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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- July 1998-June 1999 --

This report is submitted by the German Delegation to the Committee on Competition Law and Policy FOR CONSIDERATION at its forthcoming meeting to be held on 20, 21 and 22 October 1999.

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GERMANY

(July 1998 - June 1999)

Executive Summary

1. *Legislation*

1. After three years of preparation, the Sixth Act to Amend the Act against Restraints of Competition (ARC) came into force on 1 January 1999. The main features of the Amendment are the introduction of an explicit essential facilities provision and a reform of the merger control procedure.
2. Apart from updating and streamlining the wording of the Act and bringing it into line with European law, the acknowledged aim of the legislator was to strengthen the principle of competition.
3. In addition, the amendments in the field of German public procurement law, which also came into force at the beginning of 1999, have led to an expansion of the Bundeskartellamt's scope of activities.

2. *Agreements / abusive practices by dominant firms*

4. In the reporting period administrative fines were imposed in two antitrust proceedings against several firms operating in the field of pipeline construction that were involved in bid-rigging. Other investigations conducted by the Bundeskartellamt on suspicion of illegal agreements concerned the markets for insulating materials, ready-mixed concrete and army boots. High fines are expected in these cases. Infringements of the ban on price recommendations were also punished by administrative fines.
5. The abuse control of dominant enterprises focused on enforcing the ARC provisions on the access of competitors to the networks of local and regional electricity providers. In addition, it was possible to successfully conclude abuse proceedings against Deutsche Telekom AG. The Bundeskartellamt prohibited the largest German retail enterprise Metro AG from requiring its suppliers to grant it preferential terms with retroactive effect.

3. *Merger control*

6. The establishment of a joint venture between the two leading private television providers in Germany, CLT/UFA (Bertelsmann) and the Kirch group, was prohibited by the Bundeskartellamt. A press merger and the merger between two manufacturers of railway sleepers were not cleared either on the ground that there was a risk of a dominant position being created or strengthened. The Coca-Cola Company, Atlanta, avoided the imminent prohibition of its planned acquisition of brand rights and production facilities of Cadbury-Schweppes plc by withdrawing its notification. Other proposed mergers with an international dimension in the pharmaceuticals sector, the automotive supply industry and maritime shipping were given the green light after the Bundeskartellamt accepted commitments or attached certain conditions and obligations.

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

7. On 1.1.1999 the 6th Act to Amend the Act against Restraints of Competition (ARC) came into force. The objectives and main content of this Act have already been described in the previous three Annual Reports. Significant amendments introduced by the Act lie in the field of conduct control over dominant enterprises. The abuse of a dominant position is now - in line with the provisions of Article 82 of the EC Treaty - prohibited per se. This makes it possible to bring civil actions in this area. The new essential facility provision deserves particular mention - it is intended to make the abuse control of dominant suppliers of infrastructure and network-related services more effective.

8. In addition, the German merger control regime was reformed by abolishing ex-post control, as a direct response to the negative experience gained in connection with divestiture proceedings, and by raising the turnover threshold. This is. Since the beginning of 1999 concentrations among enterprises with an aggregate turnover of more than DM 1 billion are subject to preventive merger control. However, the acquisition of a firm with a turnover of less than DM 20 million and mergers affecting a market with a turnover volume less than DM 30 million ("de minimis market") are not subject to control. Under certain circumstances third parties which are not involved in the merger can now have clearance decisions reviewed in court.

9. The 6th Act to Amend the ARC has reorganised the system relating to the forms of co-operation that are exempt from the general ban on cartels. The exemptions for rebate cartels and for export and import cartels were abolished, and in line with Article 81 (3) of the EC Treaty a general exemption was introduced which is, however, subordinate to the special exemption provisions.

10. The amendments to the legal basis for the award of public contracts (Annual Report 1996/97, para. 12), which also came into effect on 1.1.1999, have resulted in a considerable part of German public procurement law being integrated into the ARC. This has in turn greatly extended the scope of the Bundeskartellamt's activity. In future those tendering for public contracts in excess of the thresholds stipulated in European law can request that the award provisions be complied with and can apply for contract award proceedings to be examined. The Bundeskartellamt is in the first instance responsible for reviewing the award procedures of the federal institutions. The public procurement tribunals of the respective federal Länder are responsible for ensuring that the relevant procedural rules are observed in the case of public contracts falling within the jurisdiction of the German Länder. The higher regional courts of appeal are responsible for second instance review procedures.

