

The Federal Republic of Germany

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY**

**-- July 2007 – June 2008 --**

*This report is submitted by the German Delegation to the Committee on Competition for information at its forthcoming meeting on 22-23 October 2008.*

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## **EXECUTIVE SUMMARY**

### ***Legislation***

1. In December 2007, the amendment of the Act against Restraints of Competition (ARC) on abusive pricing came into force. It aims to facilitate price abuse control in the energy sector and tightens the prohibition of sales below cost price in the food sector.

### ***Organisation***

2. In January 2008, a new Decision Division for abuse control in the electricity, gas and district heating sectors was established.

### ***Agreements / abusive practices by dominant companies***

3. The Bundeskartellamt continued its fight against cartel agreements. It imposed high fines against companies in the liquefied gas and the drugstore sectors, TV advertising time marketing companies and décor paper manufacturers.
4. The gas sector was a major area of focus in abuse control this year.

### ***Merger Control***

5. A number of significant proceedings related to mobile television companies and the retail industry.
6. Among the mergers prohibited by the Bundeskartellamt was the acquisition of the CVS Ferrari group by Cargotec affecting markets for machinery used to move and handle freight containers. The acquisition of Norddeutsche Affinerie by A-TEC, concerning the markets for the production and distribution of oxygen-free copper billets, was also prohibited.

### ***Sector inquiry***

7. The Bundeskartellamt has initiated two sector inquiries, one into the markets for petrol and diesel fuel and one into the dairy products market.

## **I. CHANGES TO COMPETITION LAW AND POLICY, PROPOSED OR ADOPTED**

### **1. Summary of new legal provisions of competition law and related legislation**

8. On 22 December 2007, the latest amendment of the ARC came into force. In order to facilitate price abuse control in the energy sector, Section 29 was introduced into the ARC. Furthermore, the prohibition of sales below cost price in the food sector was tightened. The amendments will remain in force until the end of 2012 (sunset clause).

In the gas and electricity markets the amendment's objective is to make it easier for the Bundeskartellamt and the Länder competition authorities to prosecute excessive pricing. In particular, the comparative market concept (which compares prices for electricity and gas between structurally comparable undertakings) has been made easier to apply, it has been legally codified that price excess might be ascertained by means of a cost-profit-equation (a legal basis has been created for monitoring whether costs are appropriate), the burden of proof for excessive pricing has been shifted to the companies themselves, and decisions of the competition authorities have been made immediately enforceable.

By generally prohibiting the sale of foodstuffs below cost price it is intended to limit ruinous price competition in the retail food sector and to more effectively protect small and medium-sized food retailers from the unfair predatory practices of powerful business groups.<sup>1</sup>

## **2. Other relevant measures, including new guidelines**

9. The Bundeskartellamt published model texts for various kinds of remedies, i.e. suspensive and dissolving conditions and obligations, and for trustee mandates for use in merger control proceedings on its website ([www.bundeskartellamt.de](http://www.bundeskartellamt.de)). These texts have been drafted based on the experience which the Bundeskartellamt has gained in merger control practice. They contain the key elements which should normally be included in remedies and a trustee mandate. However, they cannot and are not designed to cover all possible case constellations. Rather, they allow for flexibility for amendment and adaptation to the characteristics and peculiarities of individual cases.

Although the use of the model texts is not mandatory, their use in future merger control proceedings would be advantageous for all sides: In the case of remedies, the model texts can be used to accelerate merger control proceedings because the time which would be required for negotiations on the form which remedies should take would be shortened. For example, if the model text for a trustee mandate is used in the case of a remedy involving divestiture, the remedy can be expected to meet with the Bundeskartellamt's prompt approval. Moreover, the use of the model texts is also expected to raise transparency in the application of the law and hence legal certainty for the companies participating in the merger.

## **3. Reorganisation at the Bundeskartellamt**

10. In the wake of the amendment on abusive pricing the Bundeskartellamt has established a new 10<sup>th</sup> Decision Division for abuse control in the electricity, gas and district heating sectors. The new division commenced its work on 2 January

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<sup>1</sup> See Annual Report on Competition Policy Developments in Germany – July 2006-June 2007, DAF/COMP (2007) 24/01, page 4f., marginal notes 9-15.

2008. Its main task is to examine, together with the competition authorities of the Länder, whether gas and electricity prices are reasonable under competition law.

The task will be to assess if and, where necessary, ensure that prices in the gas and electricity markets are competitive.

#### **4. Government proposals for new legislation**

11. In July 2008 the Federal Government adopted a draft amendment of section 35 par. 1 number 2 ARC. The provisions on the control of concentrations shall apply if - in addition to a combined aggregate worldwide turnover of the undertakings concerned of more than EUR 500 million – the domestic turnover of at least one undertaking concerned was more than EUR 25 million and that of one other undertaking was more than EUR 5 million in the last business year preceding the concentration.

12. The amendment of the ARC still has to pass the legislative procedure. It has to be adopted by both chambers of parliament, the Bundesrat and Bundestag, and will probably enter into force in the spring of 2009.

