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

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ANNUAL REPORT ON COMPETITION LAW AND POLICY DEVELOPMENTS IN GERMANY

(1st July 1996 - 30 June 1997)

This report is submitted by the German Delegation to the Committee on Competition Law and Policy FOR CONSIDERATION at its forthcoming meeting on 23-24 October 1997.

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Executive Summary

1. Legislation

- The focus of the legislative work in competition law and associated fields is on the amendment of the Act against Restraints of Competition (ARC), the amendment of the Energy Industry Act, the passing of the Telecommunications Act, the creation of a Post Act, the revision of the law governing public procurement as well as changes in the action against prohibited cartels. Work was carried out on all the legislative proposals in the reporting period. Only the Telecommunications Act was adopted, however, during this period.

- The Telecommunications Act provides *inter alia* for the following important changes: the elimination of the network monopoly of Deutsche Telekom AG as from 1 January 1998, the interconnection (by force if necessary) of networks, an independent regulatory authority.

- In the summer of 1997, the legislator made collusive tendering among cartels (so-called bid rigging) a criminal offence for the first time and at the same time gave competition authorities exclusive responsibility for imposing fines on enterprises.

2. Agreements / abusive practices by dominant firms

- The most important hard-core cartel which the Bundeskartellamt proceeded against in the reporting period concerned manufacturers of power cables. Fines totalling over DM 280 million have meanwhile become unappealable.

- The Bundeskartellamt instituted proceedings against the co-operation between United Airlines and Lufthansa. It is liaising closely with the EC Commission in this case.

- With regard to the supervision of price abuses the proceedings of the Bundeskartellamt against energy utility companies and Lufthansa are particularly interesting.

3. Merger control

- Prohibition or prevention of mergers:

  Potash Corp./Kali und Salz (fertilisers), PSG Postdienst Service/Axel Springer Verlag (newspaper distribution), Herlitz/Landré (paper/stationery), Fresenius/Schiwa (dialysis), Merck KGaA/KMS Laborchemie.

- Clearance of mergers in a modified form:

  Neckarwerke/Technische Werke Stuttgart (electricity), RWE/Thyssengas (gas supply), Bayernwerke/Isarwerke (electricity)

- Important clearances:

Deutsche Telekom/France Télécom (telecommunications: "Atlas", "Global One"), Fresenius/Grace (dialysis), Coca Cola/Coca Cola licensees (drinks), Heidelberger Druck/Linotype-Hell (printing machines).

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

1. Summary of new legal provisions of competition law and related 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. The 1995/96 Report mentioned six projects aimed at drafting and adopting laws of competitive relevance and at revising existing competition law, namely the proposed amendment of the ARC, the proposed amendment of the Energy Industry Act, the drafting of the Telecommunications Act and the criminalisation of collusive tendering. Of these projects, only that concerning the Telecommunications Act came to fruition in the reporting period. Collusive tendering was made a criminal offence only recently, whereas the other legislative projects are still the subject of much controversy. In addition, three other legal provisions of competition relevance came into effect. The description of the legislative projects will be as topical as possible so that those developments may be omitted which have since become obsolete.

As mentioned in the previous report, the Telecommunications Act took effect on 1 August 1996. To facilitate new providers' access to so far monopolised areas (in particular, the fixed network) the Act provides for sector-specific regulation of market-dominating providers. All providers have to acquire a licence for certain services. If for technical reasons there is only a limited number of licences, these will be allocated by tender or auction. The price of up to DM 40 million for fixed network licences originally intended to be charged by the Federal Government is lowered considerably, because the EU Commission considers charges in excess of administrative expenses to be anticompetitive.

3. The lawmaker has assigned the comprehensive technical and competitive regulatory tasks arising from the Telecommunications Act to a sector-specific regulator, to be set up. Until 31 December 1997, however, these tasks will be performed by the Federal Ministry for Post and Telecommunications and the Economics Ministry, respectively. As the regulator has wide responsibilities for competition issues, close co-ordination between this body and the Bundeskartellamt will be necessary. Therefore, the Telecommunications Act provides that when granting a limited number of telecoms licences and defining product and geographic markets the two authorities must reach agreement. In proceedings concerning fee regulation and interconnection of networks the Bundeskartellamt must be given an opportunity to be heard. There is an important difference between general competition law and telecoms law as far as the legal procedure is concerned. The competition authorities' decisions are subject to review by the civil courts, whereas the telecommunications regulator's decisions are subject to review by the administrative courts.

4. The German telecommunications markets will not be fully liberalised until 1 January 1998, but in the meantime a host of measures has been taken to start the liberalisation of the telecoms market in Germany. For example, the Federal Minister for Post recently ordered Deutsche Telekom AG to interconnect its network (in particular local residential subscribers) and that of its competitors at a significantly lower price than had been intended by Deutsche Telekom (Pfennig 2.7 on average for all tariff zones).

