two-pronged approach to the revision will on the one hand take account of the legitimate interests of the business community in having largely similar legal bases. On the other hand, German competition law will be retained in its present form:

- wherever its rules are more specific than Community law;
- wherever Community law is still developing; and
- wherever, in the opinion of the Federal Government, national law offers solutions preferable to those available under European law.

7. The harmonisation of legislation will focus in particular on the general ban on horizontal agreements (cartels) and merger control. The areas exempted under the ARC will also be reviewed.

8. The cornerstones provide interested business circles with an opportunity to define their present position on the reform of the ARC more closely. Following a phase of comment, a draft for the revision of the ARC will be prepared, which is to be presented to Parliament.

The cornerstones contain the following proposals:

Ban on cartels and exemptions:

- adopt the wording of Article 85 (1) of the EC Treaty covering the ban on cartels in respect of horizontal agreements;
- retain the distinction between horizontal and vertical restraints of competition under German law; vertical agreements to continue to be effective in principle;
- introduce a general exemption based on EC law (Article 85 (3) of the EC Treaty); define more closely key groups of factual situations in line with the present list of exemptions of Sections 2 to 7 of the ARC;
- refrain from including an enabling provision for issuing block exemptions for national cases; and
- retain ministerial authorisation (Section 8 of the ARC).

Other agreements:

- retain ban on resale price maintenance (RPM);
- retain admissibility of RPM for publications; and
- retain abuse supervision of vertical restraints of competition.

Abuse, discrimination, other restrictive practices:

- introduce a ban on abuse of a market-dominating position in line with EC law (Article 86 of the EC Treaty);
- delete market domination presumptions; and
- retain abuse supervision in cases of relative market power.

Merger control:

- extend pre-merger control to bring it in line with EC law; raise turnover thresholds from DM 500 million to 1,000 million; increase *de minimis* threshold to DM 10 million;

- streamline definition of merger; introduce acquisition of control as a definition of merger in line with EC law; retain acquisition of a 25 percent share/50 percent share as well as the criterion of a "competitively significant influence";

- treatment of co-operative and concentrative joint ventures in line with EC law;

- retain the substantive test of "creation or strengthening of a market-dominating position" in the form of single-firm market domination and oligopoly; essentially retain quantitative presumption rules;

- improve transparency of proceedings; introduce an obligation to issue formal decisions in main proceedings and publish them even if a merger is cleared; introduce a right to bring third-party actions in respect of decisions in main proceedings; the instrument of summary preliminary proceedings to be retained; and

- retain ministerial authorisation (Section 24 (3) of the ARC).

Exempted sectors:

- delete as many exemptions as possible, in particular for transport, banking and insurance sectors; and

- introduction of competition into energy sector will be dealt with in the context of the revision of the Energy Industry Act (see paragraph 9).

9. In June 1996 , the Federal Ministry of Economics submitted a draft for the revision of the Energy Industry Act. As a central pillar for the introduction of competition into the electricity and gas sectors this draft provides for the elimination of the protection given to closed supply areas. The exemption under competition law enjoyed by supply companies would be abolished. Demarcations and exclusive rights of way will no longer be permitted.

10. The supply of electricity and gas via networks will thus be placed on the same footing as other sectors of the economy. It is planned to submit the amendment to the Federal Cabinet before the end of this year.

11. The new Telecommunications Act has been in effect since August this year. It marks the conclusion of a legislative process spanning just one and a half years. It is to form the legal basis for complete competition in the German telecoms market from 1 January 1998 and mark the abolition of the Deutsche Telekom AG's monopoly, particularly in the area of telephone voice services and transmission networks.

12. The act is divided into 13 parts:

- general provisions (purpose of the act, regulatory aims, definition of terms),

- regulation of telecommunication services (licences, universal service),

- regulation of market-dominating providers,

- open network access and interconnections,

- customer protection,
- management of pool of telephone numbers,
- management of frequencies,
- use of transport routes,
- authorisation, transmission equipment,
- creation of a regulatory body,
- telecommunications secrecy, data protection, security,
- provisions concerning sanctions and administrative fines, and
- transitional and final regulations.