## **II. ENFORCEMENT OF COMPETITION LAW AND POLICY**

### **1. Action against anticompetitive practices, including agreements and abuses of a dominant position**

#### ***1.1 Statistics and summary of activities***

13. With regard to cartel detection, from July 2007 to June 2008 the Bundeskartellamt received 30 leniency applications. It conducted 21 dawn raids in administrative offence proceedings, of which 9 were inspections conducted on behalf of the European Commission.

14. In the period covered by the report, the Bundeskartellamt imposed several fines for anti-competitive behaviour, i.e. approximately EUR 216 million against TV advertising time marketing companies, about EUR 208 million against companies in the liquefied gas sector, about EUR 62 million against manufacturers of décor paper and a further EUR 36 million against manufacturers of drugstore products.

#### ***1.2 Description of significant cases***

Some of the cases described below may still be pending and some decisions have not yet become binding.

### **1.2.1 Agreements**

#### **Cartels**

15. The Bundeskartellamt examined whether the German Football League's (DFL) new model for the central marketing of broadcasting rights to the 1<sup>st</sup> and 2<sup>nd</sup> German Football league from the 2009/2010 season onwards was compatible with competition law. Being a price cartel, the central marketing scheme of the broadcasting rights is, in principle, an anti-competitive agreement. Under German and European cartel law it can only be exempted from the ban on cartels if it is indispensable for achieving efficiency gains and the consumers, i.e. the football television viewers, receive a fair share of the resulting profits.

In the Bundeskartellamt's view the proposed model did not meet the requirement for adequate consumer participation. The Bundeskartellamt envisages this requirement as being satisfied if end consumers still have the opportunity to choose between combined pay TV live coverage and prompt free-to-air coverage of the highlights of the games. In this way consumers benefit from both free-to-air and pay television. According to the assessment of the market participants, which is also shared by the Bundeskartellamt, a key advantage of central marketing is that it enables combined coverage of the highlights. This enhances product diversity by allowing the TV viewer to gain a general picture of the matchday in a manageable timeframe. Above all, the availability of prompt free-to-air highlight coverage following the games limits the scope of the acquirer of the combined live pay TV broadcasting rights for setting prices. Offering consumers a sufficiently attractive opportunity to switch to free-to-air TV would prevent any paramount market position associated with an exclusive combination of live broadcasting rights from being abused by charging excessive pay TV subscription fees.

The Bundeskartellamt sees such freedom of choice as guaranteed if highlight coverage constitutes an integral part of the matchday and if this is broadcast shortly following the games at a time when a wide section of the population can be accessed. The tendering procedure proposed by DFL would most probably not have allowed for this outcome.

After having been informed about the Bundeskartellamt's assessment, DFL proposed final changes to its marketing scheme. However, even with these changes, the proposed model did not meet the requirement for adequate consumer involvement. Consequently, the central marketing scheme will be formally prohibited should DFL adhere to this model.

16. In November 2007 the Bundeskartellamt imposed fines totalling EUR 216 million against the advertising time marketing companies of the two private broadcasting groups RTL and Pro7Sat.1. On the grounds of anti-competitive discount agreements, which the marketing companies IP Deutschland GmbH, active for RTL, and SevenOne Media GmbH, active for Pro7Sat1, concluded with media agencies or the advertising industry in the form of contracts for the broadcast of television advertising spots, the Bundeskartellamt issued orders imposing fines of EUR 96 million (RTL) and EUR 120 million (Pro7Sat1).

Firstly, the discounts concerned were so-called proportional or share discounts. Under these agreements the media agencies were granted substantial discounts and other refunds if they placed a certain large proportion of their advertising budget with the two large marketing companies and not with smaller broadcasters. This was due to the fact that the discounts were granted retrospectively for the entire budget, i.e. not only for the amount in excess of the discount thresholds. This incentive effect foreclosed the TV advertising market to smaller, less powerful broadcasters and generally made access to the market more difficult. Secondly, the anti-competitive discounts were in the form of retroactive quantity discounts which have their own negative effect on competition. In view of the companies' joint market share of more than 80 per cent on the television advertising market affected, the discount system practised by RTL and Pro7Sat1 violated German and European competition law.

The proceedings were based on a search of the premises of both advertising time marketing companies and a number of media agencies in June 2007, during which substantial evidence of the existence of the anti-competitive agreements was seized. RTL and Pro7Sat1 had already announced their acceptance of the fines at the beginning of October. Thus, the orders became legally binding. Since then both broadcasters have introduced new discount systems.

17. The Bundeskartellamt imposed a fine totalling EUR 10.34 million against Bayer Vital GmbH, the German pharmaceuticals distributor of the Bayer group. Bayer Vital had influenced in an anti-competitive manner the resale prices of non-prescription medicines sold in pharmacies.

Since 2004 pharmacies are free to set their own prices for non-prescription pharmaceuticals. Against this background, agreements between the manufacturer and the retailer, i.e. the pharmacy, which are aimed at influencing the sales price, are inadmissible. However, Bayer Vital concluded so-called target agreements with several pharmacies in which, inter alia, they were promised an additional discount for "positioning Bayer products as premium products". To obtain this "partnership bonus" the pharmacies had to essentially observe Bayer Vital's non-binding price recommendation; time-limited price campaigns were tolerated, but not permanently low prices.