5. In the context of the enactment of the Anti-Corruption Act a new criminal offence "restrictive agreement in respect of competitive tenders" (Section 298 of the Criminal Code) came into force in August 1997. From a competition law perspective the accompanying regulations are of particular importance. The period of limitation for administrative offences under competition law was adjusted to the provisions governing limitation under criminal law and extended to five years. In addition, exclusive responsibility of the competition authorities for imposing fines on enterprises was adopted in the context of criminal offences and administrative offences under competition law. In future the Bundeskartellamt may impose a fine on the enterprise profiting from the cartel agreement, independent of criminal proceeding s directed against the offender personally, and this is possible even if the public prosecutor has not yet closed the proceeding against the offender or if the case has been dropped already.

6. The international part of the revised German Trade Mark Act of 25 October 1994 came into force on 20 March 1996. An Act to Modify the Trade Mark Act, which came into force on 20 July 1996, was necessary, however, to enable German applicants to acquire Community trade marks. The provisions of the Trade Mark Act are also applicable to Community trade marks, if they have already been registered or even if registration has only been applied for. In agreement with the EC trade mark law directive, also the owner of a Community trade mark may now file claims for damages and the furnishing of information to which he is entitled under the Trade Mark Act.

7. In the autumn of 1996 the German lawmaker has revoked the legal obligation under Section 129 (1) No. 2 of the Code of Social Law V to sell imported drugs. The reason was that the Federal Supreme Court had affirmed the Bundeskartellamt's pharmaceuticals re-import decision which had prohibited three leading pharmaceuticals wholesalers from unfairly hindering an importer of drugs by generally refusing to supply re-imports and parallel imports of drugs. The lawmaker's abolition of Section 129 (1) No. 2 Social Law Code V again reinforces the trend of the current Drugs Price Ordinance towards the sale of original preparations, because the latter enable pharmacies to earn higher absolute margins. The adoption of an obligation to sell imported drugs had originally been intended to remedy a situation where pharmacists, as a result of the Drugs Price Ordinance with its predetermined margins, have no economic incentive to sell lower-priced drugs, which include reimported drugs, because higher-priced original preparations allow them to earn higher margins in absolute terms. It remains to be seen whether and to what extent this will have a negative effect on competition from imported drugs which had just started to pick up in the wake of the Federal Supreme Court's decision.

8. The Recycling Act (Kreislaufwirtschaftsgesetz) came into force on 7 October 1996. Under that act industry and trade are considered as orginators of waste. Therefore they are held responsible for their products in the sense that manufacturers and distributors are under the legal obligation to take back and have recycled certain types of waste. Since individual compliance with such duties would overtax manufacturers or traders financially and organisationally, the lawmaker has provided for the possibility of industry-wide co-operation in collective recycling systems. One such model of a recycling system has been introduced in the form of Duales System Deutschland GmbH (DSD), which was put in place for the recycling of sales packaging under the 1991 Packaging Ordinance. Other recycling systems have been designed for used batteries, used cars or electronic waste. As their effects on competition may raise concerns, such collective systems are subject to scrutiny also under competition law.

2. Government proposals for new legislation

9. In July 1997 the Federal Ministry of Economics submitted a preliminary draft, containing a complete overhaul of the ARC. The draft largely corresponds with that presented in the 1995/96 report. There is broad consensus among experts on the contents of the amendment even though representatives of German industry have complained that it does not provide for the adoption of European merger control provisions (particularly those relating to the acquisition of control). In the meantime, however, calls for changes and additions to the draft have emerged in the political discussions which may result in the amendment not being passed in the current legislative period if no compromise can be reached. Bavaria, in particular, has demanded that tougher provisions be adopted against concentration in the distributive trades and against buying power of the traders vis-à-vis manufacturers. Another demand is for sales below purchase price (dumping prices) to be prohibited if there is no reasonable justification for them.

10. The draft submitted in June 1996 by the Economics Minister to amend the Energy Industry Act has also met with considerable political obstacles. In the meantime broad agreement has been reached on dropping the energy sector's present exemption from the general ban on cartels, which resulted in energy generators gaining incontestable monopolies in their respective supply territories by means of demarcation and concession agreements. Particularly controversial, however, is the question whether the communities should be granted single buyer status in municipal energy distribution. Communities as owners of their municipal energy undertakings want to prevent a situation where instead of them supplying their whole territory the end users themselves can choose their own supplier of electricity or gas in future (negotiated third party access). Since communities are used to defending their interests irrespective of party affiliation in the German Parliament, the Federal Government can only seek to reach a compromise on that matter.

11. Recently, the Bundestag, the Lower House of Parliament, decided on a bill to revise the Post Act which had been under discussion for a long time. It provides for the abolition of the German postal monopoly for letters weighing more than 100 g (so-called exclusive licence). Deutsche Post is to retain an exclusive licence running to the end of 2002 for letters weighing less than 100 g. The market for bulk printed matter (so-called Infopost), which has already been opened to competition for mailings weighing more than 100g, is to be completely liberalised starting in 1998. Although it is to be anticipated that also this Act will meet with fierce resistance within the Bundesrat, the Upper House of Parliament, its enactment is very likely, because the old Post Act expires at the end of 1997 so that the monopoly of Deutsche Post would expire anyway effective 1 January 1998 if no agreement is reached.

