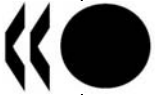


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**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- July 2003-June 2004 --

This report is submitted by the German Delegation to the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting (14-15 October 2004).

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Executive Summary

Legislation

1. During the reporting period the amendment to the Telecommunications Act (Telekommunikationsgesetz, TKG) came into force.

2. The seventh amendment to the Act Against Restraints of Competition (ARC) (*Gesetz gegen Wettbewerbsbeschränkung, GWB*) is still in the legislative process as is the draft of the second act on the reform of the energy industry law (*Entwurf des Zweiten Gesetzes zur Neuregelung des Energiewirtschaftsrechts (EnWG)*).

Agreements / Abusive practices by dominant firms

3. In the further course of proceedings against a market allocation and quota cartel in the cement industry six SMEs producing or distributing cement received administrative orders imposing fines of a further 41 million Euro.

4. In addition, the Bundeskartellamt has imposed fines totalling 8.8 million Euro on account of illegal price agreements on the three leading German manufacturers of pyrotechnical products and responsible staff members.

5. Again, significant abuse proceedings were conducted in the electricity sector in which an energy supplier was prohibited from denying site network operators access to a medium-voltage network. Other abusive practices, e.g. by Deutsche Telekom AG, Deutsche Post AG and Toll Collect GmbH, have been dropped by the respective companies upon intervention of the Bundeskartellamt so that there was no need to initiate formal abuse proceedings.

Merger control

6. A number of prominent proceedings in the area of merger control, where the number of cases are slightly declining, related to the media sector: After no ministerial authorisation had been granted in the Holtzbrinck/Berliner Verlag merger case, the Bundeskartellamt prohibited the merger again after a second notification, holding that the planned sale of the Tagesspiegel to a former manager of the Holtzbrinck-Gruppe did not give rise to a new competitive evaluation of the case. In addition, the Bundeskartellamt ordered the dissolution of the illegally effected merger between WAZ Westdeutsche Allgemeine Zeitungsverlag GmbH & Co. Zeitschriften und Beteiligungs-KG and OTZ Ostthüringer Zeitung Verlag GmbH & Co. KG. The takeover of the Heyne publishing house by the Random House publishing group was only cleared by the Bundeskartellamt after a considerable part of the originally notified project had been withdrawn.

7. To prevent further concentration and foreclosure of the energy markets, the Bundeskartellamt examined participations of large grid companies in municipal utilities very critically: Several prohibitions were issued; in other cases clearance was only given subject to strict obligations or the companies gave up their original project.

1. Changes to competition law and policy, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

8. On 26 June 2004 the amendment to the Telecommunications Act (TKG) came into force which implemented five European guidelines. The basic revision of the TKG covers inter alia the following

issues. Firstly, the scope of sector-specific regulation was restricted; in future it will only apply to those markets that have structural market barriers, in which substantial market power cannot be reduced in the foreseeable future and in which the application of general competition law provisions is not sufficient to prevent market failure. The Regulatory Authority has to conduct corresponding market definitions and analyses every other year and coordinate these with the European Commission.

9. In future no licence will be required to provide telecommunication services. Access regulation remains the key element of the Telecommunications Act; it establishes to what extent competitors are entitled to services provided by powerful companies. Where certain advance concessions (such as interconnection services, access to subscriber lines, collection services, etc.) are deemed essential for competition, the powerful company has to provide them in a non-discriminatory way. In future, the powerful company may only introduce new services that contain essential advance concessions for end customers if at the same time corresponding advance services are offered to its competitors (so-called simultaneity provision) In addition, the provisions on the regulations of fees have been put into concrete terms. The so-called consistency regulation ensures that end consumers' fees and fees for advance services are coordinated. Illegal abuse practices such as cost-price squeezes, dumping or bundling of products have been explicitly included in the wording of the Act.

Authorisation procedures for fees are largely restricted to fees for advance services charged by powerful companies. Fees payable by end customers, on the other hand, will in future be largely subject to abuse control. Unlike in the current version of the TKG no differentiation will be made between data services and communication services.

10. On the whole the Regulatory Authority's possibilities to punish abusive conduct (such as discrimination between internal and external purchasers) have been considerably improved (e.g. retroactive skimming off of benefits in case of negligent conduct).

11. The obligation to take precautions to ensure the implementation of legal measures for monitoring telecommunications is limited to providers of public telecommunications networks. Consequently, all providers of non-public telecommunications services are exempt from this obligation. Further limitations are laid down in the corresponding ordinance (Telekommunikations-Überwachungsverordnung, TKÜV).

