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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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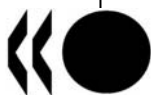
**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY**

**-- 2008 --**

*This report is submitted by Germany to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 21 - 22 October 2009.*

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## **Executive Summary**

### ***Legislation***

1. In March 2009 the amendment of Section 35 (1) no. 2 of the Act against Restraints of Competition (ARC) came into force. It introduces a second domestic turnover threshold to merger control. The amendment is in line with international recommendations and conduces to a more efficient merger control by concentrating on those mergers which are more likely to pose competition problems.

2. In February 2009 a motion for the modernization of the public procurement law was passed.

### ***Organisation***

3. In October 2008 the Bundeskartellamt established a 12<sup>th</sup> Decision Division. It deals with the prosecution of cartel infringements.

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

4. The Bundeskartellamt continued its fight against cartel agreements. It imposed high fines against companies in the clay roof tile, the gas and the mortar sectors.

5. The gas sector was a major area of focus in abuse control in the period under review.

### ***Merger Control***

6. A number of significant proceedings related to the food sector and petrol companies.

7. Among the mergers prohibited by the Bundeskartellamt was the acquisition of SimonsVoss AG by the Swedish Assa Abloy group affecting markets of mechatronic and electronic locking cylinders. The acquisition of the petrol station network of OMV Deutschland GmbH (active in the east of Germany) by the Total Deutschland GmbH was also prohibited.

### ***Sector inquiry***

8. The Bundeskartellamt further pursued its sector inquiry into the fuel market. First results were published in an interim report. The data obtained in the sector inquiry into the dairy market is currently being analyzed. Further market studies have been initiated in the field of transport and distribution of natural gas and in the field of electricity production and wholesale.

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

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

9. On 25 March 2009 the German Parliament passed a law introducing a second domestic turnover threshold for German Merger Control (Section 35 (1) no. 2 ARC). This amendment of Section 35 (1) no. 2 ARC was incorporated in the "Third Act to reduce bureaucratic burdens in particular for small and medium sized enterprises (Drittes Mittelstandsentslastungsgesetz)". The provisions on merger control now 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 another was more than EUR 5 million in the last business year preceding the concentration. It is expected that the introduction of the second domestic turnover threshold will reduce the number of

transactions that have to be notified to the Bundeskartellamt in Germany. In particular ‘foreign to foreign’ transactions or German acquisitions of foreign companies with little business in Germany will in the future be exempted from notification requirements.

10. In December 2008 the German Parliament passed a motion for the modernization of the public procurement law. In February 2009 the Bundesrat accepted the law. The new law stipulates that additional, especially social, environmental or innovation-oriented demands can be placed on the contractor, if they are objectively related to the subject of the contract to be awarded and evident in the specification of the services. Services have to be allocated separately according to type, specialist field and quantity. Contracts assigned without award procedure are from now on invalid.<sup>1</sup>

## **1.2 Reorganisation at the Bundeskartellamt**

11. In October 2008 the Bundeskartellamt established a 12<sup>th</sup> Decision Division. Both the 11<sup>th</sup> and the newly established 12<sup>th</sup> Decision Division are responsible for the prosecution of cartel infringements. The remaining Decision Divisions maintain their sector-specific competences in the prosecution of cartel infringements, as far as cases are not pursued by the 11<sup>th</sup> or 12<sup>th</sup> Decision Division.

## **2. Enforcement of competition law and policy**

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

#### *2.1.1 Statistics and summary of activities*

12. With regard to cartel detection, from July 2008 to June 2009 the Bundeskartellamt received 32 leniency applications. It conducted 22 dawn raids, 7 of which were inspections conducted on behalf of the European Commission.

13. In the period covered by the report, the Bundeskartellamt imposed several fines for anti-competitive behavior, i.e. approximately EUR 165 million against market participants in the clay roof tile sector, about EUR 41 million in the gas sector and approximately EUR 39.69 million in the mortar sector.