12. In September 1996, the Federal Government decided to fundamentally revise the German law governing public procurement and include in the ARC a chapter dealing with the awarding of public contracts. This was done in the light of the fact that the Federal Republic has not yet transposed the EU directive on public procurement of services into German law. Only a few weeks ago, the European Court of Justice decided on a submission of the surveillance committee for public procurement contracts (Vergabeüberwachungsausschuß) that the Federal surveillance committee for public procurement contracts (located at the Bundeskartellamt) has the quality of a court within the meaning of Article 177 of the EC Treaty. However, the present law governing the awarding of public sector contracts is mere budget law and might not satisfy the competition law requirements of the EC directive. The bill submitted to the Federal Cabinet in late August therefore provides for an extensive revision of the German law governing the awarding of public sector contracts and its inclusion in the ARC. Besides goods and building contracts also services by professionals are to be covered for the first time by the rules governing public procurement. The relevant decisions are to be reviewed by chambers for the awarding of public procurement contracts (the former surveillance committees for public procurement contracts), and appeal

against their decisions is to lie with the courts of appeal of the Länder (Oberlandesgerichte) and with the Federal Supreme Court (Bundesgerichtshof). This legislative proposal has also been delayed, however, because political resistance has been forming in the Bundesrat, urging that criteria (such as compliance with the collective wage agreements, apprenticeship training, the furtherance of women) that have nothing to do with competition should be taken into account for the awarding of public sector contracts. If no agreement is reached soon, the bill cannot be enacted on 1 January 1998 as envisaged, and possibly its enactment in the current legislative period is also in jeopardy.

13. The Federal Ministry of Justice has prepared a bill revising the Patent Act, which is being co-ordinated with the patent authorities and the judicial authorities of the Länder at present. Patent and utility model applications are to be made easier, and in future it would be possible to file also foreign language applications. The Federal Ministry of Justice aims to have the legislative procedure finalised still in the current legislative period so that the Act may come into force in 1998.

II. Enforcement of competition laws and policies

1. Action against anticompetitive practices, including agreements and abuses of dominant positions

1.1 Summary of activities by competition authorities

1.1.1 Agreements (action in the form of administrative fine proceedings against cartels)

14. In the reporting period the Bundeskartellamt again proceeded against hard-core cartels constituting an administrative offence, i.e. in particular price-fixing and territorial agreements among competitors. Throughout Germany enterprises and associations of firms of the following industries were searched: power cables, flour mills, traffic signs and telematics systems as well as pipelaying. In proceedings against cartel agreements among road marking companies initiated in 1994 and still being pursued 33 decisions imposing fines totalling DM 24 million have meanwhile become unappealable. Additional administrative fine decisions have been issued since in the context of these proceedings. In the power cable case described under significant cases, fines imposed were for the record amount of DM 280 million in view of the enormous economic significance of this cartel.

1.1.2 Exemptions from the general ban on cartels

15. As can be seen from the following table, legalisation of newly notified cartels played a minor part in the reporting period. The focus of the Bundeskartellamt's investigations was therefore on old cartels as well as on renewals of such cartels or changes to their subject-matter, which have to be notified. At the instance of the Bundeskartellamt's fifth Decision-making Division the export cartel for oil pipes has been dissolved. The Exportgemeinschaft Großschiffbau, an export cartel in the shipbuilding industry, disbanded on its own initiative.

16. 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 July-Dec.1996 additions	deletions	Total number since 1958	Still effective as at Dec. 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)	-	-	17	8
Rationalisation cartels Section 5 (2)	-	-	24	2
Rationalisation cartels Section 5 (2) and (3)	-	-	40	11
Specialisation cartels Section 5 a (1) Sentence 1	3	-	66	20
Specialisation cartels Section 5 a (1) Sentence 2	-	1	57	15
Co-operation cartels Section 5 b	2	-	122	112
Purchasing co-operation Section 5 c	-	-	10	9
Export cartels Section 6 (1)	-	2	115	35
Export cartels Section 6 (2)	-	-	14	2
Import cartels Section 7	-	-	2	-
Emergency cartels Section 8	-	-	4	-
Total	**5**	**3**	**594**	**266**

17. There is no contradiction between the consistent enforcement of the German ban on cartels by the 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. According to the wording of the legal requirements for the legalisation of such cartels, the agreements should result in reviving competition by rationalisation or specialisation, for example. Authorisation as a rule is granted for a specific period and can be revoked once granted. It should be noted, however, that purchasing co-operation agreements operated exclusively by small and medium-sized firms 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.

18. Special difficulties arise in examining cartels initiated by the Government and/or the lawmaker itself in an attempt to achieve an environmental policy goal through self-commitments by the business community, because compulsion does not seem expedient. The proposed recycling systems provided for under the Recycling Act (see above under legal provisions) involve the danger that the firms make arrangements over and above those necessary for waste collection and recycling and hinder manufacturers in competition that do not belong to the recycling system concerned. In the context of the Used Car Ordinance, for example, the Bundeskartellamt ensured that the guaranteed take-back free of charge does not only cover motor cars intended for the German market and first registered there, but also all cars intended for the market of the European Community. With a view to obtaining exemption under Article 85 (3) of the EC Treaty, the agreement on the joint recycling of batteries under the Battery Ordinance, which also drew critical comment from the Bundeskartellamt, was notified to the European Commission.