II. Enforcement of competition laws and policies

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

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

11. In its effort to combat hard-core cartels, the Bundeskartellamt again instituted administrative fine proceedings in the reporting period against numerous firms and individuals suspected of price and quota fixing agreements as well as concerted practices. A considerable amount of evidence was seized in the course of extensive searches. The following sectors of the economy were affected in particular: pipeline construction, ready-mixed concrete, shoes, insulating materials.

12. The Bundeskartellamt imposed administrative fines in excess of DM 3 million for infringements of the ban on cartels. The majority of the administrative fine decisions have already become final.

b) Exemptions from the general ban on cartels

13. The following table summarising the type and number of cartels legalised by the Bundeskartellamt as of the end of 1998 quotes both the legal provisions in force since 1.1.1999 as well as the previously relevant rules (ARC^{old}).

Table 1

| Types of cartels | Cartels Jan.-Dec.1998 | | Total number since 1958 | Still effective as of Dec. 1998 |
|---|-----------------------|-----------|-------------------------|---------------------------------|
| | Additions | deletions | | |
| Condition cartels Sec. 2 (2) ARC (Sec. 2 ARC ^{old}) | - | - | 70 | 45 |
| Rebate cartels (Sec. 3 ARC ^{old}) | - | - | 34 | 6 |
| Combined condition and rebate cartels | - | - | 15 | 3 |
| Crisis cartels Sec. 6 ARC (Sec. 4 ARC ^{old}) | - | - | 2 | - |
| Standardisation cartels Sec. 2 (1) ARC (Sec. 5 (1) ARC ^{old}) | 2 | - | 19 | 10 |
| Rationalisation cartels Sec. 5 ARC (Sec. 5 (2) ARC ^{old}) | - | - | 24 | 2 |
| Rationalisation cartels Sec. 5 ARC (Sec. 5 (2) and (3) ARC ^{old}) | 1 | 1 | 44 | 14 |
| Specialisation cartels Sec. 3 ARC (Sec. 5 a (1) Sentence 1 ARC ^{old}) | 2 | 2 | 70 | 18 |
| Specialisation cartels Sec. 5 ARC (Sec. 5 a (1) Sentence 2 ARC ^{old}) | - | 2 | 57 | 11 |
| Co-operation cartels Sec. 4 (1) ARC (Sec. 5 b ARC ^{old}) | 7 | - | 137 | 125 |
| Purchasing co-operation Sec. 4 (2) ARC (Sec. 5c ARC ^{old}) | - | - | 10 | 9 |
| Export cartels (Sec. 6 (1) ARC ^{old}) | - | - | 116 | 34 |
| Export cartels (Sec. 6 (2) ARC ^{old}) | - | - | 14 | 2 |
| Import cartels (Sec. 7 ARC ^{old}) | - | - | 2 | - |
| Emergency cartels Sec. 8 ARC (Sec. 8 ARC ^{old}) | - | - | 4 | - |
| Total | 12 | 5 | 618 | 279 |

c) Significant cases

14. In the reporting period the Bundeskartellamt imposed fines amounting to over DM 1.2 million on several firms operating in the field of pipeline construction and their executives. It could be proved that the

firms concerned had concluded price fixing agreements in connection with three tenders for earthworks and pipe laying in the construction of natural gas lines. All the decisions imposing the fines have in the meantime become final. After assessing the extensive evidence gathered during proceedings pending since 1996 against firms in the same sector, fines totalling almost DM 1 million were imposed on five firms.

15. Proceedings have been instituted by the Bundeskartellamt against 7 manufacturers of insulating boards made of polystyrene on the suspicion of illegal concerted practices. In May 1998, the firms simultaneously announced identical price increases of up to 40 percent. A search of the business premises of the firms concerned provided evidence of inadmissible concerted practices. The parties concerned have in the meantime been given the opportunity to comment on the allegations made.