12. In addition, the Regulatory Authority is obliged to present a detailed report every year.

1.2 Other relevant measures, including new guidelines

13. 8. Following a decision by the Federal Supreme Court of 12 November 2002 on the proceedings against WalMart (see last year's report, paras 38 ff.) the Bundeskartellamt reviewed in August 2003 the principles of interpretation on the offering (previously: selling) of products below cost price by companies with superior market power. The revised principles clarify that the prohibition of making offers below cost price requires neither a predatory intent nor proof of an appreciable impact on competition conditions for small and medium-sized companies. The revised principles also clarified that exceeding a constant offer price by an increasing cost price also constitutes an offer below cost price. In such a case the offer price must generally be raised until it no longer undercuts the new cost price.

1.3 Government proposals for new legislation

14. On 26 May 2004 the Federal Cabinet adopted the government bill on the seventh amendment to the ARC (Act Against Restraints of Competition) on which the Bundesrat commented on 9 July 2004. According to the draft, the modifications, which in particular implement Council Regulation (EC) 1/2003 into national law, are to come into force on 1 January 2005. As in European competition law, the system of notification and authorisation of anti-competitive agreements will be replaced by a system of legal

exception. The current exemptions under the ARC are replaced by a general clause modelled on Article 81 (3) EC.

15. In addition, the European model for vertical restraints of competition will be adopted. Such distribution agreements are in future subject to a general prohibition with an authorisation proviso. Moreover, procedural rules and investigatory powers of the Bundeskartellamt will be adapted to the new provisions of Regulation 1/2003.

16. Irrespective of the adaptation of the ARC to European competition law, the amendment also takes into account further competition policy issues; in particular a reform of the provisions on media merger control is envisaged.

17. On further details see last year's report (paras 12 ff.; DAFTE/COMP(2003)15/01).

18. Furthermore, on 28 July 2004 the Federal Cabinet adopted a draft on the second act on the reform of the energy industry law (*Zweites Gesetz zur Neuregelung des Energiewirtschaftsrechts, EnWG*) to implement two EU guidelines. The necessary provisions on network access and charges are to come into force in early 2005, as is the act mentioned above which requires the approval of the Bundesrat.

19. In future, the approximately 1.700 gas and electricity network operators will be monitored by the Regulatory Authority for Telecommunications and Posts (RegTP) which will take on this additional task under the new name of "Federal Regulatory Authority for Electricity, Gas, Telecommunications and Posts". The reform contains provisions on unbundling requirements, organisational, personnel and accounting regulations in network operation, as well as normative provisions on network regulation. The RegTP will also be responsible for ex-post abuse control of network operators. The rights of consumers and consumer associations are strengthened who will be able to take on a more active role in future.

2. Enforcement of competition law and policy

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

2.1.1 Summary of activities of competition authorities and courts

20. In the period covered by the report, the Bundeskartellamt was able to close cartel proceedings against companies in the cement industry, initiated in April 2003, imposing a fine of 41 million Euro. Further fines were imposed on account of illegal price agreements for pyrotechnical products and for the attempt to set minimum prices.

21. In the waste management sector, the Bundeskartellamt prohibited an administrative district in a test case from calling for a boycott against Der Grüne Punkt – Duales System Deutschland (The Green Dot-Dual System).

22. The Düsseldorf Higher Regional Court reviewed several prohibition decisions of the Bundeskartellamt on abusive conduct in the energy sector of which it reversed some and confirmed others. In addition, a growing number of claims for damages by victims of cartels is brought before the civil courts.

2.1.2 Description of significant cases, including those with international implications

a) Agreements, action in the form of administrative fine proceedings against cartels / Boycotts

23. Having imposed around 661 million euro in fines on the six largest cement manufacturers in April 2003, the highest fines in its history so far, the Bundeskartellamt concluded the remaining proceedings against other companies involved in this cartel by December 2003: A further 41 million euro were imposed on six medium-sized cement manufacturers and distributors. In total, the fines imposed in the cement cartel proceedings amount to more than 700 million euro.

24. In August 2003, the Bundeskartellamt also imposed fines totalling 8.8 million euro on account of illegal price agreements against the three leading German manufacturers of pyrotechnical products, Comet GmbH, Bremerhaven, Nico Pyrotechnik KG, Trittau and Weco Pyrotechnische Fabrik GmbH, Eitorf as well as responsible staff members. A number of contributions to the fact-finding process provided by persons concerned could be taken into account as a mitigating factor when calculating the fines. All orders to impose the fines are final.