1.1.3 Vertical restraints

19. Violations of the ban on resale price maintenance (RPM) and the prohibition of binding price recommendations can be challenged in administrative fine proceedings. In the reporting period, the Bundeskartellamt therefore conducted searches on the premises of manufacturers suspected of exerting indirect pressure in order to enforce compliance with price recommendations.

1.1.4 Control of abusive practices by dominant firms

20. All enterprises may have recourse to the civil courts in the face of anticompetitive practices of their competitors or suppliers. However, it is often difficult if not impossible for them to show that they are discriminated against or hindered by their competitors in the absence of facts justifying such discrimination. The Bundeskartellamt, by contrast, has a good insight into business practices in the marketplace and thus is in a position to conduct ex officio investigations there. The ARC therefore provides for different situations in which the competition authority can proceed against market-dominating competitors and suppliers to protect small and medium-sized firms, in particular.

21. On the basis of a special provision which enables the Bundeskartellamt to order admission to a trade organisation in cases of unjustified unequal treatment, the Office ordered admission of a German removal contractor (DMS International) to a group of international movers (GIM). The competent Decision-making Division held that DMS met all the requirements for admission as laid down in GIM's statutes. Moreover, non-membership placed DMS at a competitive disadvantage, for it is only through GIM that a German contractor with international operations can become a member of the international organisation FIDI (Fédération Internationale des Déménageurs Internationaux).

22. The Bundeskartellamt challenged the pricing of Deutsche Lufthansa on the Berlin - Frankfurt route which was not served by competitors. The Office prohibited the airline from charging over DM 10 more for one-way tickets on this route than on the Berlin-Munich route, which is also served by competitors. Lufthansa argued that these prices did not cover costs, but the Bundeskartellamt countered that neither dominant companies nor companies in competition have a right to full cost recovery. Lufthansa has filed an appeal with the courts against this price abuse decision.

1.1.5 Supervision of price abuses by monopolists (utilities)

23. Nation-wide, regional or community-wide monopolies are held in Germany by public- or private-sector utilities, whose monopolies are largely based on ownership of a network (essential facility), for example, electricity, gas or water lines, telephone and cable TV network and rail network. Since so far they have been exposed to no, or only insignificant, competition, price supervision by the competition

authorities is of particular importance. However, the relevant responsibilities are highly fragmented. The largely regional electricity supply companies are subject as a rule to supervision by the Land Governments, whereas responsibility for the telecommunications and postal sector lies with the Ministry for Post or the Economics Ministry, and from 1 January 1998 with the regulator of postal and telecommunications services and with to the Federal Railway Office (Eisenbahnbundesamt) for the railways .

24. The Bundeskartellamt discontinued the proceeding brought against the east German Vereinigte Energiewerke AG (VEAG) for suspected excessive electricity prices on the ground that higher prices resulted from VEAG inevitably having to generate electricity from brown coal. It was found though that the east German regional distribution companies supplied by VEAG charged significantly different prices. Some of these companies come within the Bundeskartellamt's responsibility because they engage in activities beyond their respective Federal Land. Otherwise, the Land energy authorities are responsible which are part of the respective ministries. The Bundeskartellamt instituted price abuse proceedings against the five distribution companies that charge the highest prices.

1.2 Summary of activities by courts

25. The Berlin Court of Appeals (Kammergericht) in December 1996 upheld the Bundeskartellamt's prohibition decision directed against 16 public lottery companies which was already described in last year's Annual Report. Only the lottery company of the Land Hesse filed an appeal on points of law with the Federal Supreme Court against this decision.

26. In a decision directed against the largest German publisher of legal publications, the Bundeskartellamt had declared RPM for CD-ROM products illegal in 1994. RPM, which German law allows only for publications, did not cover CD-ROM products as well, because they offered other and far more applications, e.g. the provision of extensive data bases and the search for reference publications, the Bundeskartellamt had held. The Berlin Court of Appeals had shared this reasoning, but in March 1997 the Federal Supreme Court ruled that also CD-ROM products, as substitutes for books, were covered by the RPM exemption for publications. It is, however, possible that this decision will soon be overridden by the EU Commission. More than a year ago, the Austrian book chain Libro lodged a complaint against RPM prevailing in Germany and Austria with the EU Commission. Although the majority of the EU ministers for culture advocate an exemption for the book market, Karel Van Miert, the Competition Commissioner, has indicated that he intends to allow the complaint in respect of the border-crossing trade. But if RPM is to be abolished in the frontier area between Germany and Austria it is unlikely that ultimately it can be maintained in all of the German-speaking area.

27. The Bundeskartellamt's decision prohibiting the exclusivity agreements of the tour operators TUI and NUR with Spanish hotel owners, which was upheld by the Berlin Court of Appeals in the reporting period, was now fully affirmed by the Federal Supreme Court, too, in its decision of 7 October 1997. The Federal Supreme Court, in particular, refused to submit the case to the European Court of Justice because the cases, in the Court's view, from the outset did not qualify for exemption within the meaning of Article 85 (3) of the EC Treaty. This decision is of fundamental importance to the Bundeskartellamt because it has confirmed the application of Community competition law by the Bundeskartellamt.