16. Other investigations by the Bundeskartellamt involved the market for ready-mixed concrete. There is a suspicion that over the past few years this market has been divided up in certain parts of the federal *Laender* of Berlin, Brandenburg, Saxony-Anhalt and Lower Saxony by means of price and quota fixing agreements. The documents which were seized during a widespread search carried out in May 1999 were still being evaluated at the end of the reporting period.

17. The Bundeskartellamt has also instituted anti-trust proceedings against 13 shoe manufacturers. They are suspected of having concluded price fixing and market allocation agreements in connection with tenders for supplying army boots to the German forces. The firms and private individuals concerned have in the meantime been given an opportunity to comment on this allegation.

18. In March 1999, the Bundeskartellamt prohibited the distribution cartel Nordzucker GmbH & Co, KG, which had originally been exempted from the ban on cartels as a co-operation of small and medium-sized sugar factories. After several mergers Nordzucker AG (NZ) and Union Zucker Südhannover GmbH (Union) were the only remaining members of the cartel. Together they had a market share of well over 80 percent in the cartel's main sales area. The paramount market position of the cartel also made it appreciably more difficult for supplies to be imported from the neighbouring EC Member States Denmark and the Netherlands. The Bundeskartellamt therefore based its decision also on Article 81 (1) of the EC Treaty, taking account of the principles applied by the EC Commission in its administrative fine decisions against the British sugar cartel.

d) *Vertical restraints (RPM)*

19. After the administrative fines imposed in the reporting period by the Bundeskartellamt on two domestic distribution agents of Benetton had become final (Annual Report 1997/98, para. 16), an administrative fine was also imposed in November 1998 on the Italian parent company Benetton SpA for having infringed the ban on recommended prices. In the spring of 1999 the Berlin Court of Appeals rejected the objections raised by the enterprise to this decision and fined Benetton DM 1.75 million. Since the enterprise announced that it would dispense with any further appeals, this decision is now final and binding.

20. According to investigations of the Bundeskartellamt, the provision of the ARC relating to non-binding price recommendations was also violated by "NUR HIER"-Großbäckerei GmbH, a large bakery operating mainly in northern Germany. The company stipulated binding sales prices to the independent tenants of the various sales outlets and also attempted to force them to observe these prices by threatening to terminate their contractual relationship. The Bundeskartellamt imposed a fine totalling DM 500,000 for this infringement.

e) *Control of abusive practices by dominant firms*

21. One of the Bundeskartellamt's main activities in the field of abuse control of dominant firms in the reporting period was to enforce the new ARC provision regulating access to essential facilities. Several proceedings enforcing third-party access in the electricity sector with the aim of introducing competition were of major significance in this connection. Other abuse proceedings involved trade, telecommunications and shipping.

22. Non-discriminatory access to the networks of the supply firms is of central importance to the desired implementation of effective competition in the German energy markets. Since the Energy Industry Act came into force in April 1998 (Annual Report 1997/98, para. 21/22), electricity supply firms with dominant positions in their supply areas are obliged to permit competitors to supply customers by granting them access for an adequate fee. Refusing access is abusive if the electricity supply firm obliged to grant access is unable to prove that there is objective justification for such a refusal. This reversal of the burden of proof (which is also provided for in the new ARC provisions) simplifies matters considerably for the competition authorities even though it is actually of greater significance when the private parties bring their case before the civil courts.

23. The first case of a refusal to grant third-party access which the Bundeskartellamt took up involved the utility ELEKTROMARK Kommunales Elektrizitätswerk Mark AG (Elektromark). The abuse proceedings which were already instituted in 1998 were initially based on the general provisions of the ARC relating to abuse control of dominant firms. The newly introduced essential facility rule has formed the legal basis since 1.1.1999. Elektromark had refused to allow Enron Energie GmbH to supply electricity to a municipal undertaking in Elektromark's supply area. The reason it gave was that technical problems were to be expected in its supply network if it allowed access. In December 1998 the Bundeskartellamt informed Elektromark that its conduct constituted an abuse of a dominant position since the arguments given could not justify a general refusal to allow third-party access. The firm consequently agreed to grant third-party access in January 1999 and concluded a corresponding agreement with Enron. It was thus possible to conclude the proceedings successfully without a formal prohibition decision.