25. Furthermore, in September 2003 the Bundeskartellamt imposed fines totalling about €100,000 each on Swissphone Telecommunications GmbH, Gundelfingen, and Ansmann Energy GmbH, Assamstadt, for abusively influencing the pricing policy of trading companies. The orders to impose the fines are final. From February 2001 to April 2003 Swissphone, a well-known manufacturer of paging equipment, made the granting of additional rebates to its dealers conditional upon them maintaining the recommended minimum sale prices. In the period between July 2002 and May 2003 Ansmann Energy, a well-known manufacturer of batteries and accumulator chargers, tried on several occasions to set minimum prices for the sale of its products via the Ebay Internet auction platform by threatening to stop deliveries.

26. 17. Moreover, on 11 May 2004 the Bundeskartellamt prohibited the administrative district of Neu-Ulm from calling upon the local paper waste disposal company to boycott the "Der Grüne Punkt – Duales System Deutschland AG" (DSD, The Green Dot – Dual System) and from exerting pressure on DSD to adopt practices which would violate the ban on cartels. The administrative district of Neu-Ulm had requested the local waste disposal company and DSD to refrain from entering into individual service agreements for the disposal of paper, cardboard and cardboard packaging ("Papier, Pappe und Kartonagen", PPK).

27. Numerous municipal waste management authorities reject direct contractual agreements between dual system operators and the respective local waste disposal company on the collection and recycling of used PPK-sales packaging. They are of the opinion that dual system operators should either voluntarily adhere to agreements reached with the respective local waste disposal company or be obliged under administrative law (Article 6 (3) sentence 8 VerpackV) to accept co-utilisation of PPK collection systems and a proportional absorption of the costs involved. However, in the Bundeskartellamt's view for waste management to be cost-efficient and inexpensive for consumers it is necessary for each dual system operator intending to use the disposal services of the local disposal company to negotiate individual disposal prices corresponding to its proportional share. By contrast, upholding the opinion of the public waste management authorities would lead to a pooling of demand for waste disposal services for PPK products which would be incompatible with Article 1 of the ARC. Moreover, it contradicts the explicit aim of the Waste Avoidance, Recycling and Disposal Act (Kreislaufwirtschafts- und Abfallgesetz), i.e. to prevent a re-municipalisation of the whole paper sector. Against this background the Bundeskartellamt's prohibition decision against the Neu-Ulm administrative district is of general significance.

28. After a search conducted in July 2002 of insurance companies at 13 sites on suspicion of agreements in industrial insurance business (cf. report of previous year, para. 18) written charges were initially served in July 2003 on seven companies and on a further eleven in May 2004.

29. In enforcement of the ban on cartels the Bundeskartellamt conducted eleven searches nationwide during the reporting period. The searches concerned, among others, the cement, waste management, paper and construction sectors.

30. On 11.9.2003 with the assistance of the Criminal Investigation Department the Bundeskartellamt and the Cologne Public Prosecutor's Office with over 300 officers searched 120 companies in the waste management sector. The closely coordinated investigations undertaken by the Bundeskartellamt and the Cologne Public Prosecutor's Office follow up suspicions that companies in the waste management sector coordinated bids for service contracts put out to tender by the Der Grüne Punkt – Duales System Deutschland AG (The Green Dot – Dual System) (DSD).

31. Such agreements constitute an anti-competitive administrative offence (Section 81 (1) in conjunction with Section 1 of the ARC) and also fulfil the elements of collusive tendering (Section 298 of the Criminal Code).

32. Furthermore in March 2004 the Bundeskartellamt conducted further searches of companies in the cement industry following tip-offs from cement purchasers that cement manufacturers were continuing to charge anti-competitive prices and to operate market allocation agreements. In addition the search was intended to obtain additional information on developments which took place after the cement cartel was uncovered in 2002. This information may be of significance in evaluating the appeals lodged by the companies against the fines already imposed.

33. Finally, in May 2004 the Bundeskartellamt conducted a search operation on the suspicion that paper manufacturers had coordinated their purchasing of used paper in order to push down purchasing prices. This search operation was assisted by simultaneous investigations carried out by the Austrian competition authority within the scope of the network of European competition authorities (ECN) which was launched on 1 May 2004. Moreover, in separate proceedings the European Commission simultaneously carried out inspections on the premises of paper manufacturers in several Member States (including Germany) and Norway on suspicion of anti-competitive agreements.

b) Exemptions from the general ban on cartels

34. The following table gives an overview of the type and number of agreements under competition law which during the reporting period were exempted by the Bundeskartellamt from the statutory prohibition on the basis of the ARC's exemption provisions.