#### *2.1.2 Description of significant cases*

14. Some of the cases described below are still pending and some decisions have not yet become final.

#### *Agreements*

#### *Cartels*

15. In July 2008 the Bundeskartellamt informed the German Football League (DFL) that in its current form the model which DFL proposed for marketing TV broadcasting rights for the football league, did not meet competition law requirements for allowing consumers a fair share of the resulting benefit.

16. The combined marketing scheme for the broadcasting rights (“central marketing”) represents an anticompetitive agreement which falls under the ban on cartels of German and European competition law.

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<sup>1</sup> Bundeskartellamt: Activity Report 2007/08, p. 159.

The scheme would only be admissible if it ensured that consumers receive a fair share of the benefit resulting from the central marketing scheme.

17. 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.

18. 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 match day 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 the end consumer 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.

19. The Bundeskartellamt sees such freedom of choice as guaranteed if highlights coverage constitutes an integral part of the match day, if it is broadcast shortly following the games and at a time when a wide section of the population can be accessed. This requires that the core of the match day, i.e. the Saturday games, can be broadcast in a free-to-air TV round-up in a broadcasting slot before 8 p.m.

20. Either public or private TV stations could provide this service. By contrast, the tendering procedure proposed by DFL would most probably have resulted in the exclusion of free-to-air TV highlight coverage on Saturdays before 10 p.m. The possibility envisaged by DFL of the free-to-air live broadcast of a single game every second Sunday is not adequate to offer the consumers a fair share of the benefit of central marketing. Above all, the live broadcasting of single games on Sundays would be inadequate to limit the scope of pay TV to increase its prices.

21. As a consequence, the DFL proposed final amendments to its marketing model. However, even with these amendments, the proposed model did not meet the requirement that consumers receive a fair share of the resulting benefits. Consequently, the marketing model would have to be prohibited by a formal decision if the DFL were to adhere to it.

22. The Bundeskartellamt imposed fines totaling EUR 165 million against six companies in the clay roof tile sector and eight persons responsible on account of their participation in anti-competitive agreements concerning clay roof tiles.

23. At a trade association meeting in July 2006, almost the entire sector had agreed to raise prices by 4 – 6 per cent by levying a so-called “energy cost surcharge” for that year. Already in the spring of that year, four of the companies had agreed on a massive price increase in a specific clay roof tile segment. The July agreement concerned the entire product range of the clay roof tile industry. With a market volume of over EUR 1 billion in 2006 the entire roofing tile market represents an important part of the building sector.

24. In these proceedings the guidelines on the setting of fines issued by the Bundeskartellamt in 2006 were applied, in which the level of fines was increased. Accordingly, the fines against four companies belonging to groups with an annual turnover of over EUR 2 billion were significantly raised to increase the deterrent effect. The remaining clay roof tile manufacturers, however, were SMEs and mainly single product manufacturers. Moreover, the role of the cartel initiator within a group was taken into closer consideration.

25. After a search of the companies in December 2006, during which substantial evidence was seized, two of the companies filed leniency applications. In accordance with the Bundeskartellamt's Leniency Programme, the cooperation offered by both companies was taken into account as a mitigating factor in the calculation of the fines. The accusations were also admitted by other companies, which had announced their acceptance of the fines. The proceedings against two further SMEs, which had also admitted to the accusations, are nearing conclusion. Another fine proceeding in this sector against the parent company of a group, whose management was informed of the agreement, is also about to be concluded.

26. The Bundeskartellamt imposed fines totalling EUR 41.4 million against Westfalen AG and Propan Rheingas GmbH & Co. KG on account of illegal cartel agreements. The companies had been accused of having restrained competition in the market for tank and bottled gas by customer protection agreements and accompanying price agreements, at least from 1997 until a search in May 2005.

27. In December 2007 and February 2008 the Bundeskartellamt had already imposed fines totaling approximately EUR 209 million against nine liquefied gas suppliers and their CEOs on grounds of such agreements. The total fine imposed therefore amounted to EUR 250.4 million.

28. The companies concerned are active in the supply of private and commercial customers with liquefied gas in small tanks (up to 5.6 t) and bottled gas.

29. As the violations occurred before the new guidelines on the setting of fines based on turnover came into effect, the Bundeskartellamt has calculated the fines based on the old system of determining the additional proceeds achieved from the agreement.