24. It was also possible to discontinue abuse proceedings of the Bundeskartellamt against EnBW Transportnetze AG in July 1999 after the firm allowed a Swiss energy provider to supply electricity to a municipal undertaking in the south of Germany via the EnBW network.

25. However, a conclusion has not yet been reached in the proceedings being conducted by the Bundeskartellamt against the Berlin electricity provider Bewag AG after receiving several complaints. The enterprise generally refuses to allow access before the year 2001 and gave as one of its reasons the capacity bottlenecks existing in its network. After an extensive investigation the Bundeskartellamt informed Bewag that the technical reasons it had put forward were not sufficient to justify a general refusal to grant third-party access. The ARC provides for a public hearing prior to a decision in abuse proceedings. For that reason, the Bundeskartellamt conducted a hearing in June 1999 and gave all those concerned the opportunity publicly to put forward their technical and legal arguments.

26. In conjunction with Article 82 of the EC Treaty, the newly introduced abuse criterion of refusing without justification to grant access to essential facilities also formed the legal basis for the Bundeskartellamt's abuse proceedings against Scandline Deutschland GmbH. The enterprise is refusing to grant access to the infrastructure facilities of the Puttgarden ferry terminal to two ferry companies that wish to compete against Scandline on the route between Puttgarden and Rödby (Denmark) with a passenger and vehicle ferry service. So far the results of the investigation indicate that an abuse of a dominant position exists in this case. For this reason, the enterprise has been given another opportunity to comment on the allegations before a final decision is taken.

27. 19. In the telecommunications sector a distinction has to be made between two different types of proceedings in the field of abuse control. On the one hand the Bundeskartellamt participates in the proceedings conducted by the Regulatory Authority for Telecommunications and Posts on the basis of the Telecommunications Act (TKG). The general provisions of the ARC are on the other hand applied if the Telecommunications Act offers no legal basis for the regulatory authority to intervene. In the latter case, it was possible to successfully conclude the proceedings instituted in the spring of 1998 by the Bundeskartellamt against Deutsche Telekom AG (DTAG) for engaging in abusive conduct in providing directory information (Annual Report 1997/98, para. 29). In November 1998 the Bundeskartellamt informed DTAG that providing only part of the information necessary for operating an information service as well as the amount charged for such provision constituted abusive behaviour. DTAG consequently agreed to provide its competitors with complete files at much lower prices. In future, the price to be paid by the competitors for using directory files will be based on distributing the costs arising for DTAG when compiling and updating the stock of data among all information providers, i.e. including DTAG itself. The costs will be distributed according to the number of cases in which directory information is actually used to provide a customer with information.

28. The liberalisation of the telecommunication sector in Germany (Annual Report 1996/97, paras. 2-4) has led to greater competition and considerably lower prices in the field of national long-distance calls due to the market entry of new competitors. There is, however, still little competition in the market for local calls. Although the Telecommunications Act obliges Deutsche Telekom AG (DTAG) to open its network to competitors, DTAG has a strong influence on the cost structure of its competitors as a result of the fees it charges for renting the direct telephone line to the final customer ("last mile"). The rental fee application DTAG submitted in the reporting period to the Regulatory Authority for Telecommunications and Posts for local loops was well above the price DTAG charges its final customers for a telephone connection. In its comment on the situation, the Bundeskartellamt therefore stated that approving the price applied for would constitute a violation of the ban on discriminatory practices, which is also set out in the Telecommunications Act. There is said to be a danger that DTAG's competitors would fall into a cost-price gap which would make it difficult, if not even impossible, for them to attract new customers. In February 1999, the Regulatory Authority decided, however, that DTAG may charge its competitors a price which is almost 20 percent higher than the price DTAG charges its final customers for a telephone connection.

29. The ARC prohibits dominant buyers from using their market position to cause small and medium-sized firms, who have no reasonable alternatives, to grant them preferential terms without any objective justification. The Bundeskartellamt therefore prohibited Metro AG in May 1999 from inducing several suppliers to grant it lower prices and terms of delivery with retroactive effect, and to make corresponding compensatory payments. Metro AG had adjusted its demands to the more favourable purchasing prices and terms of the Allkauf group that had been brought to its knowledge in connection with the proposed, and subsequently cleared, merger of these two firms. Metro thus demanded and was granted preferential treatment, which de facto has the same effect as most-favoured-nation treatment. Metro AG has lodged an appeal against the Bundeskartellamt's decision.