Table 1

Cartels	new in 2003	in force until end 2003
Standards and types cartels Section 2(1) of the ARC	3	-
Condition cartels (Section 2 (2))	11	5
Specialisation cartels (Section 3)	-	1
Cartels of small or medium-sized enterprises Section 4 (1)	27	11
Purchasing cartels (Section 4 (2))	17	76
Rationalisation cartels (section 5)	2	1
Structural crisis cartels (Section 6)	-	-
Old cartel cases:	2	1

c) Control of abusive practices by dominant firms / Supervision of price abuses by monopolists (utilities)

35. In October 2003 the Bundeskartellamt prohibited the energy supplier Mainova AG, Frankfurt/Main, from denying GETEC net GmbH Hanover (GETEC net) and Energieversorgung Offenbach AG (EVO) access to its medium-voltage network. GETEC net and EVO depend on this network connection in order to be able to operate electricity networks (so-called site network facilities) on premises used for business or housing purposes and to supply end customers located there with electricity generated by the companies themselves or by third suppliers. The present proceedings are limited to newly developed sites or sites already operated by third parties. The Bundeskartellamt's decision was confirmed by the Düsseldorf Higher Regional Court in provisional legal protection proceedings and in proceedings in the main action.

36. In September 2003 abuse proceedings against Deutsche Telekom AG were suspended after the company had agreed to reduce by about 45 per cent its fees for relinquishing subscriber data to providers of information services and publishers of telephone directories.

37. The Bundeskartellamt also decided not to initiate formal abuse proceedings against Deutsche Post AG (DPAG). In the summer of 2003 DPAG initiated a reform of its distribution system. Numerous postal agencies then complained to the Bundeskartellamt about worsening contractual conditions and DPAG's threat to terminate all contracts if the new conditions were not accepted. DPAG was able to allay competition concerns about individual contractual agreements (in some cases only one month's notice, reduction of the fees for agency services by up to 30 per cent) by making various commitments (interim periods for contract terminations and the planned fee reduction).

38. Formal abuse proceedings also became unnecessary against Toll Collect GmbH (TC) as this assured the Bundeskartellamt in September 2004 that it would conclude service-partner contracts with approx. 200 further independent garages for the fitting of on-board units (OBUs) for lorry toll collection. In its assurances the operator of the German lorry toll system, which involves DaimlerChrysler, Deutsche Telekom and Cofiroute, had taken account of competition concerns about the choice of authorised garages because previously garages had mainly been considered which belong to the network of garages of one utility vehicle manufacturer.

d) Activities of the courts

39. In the energy sector the Düsseldorf Higher Regional Court had to deal with a whole number of Bundeskartellamt decisions. In 2003 the authority prohibited several electricity network operators from abusing their dominant positions by demanding excessive fees for network use and charging excessive metering and billing prices. These prohibition decisions against TEAG, Stadtwerke Mainz and RWE Net were reversed. In the case of Mainova, however, which was prohibited from denying site network operators access to its medium-voltage network, the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's prohibition decision in the provisional legal protection proceedings and in the proceedings in the main action.

40. Two of these proceedings, Stadtwerke Mainz and Mainova, are currently pending before the highest German civil court, the Federal Supreme Court.

41. During the period covered by the report several buyers from cartels claimed damages against cartel members before the civil courts as they had to pay excessive prices due to the cartel members' agreements. Except for the Dortmund Regional Court the competent regional and higher regional courts

rejected these claims although the national or European ban on cartels had been violated, arguing that the plaintiffs, as buyers from the cartel members, did not come within the scope of protection of the damages norms. According to the courts claims could only be justified by intentional conduct on the part of the violator which was aimed directly at the party concerned. Currently an appeal against refusal of leave to appeal against a Higher Regional Court's decision is pending before the Federal Supreme Court. The outcome of this appeal is awaited with great interest. The Bundeskartellamt will submit its comments in these proceedings.

2.2 *Mergers and acquisitions*

2.2.1 *Statistics on number, size and type of mergers notified and/or controlled under competition law*

Table 2

Mergers notified under Section 39 (6) of the ARC
(Section 23 of the old version of the ARC) and effected 1973-2003

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
1999	1.182
2000	1.429
2001	1.138
2002	1.317
2003	1.132
Total	32.025

42. A breakdown according to examination category:

Table 3

	1996	1997	1998	1999	2000	2001	2002	2003
Mergers notified and reviewed prior to completion	1,006	1,207	1,300	1,147	1,359	1,122	1,272	1108
Mergers notified after completion and subject to control	280	362	391	32 ¹	70	16	45	24
MERGERS NOT SUBJECT TO CONTROL	148	182	197	3	-	-	-	-
Completed mergers total	1,434	1,751	1,888	1,182	1,429	1,138	1,317	1132

43. A breakdown according to type of merger:

Table 4

	2001	2002	2003
Acquisition of assets	229	274	300
Acquisition of interest	503	643	526
Of which: acquisition of majority interest	453	601	477
Joint ventures	237	236	149
Joint ventures with joint control	98	103	97
Acquisition of control by contract	37	38	28
Competitively significant influence	13	6	18
Others	21	12	10

44. By type of diversification, horizontal mergers (1.002, of which 106 were without and 896 with product diversification) clearly dominated again in 2003 as in previous years. The number of notifications of vertical mergers dropped to 20 and the number of conglomerate mergers rose to 110.