30. The Bundeskartellamt imposed fines totaling EUR 39.69 million against several companies in the mortar sector. Nine companies and as many senior executives were accused of having participated in anti-competitive agreements on set-up fees for dry mortar silos.

31. In May 2006 and January 2007 the Bundeskartellamt conducted searches at the companies in question during which it seized substantial evidence. According to the Bundeskartellamt's findings, in 2004 and 2005, following a number of coordination activities, agreement was reached in almost the entire mortar sector to charge as of 2006 a set-up fee for erecting dry mortar silos in addition to the costs for the mortar. The agreement, which was implemented at the beginning of 2006, concerned the sale of dry mortar silos across Germany.

32. The calculation of the fines was based on the companies' turnover achieved with mortar, as well as their revenue from the set-up fee, in order to take sufficient account of the economic significance of the agreements. In the case of two companies belonging to corporate groups with an annual turnover of more than EUR 1 billion, the fines were significantly raised to enhance the deterrent effect of the Bundeskartellamt's decision.

#### Abuse of a Dominant Position

33. The Bundeskartellamt has in most cases terminated the abuse proceedings that were initiated against gas suppliers in March 2008. In 29 cases of the 33 pending proceedings, the companies offered monetary compensation for consumers amounting to EUR 127 million. Approximately 50 per cent of this sum is accounted for by bonus payments and credits to be granted in the next annual statement or final account of customers. The remaining amount will be transferred to customers via price reductions or the postponement of price increases. The cited amounts are net amounts, i.e. customers are additionally relieved from the burden of having to pay taxes and duties on them. Furthermore, to a large extent the gas suppliers did not pass on increased gas procurement costs in 2008.

34. The proceedings were instituted against gas suppliers of differing sizes from all geographic regions in Germany. The subject of the proceedings was their pricing policies in 2007 and 2008. The proceedings were instituted, inter alia, on the basis of the new Section 29 of the ARC, which provides for a stricter abuse control of energy suppliers. Following the comparative market concept, the turnover which the companies concerned achieved in 2007 was compared to that of gas suppliers offering lower prices. As regards data for 2008, the Bundeskartellamt based its assessment on a comparison of the tariffs used by the majority of the customers of the target and comparable companies. For its evaluation, the Bundeskartellamt deducted network fees (approx. 16 per cent of the gross price) as well as taxes and licence fees (approx. 29 per cent of the gross price). Accordingly, the turnover component (or price component) examined by the Bundeskartellamt accounted for a good 55 per cent of the gas price the citizens see on their gas bill.

35. The suppliers made ample use of the possibility provided by the law to put forward objective justifications for the price deviations, the major one being their procurement costs. The Bundeskartellamt, however, also compared the procurement behaviour of these companies to that of other suppliers in order not to accept the stated procurement costs without challenging their authenticity.

36. The Bundeskartellamt opted for a commitment solution because the amount of consumer benefits achieved by this almost equaled the amount that would have been achieved by way of a formal decision. Most significantly, consumers benefited directly from the advantages. In addition, the Bundeskartellamt's findings suggested that the profitability of the companies concerned did not allow for any further concessions. The companies and the Bundeskartellamt continued to differ about the case; nevertheless, the proceedings were concluded by means of a commitment solution to avoid protracted legal disputes. This way, customers largely benefited from the price measures during the heating period in winter, and tenants as so-called "trapped customers" also profited. The settlement also comprised the assurance that the financial commitments would not be compensated for by future price measures.

37. Of the approx. 770 gas suppliers in Germany, only 30 companies fall in the Bundeskartellamt's area of competence, the others fall in the area of competence of the competition authorities of the *Länder*. Several *Land* competition authorities are also conducting proceedings or have already concluded them. In addition, the competition authorities of the *Länder* have referred 14 gas suppliers from their area of competence to the Bundeskartellamt.

38. In its decision of 12 November 2008 the Bundeskartellamt found that the Federal Dairy Farmers Association in Freising (Bundesverband Deutscher Milchviehhalter e.V., BDM) had called for a milk boycott as part of its "2008 Milk Price Offensive".