In calculating the fine the Bundeskartellamt took into account the fact that the company had cooperated with the authority following the search and thus been of considerable assistance in the fact-finding process. Another aspect which helped to reduce the fine was the fact that the company had voluntarily discontinued its inadmissible conduct. Since Bayer Vital accepted the fine, the order became legally binding. As this would be a minor accusation applying to each individual pharmacist, no prosecution proceedings were brought against the approximately 11,000 pharmacists who concluded target agreements with Bayer Vital.

18. In December 2007 the Bundeskartellamt imposed fines totalling EUR 208 million against seven liquefied gas suppliers and their directors on the grounds of agreements aimed at protecting their respective consumer bases. The companies



involved are active in the supply of private and commercial customers with liquefied gas in small tanks (up to 5.6 t) or bottled gas. Among the companies involved were the German subsidiaries of suppliers of liquefied gas and mineral oil active in many European countries. Proceedings against four other companies are still pending.

An evaluation of the documents and files seized during the search of the companies in May 2005 had revealed that the leading liquefied gas suppliers, especially the members of the German Liquefied Gas Association (DVFG), had agreed, at least since 1997, not to poach customers from one another. Customers of rival companies were not allowed to be poached by the staff of other suppliers. The cartel agreement in the tank gas business was secured by a system of "notification of competition": Information was exchanged about enquiries from customers and compensation was mutually offered in the event of a successful change of supplier. The report centre was the transport company, Transgas, which was jointly operated by several cartel participants. In the case of bottled gas, so-called bottle pools formed the basis of the customer protection agreement. As a consequence, the prices of the companies participating in the agreement, i.e. around half of the German market, reached levels well above those of smaller, so-called independent suppliers. Although liquefied gas as a product is equally homogeneous as, e.g. heating oil, there were price differences of up to 100 per cent as a result of the cartel.

As the violations occurred before the new guidelines on the setting of fines came into effect, the Bundeskartellamt calculated the fines based on the old system of determining the additional proceeds. In doing so it took the prices of the independent suppliers as a standard for calculating the considerable additional proceeds generated by the cartel.

19. The Bundeskartellamt imposed fines totalling approximately EUR 37 million against four brand manufacturers of drugstore products and their sales managers for coordinating price increases (EUR 19 million) and exchanging information about the state of annual talks with retailers (EUR 18 million). The proceedings had been initiated on the basis of a leniency application.

At the turn of the year 2005/2006 the companies had agreed to increase the list prices by around five per cent for several drugstore products. The brands concerned were almost identically positioned in price in their product areas and were therefore in close competition with one another. Furthermore, these brand product manufacturers, along with further companies in the sector, had for years been involved in an exchange of information about negotiations with retailers. The aim was to influence the market behaviour of the competitors or to dispel uncertainty from the outset about the competitors' future market behaviour.

20. At the end of January 2008 the Bundeskartellamt imposed fines totalling EUR 62 million against three manufacturers of décor paper and five persons responsible on account of price fixing and agreements on capacity shutdowns. The companies are subsidiaries of the three major European manufacturers of décor

papers. Décor papers are specialty papers for the surface refinement of wood products. They are primarily used in the furniture industry and for interior fittings.

The proceedings started with a search carried out in November 2007. Three premises were searched in Germany and, upon request by the Bundeskartellamt, on further premises in Sweden. Substantial evidence was seized. The agreements involved coordinated price increases over a period from at least August 2005 until early November 2007. Furthermore, in the second half of 2007, the cartel members also agreed on coordinated capacity shutdowns to reduce over-capacities in the market.

### **Cooperations**

21. The Bundeskartellamt ended its examination under competition law of plans by the three mobile phone network operators T-Mobile Deutschland GmbH, Vodafone D2 GmbH and O2 (Germany) GmbH & Co. KG to set up a joint venture to create and operate a mobile television broadcasting platform based on DVB-H Standard. This project is connected with the invitation to tender for DVB-H frequencies and the TV content for these frequencies put out by the Federal Network Agency and the media regulation authorities of the Länder. As part of the joint venture the three mobile telephone network operators wished to jointly perform technical services which are necessary to produce and transmit digitalized TV signals, to purchase programme content and to bundle the content into programme packages for mobile TV which is based on the DVB-H standard.

According to the Bundeskartellamt's preliminary assessment the cooperation would have led to restraints of competition, especially in the newly emerging market for mobile broadcasting. However, T-Mobile, Vodafone and O2 offered commitments which were sufficient to eliminate these concerns.

#### ***1.2.2 Abuse of a dominant position***

22. In March 2008 the Bundeskartellamt opened abuse proceedings on the basis of the new Section 29 of the Act against Restraints of Competition against approximately 35 gas suppliers on the grounds of their charging abusively excessive gas prices to household and commercial customers. Involved in the proceedings are companies from all regions of Germany, municipal and rural suppliers, independent municipal utilities, and providers which are associates of the four major grid companies. Specifically concerned in the proceedings is the market for the supply of mineral gas to standard load profile customers, i.e. household and commercial customers which are billed on a consumption-only basis. With approximately 4 million customers and a sales volume of approximately 100 billion kWh the abuse proceedings against the companies involved cover near to 20 per cent of the market.