2.2.2 *Summary of significant cases*

a) Prohibition or prevention of mergers

45. In September 2003 the Bundeskartellamt prohibited EAM Energie AG, Kassel, which belongs to the E.ON group, from acquiring a 30 per cent share in the municipal utility Stadtwerke Eschwege GmbH as this participation is likely to lead to a strengthening of the dominant positions held by the E.ON group both in the electricity and gas sales markets. The appeal filed against this prohibition is currently pending at the Düsseldorf Higher Regional Court.

¹ Since 1 January 1999, all mergers subject to control have to be notified prior to completion. The notifications after completion concern cases in which, due to transitory provisions, this obligation did not apply or had simply been disregarded in violation of the ban on putting a merger into effect.

46. 32. For the same reasons the Bundeskartellamt prohibited E.ON Hanse AG (previously Schleswig AG), Rendsburg, which is also an E.ON subsidiary, from acquiring a 49,9 per cent share in the municipal utility Stadtwerke Lübeck GmbH. The actual markets affected in this case were those for the supply of electricity to electricity distributors, major and small electricity customers as well as the market for the supply of gas to major gas customers. The decision is final.

47. 33. In the media sector, the Bundeskartellamt again prohibited the merger of Holtzbrinck KG (Tagesspiegel, city magazine Zitty and other publications) and Berliner Verlag KG (among other publications daily newspapers Berliner Zeitung, Berliner Kurier and city magazine Tip) in February 2004. The proposed acquisition of control had already been prohibited in 2002 as it would have led to the creation of a dominant position held by Holtzbrinck in the reader market for regional subscription dailies in Berlin and the Berlin reader market for city magazines (for details see last year's report, para. 48 ff). The proposed merger was notified again in October 2003, at the same time as the proposed acquisition of the "Tagesspiegel" daily which belongs to Holtzbrinck, by a former manager of the Holtzbrinck group. In the Bundeskartellamt's opinion, however, the planned sale of Tagesspiegel shares did not give rise to a new competitive evaluation of the case since the shares to be sold are still to be classified as belonging to Holtzbrinck. This mainly follows from an economic assessment of the purchase contract concluded between Holtzbrinck and the acquirer and in consideration of all the circumstances of the case. The purchase contract e.g. included a call option providing Holtzbrinck with the opportunity to reacquire 75 per cent of the shares in Tagesspiegel if a reform of the media merger control provisions resulted in a change in the legal framework. Even if the shares in Tagesspiegel held by the acquirer were not classified as still belonging to Holtzbrinck, the project could not be cleared under the legal provisions because it would create a joint dominant position held by the publishers of Berliner Zeitung and Tagesspiegel in the Berlin reader market for regional subscription dailies. The case is pending before the Higher Regional Court.

48. 34. Furthermore the Bundeskartellamt prohibited the merger between the Holtzbrinck subsidiary Lausitzer Rundschau Medienverlag GmbH, Cottbus and KG Wochenkurier Verlagsgesellschaft mbH & Co. Brandenburg, Elsterheide / Bergen, which had already been put into effect, but not notified, in 1996. The merger resulted in a strengthening of Lausitzer Rundschau's dominant positions in the local advertising markets in Cottbus and Senftenberg and in the South Brandenburg regional advertising market. In addition the acquisition secures Lausitzer Rundschau's unique position as a regional subscription daily.

49. 35. Finally the Bundeskartellamt ordered the dissolution of the merger between WAZ Westdeutsche Allgemeine Zeitungsverlag GmbH & Co. Zeitschriften und Beteiligungs-KG (Essen) and OTZ Ostthüringer Zeitung Verlag GmbH & Co. KG (Löbichau) and threatened to take coercive measures to enforce the order. In November 1995 WAZ had already acquired a 40 per cent share in OTZ held by the publishing group Rhein-Main GmbH & Co. KG (Mainz) without notifying the Bundeskartellamt. On 12 January 2000, once this had come to its knowledge, the Bundeskartellamt prohibited the concentration as it had led to the strengthening of the dominant positions held by the WAZ group and OTZ in the reader markets for regional subscription dailies and advertising markets in the distribution area of the "Ostthüringer Zeitung" and the "Thüringer Allgemeine". Now that the appeals filed by the parties concerned against the decision have been unsuccessful and WAZ has failed to carry out independently the divestment measures it had promised, the Bundeskartellamt is pursuing the dissolution of the concentration *ex officio*.