39. The BDM had called on dairy farmers in Germany not to supply dairies and to demonstrate at selected dairies in order to enforce a nation-wide standard minimum price of 43 cent per kilogram of milk and a reduction in milk supply. In addition, dairies were to sign "declarations of commitment" already prepared by the BDM. With their signatures under these declarations the dairies were to request the Dairy Industry Association to hold talks with the BDM with the aim of enforcing the minimum milk price demanded by the BDM in the retail trade.

40. As a result of the call for boycott many dairies throughout Germany were not supplied with milk by the dairy farmers. In some cases the supply and delivery of milk and milk products was obstructed by blockades.

41. With its call for boycott the BDM had violated the boycott prohibition under Section 21 ARC. The call was not made to defend any legitimate interests. The BDM aimed to establish a cooperation which did not conform with competition law either at the dairy farmers or dairies level.

42. The investigations also revealed that a nation-wide standard price would have led to extensive cartelisation across all market levels (dairy farmers, dairies and the retail trade). This would have led to an inadmissible elimination of competition and higher prices for consumers. The BDM's endeavour to reduce the quantity of milk by changing the conversion factor (volume in weight) of the milk supplied did not justify a call for a boycott either.

43. With its decision the Bundeskartellamt made it clear that structural-policy problems can in no way be solved by anti-competitive means. In the case in question the Bundeskartellamt had made use of its discretion not to initiate fines proceedings, for the BDM's benefit. However, should the BDM again violate cartel law in a similar fashion, the Bundeskartellamt shall promptly initiate fines proceedings.

44. As a consequence of the Bundeskartellamt's proceedings against manufacturers of ophthalmic lenses on account of illegal price recommendations, the major manufacturers of ophthalmic lenses, Essilor, Rupp and Hubrach, Rodenstock, Zeiss and Hoya, gave up their non-binding price recommendations from 1 April 2009 until further notice.

45. Until then, manufacturers of ophthalmic lenses had issued price recommendations that included the craftsmanship services rendered by the optician. According to the Bundeskartellamt's assessment, a large number of small and medium-sized opticians had observed these price recommendations so that, de facto, they had the same effect on the market as fixed or minimum prices would have had.

46. This system of price recommendations was prohibited by the Bundeskartellamt in March 2009. In future, the opticians will calculate their prices increasingly independently, which will improve competition amongst them to the benefit of consumers.

47. The Bundeskartellamt imposed a fine of EUR 9 million on Microsoft Deutschland GmbH. Microsoft had influenced the resale price of the software package "Office Home & Student 2007" in an anticompetitive manner.

48. The product in question was heavily advertised in the autumn of 2008 in stationary retail outlets. Amongst others, a nationwide active retailer advertised the product with financial support from Microsoft. Even before the launch of the advertising campaign in mid-October 2008, employees of Microsoft and the retailer in question had agreed on at least two occasions on the resale price of the software package "Office Home & Student 2007".

49. Not every contact between supplier and retailer regarding resale prices constitutes an illegal concerted practice within the meaning of Section 1 ARC. However, this must not lead to a form of coordination where the supplier actively tries to coordinate the pricing activities of the retailer and thus retailer and supplier agree on future actions of the retailer. In the present case, this boundary had been crossed.

### *2.1.3 Activities of the Courts*

50. In its "lodge cards" (travel services credit cards) decision the Federal Court of Justice made a general statement on the issue of market dominance by several companies in a non-oligopoly market. The case dealt with a specialized market concerning the indication of the amount of sales tax on lodge cards which in turn was of essential importance for the competition conditions in a specific credit card market based on this concept. In interpretation of the ECJ's Magill decision the Federal Court of Justice ruled that if several companies are able to prevent effective competition on a downstream market independently of one another due to their position on the upstream market, it is possible for each one of them to have a dominant position within the meaning of Article 82 EC.



51. In the Cartel Damages Claim SA pioneer case, in which more than 35 companies affected by a cement cartel active in Germany assigned their claims to a Belgian company, the Federal Court of Justice ruled that the appeal was admissible. The case now has to be examined by a court of first instance with regard to the justification of the complaint.