28. As reported in last year's Annual Report, the Bundeskartellamt had prohibited IMAX Corporation, Toronto, Canada, from treating the Munich-based Big Screen Cinema Projektionsgesellschaft mbH differently from Sony Corp. of America, New York, as regards the supply of

two-dimensional large-screen film projection systems in the geographical market of Berlin (IMAX had promised Sony exclusive supply for a period of three years and therefore refused to sign a contract with Big Screen). In view of the delivery period of about two years and the construction conditions to be laid down by IMAX for the theatre in connection with large-screen projection systems, the competent Decision-making Division had to order the immediate enforcement of the decision so that Big Screen might retain the possibility of effective legal protection. IMAX appealed against this order and moreover filed an application for restoring the suspensive effect of the appeal, which was dismissed by the Berlin Court of Appeals in an unappealable decision. The case has now been settled because IMAX thereupon concluded a delivery agreement with Big Screen.

29. In a decision on surplus electricity purchases from independent companies the Federal Supreme Court in October 1996 ruled that the basic rights of public electricity suppliers were not infringed by their obligation under the 7 December 1990 Act of Feeding Electricity from Renewable Resources into the Public Network (Stromeinspeisungsgesetz) to buy surplus electricity from renewable resources at minimum prices set at an amount which exceeds the value of such electricity.

30. On 2 July 1996 the Federal Supreme Court ruled that the obligation of territorial supply companies to purchase self-generated surplus electricity from independent companies and to pay a fee calculated on the basis of the buyers' cost saving also applies to electricity obtained from combined heat and power stations. The court argued that the sparing use of electricity from finite primary energy resources was encouraged also where it was a question of using electricity generated as a by-product of industrial processes for energy industry purposes.

31. In July 1995 the Bundeskartellamt prohibited the gas supply companies Ruhrgas AG and Thyssengas GmbH from implementing, effective 1 January 1997, the demarcation agreement operated by them. While demarcation agreements between energy suppliers are classic cartels in the form of territorial agreements, they are exempted from the German ban on cartels, because supply companies count among the so-called exempted areas. The Bundeskartellamt therefore based its prohibitory decision on European competition law (Article 85 (1) of the EC Treaty). On 30 October 1996 the Berlin Court of Appeals suspended the appeal proceedings brought against the prohibition by Ruhrgas AG and Thyssengas GmbH and, at the Bundeskartellamt's suggestion, submitted 11 key questions and numerous secondary questions to the European Court of Justice, requesting it to give a ruling thereon. The European Court of Justice decision will assume paramount importance if the proposed amendment of energy legislation is not passed by the German legislator, in which case the energy suppliers' exemption from the cartel ban of the ARC would remain in place and as in the past the Bundeskartellamt's only option would be to attack monopolies held by energy suppliers on the basis of European competition law.

1.3 Description of significant cases, including those with international implications

32. In July 1996 the Bundeskartellamt instituted proceedings against the Cologne-based Deutsche Lufthansa AG and against United Airlines Inc., Illinois, USA, for co-operation arrangements (code-sharing, co-ordination of flight routes, flight schedules, price policy, marketing, advertising, etc.) which almost amount to a merger. As this special case of an aviation alliance between a national airline and an airline from a non-EU third country is subject to special jurisdiction, it is by way of exception left to the national competition authority to prohibit the co-operation arrangement under Article 85 (1) of the EC Treaty or to grant an exemption under Article 85 (3) of the EC Treaty - possibly attaching conditions to it. In view of the international orientation of the country-crossing aviation market it is impossible, however, to examine the alliance in isolation. It can only be judged in the context of comparable alliances such as the co-operation between British Airways and American Airlines. Since the various alliances ought to be

treated using the same standards, if possible, and since any competitive discrimination ought to be avoided, the Bundeskartellamt liaises closely with the EU Commission, which has initiated its own proceeding in this case under Article 89 of the EC Treaty (no exemption possibility).

33. The power cable case, in which the Bundeskartellamt imposed record fines so far totalling DM 280 million on 14 manufacturers, two cable industry organisations and 23 persons in charge, is of utmost importance as regards action against criminal offences in the cartel field. All of these fines have already become unappealable. Based on a quota system, those concerned had been dividing up the market for power cables among each other practically for decades. The amount of the fines was based on the cartel turnover achieved by them in the three-year period in which the offence has not yet become statute-barred. The fine for the large companies was 10 per cent of this cartel turnover, but in view of the minor contribution to the offence by the small and medium-sized companies, and taking account of their economic performance, some of the fines imposed on the latter amounted to only about five per cent of the cartel turnover.

2. Mergers and acquisitions

2.1 Statistics on number, form and type of mergers notified and/or controlled under competition laws

34. In 1996 the number of notified mergers slightly decreased, as can be seen from 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
1996	1,434
Total	**22,188**

Table 2

A breakdown of the total figure by type of merger is as follows:

	1993	1994	1995	1996
Mergers notified and reviewed prior to completion	1,050	1,086	1,089	1,006
Mergers notified after completion and found to be subject to control	310	331	276	280
Mergers not subject to control	154	147	165	148
completed mergers total	**1,514**	**1,564**	**1,530**	**1,434**

35. A breakdown by type of merger is as follows (1996):

Acquisition of assets	313
Acquisition of interest	673
of which : majority interest acquisition	601
Joint venture	410
Contractual relations	12
Interlocking directorates	-
Competitively significant influence	6

36. By type of diversification, horizontal mergers (1,235, of which 288 with and 947 without product extension) again clearly predominated in 1996. In addition 78 vertical und 121 conglomerate mergers were notified.