50. 36. A further prohibition order was issued against the medical technology manufacturer Synthes-Stratec Inc. (USA) prohibiting the acquisition of the osteosynthesis business division (products for surgical fracture treatment) from Mathys Medizinaltechnik AG (Switzerland). In Germany the merger would have led to Synthes-Stratec acquiring a dominant position in the market for implants (particularly plates, screws and nails) and instruments for trauma treatment.

51. 37. Furthermore the takeover of the French company Financière Atys SA, Neuilly-sur-Seine by Agrana Zucker und Stärke Aktiengesellschaft, Vienna, an affiliate of Südzucker AG, Mannheim/Ochsenfurt was prohibited. Agrana is active in Germany inter alia in the manufacture of processed fruit for further industrial processing. The merger would have led to a joint dominant position held by Agrana / Atys and the market leader Franz Zentis GmbH & Co. KG, Aachen, in the relevant market.

52. 38. The planned acquisition of shares in Lokalradio Services GmbH, Reutlingen by Radio TON-Regional Hörfunk GmbH & Co. KG, Heilbronn was also prohibited. The merger would have meant that the two only competitors in the local market for radio advertising would in future have been controlled by the same company, Medien Union GmbH, Ludwigshafen.

53. The Bundeskartellamt finally also prohibited the planned project of Deutsche Bahn AG (DB AG) to acquire a 30 per cent participation in Kreis-Verkehrsbetriebe Saarlouis GmbH (KVS, Saarlouis district transport companies) via its affiliate company Regionalbus Saar-Westpfalz GmbH (RSW, Saar-Westpfalz regional bus company) as the proposed merger is likely to lead to a strengthening of DB AG's dominant position in local public transport in Saarland. KVS provides local transport, mainly for scheduled transport services, in the Saarland administrative district of Saarlouis.

54. 40. In the reporting period the Bundeskartellamt imposed a further number of fines for violations against the prohibition to put into effect mergers which have been notified but not yet cleared. One example are fines totalling 65,000 € imposed against Lignum Technologie AG, Schopfloch and a member of management responsible. Lignum Technologie AG was founded in November 1999 as a holding company, to which the shares of Homag Holzbearbeitungssysteme AG, Schopflöch, were contributed. Subsequently IMA AG, Gütersloh, was merged with Lignum Technologie AG. The merger, which according to merger control regulations, had to be notified to the Bundeskartellamt, was, in the knowledge of this obligation, put into effect without notification and without the necessary merger control clearance in order to avoid any possible prohibition by the Bundeskartellamt at the time. As the market situation on the affected markets for woodworking plant and machinery for the furniture and construction component industry has significantly changed since the merger was put into effect, an examination of the case was concluded in September 2003 without prohibition. The orders to impose the fines are final.

b) Clearances subject to conditions and obligations

55. The Bundeskartellamt has cleared BASF AG's acquisition of certain crop protection segments of Bayer Crop Science AG subject to obligations. According to the Bundeskartellamt's findings this concentration would have enabled BASF to acquire a paramount market position over its competitors in the market for fungicides for the treatment of wheat leaves. In order to prevent the Bundeskartellamt from prohibiting the concentration BASF has agreed to grant an interested third party an exclusive marketing licence for at least 5 years, which can also be sub-licensed, for certain cereal fungicides. Through this sale Bayer Crop Science fulfils an obligation imposed in 2001 in respect of the merger of Bayer and Aventis Crop Science which was examined by the European Commission. At the time Bayer had committed itself to sell certain crop protection segments or to license production and/or marketing to third parties in order to avoid a prohibition.

56. 42. In the energy sector the Bundeskartellamt has cleared four participations by RWE Rhein-Ruhr AG which belongs to the RWE group of companies only subject to conditions and obligations. The projects concerned involve the acquisition of 20 per cent of the shares of both Wuppertaler Stadtwerke AG and Stadtwerke Velbert GmbH, 25 per cent of the shares of Stadtwerke Remscheid GmbH and, in addition to the 50 per cent stake already held, a further 40 per cent of the shares of Energieversorgung Oberhausen AG.

57. The examination showed that the mergers are likely to result in a strengthening of dominant positions in the national and local markets for electricity and gas sales. They were therefore cleared with conditions and obligations which at least balance out the disadvantages of the increased market dominance. For example, RWE committed itself to sell its 40 percent share in the municipal utility Stadtwerke Leipzig GmbH before putting the projects into effect. Stadtwerke Leipzig can thus establish itself as an independent purchaser in the market for electricity distribution – without a partner interested in supplying electricity itself. At the same time RWE must part with its 20 per cent stake in Stadtwerke Düsseldorf AG within a set period of time after the projects have been put into effect. This sale can possibly also be carried out by an independent trustee. In its assessment, in which it took account of both qualitative and quantitative aspects, the Bundeskartellamt has concluded that the negative effects expected from the concentrations will be outbalanced by positive effects likely to result from the compensations offered.