52. In its "Stadtwerke Uelzen" decision the Federal Court of Justice has provided clarification on the assessment of a gas provider's market position. While the proceedings were between the regional competition authority and the local utility company, the Bundeskartellamt submitted its arguments as *amicus curiae*. The Court upheld the Bundeskartellamt's view that the relevant market was that for pipeline gas supplied to end consumers – and not a market for any type of energy used for heating purposes (which would have included oil and electricity). The Court also confirmed that, geographically, the market so defined extends to the region supplied by the incumbent utility company, at least for the time being. Finally, the judgment clarified that competition authorities are not prevented from ordering an undertaking to pay back the profit achieved from the abusive behaviour

53. With its judgment on „Long-term Gas Supply Contracts“, the Federal Court of Justice upheld a Bundeskartellamt decision of 2006. The Bundeskartellamt had declared that E.ON's long-term gas supply contracts with regional and local utility companies were anti-competitive. They were therefore prohibited. In addition, the Bundeskartellamt had given binding guidance as to the conditions (capacities, contract duration) under which long-term contracts could be concluded in the future. The Federal Court of Justice confirmed the Bundeskartellamt's findings, stating that within the confines of its own gas distribution grid E.ON held a dominant position in the gas wholesale market so defined. According to the Court, the bundle of E.ON's supply contracts violated EC competition law, since they foreclosed and impeded entry to the market. In order to remedy the situation it was necessary for the Bundeskartellamt to impose certain capacity / duration requirements on E.ON for future contracts.

54. In May 2009 the Federal Court of Justice clarified the admissibility of the "competition law defence" against the holder of a patent. Philips is the owner of a basic patent which is essential for the production of recordable and rewriteable optical data carriers (CDR and CDRW) and gives Philips a dominant position. Philips has granted companies a licence to the patent on the basis of a standard licence agreement. One company manufactured and marketed CDRs and CDRWs without such a licence arguing that the licence fees were excessive and also discriminatory.

55. In its decision the Federal Court of Justice stated that the patent holder may not discriminate against a company wishing to conclude a licence agreement by charging this company higher licence fees. Patent holders who violate this ban on discrimination cannot enforce a claim for injunction under patent law. Just as the patent holder's refusal to conclude a licence agreement with the company seeking to obtain a licence, a claim based on the patent would constitute an abuse of his dominant position. The Federal Court of Justice also held that a company which manufactures products under a patented industrial standard without a licence could use the "competition law defence" against the holder of the patent. This means that the user of the patent can claim that the patent holder is abusing his dominant position by depriving him of the use of the patent. According to the court the user would have to prove that he tried unsuccessfully to obtain a licence under adequate terms and conditions, and that by refusing to grant the licence the holder of the patent was violating the prohibition under competition law of hindering other companies or treating them differently from similar companies without any objective justification. However, the user may only use the patent in anticipation of the licence agreement unlawfully denied, if he fulfils the obligations arising from the licence agreement he seeks to obtain; in particular if he pays the patent holder an appropriate licence fee or at least guarantees this payment.

## **2.2 Mergers and Acquisitions**

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

56. In 2008, 1,675 mergers were notified to the Bundeskartellamt. The number of mergers decreased compared to 2007.<sup>2</sup> That might be due to the economic crisis. Main examination proceedings were initiated in 13 cases.

57. 79 percent<sup>3</sup> 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.

58. In 2008 the Bundeskartellamt prohibited 4 mergers and cleared 4 mergers subject to conditions and obligations.

### *2.2.2 Summary of significant cases*

#### Prohibition or prevention of mergers

59. In November 2008 the Bundeskartellamt prohibited the acquisition of SimonsVoss AG by the Swedish Assa Abloy group.

60. Assa Abloy is active worldwide and offers mechanical and mechatronic locking cylinders and access control products. In Germany, Assa Abloy products are mainly known under the brand names Ikon, effeff and Keso. SimonsVoss manufactures electronic locking cylinders. These are locking cylinders working solely with electronic identification (card, chip), and without any keys. Assa Abloy's mechatronic cylinders also work with an electronic identification component. However, they require additional mechanical identification with a key. Assa Abloy's total worldwide turnover amounts to approx. EUR 3.5 billion, that of SimonsVoss to EUR 30 – 40 million.