13. The upper house of the German Parliament presented a bill in the autumn of 1995 which is to make collusive tendering a criminal offence. This complements the previously existing offence of fraud. The aim is to render more effective the fight against illicit payments. Any cartel agreements made in the course of invitations to tender would also be subject to criminal prosecution. Such agreements would no longer be covered by the provisions of the Administrative Offences Act and would thereby no longer fall within the responsibility of the competition authorities. The Bundeskartellamt and the competition authorities of the Laender basically welcome the fact that such agreements are being classified as criminal offences. For the current discussion they are, however, of the opinion that the deterrent effect of such a criminal sanction depends to a large extent on it being applied effectively. The competition authorities' particular experience in this field could no longer be used in the criminal proceedings. Above all this legislative initiative involves the danger that the proceedings, as is also the case in other criminal proceedings, will concentrate on the individual, while the punishment of the businesses profiting from the agreements will become a secondary consideration. The competition authorities would prefer a more flexible method of regulating the distribution of responsibilities as is already provided under German law in the sectors of taxation and finance.

14. The Federal Ministry of Justice set up a working group "Review of Competition Law" in 1995 which dealt with the question of amending the Unfair Competition Act (UCA). In the final report of the working group, which was submitted at the beginning of October 1996, it was stated that reservations exist about making any major changes to the existing law.

B. Enforcement of competition laws and policies

I. Action against anti-competitive practices, including agreements and abuses of dominant positions

I.1. Summary of activities of competition authorities and courts

1. Agreements

15. The adjustment of German law to the European legal system must not be a one-way process, however, as has been explained above.

16. Rather, sensible harmonisation also presupposes the simultaneous further development of the different national and European competitive systems into a co-ordinated and improved system that is to serve as a protective mechanism against restraints of competition. A central concern in the context of this harmonisation process also ought to be the general and consistent embodiment of the subsidiary principle. One of the significant steps in this direction is to increase the decentralised application of EU competition law. Irrespective of decentralised enforcement and the conditions of enforcement, the Bundeskartellamt may challenge violations of Articles 85 and 86 of the EC Treaty provided the Commission has not initiated its own proceedings.

17. In the reporting period the Bundeskartellamt conducted the following proceedings, based either exclusively or additionally on the European competition rules. Regarding each of the proceedings, the Bundeskartellamt consulted with the EU Commission at an early stage. The Bundeskartellamt also instituted a number of proceedings for violations of the German ban on cartels.

18. In the reporting period, the Berlin Court of Appeals affirmed, among others things, the prohibitory decision against the Deutsche Fussball-Bund (German Football Association) in the context of the ban on cartels. The proceedings concerned the following cases:

19. A prohibitory decision based on Article 85 of the EC Treaty was issued against the energy supply company RWE Energie AG (RWE) and the city of Nordhorn. Both parties were prohibited from carrying out the electricity concession agreement they had concluded for a 20-year term, insofar as it hindered electricity imports from other EU Member States. In this case, the hindrance resulted from the fact that, under the exclusivity clause embodied in the agreement, the city of Nordhorn was obliged to grant RWE the exclusive right to use the town's public roads for the installation and operation of electric mains for the supply of electricity.

20. In this case, the Commission refrained from initiating its own proceedings and informed the Bundeskartellamt that in principle the Office's proceedings fitted in with the Commission concept. The prohibitory decision has not yet become unappealable.

21. In agreement with the Commission, the Bundeskartellamt reviewed under Article 85 of the EC Treaty the distribution system operated by seed growers which had been notified to Brussels. The restraint in question has since been abandoned by the parties involved.