58. 43. DB Regio AG (DB Regio) and üstra Hannoversche Verkehrsbetriebe AG (üstra), were allowed to combine their local public transport activities in the greater Hanover area in the joint venture üstra intalliance AG (intalliance). However this decision was made subject to the condition subsequent that contracts for public local transport services in the Hanover area be awarded through competitive procedures. The condition subsequent ensures that the market is opened up gradually. Accordingly, as soon as their existing contracts have expired, at least 30 per cent of DB Regio's local passenger rail services and at least 50 per cent of üstra's bus transport services have to be awarded in a Europe-wide award procedure with effect from 1 January 2007 and 1 January 2010, respectively. By 1 January 2013 at the latest the Hanover regional authorities as the contracting entity for local public transport have to award all bus transport services provided by üstra and all local passenger rail services provided by DB Regio in the region in a Europe-wide, competitive procedure.

59. Currently, DB Regio provides all local passenger rail services in the relevant Hanover market area on the basis of a transport contract with the Hanover regional authorities, the duration of which is limited to the end of 2006. In addition it is also active in local public road transport in the greater Hanover area via its regional bus subsidiaries. Üstra is by far the leading municipal transport company in the greater Hanover area. On account of a considerable overlap in their areas of operation their combined market shares reach a level of well above 80 per cent in the Hanover market area.

60. A special feature of local public transport is that its market structure is currently characterised by regional or local monopolies. The currently low level of intensity of competition is due primarily to the practical implementation of the regulatory framework, especially the relevant regulations of the Passenger Transportation Act (PbefG) and the General Railway Act (AEG). The low intensity of competitive pressure in the local public transport sector has led to initiatives at European level aimed at extending the awarding of contracts for transport services through competitive procedures. However, as yet no one can predict when this political process will be completed and what form it will take. Nevertheless the fact that first signs of a pressure to liberalise can be detected has led many transport companies to consider how they can adapt to potentially increasing competition. In many cases cooperation with transport companies with strong market positions such as DB AG plays an important role in this context. There is the danger, however, that the liberalisation successes envisaged will be prevented because, in anticipation of liberalisation, the transport companies will secure and strengthen their dominant positions through mergers. On the other hand it must be acknowledged that in the event of effective liberalisation it will also be necessary to adjust the corporate structure of the local public transport providers accordingly.

c) Clearances and withdrawal of application

61. The Bundeskartellamt has cleared the acquisition of Wilhelm Heyne Verlag GmbH by the publishing group Random House GmbH, a Bertelsmann subsidiary, after the participating parties limited the planned takeover to this sub-section.

62. Originally Random House had notified the acquisition of the whole Ullstein Heyne List book publishing group from Axel Springer AG. The Bundeskartellamt voiced considerable concerns against the project and issued a warning letter on 21 May 2003. As a result Random House refrained from acquiring large parts of Ullstein Heyne List and withdrew all parts of its notification other than the acquisition of Heyne. Furthermore both Heyne and Random House itself will part with several sectors of their publishing houses.

63. The planned acquisition by the Colfax Corporation, Richmond, Virginia, USA, of all the shares in Netzsch GmbH & Co. KG as well as Netzsch Beteiligungs GmbH, both based in Selb, was cleared. Colfax produces and distributes all types of pumps in Germany via various subsidiaries. Netzsch is the parent company of an internationally active group of companies producing different types of pumps and systems for various applications in wastewater treatment, the chemical and food industry, paints and dyestuffs industry and in the waste management sector. The merger affects the market for special pumps used in particular in the chemical and pharmaceuticals industry, the foods industry and in water and wastewater treatment technology. The merger leads to an addition of market shares of the two parties on the market for these pumps in Germany and thus strengthens Netzsch's position as leading supplier. At the same time the newly formed group will still be exposed to substantial competition by further major competitors and to considerable demand power and so the merger was cleared.

64. The Bundeskartellamt has cleared the planned acquisition by Invoptic S.A., Provins, France (part of the Essilor Group) of all the shares in Rupp + Hubrach GmbH & Co. KG, Rupp + Hubrach Beteiligungsgesellschaft mbH, Rupp + Hubrach Optik GmbH, Rupp + Hubrach Entwicklung und Verfahrenstechnik GmbH and Rupp + Hubrach Verwaltungsgesellschaft, all based in Bamberg.