61. The concentration would have affected the German market for mechatronic and electronic cylinders in which Assa Abloy and SimonsVoss hold a joint market share of 65 – 70 per cent. Their market share lead over the next closest competitor amounts to more than 50 percentage points. Furthermore, the market structure is largely fragmented.

62. The concentration project would have led to the creation of a dominant position for Assa Abloy and SimonsVoss. For the next years the market for mechatronic and electronic cylinders, which is still young, can be expected to experience strong growth. Nonetheless, as a consequence of the merger, Assa Abloy and SimonsVoss would have held an almost unassailable market position: SimonsVoss has a high market share and a leading technology and pre-eminent position in the electronic cylinder sector, while, in Germany, Assa Abloy is by far the largest supplier of mechanical locking systems and mechatronic cylinders. None of the predominantly medium-sized competitors in this market, which is characterised by intensive R&D activity, can employ comparable means to create an effective competitive counterweight.

63. Moreover, due to their superior access to the sales markets, Assa Abloy and SimonsVoss have a powerful deterrence potential against competition: Due to their superior economic position vis-à-vis the trade sector, Assa Abloy can use market-typical rebate systems as a strong incentive for its main

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<sup>2</sup> In 2007, 2242 mergers were notified.

<sup>3</sup> Bundeskartellamt: Activity Report 2007/08, p. 181.

distribution channel, i.e. security systems stores, to primarily use the products supplied by the parties to the merger.

64. The Bundeskartellamt could not establish that the further development of the market conditions after the merger would have sufficiently restricted the market power of Assa Abloy and SimonsVoss. The creation of a dominant position in a technological future-oriented market could therefore only be prevented by prohibiting the concentration.

65. In April 2009 the Bundeskartellamt prohibited the acquisition of the East German petrol station network of OMV Deutschland GmbH by Total Deutschland GmbH. The planned takeover would have strengthened the dominant positions held by Total together with Shell, Aral/BP, ConocoPhillips/Jet and ExxonMobil/Esso in the sale of diesel and Otto fuel in the relevant regional petrol station markets.

66. Not only would Total's takeover of the East German OMV network have increased the market share of the dominant oligopoly to 80 to 85 per cent, but it also would have eliminated one of its strongest competitors.

67. This was the first measure taken by the Bundeskartellamt following the fuel sector inquiry which it launched in 2008. The focus of the inquiry lies with the upstream procurement markets, i.e. wholesale and production, which are the key to corporate success in the petrol station market. An important interim result of the inquiry confirmed that the prevailing high vertical and horizontal concentration in the fuel sector poses a major obstacle to more competition. In particular, the five companies mentioned above are integrated at all levels of the mineral oil sector and are active not only at the retail level but also in the procurement markets and in the transport sector. Due to the oligopolistic market structures, further mergers involving these companies will – subject to the assessment of the mergers- not be possible in the future, or if so, only to a very limited extent.

68. The interim results of the fuel sector inquiry can be summed up as follows: Structures prevail at all market levels which have a significantly restraining effect on competition in general.

69. In addition, the oligopoly members are interlinked with collective refineries, pipelines and tank farms and are interdependent on one another in a long practiced system of fuel exchange. External competitors, among them the largely fragmented medium-sized mineral oil sector which is dependent on the members of the oligopoly for its upstream supplies, (“independent petrol stations”) are unlikely to be able to effectively limit the oligopoly's scope for action.

70. In the field of hospital services, the Bundeskartellamt prohibited Gesundheit Nordhessen Holding from acquiring Gesundheitsholding Werra-Meißner. The holding company Gesundheit Nordhessen Holding, in which the city of Kassel and Kassel administrative district have an interest, operates six hospitals in greater Kassel with approx. 1,700 beds. The holding company Gesundheitsholding Werra-Meißner, which is owned by the Werra-Meißner administrative district, owns two hospitals with a total of approx. 500 beds.