22. The Bundeskartellamt found that the articles of association of carpartner Autovermietung GmbH constituted a violation of the ban on cartels under both Community law and German law and therefore prohibited the firm from implementing these articles. The prohibition covered, among other things, co-operation agreements that carpartner had concluded with 42 insurance companies. Carpartner had been set up as a car rental company by six insurance companies and, according to the Bundeskartellamt, served to depress prices in the so-called rental car replacement business. The decision has since been affirmed by the Berlin Court of Appeals, which granted leave for an appeal on points of law to the Federal Supreme Court.

23. The Bundeskartellamt has so far imposed administrative fines totalling DM 25.4 million on 33 firms and 29 executives of these firms for bid-fixing agreements regarding tenders for road-marking work. Of these, administrative fine orders amounting to almost DM 20 million have already become unappealable.

24. Administrative fines totalling DM 570 000 were imposed on four manufacturers of ventilating and air-conditioning equipment as well as on their general managers and some members of their staff.

From 1991 until early 1994 the firms had fixed prices of a large number of individual contracts, involving building projects in the Saarland and the neighbouring Federal Laender. Given the great social harmfulness of the competition law violations, the fine level is low. However, in deciding on the amount of the fines, the Bundeskartellamt made allowances for the extremely difficult economic situation of the firms concerned.

25. The Bundeskartellamt prohibited the 16 lottery companies run by the Federal Laender from excluding commercial players' associations from the lotteries. There have been about 30 such commercial pools in Germany for some 15 years now. They collect lottery tickets and football pool coupons from private individuals and pay them into a particular lottery outlet. Lottery and sports bets made by commercial players' associations have so far only accounted for two to three percent of the total lottery turnover of about DM 13 billion. The majority of the Land lottery companies wished to exclude these private firms from their gambling operations. In the Bundeskartellamt's view, this decision violates the ban on cartels, and it was therefore prohibited under penalty of a fine of up to DM one million. An appeal against this prohibitory decision was filed with the Berlin Court of Appeals.

26. The Berlin Court of Appeals affirmed the Bundeskartellamt's prohibitory decision against the Deutsche Fußball-Bund ('DFB', German Football Association): In September 1994, the Bundeskartellamt had prohibited the DFB from centrally marketing the television broadcasting rights of European Cup home games of German teams. The national champions, the national cup winner and the top-ranked clubs of the national league participate in this annual competition in three categories. The Bundeskartellamt found that the DFB's central marketing of television broadcasting rights constituted a restraint of competition and that it therefore violated the ban on cartels embodied in Section 1 of the ARC. The Berlin Court of Appeals confirmed the Bundeskartellamt's view that the individual clubs were the owners of the broadcasting rights of the games. The application for authorisation of a rationalisation cartel (under Section 5 of the ARC) was also rejected, because the conditions for exemption from the ban on cartels were not met.

2. Ban on concerted action

27. The German competition legislation provides for a ban on concerted action and restrictive practices. Enterprises are prohibited from threatening or causing harm, or from promising or granting advantages, to other enterprises for the purpose of inducing them to adopt conduct which under the ARC must not be made the subject-matter of a contractual commitment (cartel).

28. Based on this provision, the Bundeskartellamt imposed administrative fines totalling DM 397 000 on five mineral oil dealers on the grounds that they had violated the prohibition of exerting pressure on others. The firms concerned had threatened to take predatory measures against a mineral oil dealer who was located outside the region concerned in order to induce him to refrain from supplying diesel fuel to industrial customers in a particular region of Germany. For this purpose, the five firms involved sent offers to individual customers of the non-resident dealer, quoting unusually low prices for heating oil, thereby causing the dealer perceptible sales or revenue losses. One company has withdrawn its appeal against the decision. The other proceedings are currently pending before the Berlin Court of Appeals.