A preceding nationwide survey of the prices of all established gas suppliers active in this area of supply<sup>2</sup> had shown that in some cases there are considerable differences in price of 25 per cent to 45 per cent and more between the companies. In comparing gas prices paid by the end consumer, the Bundeskartellamt deducted the approved network fees as well as taxes and licence duties. This allowed for a much more precise basis for assessment and was likely to leave the companies little room to justify their behaviour with any special characteristics of their specific supply area. The price components examined by the Bundeskartellamt accounted for a good 55 per cent of the gross price, which the end consumer sees on his gas bill and which can be compared with other prices on internet portals established for this purpose.

Of the approximately 770 gas suppliers in Germany, only 30 companies providing basic cross-Länder gas supplies fall automatically within the Bundeskartellamt's area of competence, the others falling within the area of competence of the respective Land competition authority. Some Land competition authorities have already initiated proceedings. Furthermore, at the Bundeskartellamt's request, many Land competition authorities have either referred several gas suppliers with high gas prices from their area of competence to that of the Bundeskartellamt or plan to do so. Further proceedings are therefore likely to follow.

23. In October 2007 the Bundeskartellamt issued a decision establishing that Netto Marken-Discount, a subsidiary of the food retail company EDEKA, had violated the ban on selling not merely occasionally below cost price. The company had offered various dairy products below their respective cost prices, in some cases almost 40 per cent below this level, in December 2006 and in January and February 2007. With its decision the Bundeskartellamt showed that the prohibition of sales below cost price in its then valid form was sufficient to protect small and medium-sized companies from being squeezed out of the market by such actions of powerful companies.

### ***1.3 Activities of the courts***

24. The Bundeskartellamt prohibited the company Soda Club from abusing its dominant position. Soda Club had prevented competing suppliers from refilling CO<sub>2</sub>-cartridges for water carbonating machines by claiming its ownership of the cartridges. On 4<sup>th</sup> March 2008 the Federal Court of Justice confirmed the Bundeskartellamt's decision. Soda-Club is dominant in the market for refilling CO<sub>2</sub>-cartridges. Hindering competitors from refilling CO<sub>2</sub>-cartridges represents an abuse of this dominant position. By this conduct Soda-Club prevents consumers from taking advantage of alternative refilling possibilities.<sup>3</sup>

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<sup>2</sup> See Annual Report on Competition Policy Developments in Germany – July 2006-June 2007, DAF/COMP (2007) 24/01, page 10, marginal note 55.

<sup>3</sup> See Annual Report on Competition Policy Developments in Germany – July 2006-June 2007, DAF/COMP (2007) 24/01, page 12, marginal note 63.

25. In the gas market a decision of the Bundeskartellamt has also been confirmed on the merits by the Düsseldorf Higher Regional Court. The case involved long-term gas supply contracts between E.ON and regional providers. These contracts obliged regional providers to purchase 80 to 100 per cent of their gas requirements from E.ON and ran for periods of 4 to 20 years. In 2006 the Düsseldorf Higher Regional Court had already rejected an application by E.ON Ruhrgas in expedited proceedings for its appeal to have suspensive effect. The court argued that the agreements were likely to restrict competition in the gas market. By committing regional providers to purchase nearly all their gas requirements from E.ON Ruhrgas AG, the latter was hindering them from procuring their requirements from other suppliers. In the court's opinion, even E.ON Ruhrgas's offer to conclude several short-term contracts with one customer involving various supply quantities and contract periods ("serial contracts"), restricted competition. This would involve the risk of smaller companies, in particular, remaining with the familiar contract partner and not even procuring partial amounts of gas (which would no longer be contract-bound) from third suppliers. An appeal on points of law against this decision is still pending at the Federal Court of Justice (BGH).

26. In a cartel case in the paper wholesale sector the BGH had to calculate the so-called "additional proceeds". Additional proceeds represent the difference between the actual revenue of a company and the revenue which it would have earned without the cartel. For infringements of the ban on cartels, the ARC originally stipulated a fine level of three times the additional proceeds earned from a cartel. Since an amendment to the law in 2007 the level of fines has changed and, in line with European law, now provides for fines of up to 10 per cent of the annual turnover of the company concerned. However, in the cases of cartels which took place before the amendment, the courts have to determine which range of fines is more favourable for the company in question. In calculating the additional proceeds, the Düsseldorf Higher Regional Court could not find a suitable comparable market for establishing the actual market price. It therefore based its calculations on a hypothetical market price. As in this particular case the companies participating in the cartel in some cases deviated from the price agreed by the cartel, the court calculated an "average undercutting price" based on these individual cases. The BGH rejected this approach. Its argument was that even where agreed prices were undercut, this was not a sign of well-functioning competition because prices deviating from the negotiated price were still based on the price agreed by the cartel. The BGH referred the Düsseldorf Higher Regional Court to the comparative market concept. In the absence of a suitable comparative market in Germany, comparative markets had to be found abroad. Only in the absence of any suitable comparative markets would the need arise to determine an abstract market price based on an overall economic analysis. In the case of cartels in the trade sector, this could be estimated on the basis of manufacturer prices, cost structures and return on turnover. The BGH has returned the case to the Higher Regional Court.