30. The Bundeskartellamt's decision to prohibit the Berlin Senate from making the award of public road building contracts dependent on a "loyalty declaration" of the bidders had been upheld by the Berlin Court of Appeals already in the previous reporting period (Annual Report 1997/98, para. 18). After the Senate filed an appeal on points of law against this decision to the Federal Supreme Court, the Bundeskartellamt ordered the immediate enforcement of its prohibition decision. This prevented the Senate from being able to continue its abusive award practice until a final court decision on the case had been passed. The Bundeskartellamt held that this would have caused lasting damage to the competitive structures in the Berlin road construction sector. The Berlin Senate's objection before the Federal Supreme Court to the Bundeskartellamt's order was unsuccessful.

2. Mergers and acquisitions

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

Mergers Notified Pursuant to Sec. 39 (6) ARC (Sec. 23 of the ARC^{old})

| Year | Mergers |
|-------|---------|
| 1973 | 34 |
| 1974 | 294 |
| 1975 | 445 |
| 1976 | 453 |
| 1977 | 554 |
| 1978 | 558 |
| 1979 | 602 |
| 1980 | 635 |
| 1981 | 618 |
| 1982 | 603 |
| 1983 | 506 |
| 1984 | 575 |
| 1985 | 709 |
| 1986 | 802 |
| 1987 | 887 |
| 1988 | 1 159 |
| 1989 | 1 414 |
| 1990 | 1 548 |
| 1991 | 2 007 |
| 1992 | 1 743 |
| 1993 | 1 514 |
| 1994 | 1 564 |
| 1995 | 1 530 |
| 1996 | 1 434 |
| 1997 | 1 751 |
| 1998 | 1 888 |
| Total | 25 827 |

31. The number of mergers completed and notified to the Bundeskartellamt was up again from 1997. Owing to a change in the merger control turnover thresholds (see above para. 1) this number is expected to decline in 1999.

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

Table 2

| | 1994 | 1995 | 1996 | 1997 | 1998 |
|--|-------|-------|-------|-------|-------|
| Mergers notified and reviewed prior to completion | 1 086 | 1 089 | 1 006 | 1 207 | 1 300 |
| Mergers notified after completion and found to be subject to control | 331 | 276 | 280 | 362 | 391 |
| Mergers not subject to control | 147 | 165 | 148 | 182 | 197 |
| Completed mergers total | 1 564 | 1 530 | 1 434 | 1 751 | 1 888 |

33. A breakdown by type of merger is as follows (1998):

| | |
|--|-----|
| Acquisition of assets | 414 |
| Acquisition of interest | 975 |
| of which : majority interest acquisition | 883 |
| Joint venture | 467 |
| Contractual relations | 8 |
| Interlocking directorates | 1 |
| Competitively significant influence | 1 |
| Others | 22 |

34. By type of diversification, horizontal mergers (1,620, of which 1,251 with and 369 without product extension) again clearly predominated in 1998. In addition 82 vertical and 186 conglomerate mergers were notified.

b) Summary of significant cases

35. The media sector was one of the focal points of merger control in the reporting period. In October 1998 the Bundeskartellamt prohibited CLT/Ufa (Bertelsmann group) and the Kirch group from raising their shares in the pay-TV channel PREMIERE from 37.5 percent and 25 percent respectively to 50 percent each. As a result of the transformation into a 50:50 joint venture between Kirch and Bertelsmann PREMIERE's already dominant position in the German pay-TV market would have been strengthened. Since DF1, the only competitor, belongs to the Kirch group, the merger would have created a monopoly position in the pay-TV market which could hardly have been contested. CLT/Ufa and Kirch moreover are by far the most important operators in the German market for advertising-funded free-TV.

Since the proposed co-operation of the two firms in the field of pay-TV would have opened up new opportunities for co-ordinating their competitive interests and programming strategies, the project was also expected to create a non-competitive oligopoly in the free-TV market. Moreover, competition in the market for TV advertising would have been significantly restricted.