3. Exemptions from the general ban on cartels

29. There are some statutory exemptions from the general ban on cartelisation. For instance, co-operative agreements of small and medium-sized firms are permissible if three conditions are satisfied, viz:

- if the object of the agreement is the rationalisation of certain economic activities,
- if competition in the market concerned is not substantially impaired,
- if the agreement serves to promote the efficiency of small and medium-sized companies.

30. In the reporting period, the small business co-operative scheme Logex System für Entsorgungslösungen met the conditions for legalisation. The waste disposal companies operating in Bavaria and Baden-Württemberg will initially co-operate in the fields of electronic waste recycling, motorcar recycling/automotive components recycling, workshop waste disposal, plastics recycling as far as national waste disposal solutions are concerned. The companies concerned jointly solicit orders and handle national waste disposal orders. Each partner provides the services that are necessary in the context of the co-operative arrangement in his own name and for his own account.

4. Statistics of different types of legalised cartels

31. The number and types of cartels legalised by the Bundeskartellamt and the Federal Minister of Economics can be seen from the table below.

Table 1

Types of cartels	Cartels 1995/1996 additions	Cartels 1995/1996 deletions	Total number since 1958	Still effective as at June 1996
Condition cartels (Section 2)	-	-	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	8
Rationalisation cartels (Section 5 (2))	-	1	24	2
Rationalisation cartels (Section 5 (2) and (3))	2	1	40	11
Specialisation cartels (Section 5 a (1) Sentence 1)	1	-	66	17
Specialisation cartels (Section 5 a (1) Sentence 2)	-	-	57	16
Co-operation cartels (Section 5 b)	10	-	122	110
Purchasing co-operation (Section 5 c)	-	1	10	9
Export cartels (Section 6 (1))	-	3	115	37
Export cartels (Section 6 (2))	-	-	14	2
Import cartels (Section 7)	-	-	2	-
Emergency cartels (Section 8)	-	2	4	-
Total	**14**	**8**	**592**	**264**

32. There is no contradiction between the consistent enforcement of the German ban on cartels by he Bundeskartellamt 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 Bundeskartellamt rose from 258 to 264 (against an increase from 239 to 258 in the 1994-1995 period). The increase in the number of legal cartels recorded in the period 1995/96 is mostly due to 10 cases of purchasing co-operation agreements operated exclusively by small and medium-sized firms. Such co-operation agreements account for some 40 percent of all legalised cartels. 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. The so-called small business co-operation agreements offer the co-operating companies better market chances when competing with powerful large enterprises.

5. Vertical restraints

33. In this area, too, the Bundeskartellamt - upon consultation with the EU Commission - conducted proceedings based on the application of Community law. The main points of the decision, by which the Bundeskartellamt in November 1994 prohibited the exclusivity agreement concluded by the Hanover-based Touristik Union International GmbH & Co. KG (TUI) with Spanish hotel owners on the Balearic and the Canary Islands, were affirmed by the Berlin Court of Appeals.

34. TUI (as a big but not dominant competitor) was prohibited from:

- excluding individual German competitors from buying room quotas in the same hotel as TUI for the season concerned,

- limiting the number of competitors admitted to the TUI contract hotel.

35. The Court has thus also confirmed that European competition law may be applied to such cases by the Bundeskartellamt. Leave was granted for an appeal on points of law to the Federal Supreme Court.

36. In a similar case, the Bundeskartellamt and the travel operator NUR Touristic GmbH had negotiated a settlement during a hearing on 1 November 1995 by which NUR agreed to refrain from applying the above prohibited clauses until an unappealable decision has been rendered.

37. To enforce non-binding price recommendations, manufacturers and importers unlawfully try to induce their dealers to adhere to recommended prices by threatening, among other things, to withhold supplies. In an effort to protect non-binding price recommendations, the Bundeskartellamt in several cases imposed fines on manufacturers and importers of branded goods. These firms had threatened, among other things, to withhold supplies from their retailers in order to enforce price recommendations or minimum price levels. Among the firms fined were manufacturers or distributors of paints, toothpaste and jeans.