71. The merger would have strengthened the dominant position of Gesundheitsholding Werra-Meißner on the market affected. Apart from the creation of a high market share, the range of health care services provided by Gesundheit Nordhessen Holding, which is clearly superior to that of its other competitors, constituted another strengthening effect. In the course of the market investigations several rival hospitals criticized the merger plans.

72. The Bundeskartellamt could not follow the parties' argument that an improvement in competition conditions could be expected from the merger, which would outweigh the disadvantages of dominance.

Ultimately, the commitment proposals submitted by the parties were not adequate to rule out the negative impact the merger would have on the market structure.

Clearances subject to conditions and obligations

73. In June 2008 the Bundeskartellamt cleared a joint venture mutually controlled by EDEKA and Tengelmann subject to suspensive conditions. The undertakings intended to merge the two discount chains 'Netto Marken-Discount' and 'Plus' and to operate the joint venture under the name 'Netto Marken-Discount'. According to the relevant legal provisions, the merger of the two undertakings also included a merging of their supermarket businesses, i.e. EDEKA and Kaiser's Tengelmann. The commitment solution stipulated that those outlets that were problematic under competition law had to be sold. In addition, the planned purchasing cooperation was denied. The German food retail market has undergone a radical consolidation process in recent years. Today about 90 per cent of the domestic market volume is accounted for by the five major trading companies. EDEKA is the market leader with a share of 25 per cent nationwide.

74. 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.

75. This market leadership would have been further intensified by the merger. The planned concentration entailed the merger of the number 1 and 5 in the German food retail trade. EDEKA would not only have taken over a close competitor (in terms of sales concept), but would also have been in a position to considerably expand its coverage of regional and nationwide markets. In many of the regional markets the merger would have led to market share additions.

76. EDEKA would have been able to expand its substantial competitive potential further. With the Netto Marken-Discount stores and EDEKA supermarkets, EDEKA has positioned itself both in the full-line retail sector and the so-called "soft discount" sector which is also brand-oriented. Like hardly any other trading company, EDEKA is already in a position to target different groups of customers through its sales concept. The company's strength lies in particular in the area of brand products.

77. Without Tengelmann the only major suppliers remaining in the soft discount and full-line sectors would have been REWE and, with some restrictions, the Schwarz group. The price competition which could be observed in the market would not have been sufficient to effectively restrict EDEKA's competitive scope of action.

78. Finally, the notified concentration would have intensified 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 have also further strengthened its market position in the sales markets, especially since EDEKA intended to largely adapt the newly acquired supermarkets to Netto's brand discount concept which has been more economically successful.

79. Before the concentration could be put into effect, Tengelmann had to sell all those outlets which were located in markets which the Bundeskartellamt considered to be problematic, to one or several (a maximum of three) purchasers.

80. A site could only be closed if it was proven that no purchaser could be found. Under the condition set by the Bundeskartellamt this regulation was limited to a few individual cases.

81. 313 of the 357 outlets for sale were taken over by REWE, six by Okle and one by Lidl. All three purchasers demonstrated their interest to the Bundeskartellamt to maintain the outlets acquired in competition with EDEKA. This will prevent an increase in EDEKA's market share in the regional markets affected.

82. Only 37 outlets had to be closed. In the cases of these outlets, which had remained unsellable, the parties concerned and potential purchasers had submitted operating figures which justifiably appeared to indicate that maintaining them would be uneconomical (especially due to high rents, unfavourable shop space and inadequate catchment areas). All potential purchasers argued that the outlets affected could not be maintained as economically viable entities even if Tengelmann were to provide considerable investment contributions. The option of managing the shop space for other purposes by Tengelmann (e.g. for its subsidiary kik, a textile discount chain)) or by third companies outside the food retail sector is, of course, still possible.

83. The combination of "site divestment" and "separate purchasing arrangement for Kaiser's supermarkets" will make any increase in EDEKA's goods purchasing power resulting from the merger insignificant.