36. In the meantime the PREMIERE ownership structure has been reorganised. Since the increase of its stake to 95 percent was cleared in April, Kirch group has had sole control of PREMIERE. Although this has merged the only competitors currently operating in the German pay-TV market, the anti-competitive effect of this has been more than offset by structural improvements in the competitive conditions in the German TV markets. The withdrawal of the Bertelsmann group and the resulting loss of financial resources for PREMIERE has meant lower entry barriers to the pay-TV market. As more than 90 percent of the total revenue in the German TV market continues to be earned in the market for advertising-funded free-TV, however, the main reason for the Bundeskartellamt clearing the merger was the fact that the structural links between the leading German TV operators had been severed.

37. Once the conditions for the emergence of a non-competitive oligopoly in the free-TV market had been eliminated, the Bundeskartellamt no longer considered the increase of Kirch group's share in the advertising-funded TV channels DSF Deutsches Sportfernsehen GmbH and SAT.1 to raise competition law concerns. The proposed acquisition as well as the acquisition by Thomas Kirch of a majority of the voting capital in PRO SIEBEN Media AG was therefore allowed to go ahead.

38. In the press markets in Germany the concentration process has continued. As far as local and regional daily newspapers are concerned, the Bundeskartellamt uses a narrowly defined geographic market because their area of circulation as a rule is confined to the territory of a single district. More than half the German districts now have only one regional daily or at least no other independent regional daily. Therefore mergers between newspaper publishers operating in the same or neighbouring newspaper and advertising markets fairly often result in already dominant positions being strengthened. In the period under review the acquisition of all shares in R&B Werbe- und Verlagsgesellschaft mbH (R & B) by Thüringische Landeszeitung Verlag GmbH & Co. KG (TLZV), which belongs to the WAZ group, was prohibited by the Bundeskartellamt. The dominant position in regional advertising markets in Thuringia would have been strengthened if the merger had gone ahead.

39. In late 1998 the Berlin Court of Appeals upheld the prohibitions issued in the previous reporting period in the "Westdeutsche Allgemeine Zeitung/Iserlohner Kreisanzeiger" and "Hessisch-Niedersächsische Allgemeine/Werra Rundschau cases (Annual Report 1997/98, para. 37). The appeal against the prohibition issued in the Axel Springer Verlag/Stilke case was not successful either (Annual Report 1997/98, para. 36). The parties to the three proposed mergers lodged appeals on points of law with the Federal Supreme Court against the Berlin Court of Appeals decisions.

40. In the period under review the German retail trade was marked by two strands of development. On the one hand the trend toward concentration visible in recent years has continued. The Schickedanz-Holding/ Karstadt AG merger (non-food retail trade and mail order) and the take-over of the Allkauf group by the market leader Metro AG (food retail trade) are worth mentioning in this context. After an in-depth examination from the supply- and demand-side perspectives the Bundeskartellamt concluded that there was no evidence of single-firm or oligopolistic dominance and did not prohibit the two proposed mergers. On the other hand foreign groups again set the German retail market in motion. Last year's clearance by the Bundeskartellamt of the Wertkauf group take-over was followed by the world's largest retailer, the US WalMart group, acquiring 76 self-service stores of the ITM-Intermarché-owned SPAR Handels AG. In the Bundeskartellamt's opinion this merger is beneficial in that it adds another financially strong rival to those competing with the top five food retailers.

41. In the tobacco wholesale trade the merger between Lekkerland group, the leading German specialist wholesaler of convenience products, and tobaccoland Großhandelsgesellschaft owned by Austria Tabak AG was cleared subject to conditions. The Bundeskartellamt found that the proposed merger would have created dominant positions in several regional markets. The parties to the merger therefore had to sell viable parts of their operations to a third party and to sever all contractual links with a group of competing tobacco wholesalers whose co-operation arrangement was exempted from the ban on cartels. A third party availed itself of the possibility introduced on 1 January 1999 to take court action against the decision clearing the merger (see above, para. 1) and filed an appeal with the Berlin Court of Appeals.

42. The acquisition of First Reisebüro Management GmbH & Co. KG by Hapag Touristik Union (HTU) owned by Preussag group was not prohibited by the Bundeskartellamt either. Although the merger resulted in the creation of largest chain of travel agents, it was not expected to create dominant positions in the markets for private or corporate customers.