2.2 Summary of significant cases

37. In the reporting period, there were four merger prohibitions in formal proceedings. However, there were a number of merger cases involving competition concerns which gave rise to in-depth investigations or warning letters in the period under review. Twelve proposed mergers were abandoned in advance of formal proceedings before the Bundeskartellamt; in five other cases, projects were modified and completed in a way that took account of the competition concerns. A number of proposed mergers of great economic significance were allowed to go ahead on thorough examination by the Bundeskartellamt:

38. In the opinion of the Bundeskartellamt the joint ventures Atlas and Global One by Deutsche Telekom, France Telecom and Sprint notified as mergers under Section 24a of the ARC strengthened Deutsche Telekom's dominant position in the market for packet-switched data transmission services and therefore ought to have been prohibited under the German merger control provisions. However, such a decision would have been in conflict with the Commission's decision to exempt these projects under Article 85 (3) of the EC Treaty. In view of the precedence of European law in cases of conflict, the application of German merger control provisions to the Atlas and Global One mergers was ruled out. The mergers were therefore not prohibited.

39. The Bundeskartellamt did not prohibit Münchener Rückversicherungs-AG's proposed acquisition of a 51 per cent share in the Cologne-based Deutsche Krankenversicherungs AG (DKV) from Allianz AG. Münchener Rück already held directly 10 per cent and indirectly 39 per cent of the remaining shares in DKV. Not prohibited either was Allianz AG's proposed acquisition of a 25.7 per cent share in the Munich-based Vereinigte Krankenversicherungs AG (VKA) from Münchener Rück. The remaining VKA shares are held directly or indirectly by Vereinte Holding AG. Simultaneously with the Bundeskartellamt's clearance the EU Commission had declared compatible with the common market Allianz AG's proposed acquisition of all shares in Vereinte Holding AG from Schweizerische Rückversicherungs-Gesellschaft. The three merger projects were another step towards dismantling the links between the Allianz and Münchener Rück groups. The effects of the Münchener Rück/DKV and Allianz/VKA mergers were felt in the market for private health insurance. As the two leading firms DKV and VKA in 1995 had market shares in Germany of 15.2 and 13.3 per cent respectively. After Allianz AG had withdrawn from the firm, DKV's market position was not to be expected to be strengthened as a result of its merger with Münchener Rück. Nor was a market-dominating position of VKA likely to result from its merger with Allianz because VKA's market share had been declining for some years, its new business comparatively slack and new entrants in the last few years were numerous.

40. The Münchener Rückversicherungsgesellschaft's plan to merge its primary insurance activities, which are to be controlled by Hamburg-Mannheimer, within the Victoria AG under the name of ERGO was also given approval. In Germany ERGO (DM 21 bn in premiums) will be second, far behind Allianz (DM 38 bn in premiums) in the primary insurance business. The merger will bring little change in the reinsurance sector, in which Münchener Rück is the world market leader with a share of 10 per cent. As a result of the merger, Allianz, which has a stake in Hamburg-Mannheimer-Versicherungs-AG, will also gain a share in ERGO. This share will, however, be so small that it will give Allianz no competitively decisive influence on ERGO.

41. On 25 November 1996 the EU Commission granted a German application for referral of the RWE/Thyssengas and Bayernwerk/Isarwerke merger cases to the Bundeskartellamt for further scrutiny. While the two proposed mergers came within the competence of Brussels on account of the turnovers of the companies involved, they only concerned regional electricity and gas supply markets in Germany. The Bundeskartellamt welcomed the Commission's decision to refer this case as a contribution to increased decentralised application of competition rules within the EU to cases whose main impact is felt on the national market. The two proposed mergers were allowed to go ahead in 1997. While the proposed Bayernwerk/Isarwerk merger has a considerable horizontal and vertical concentration effect in Germany, there is, on the other hand, the deconcentrative effect as a result of RWE's complete withdrawal from Isarwerke. Moreover, Bayernwerk and RWE committed themselves to either cancelling, by mutual agreement, the demarcation agreement between Isarwerke's subsidiary Isar-Amper-Werke and RWE's associated company Lechwerke AG, Augsburg, or to ensuring that Isar-Amper-Werke unilaterally waives its rights under this agreement. In the light of this commitment an overall assessment of the proposed merger allows the conclusion that the market-dominating position of Bayernwerk and Isar-Amper-Werke within the interconnected network and at the regional level in Bavaria is no longer likely to be strengthened.

42. RWE's acquisition of an interest in Thyssengas will have a rather significant vertical concentration effect in the gas supply market, because Thyssengas supplies a number of gas distributors in which RWE holds major participations. Thyssengas's market-dominating position in its supply territory would likely have been strengthened, if the two companies had not committed themselves to improving the competitive chances of other gas companies in Thyssengas's territory, in particular those of Wingas GmbH, of Kassel, with its own pipeline, whose market entry is imminent. Thyssengas undertook to waive

certain exclusive rights in its agreements with buyers; RWE agreed not to use its influence to encourage its associated companies to purchase gas from Thyssengas.