27. The Düsseldorf Higher Regional Court has considered as admissible an appeal in which more than 35 companies affected by a cement cartel active in Germany have assigned their claims to a Belgian company. This company is now

claiming compensation for damages in civil proceedings on their behalf. The Higher Regional Court has established that the appealing company has the right of action and can sue for damages even if it itself has no economic interest in receiving compensation. Proof of holding the right to assert the claim is sufficient for the claim to be admissible. The Bundeskartellamt has already imposed high fines against the companies participating in the cartel.

## **2. Mergers and acquisitions**

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

28. In 2007, 2,240 mergers were notified to the Bundeskartellamt. The number of notifications in 2007 exceeded the previous record level of 1,829 in 2006. Main examination proceedings were initiated in 30 cases.

29. 50 percent of all notifications have been submitted because they fulfilled the criteria of a combined purchase of share and control under merger control law. Other criteria for notification have been of subordinate significance.

30. In the period covered by the report the Bundeskartellamt prohibited 7 mergers and cleared 9 mergers subject to conditions and obligations.

## **2.2 Summary of significant cases**

### **2.2.1 *Prohibition or prevention of mergers***

31. In August 2007 the Bundeskartellamt prohibited the acquisition of the Italian CVS Ferrari group by the Finnish Cargotec Cooperation after it was obvious that the parties would not agree to commitments.

The planned merger would have had a considerable effect on competition in Germany. The merger affected at least Europe-wide markets for machinery used to move and handle freight containers. This equipment is bought by container ports, container rail terminals and other logistic services providers. A thorough examination was carried out of the markets for various machinery used to transport and stack containers such as so-called terminal tractors, container stackers, reach stackers and straddle carriers.

The investigations revealed that Cargotec and Fantuzzi (brand name: Noell) already have a dominant duopoly on the straddle carrier market with roughly equal market shares worldwide and European-wide. The acquisition of CVS Ferrari would have further strengthened this duopoly. This became especially clear from the fact that CVS Ferrari had been planning a market entry into this segment. Prototypes of a straddle carrier had already been in operation. The sale of CVS Ferrari to Cargotec would have eliminated this emerging competition from the outset.

32. The Bundeskartellamt prohibited A-TEC Industries AG, Vienna, from acquiring a competitively significant influence on Norddeutsche Affinerie AG, Hamburg ("NA"), and ordered the dissolution of the merger, which had already been put into effect. A-TEC held 13.75 per cent of the shares in NA. As a result of the decision to dissolve the merger, A-TEC was obliged to sell all the shares it acquired in its infringement of the ban on putting a merger into effect.

The merger would have led to the creation of a dominant position in the market for oxygen-free copper billets. A-TEC and NA are the largest competitors in the manufacture and distribution of oxygen-free copper billets in the EEA. Whilst before the merger the buyers of oxygen-free copper billets could choose between two equal suppliers which were independent of one another, the two parties concerned were expected to coordinate their behaviour in the market as a result of the merger. Customers have had no real alternatives to switch to another supplier. The market entry of other copper manufacturers was unlikely because of the specific requirements of the production of oxygen-free copper billets.

According to the Bundeskartellamt's evaluation, the stake of 13.75 per cent of the shares in NA acquired by A-TEC gave it a competitively significant influence on NA. In view of the constantly low voting presence at NA's annual general meetings in recent years, the shares held by A-TEC virtually represented a blocking minority comparable to a 25 per cent share acquisition. Moreover, all NA's shareholders, with the exception of A-TEC, had no expertise whatsoever in the copper sector and did not pursue any long-term strategies interests which would influence the competitive behaviour of NA. A-TEC, on the other hand, was itself active in all NA's key areas of business.

33. The Bundeskartellamt prohibited the Land of Rhineland-Palatinate from acquiring a majority stake of 51% in the lottery company Lotto Rheinland-Pfalz GmbH. Lotto Rheinland-Pfalz GmbH is the only remaining lottery company in Germany in which one of the Länder does not hold a majority stake. Currently, the shares are held by the three sports associations (so-called Sportbünde) in Rhineland-Palatinate. With its diverse lottery products which are sold at more than 1,200 lottery collection points and little residual competition, Lotto Rheinland-Pfalz GmbH holds a dominant position in the Rhineland-Palatinate lottery market. In addition, there are high legal and factual barriers to market entry due to the strict regulation of lotteries by the State Treaty on Lottery and the State Treaty on Gambling, which came into force on 1 January 2008.

The acquisition of a majority stake by the Land of Rhineland-Palatinate would have strengthened this dominant position. The strongest competitor in the lottery market of Rhineland-Palatinate is the South German Class Lottery, which is jointly operated by the Länder of Baden-Württemberg, Bavaria, Hesse, Rhineland-Palatinate, Saxony and Thuringia. The merger would have created a structural link between Lotto Rheinland-Pfalz GmbH and the South German Class Lottery which would have largely eliminated the remaining competition.

34. With its prohibition of the acquisition of a minority share in the asphalt mixing plant Langenthal GmbH & Co. KG by the road construction company Faber, the Bundeskartellamt made it clear that it also prohibits mergers of companies in the building materials industry which bear a supply relationship to one another (vertical competition restraints) if these mergers strengthen the dominant position of the supplier. Faber is a road construction company with one of the highest turnovers in this sector in Rhineland-Palatine. The sole owner of the asphalt mixing plant concerned in Langenthal near Bad Kreuznach is the Werhahn group which would have remained the majority shareholder after the merger. The planned merger would have strengthened the already dominant position of the Werhahn group in the production and distribution of asphalt in the Bad Kreuznach area.