43. In April 1999 the Bundeskartellamt prohibited the Pfeleiderer group from purchasing Ways & Freytag AG's railway sleeper production and distribution business. In view of the high transport cost of this product, the Bundeskartellamt considered the relevant markets to be regional. The merger would have raised Pfeleiderer group's share of the south German concrete sleeper market to well over 60 percent and strengthened its already dominant position.

44. In recent years mergers in the German telecommunications markets mostly involved start-ups. The reporting period saw the first ever merger between two financially strong rivals of the former monopolist Deutsche Telekom AG (DTAG). In spring 1999 Mannesmann Arcor AG & Co. notified the Bundeskartellamt of its intention to acquire o.tel.o communications GmbH & Co., a firm so far jointly controlled by the RWE group and Veba AG. Through this merger Mannesmann Arcor, which owns the largest alternative fixed network in Germany, will strengthen its position as second-strongest operator of long-distance and foreign calls after DTAG. In view of DTAG's dominant position in the relevant markets the Bundeskartellamt did not prohibit the proposed merger.

45. In early 1999 The Coca-Cola Company, Atlanta, notified the Bundeskartellamt of its intention to acquire most of the Cadbury-Schweppes plc. (CS) drinks brands and production facilities for concentrates. The Bundeskartellamt found that Coca-Cola's dominant position in the German market for carbonated soft drinks would have been strengthened as a result of the merger. The acquisition of the leading supplier of carbonated bitters would have further strengthened Coca-Cola's already large share of 60 percent. In addition competitors' entry to the market would be rendered difficult because Coca-Cola is the only supplier with a comprehensive distribution system in the food retail trade. Had it acquired the CS brands, it would have been able to supply the full range of carbonated soft drinks through the hotel, restaurant and catering business. To avert prohibition, which was imminent, the parties abandoned the original merger project and withdrew their notification to the Bundeskartellamt.

46. The acquisition by Fresenius AG of the international infusion solution business of Pharmacia & Upjohn AB, Stockholm (P & U) was cleared by the Bundeskartellamt subject to conditions. The parties agreed to sell P & U's German infusion business to a third party. Although P & U's activities in Germany did not form part of the proposed merger, the Bundeskartellamt did not expect this division to survive on a lasting basis as independent competitor in Germany after the parent's exit. Since the Bundeskartellamt was convinced that the market shares of the German P & U subsidiary would have accrued to Fresenius in the event of the former exiting the market, the merger as planned would have created and/or strengthened Fresenius' already dominant positions in various markets for infusion solutions in Germany.

47. While the effects of the proposed merger were felt not only in Germany, but also in many other EU Member States, the transaction fell short of the thresholds of the European Merger Regulation.

However, the possibility of referring the case to the EC Commission, which normally is provided for in such a situation, could not be used on this occasion. This was due to the fact that - while the statutory time for examination in Germany was running out - the merger had not even been notified in other European countries and therefore its competitive effects could not be assessed there.

48. In the car components supply industry the Bundeskartellamt cleared in May 1999 the proposed acquisition by Federal Mogul Nürnberg GmbH (FM) of Alcan Deutschland GmbH's Nuremberg piston factory subject to conditions. The creation of a dominant oligopoly in the piston market was prevented by FM agreeing to sell its shares in a joint venture in which the leading manufacturer of pistons for petrol and diesel engines also had a significant share. FM also agreed to grant interested firms the right to use a patent to enable them to economically produce, or have produced, a special type of piston ring. This ensures that the merger will not result in the creation of a dominant position of FM in the market for piston assemblies (piston and piston ring) for high-speed diesel engines.

49. The proposed consolidation of the container liner services of the Canadian shipping company C.P. Ships Holding and the Mexican operator Transportación Marítima Mexicana (TMM) under the umbrella of a jointly-controlled holding company was cleared by the Bundeskartellamt on condition that TMM terminate its membership of the Mexican section of the W.I.T.A.S.S. shipping conference. Moreover, the parties agreed to refrain from future membership of a shipping conference for the North Europe/Mexico routes. This rules out the likelihood of a dominant position being created as a result of the proposed merger in the market for container liner services between German and North European ports and Mexico

III. References to new reports and studies on competition policy issues

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