43. As a result of these commitments potential market entry to the gas supply market, on which Thyssengas currently retains a monopoly, has improved to an extent which ensures that Thyssengas's market dominance will not be strengthened even though there will be vertical concentration between RWE and Thyssengas.

44. The merger between the Esslingen-based Neckarwerke AG (NW) and the Stuttgart-based Technische Werke der Stadt Stuttgart AG (TWS) was allowed to go ahead after the utilities concerned made commitments to remove the Bundeskartellamt's original competition concerns. While the merger of NW and TWS, which supply the city of Stuttgart and part of its surroundings, into Neckarwerke Stuttgart AG (NWS) will eliminate potential competition between them in the area where their territories overlap, the supply territory will at the same time be opened up to outside competitors as a result of the undertakings given. Moreover, since actual competition among the two utilities was rather unlikely, the Bundeskartellamt held that the strengthening of dominant positions in the distribution of electricity could be ruled out. The merging parties agreed to waive exclusivity clauses in their concession agreements with communities. As a result these communities are no longer prevented from allowing competitors to use their public roads for local supply purposes. NW and TWS also committed themselves not to agree exclusivity clauses in new concession agreements. Nor will they conclude new demarcation agreements hindering other companies to supply electricity within the territory. They also waived such rights in existing demarcation agreements.

45. Also the following case raised competition concerns: Fresenius AG, Bad Homburg, had combined its world-wide dialysis business with that of W.R. Grace & Co., Boca Raton, USA, and contributed it to the newly set up Fresenius Medical Care AG, Bad Homburg. This merger, whose economic centre of gravity is abroad, results in the formation of the world-wide largest supplier of dialysis products and services. Although Grace's market share had been only small in Germany, it had to be considered as a competitor of Fresenius that was strong in terms of resources. Since as a result of the merger an important competitor of Fresenius exited the domestic markets and thus a market-dominating position on various German markets for dialysis and dripfeed solutions would have been created or strengthened, the Bundeskartellamt would not allow the proposed merger to go ahead, unless the following changes were made: Prior to the completion of the Fresenius/Grace merger, Fresenius had to sell its stake in Schiwa GmbH, Landorf, and Grace its German dialysis activities in Rena-Med Medizintechnik GmbH, Bremerhaven, to an independent competitor that is strong in terms of resources. Schiwa and Rena-Med were thereupon sold to B. Braun Melsungen AG. This also led to a competitively acceptable demerger of Fresenius/Schiwa, a case for which a prohibition had been issued that had become unappealable.

46. The Bundeskartellamt has given the green light to the proposed acquisition by Heidelberger Druckmaschinen AG of a majority stake in Linotype/Hell. The transaction involved the product markets for two different types of offset machines. In view of its market share of 60 per cent, its leading position on the international market and its superior financial strength, Heidelberger Druckmaschinen holds a paramount market position in respect of sheet-fed offset machines. By contrast, it is not among the three leading companies as regards rotary offset printing. Linotype/Hell makes pre-press equipment. Initial concerns that Heidelberger Druckmaschinen might now design the pre-press equipment in such a manner that it fitted only its own printing machines have proved unreasonable from an economic perspective, according to the Bundeskartellamt's findings. Therefore, the merger has been allowed to go ahead.

47. The Bundeskartellamt has also cleared the following merger: The Berlin-based Coca Cola Erfrischungsgetränke GmbH (CCEG), an indirect 100 per cent subsidiary of the Atlanta-based The Coca Cola Company (TCCC), acquired three holding companies of Coca Cola licences as well as the relevant distributing companies. In compensation for the sale of their shares in the respective bottling and distribution companies, the selling shareholders were given majority stakes in CCEG. The aim of the merger was to combine further licence territories that had so far been handled by independent Coca Cola licensees. For the combined licence territory CCEG was to be granted a new licence agreement by TCCC. The number of so-called "free" Coca Cola licensees in Germany would thus have been reduced to eight. The Bundeskartellamt did not prohibit the merger because the contractual commitments of the licensees to Coca Cola on the basis of the bottling agreement are so close already that no perceptible strengthening of Coca Cola's market position is to be anticipated from the envisaged acquisition of the licensees' bottling and distribution facilities. Nor has there so far existed any substantial price competition among the sales territories between the licensees which might have been restricted as a result of the merger.

48. There were several cases in which the concerns raised by the mergers that were modified in the reporting period could not be eliminated:

49. The completed merger between the leading German stationery manufacturer, the Berlin-based Herlitz AG, and Papierwarenfabrik Landré based in Gronau, Leine, raised considerable competition concerns at the Bundeskartellamt. In its warning letter of 31 October 1996 the Bundeskartellamt informed the company that it intended to prohibit the merger. Late in 1993 Herlitz had already taken over the economic management of the Gronau learning aids manufacturer through a trustee. The Bundeskartellamt's findings showed that as a result of the merger the paramount market position of Herlitz in the supply of so-called learning aids (exercise books, etc.) had been clearly strengthened (the aggregate market shares of the companies on the markets concerned ranging between 50 and 70 per cent). Meanwhile the merger has been formally prohibited.