### ***2.2.2 Clearances subject to conditions and obligations***

35. The acquisition by Globus Fachmärkte GmbH & Co. KG of the DIY business of the Distributa group was cleared by the Bundeskartellamt with the obligation to sell four DIY stores to an independent store operator. The merger concerned the takeover of 31 large building supplies and DIY markets ("hela Profizentren") with a domestic turnover of more than EUR 350 million. Whereas in most of the relevant markets affected the project raised no concerns under merger control law, the concentration was likely to create a dominant position in four regional sales markets. In order to satisfy the requirements for clearance the companies concerned have to sell one DIY store in each of the regional markets concerned.

36. In July 2008 the Bundeskartellamt cleared the project of a joint venture mutually controlled by the food retail chains EDEKA and Tengelmann subject to suspensive conditions. The undertakings intend to merge the two food discount chains 'Netto Marken-Discount' and 'Plus' and to operate the joint venture under the name 'Netto Marken-Discount'. The concentration affects the German food retail market which has undergone a radical consolidation process in recent years. Today about 90% of the domestic market volume is accounted for by the five major retail companies whereby EDEKA is the market leader with a market share of 25 %. The planned concentration thus entails the merge of the number 1 and 5 in the German food retail trade.

The Bundeskartellamt divides the food retail sector in Germany into 345 regional sales markets. Approximately 100 of these markets were examined in more detail. All trading companies with considerable market significance were included in the investigation. According to the Bundeskartellamt's findings, the market shares of EDEKA substantially exceed those of its next largest competitors. The highly concentrated markets fall almost exclusively into so-called "clusters" of neighbouring markets where EDEKA also holds high market shares. Also in a regional market assessment EDEKA's market leadership therefore poses a more than regional problem even today. This market leadership would have been further

strengthened by the merger. The concentration would intensify the already high level of market concentration in the procurement of goods, leading to an even greater dependence of the suppliers. An expansion of EDEKA's position in the procurement markets would also further strengthen its market position in the sales markets.

To avoid a prohibition, EDEKA and Tengelmann approached the Bundeskartellamt with an offer to undertake certain commitments. The case could be closed after intensive negotiations had resulted in a commitment solution. According to this solution Tengelmann will, before the concentration can be put into effect, sell all those outlets which are located in markets which the Bundeskartellamt considers to be problematic to one or several (a maximum of three) purchasers. These will number almost 400 sites. Furthermore, the purchasing cooperation between EDEKA and Kaiser's Tengelmann was found to be inadmissible.

### **2.2.3 Clearances and withdrawal of application**

37. After thorough examination the Bundeskartellamt cleared the takeover of the airline LTU by Air Berlin. In the investigation proceedings, the market for flight services to holiday destinations which, apart from the classical charter business also includes the sale of single seats, was examined. The investigation showed that consumers are increasingly buying their flights not as part of a package tour but individually as part of a holiday trip which they arrange themselves. Although the companies' flight offers overlapped on a number of routes, on some of which both have high market shares, Air Berlin / LTU do not have a dominant position. According to the Bundeskartellamt's findings there continues to be sufficient potential or actual competition on individual routes.

38. The Bundeskartellamt cleared the joint venture to create and operate a platform for the broadcasting of mobile television based on the DVB-H standard by the three mobile phone network operators T-Mobile Deutschland GmbH, Vodafone D2 GmbH and O2 (Germany) GmbH & Co. KG. In separate proceedings this project was also examined under the aspect of a cartel agreement.<sup>4</sup> From a merger control perspective, according to the Bundeskartellamt's assessment, the project will not result in the creation or strengthening of a dominant position of the participating companies in the affected markets.

The Bundeskartellamt examined markets which are directly linked with the broadcasting of radio/TV programmes (final consumer market for mobile television, market for the wholesale of programme packages for mobile radio and TV, market for the acquisition of marketing rights for programmes). It was expected that the joint venture of the parent companies T-Mobile, Vodafone and O2 will achieve considerable shares in all the markets concerned. However, since these are newly emerging technology markets which are still in the experimental phase, the market shares to be expected are not yet so stable that they could substantiate a

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<sup>4</sup> For further details see marginal note 21 above.



dominant position. Besides, the three companies have hardly ever been active, if at all, in these markets. Furthermore, the Bundeskartellamt examined whether the creation of the joint venture could have an effect on the market positions of its parent companies in the mobile telephone and consumer markets for data services and voice telephony (including SMS). In detail, it examined whether, in view of the combined high market share of T-Mobile, Vodafone and O2, the merger would lead to the creation or strengthening of collective dominance (so-called oligopoly). The market for mobile telephone data services is, however, still a young, dynamic market, which offers little incentive for oligopolistic parallel conduct. In the case of the mobile cellular telephony market, the strategic importance of mobile TV in terms of narrow-band telephone services is minor, so that again here the creation or strengthening of an oligopoly is not to be expected.