6. Control of abusive practices by dominant firms

38. An important objective of abuse control is to keep markets open. Abuse control and the ban on discrimination are designed to prevent powerful firms from restricting other firms in their freedom to engage in economic activities and decision-making. In the year under review fewer abuse proceedings were brought by the Bundeskartellamt than in previous years. This illustrates that the number of proceedins is back to normal after a surge in the early 90s in the wake of German reunification. Many of for fear of negative publicity in connection with press reports.

39. IMAX Corporation, Toronto, Canada, was prohibited from treating Big Screen Cinema Projektionsgesellschaft mbH, Munich, Germany, differently from other large-screen theatres as regards the supply of 15/70 mm motion picture projection systems to be used in Berlin. IMAX had refused to supply Big Screen, which intends to operate a large-screen theatre on Potsdamer Platz in the centre of Berlin, on the grounds that the exclusive supply of IMAX projection systems had already been agreed with another Berlin-based firm. According to IMAX, two commercial theatres equipped with IMAX projectors were not viable in Berlin. IMAX has a market-dominating position as regards 15/70 mm projection systems. Moreover, IMAX already supplied several firms in geographic markets comparable to the Berlin market. In addition, there were no facts justifying IMAX's refusal to supply Big Screen. In the Bundeskartellamt's view, this constituted unlawful discriminatory conduct.

40. Moreover the Bundeskartellamt ordered an interim prohibitive injunction on the grounds that the long delivery time of the projector might otherwise prevent the timely inauguration of the large-screen theatre. The proceeding is pending before the Berlin Court of Appeals.

41. The Bundeskartellamt prohibited the regional gas supply company Spree Gas Gesellschaft für Gasversorgung und Energiedienstleistung mbH, Cottbus, from charging its small-scale customers and heating gas customers higher prices than those demanded in a comparable supply area. SpreeGas supplies approx. 20 000 customers in south-east Brandenburg as well as in some parts of Saxony and Saxony-Anhalt with gas at prices that are on average 10 percent (in some cases up to 58 percent) higher than those of EWE, the company which works under comparable circumstances in the Brandenburg supply area.

42. The Bundeskartellamt exercised its discretionary powers to prohibit the abusive prices of an east German utility also on the grounds that the income level of consumers in the new Federal Laender is still substantially lower than in the old Laender.

43. In another case, abuse proceedings brought against the rail company Deutsche Bahn AG (DB) were discontinued after the latter abstained from the conduct objected to by the Bundeskartellamt. DB had refused to deal with the computer reservation system (CRS) SABRE. Originally set up as a marketing tool for airlines, CRSs are increasingly being used by rail operators as well. CRSs enable travel agents to issue airline and rail tickets, book seats, etc. via their personal computers. The START group, in which DB holds a stake, accounts for 90 percent of the German market for CRS services; the remaining 10 percent market share is held by SABRE, Galileo and Worldspan.

II. Mergers and acquisitions

II.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws

44. Although the number of notified merger projects tends to be higher towards the end of any year than over the first six months, the year under review saw a decrease in the overall number of notified mergers compared with the previous reporting period.

45. Table 2 shows the number of mergers notified since the 1973 adoption of merger control in Germany.

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
1995	1 530
1 Jan. 1996- 30 June 1996	620
Total	**21 374**

Table 3. Breakdown of total figures

	1993	**1994**	**1995**	**Jan. - June 1996**
Mergers notified and reviewed prior to completion	1 050	1 086	1 087	430
Mergers notified after completion and found to be subject to control	310	331	282	121
Mergers not subject to control	154	147	161	69
completed mergers total	**1 514**	**1 564**	**1 530**	**620**

46. The continuing decrease in merger activity in the 1995/96 period is explained by the declining impact of German reunification on merger statistics, which are almost back to their 1988 and 1989 levels.