50. The acquisition of PSG Postdienst Service GmbH, Berlin by the Axel Springer Verlag AG (ASV), Berlin also met with serious concerns from the Bundeskartellamt. The Bundeskartellamt presumed that the ASV had a market-dominating position in certain press markets (readership and advertising markets). The acquisition of PSG, which operates around 250 press retail outlets in east Germany (31 of which are railway station bookshops), would have led to a strengthening of this position. The structure of the German press distribution system - the supply of medium-sized press retailers by wholesalers and of medium-sized railway station bookshops by publishers -previously guaranteed a large degree of neutrality which ensured that every publication had an equal opportunity of being sold. The vertical integration would have enabled ASV to influence the last stage of the press distribution system and thus achieve improved access to the sales markets, to make access more difficult for actual competitors and to create higher market entry barriers for potential competitors. It would have also offered an opportunity of enhancing ASV's market positions in the undominated magazine markets and thereby also indirectly securing its position in dominated markets. The merger was therefore prohibited (in January 1997).

51. As already reported, the Bundeskartellamt had prohibited the proposed merger of T&N plc., Manchester, with Kolbenschmidt AG, Neckarsulm, because it anticipated that the companies' dominant position in the piston ring market would be strengthened. Although T&N originally sought a decision by court, the case has meanwhile become obsolete because the Düsseldorf-based Rheinmetall AG bought the shares for which T&N had had an option to buy. This merger between Rheinmetall and Kolbenschmidt has not been prohibited by the Bundeskartellamt since it was not accompanied by any structural change in the market for piston rings.

52. The merger between the Canadian Potash Corporation of Saskatchewan (PCS) and Kali- und Salz-Beteiligungs AG (K+S AG) was also notified during the reporting period and prohibited in February 1997. Since 1993 K+S AG has more or less been the only producer of potassium in Germany and the largest supplier in the European Union via its subsidiary Kali und Salz GmbH (K+S GmbH), in which it holds 51 per cent of the shares. The association with the world market leader PCS, which although not present in Germany is active in neighbouring European countries, would in the long run have structurally secured and thus strengthened the market-dominating position of K+S GmbH in the German market. Since PCS would have been able to start supplying the German market at any time, the merger would have removed one of K+S GmbH´s important potential competitors. At the same time, the global oligopoly would have tightened further and K+S GmbH would have been incorporated into PCS's pricing policy for the world market. The enterprises submitted an application to have the merger authorised by the Federal Minister of Economics under Section 24 (3) of the ARC. This was rejected, however, making the prohibition unappealable.

53. Due to the Bundeskartellamt's concerns Illinois Tool Works (ITW) and P.W Lenzen GmbH&Co. KG abandoned the plan to buy Titan Umreifungstechnik GmbH, Schwelm, a subsidiary of Hoesch-Krupp, which makes steel hoops and the mechanical equipment used in their production. But now ITW wants to buy Titan Umreifungstechnik in co-operation with Thyssen AG and intends to notify the planned acquisition with the EC Commission. It remains to be seen whether ITW will be able to bypass the Bundeskartellamt's decision this way.

54. The Bundeskartellamt prohibited the planned takeover of KMF Laborchemie Handels GmbH (KMF) by Bender & Hobein GmbH, a subsidiary of Merck KGaA, Darmstadt. In 1995, Merck achieved a group turnover of DM 6.3 billion, with the pharmaceuticals sector accounting for a good 50 per cent of this figure. The Bundeskartellamt believed that there was a risk of Merck, as the leading manufacturer of laboratory chemicals, also gaining control of trading in these chemicals as a result of the merger. This aroused fears that it would be more difficult for chemical manufacturers to gain market access and that prices to ultimate consumers would increase. The decision has not yet become unappealable.

55. In 1995, the Bundeskartellamt prohibited the construction company Hochtief AG from increasing its stake in its competitor Philipp Holzmann AG from 20 per cent to 35 per cent on the grounds that this merger would result in a market-dominating position in the German market for large construction projects. The parties appealed against the prohibition and the proceedings are currently before the Berlin Court of Appeals. During the appeal proceedings Deutsche Bank AG, which owns around 25 per cent of the Holzmann shares, and Hochtief AG notified the EC Commission that they had acquired joint control of Holzmann by concluding a pooling agreement. The examination of this pool of shareholders, which was obviously intended as a method of circumventing German merger control regulations, was initially not the responsibility of the Bundeskartellamt merely because Deutsche Bank achieves slightly less than two thirds of its Community-wide turnover in Germany. From the competition point of view, however, this merger does not have to be assessed any differently from the merger originally notified to the Bundeskartellamt. The Federal Republic of Germany therefore informed the EC Commission under Article 9 (2) of the Merger Regulation that the merger threatened to create a market-dominating position which would considerably impede effective competition in a German market. The enterprises withdrew their application once the Commission had announced its intention to refer the merger to the Bundeskartellamt. This prevented the EC Commission from being used to help circumvent national merger control.

56. In the reporting period the Berlin Court of Appeals confirmed the prohibition decision of the Bundeskartellamt in the WMF/Auerhahn case.

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