39. The Bundeskartellamt cleared the acquisition of seven subsidiaries of Orion Cable GmbH by Kabel Deutschland GmbH (KDG). The acquired companies mainly operate broadband cable networks (level 4) in several Länder. The merger affected around 1.2 million households. In its assessment the Bundeskartellamt made use of the balancing clause of the Act against Restraints of Competition. The positive effects of the acquisition outweighed the negative effects for competition. On the one hand the Bundeskartellamt established that the merger would have disadvantages for competition: KDG's dominant position for feeding in broadcast signals into the broadband cable networks would be strengthened. There were also strong indicators that the merger could lead to a strengthening of KDG's dominant position in the final customer market and the signal supply market. On the other hand the parties to the merger were able to prove that the concentration would improve competitive conditions in the markets for broadband connections (DSL) and narrow-band connections. Cable network operators are increasingly offering internet access and telephony in addition to the transmission of TV signals ("triple play"). The internet and telephony market via DSL is still in an expansion phase. As a result of the merger, KDG will be in a position for the first time to offer over 800,000 households internet and telephony services via broadband cable. Without the merger these offers would have been unlikely or at best might have occurred at a later time. The positive effect of the merger is the intensification of infrastructure competition, which will to a large degree no longer be reliant on the input provided by Deutsche Telekom AG, which is still dominant in the telecommunications markets.

## **2.3 Activities of the courts**

40. The Federal Court of Justice (BGH) dismissed an appeal on points of law lodged by the Rhön-Klinikum AG and the administrative district of Rhön-Grabfeld against a decision of the Düsseldorf Higher Regional Court. The Düsseldorf Higher Regional Court had confirmed a decision of the Bundeskartellamt in which the authority had prohibited Rhön-Klinikum AG from acquiring two district hospitals (Bad Neustadt District Hospital and Mellrichstadt District Hospital) from the

administrative district of Rhön-Grabfeld. In its decision the Bundeskartellamt established that Rhön-Klinikum AG already held a dominant position in the geographic markets affected. The acquisition of the two district hospitals would have further strengthened this dominant position. The BGH's decision confirmed the Bundeskartellamt's opinion in the last instance.

41. The Bundeskartellamt's prohibition decision in the Springer/Pro7Sat.1 merger case met with great interest in the general public. According to a decision by the BGH, this prohibition decision has now to be reviewed with regard to its legitimacy, although Springer has declared that it has given up the merger project. Due to this declaration the Düsseldorf Higher Regional Court had rejected Springer's appeal against the prohibition decision as inadmissible. The BGH did not follow this decision: Often, a prohibited merger had to be given up due to economic pressure before a judicial review had been conducted. Where, for example, a merger project was abandoned because the buyer was not willing to await the result of the court proceedings, a prohibition decision became obsolete. However, the buyer always had a significant interest in the clarification of the legal position where he had to expect that arguments from the previous decision would be applied to future acquisitions and that these might be prohibited on the grounds of these arguments. The BGH has therefore referred the case back to the Düsseldorf Higher Regional Court.

42. In the Sulzer/Kelmix case the BGH has made a fundamental judgement on the interpretation of the so-called "minor market clause". Accordingly, mergers are not subject to control where they affect a market in which a turnover of less than EUR 15 million is achieved. The BGH established that the term "market" within the meaning of the ARC refers only to domestic revenue. Although it was true that in the examination of a merger in terms of content the geographic market could be defined as larger than the German market, (which, incidentally, was also clarified by the 2007 amendment to the Act) and accordingly markets were to be defined under economic aspects, this did not apply to the minor market clause, whose function was that of a threshold to remove economically insignificant cases from merger control. The minor market clause therefore took account of the significance of markets in relation to the overall German economy.

43. The Phonak/Resound case, which concerned the market for hearing aids, included the request of the merging parties for permission to put the merger immediately into effect. The parties had appealed against a prohibition decision of the Bundeskartellamt and, due to the urgency of the case, had applied for an interim order at the Düsseldorf Higher Regional Court requesting the permission to put the merger immediately into effect. The court rejected this request. According to it, an interim order was not admissible due to the fact that the ARC provided for specific proceedings under Section 41 (2) ARC to cover such urgent cases. Accordingly, only the Bundeskartellamt had the capacity to grant an exemption from the statutory prohibition to implement a merger, for example, to prevent serious damage. The court argued that this was a conclusive special regulation that did not leave any

room for a judicial exemption from the prohibition to implement. The Higher Regional Court has allowed an appeal on points of law in this matter.<sup>5</sup>

### **3. *Sector inquiries***

44. The Bundeskartellamt has initiated an inquiry into the state of competition in the markets for petrol and diesel fuel. The aim of the inquiry is to assess whether the fuel markets in Germany are functioning properly. As a first step, the so-called sector inquiry will examine general market conditions and identify possible distortions of competition. Should there be any indications of violation of competition law, appropriate action will be taken.

The extensive inquiry was launched following numerous complaints by consumers and information provided by independent filling station operators. While many motorists categorically distrust the pricing of petroleum and diesel fuel, independent filling station operators also accuse the large fuel companies of applying a margin squeeze by charging wholesale supply prices that are higher than the respective retail charges at their own filling stations.