47. The statistics also reflect the effect merger control tends to have on the way the business community conducts its activities. Firms often hold informal preliminary discussions with members of Bundeskartellamt divisions to determine whether particular merger projects are likely to raise competition concerns. This may result in proposed mergers being either abandoned or modified and completed in a way that takes account of the concerns voiced by the Bundeskartellamt. For the reporting period, the Bundeskartellamt statistics show 10 projects that were abandoned. Since the 1973 introduction of merger control in Germany a total of 273 projects have been abandoned.

48. Two trends can be observed:

- The waste disposal industry is marked by a process of growing concentration. A considerable number of mergers is due to semi-public joint ventures being formed by territorial authorities, who have to ensure waste disposal, and private sector companies.

- In view of the proposed reforms of exemptions in place for energy supply via networks there has been a significant increase in the trend towards joint ventures among suppliers and buyers of energy.

II. 2. Summary of activities of competition authorities and courts

49. In the 1995/1996 reporting period, five mergers were prohibited in formal proceedings:

50. The proposed acquisition by the British company T&N plc., Manchester, of the German firm Kolbenschmidt AG, Neckarsulm, was prohibited by the Bundeskartellamt.

51. In the market for piston rings, the merger would have led to strengthening the already dominant position of the Burscheid-based German T&N subsidiary AE Goetze GmbH, whose market share of over 60 percent amounts to four times the market share figure of the second-largest competitor. Kolbenschmidt is a major buyer of piston rings, whose demand volume would have been lost to competition as a result of the merger, while securing T&N a lasting sales volume. In the market for steel/plastic friction bearings, the merger would have resulted in a paramount market position. The merging parties would have accounted for a combined market share of more than 60 percent in this market as well. This share would have been more than three times the market share of the next competitor. A look at the European competitive situation did not help to put these market positions into perspective, either. On a European scale, the piston ring market share level would have been similar, and, as far as friction bearings are concerned, market shares would have been even higher than in the domestic market.

52. Proceedings are pending before the Berlin Court of Appeals.

53. The Bundeskartellamt issued a prohibitory decision against Société d'Applications Routières S.A., Aubervilliers, France, which belongs to the Lafarge Coppée group. Société d'Applications Routières had intended to acquire a majority shareholding in the German firm Limburger Lackfabrik GmbH. The proposed merger had to be prohibited because the companies concerned would have obtained a market share of well over 40 percent in the market for road-marking paints and considerably exceeded a 33 percent share of the market for plastics materials and permanent marking films. The next ranking

competitors would have fallen far behind, with market shares of only about 10 percent. Moreover, the firms involved in the merger project would have wielded much greater financial power than their competitors.

54. The decision has become unappealable.

55. The Bundeskartellamt issued a decision prohibiting ex post the already completed acquisition by the Geislingen-based WMF Württembergische Metallwarenfabrik AG of a majority stake in the Altensteig-based Auerhahn Besteckfabrik GmbH. In 1994, the WMF group recorded a worldwide turnover of more than DM 900 million from the production and distribution of cutlery, table utensils, cookware, kitchen and food-serving utensils, large coffee machines and glassware.

56. Prior to the merger, WMF accounted for a share of over 40 percent of the German market for higher- and medium-priced stainless steel cutlery. This share was more than three times the size of the market share of the second-largest supplier. In addition, WMF had comparatively large financial resources and excellent access to the sales markets owing to its own branch network, its own cutlery brand and the goodwill value of its name. Thus even before the merger WMF had a paramount market position in relation to its - mainly medium-sized - competitors. This position would have been further strengthened as a result of the acquisition of Auerhahn. Proceedings are pending before the Berlin Court of Appeals.