65. The merger will result in an accumulation of the market shares on the affected domestic product markets for plastic and mineral glass ophthalmic lenses. However, inasmuch as Essilor/Rupp + Hubrach will assume a leading position on the market concerned in market share terms in the future the new group will still be exposed to substantial competition from other major manufacturers of ophthalmic lenses (Rodenstock, Zeiss, Hoya) and even smaller suppliers. This will not amount to a paramount market position. This also applies to the group of leading ophthalmic lense manufacturers as a whole. Although the number of major manufacturers will be narrowed down, thus tightening the oligopolistic structure, the substantial competition in terms of prices, conditions and innovation between the leading manufacturers prior to the merger will remain effective, making the creation of an uncompetitive oligopoly unlikely. Moreover the leading suppliers will also continue to be exposed to competition from smaller suppliers and the buying power of large optician shops and purchasing cooperatives, which can effectively respond to the anti-competitive behaviour of suppliers.

66. In the energy sector the planned acquisition of an 80.5 per cent share in Gelsenwasser AG, Gelsenkirchen, by Dortmunder Stadtwerke AG and Stadtwerke Bochum GmbH was cleared. The two companies intend to acquire, through a parity joint venture, the share which E.ON has to sell under an obligation imposed in the E.ON / Ruhrgas ministerial authorisation proceedings. The merger will not result in any overlaps in the local and regional water supply and sewage disposal markets. This also applies to the local markets for supplying natural gas to end consumers. As the planned merger therefore does not fulfil the precondition for a prohibition in any of the markets affected it could be cleared in the first phase without obligations.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

67. In the reporting period the Bundeskartellamt continued to promote the principle of competition in various ways at both national and international level.

68. It continued to actively participate in conferences and several working groups of the International Competition Network which was established in 2001.

69. When the EU Regulation 1/2003 came into force on 1 May 2003 the European Competition Network, of which the Bundeskartellamt is a member, was launched. One practical aspect of this new network is that the competition authorities of the EU member states and the Commission now inform one another of ongoing proceedings. Of the approx. 200 cases posted early August 2004 on the ECN Intranet, which was specially designed for this purpose, alone 30 of these were notified by the Bundeskartellamt.

70. Cooperation within the forum of the European Competition Authorities, which unites the competition authorities of the states of the European Economic Area, the European Commission and the EFTA supervisory authority, has also been further intensified. The Bundeskartellamt and the Economics Minister of Luxemburg hosted this year's meeting in May in Trier and Luxemburg. At the meeting the ECA Air Traffic Group submitted its third interim report and presented its paper "Report on Mergers and Alliances in Civil Aviation". In addition following a German-Dutch initiative it was decided to set up a joint database for organizing short stays in other ECA authorities, which is now online. Finally, the ECA working group on multiple filings has received the mandate to revise the principles for the joint referral of cases to the Commission.

71. At national level the Bundeskartellamt again organised the annual meeting of the Working Group on Competition Law in Bonn in 2003 at which university professors from law and economics faculties as well as judges from the cartel divisions of the Düsseldorf Higher Regional Court and the Federal Supreme Court discussed "Exemption Areas under Competition Law – State and Perspectives of the 7th Amendment of the Act against Restraints of Competition." This event met with great interest among the professional public all the more so since the 11th International Conference on Competition which was held in the May had brought more than 300 competition experts from over 50 countries to Bonn. Here under the theme "Competition Policy at the Crossroads?" answers from political, entrepreneurial and academic perspectives were sought to the challenges posed to competition law and policy by globalisation and liberalisation.

72. Finally the Bundeskartellamt has contributed to the current legislative process with its own comments on both the ministerial draft of the Federal Ministry of Economics and Labour and the government draft on the seventh amendment of the ARC. This also applies to legislative projects in the telecommunications and energy sector. In the reporting period the Monopolies Commission presented its 15th opinion and several special opinions on the telecommunications and postal sector and waste management and recycling sector, on the reforms to the Telecommunications Act and the ARC and two opinions on the planned merger of Georg von Holtzbrinck GmbH & Co. KG with Berliner Verlag GmbH & Co. KG.

4. Resources of competition authorities

4.1 Overall resources

4.1.1 Annual budget (in Euro and USD)

Budget 2004		Change vis-à-vis 2003
Euro	16,9 Mio.	+1,6 Mio.
USD ²	20,35 Mio	+1,93 Mio

4.1.2 Number of employees

	number	Change vis-à-vis 2003
Economists	43	0
Lawyers	79	+9
Other experts	9	-1
Support staff	145	-1
Total	276	+7

Updated: 30.6.2004

4.2 Human resources (person-year) applied in enforcement of abuse control of anticompetitive practices, merger review and enforcement and advocacy efforts

73. It is not possible to give a staff breakdown based on the above areas as the Bundeskartellamt's tasks are structured according to sectors of the economy and not types of procedures.

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