45. The Bundeskartellamt has also initiated a sector inquiry in the dairy sector to identify the factors that affect the prices of the dairies and food retailing.

46. There are no results that can be reported so far.

## **III. THE ROLE OF COMPETITION AUTHORITIES IN THE FORMULATION AND IMPLEMENTATION OF OTHER POLICIES, e.g. REGULATORY REFORM, TRADE AND INDUSTRIAL POLICIES**

47. In the reporting period the Bundeskartellamt promoted the principle of competition in various ways at both national and international level.

### ***ICN***

48. The Bundeskartellamt continued to actively participate in the conferences and working groups of the International Competition Network (ICN). The Bundeskartellamt co-chaired the ICN Unilateral Conduct Working Group together with the US Federal Trade Commission. For the 7th ICN Annual Conference in Kyoto, Japan, the Working Group developed recommendations for the assessment of dominance/substantial market power and for the treatment of state created monopolies and presented reports on predatory pricing and exclusive dealing.

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<sup>5</sup> See Annual Report on Competition Policy Developments in Germany – July 2006-June 2007, DAF/COMP (2007) 24/01, page 15, marginal note 86-89.

## **ECN/ECA**

49. With the implementation of Regulation 1/2003 on 22 December 2002, the European Competition Network (ECN) has significantly vitalised the cooperation among national competition authorities. Years of practice show that the cooperation possibilities (particularly the exchange of information and mutual assistance in investigations) play an important role in the ECN.

50. By the end of June 2008 a total of 913 cases had been posted on the joint intranet of the competition authorities. The Bundeskartellamt itself notified 91 of its own cases. Use has also been made of the competences on the exchange of information and official assistance. In the period covered by the report, the Bundeskartellamt exchanged confidential information with other competition authorities in the ECN on the basis of Article 12 of Regulation 1/2003 on more than 20 occasions and was involved in two proceedings conducted under Art. 22 of Regulation 1/2003.

51. Within the forum of the European Competition Authorities (ECA), which was established in April 2001 and comprises the competition authorities of the states of the European Economic Area, European Commission and the EFTA supervisory authority, a meeting took place in April 2008 in Budapest of the heads of the authorities. This meeting dealt, inter alia, with the issue of buyer power, priority setting and sanctions and fines in the Member States. The ECA Working Group on sanctions and fines, led by France and Italy, presented its report on financial sanctions imposed on undertakings for infringements of antitrust law under the title “Principles for convergence”. This Working Group has since completed its work.

52. A new “Working Group on Commitment Decisions” was set up to deal with commitments, which is to be co-chaired by Spain and the European Commission.

### ***Annual Meeting of the Working Group on Competition Law***

53. On 20 September, 2007, at the invitation of the Bundeskartellamt, the Working Group on Competition Law, a meeting of competition experts, esp. academics and judges, held their annual conference in Bonn and discussed the future of abuse control under a more economic approach to competition law. Among the participants were university professors from economic and legal faculties as well as judges from the cartel divisions of the Federal Court of Justice and the Düsseldorf Higher Regional Court and the Director General for Competition of the European Commission. A Bundeskartellamt working paper on “The Future of Abuse Control in a More Economic Approach to Competition Law” formed the basis of discussion.

The discussion raised a number of issues concerning the conceptual basis of competition law, e.g. the object of protection of a competition authority's work and the application of competition law in practice.

### ***Franco-German Competition Day***

54. On 19 June 2008 the 3rd Franco-German Competition Day was held on the premises of the École Nationale de l'Administration, ENA in Strasbourg/France. The theme of this year's meeting was: "Antitrust Enforcement in the Energy Markets in France and Germany". Among the 103 participants were members of the French and German competition and regulatory authorities, as well as representatives of companies, university professors and judges.

The participants agreed that antitrust enforcement in the energy sector posed a special challenge in both countries. Even after the liberalisation of the sector, the traditionally high market concentration of former monopolists constitutes the greatest obstacle to effective competition.

### ***Enhancing the principles of competition***

55. The Bundeskartellamt enhanced the principle of competition by offering its comments on legislative projects at European level as well as national level.

56. In addition to numerous informal comments, it gave its written opinions in 14 cases on draft amendments at national and European level concerning competition related matters such as the energy and the telecommunications sector, public procurement law and the health sector.

## **IV. RESOURCES OF COMPETITION AUTHORITIES**

### ***4.1 Annual budget (in EUR and USD)***

| <b>Budget 2008</b>        | <b>Change over 2007</b> |
|---------------------------|-------------------------|
| EUR 18.3 mio              | +1.3 mio                |
| USD <sup>6</sup> 27.0 mio | +4.19 mio               |

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<sup>6</sup> Exchange rate as of 15 August 2008; 1 EUR = 1.472900

#### 4.2 Number of employees

|                      | Number 2008 | Change over 2007 |
|----------------------|-------------|------------------|
| <b>Economists</b>    | <b>52</b>   | +10              |
| <b>Lawyers</b>       | <b>88</b>   | +15              |
| <b>Other experts</b> | <b>6</b>    | +/- 0            |
| <b>Support staff</b> | <b>172</b>  | +8               |
| <b>Total</b>         | <b>318</b>  | +33              |

Updated: 15 August 2008

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