57. The acquisition - completed at the end of 1994 - of the entire share capital of Adolf Deil GmbH & Co. KG Druckerei und Verlag of the daily "Pirmasenser Zeitung" by Tukan Verlagsgesellschaft mbH & Co. KG, which is controlled by Rheinpfalz/Medien Union, was prohibited by the Bundeskartellamt on the grounds that the merger would have strengthened Rheinpfalz/Medien Union's dominant positions both in the regional market for subscription dailies and the advertising market in the area of circulation of the "Pirmasenser Zeitung" newspaper Proceedings are pending before the Berlin Court of Appeals.

58. The Bundeskartellamt also prohibited the completed acquisition by VEBA Energiebeteiligungs-GmbH of a 24.9 percent stake in Stadtwerke Bremen AG (SWB). In the Bundeskartellamt's view this transaction constituted a combination of firms which enabled VEBA to exercise a competitively significant influence on SWB. This was the first prohibition issued on the basis of Section 23 (2) No. 6 of the ARC, which was only introduced in 1990.

59. In the Bundeskartellamt's view the prohibited merger resulted in strengthening the market-dominating position of the VEBA group affiliates PreussenElektra and Hannover-Braunschweigerische Stromversorgungs-AG as well as three other firms in the sale of electricity in their respective areas of supply.

60. The prohibitory decision has not yet become unappealable.

61. In the period under review one prohibition decision of the Bundeskartellamt was upheld by the Federal Supreme Court and one was upheld by the Berlin Court of Appeals. One prohibition decision of the Bundeskartellamt was revoked by the Berlin Court of Appeals; an appeal was filed against this decision.

62. The Bundeskartellamt prohibited Fresenius' acquisition of Schiwa on the grounds that the merger would create or strengthen dominant positions in various markets for infusion and dialysis solutions. The existing market-dominating position held by Fresenius in the market for blood volume replacement solutions used to dilute and replace blood in patients suffering from burns or haemorrhagic shock would be strengthened. In the market for basic solutions to compensate for electrolyte loss, the existing market-

dominating position of an oligopoly which includes Fresenius would be further strengthened. In two other markets for solutions to purify the blood of persons with renal insufficiencies Fresenius would obtain a paramount and/or monopolistic market position as a result of the merger.

63. The appeal on points of law to the Federal Supreme Court has in the meantime been withdrawn and the decision is therefore unappealable.

64. The Bundeskartellamt's prohibition in 1992 of the planned acquisition of Franz Daub & Söhne, Hamburg, by Werner & Pfleiderer GmbH, Stuttgart, a member of the Krupp group, was upheld by the Federal Supreme Court. The Bundeskartellamt had prohibited the proposed merger because it would have led to the parties involved acquiring a market-dominating position in the sector of industrial baking ovens. This was particularly evident from their high market shares, large leads over their mainly medium-sized competitors and the financial power enjoyed by Werner & Pfleiderer as a member of the Krupp group.

65. The prohibition of the acquisition of a 49.99 percent stake of RWE-Energie AG (RWE) in the Gemeinschaftsunternehmen Stromversorgung Aggertal GmbH was revoked by the Berlin Court of Appeals. The Bundeskartellamt stated in its reasons for the prohibition that this proposed merger would permanently secure the market-dominating position already existing in the electricity supply of communities.

66. The Berlin Court of Appeals did not agree with this view and stated among other things thatThe EU Commission had in the meantime introduced measures to liberalise the energy markets. It also attached particular importance to the establishment of a Single Market in the energy sector.

67. Regulations were also being prepared at national level which aimed at the far-reaching liberalisation of the energy markets, and this in turn would bring about a reorganisation of the geographic markets. The court therefore considered it highly unlikely that such market dominance would continue to exist.

68. The Bundeskartellamt filed an appeal on points of law against this decision with the Federal Supreme Court.

SUMMARIES OF OR REFERENCES TO NEW REPORTS AND STUDIES ON COMPETITION POLICY ISSUES

Wettbewerbspolitik in Zeiten des UmbruchsXI. Hauptgutachten der Monopolkommission, Köln1996 (Eleventh Biennial Report by the Monopolies Commission)

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