84. The Bundeskartellamt had made completion of the merger dependent upon fulfilment of the conditions as otherwise there would have been no time pressure on the divestment negotiations. This would have considerably impaired the overall value of the Plus outlet network. The fulfilment of the conditions now ensures that competition in the food retail sector will be maintained in spite of the existing high concentration and EDEKA's market leadership.

85. The Bundeskartellamt cleared the acquisition of the sugar activities of the Danish company Danisco A/S, Danisco Sugar A/S, by Nordzucker AG in February 2009 under the suspensive condition that Danisco's sugar production plant in Germany, at Anklam in Mecklenburg-West Pomerania, is sold to a suitable purchaser before the acquisition is realized.

86. The acquisition affected the German domestic market for industrial sugar (sugar for the food industry). Investigations by the Bundeskartellamt have shown that this market is characterized by an uncompetitive duopoly between Nordzucker and the largest German sugar producer, Südzucker AG.

87. The structural conditions in this market are influenced primarily by the European Sugar Market Regulation and its implementation in the Member States. These structural conditions range from substantial transparency on production costs and consumer prices through to a regulation of quotas via the award of sugar production quotas and extensive import control. The European Sugar Market Regulation already favours a market structure which is characterized by national monopolies or oligopolies. Added to these framework conditions is the general homogeneity of mass-produced industrial sugar and the general indispensability of sugar for the food industry. The Bundeskartellamt has found evidence of a mutual demarcation of distribution areas in large parts of Germany. It is not transport costs and the lack of production capacity which are the main factors preventing advancing competition in competitors' key sales areas. Rather, the oligopolists themselves are refraining from making any competition advances in order to keep price levels high within Germany.

88. According to the Bundeskartellamt's investigations Pfeifer & Langen, the third major German sugar producer, currently does not bring any substantial competition into the oligopoly either. The same applies to the competitors from neighboring countries. Moreover, the opening up of the European markets for sugar from third countries, which has been propagated by the European Commission, has had no effect so far, at least not in Germany.

89. The unrestricted acquisition of Danisco Sugar A/S by Nordzucker would have further expanded the joint dominant position held by Nordzucker and Südzucker. Not only the fact that the production capacities at the Anklam plant would have been added, but also the elimination of a powerful competitor would have strengthened the existing oligopoly in Germany. These effects were prevented by the obligation to sell the Anklam plant to a suitable third party before the acquisition project can be put into effect.

90. The domestic competition potential of the Anklam sugar production plant can only be maintained if the acquirer is not a member of the oligopoly and if it appears likely that on the basis of its entrepreneurial resources and scope of activities it will be able to act as a competitor in Germany in the future. It must also be ensured that Anklam's sugar production quota, which is essential for market activity, will not be withdrawn after the sale to a third party.

91. The entry of a major European sugar producer to the German sugar market in particular would be able to dispel the competition concerns. In this respect a solution could possibly be expected to emerge soon with the Dutch company Koninklijke Coöperatie Cosun U.A..

92. The Bundeskartellamt cleared plans by Energie Baden Württemberg AG (EnBW) to acquire a 26 per cent share of EWE Aktiengesellschaft (EWE) subject to the condition that the parties to the concentration divested significant company holdings. Alternatively, the decision offered the possibility of a divestiture of the respective problematic associated companies of the parties to the merger in the gas sector. Following a statement of objections by the Bundeskartellamt EWE and EnBW had undertaken to either sell the EWE associated company Verbundnetz Gas AG (VNG) or the EnBW associated company GESO Beteiligungs- und Beratungs AG (GESO) to a third party within a certain period of time (GESO holds shares in, among others, ENSO Energie Sachsen Ost AG (ENSO) and DREWAG Stadtwerke Dresden GmbH (DREWAG)). Both alternatives, each taken on their own, dispel the competitive concerns raised by the planned concentration.

93. EnBW is the parent company of a group of companies mainly active in the electricity and gas sectors, and in the energy and environmental services sectors. In the electricity sector EnBW is active via associated companies on all levels of the value-added chain, i.e. production, trade, transport, distribution and sales. In the gas sector EnBW is active mainly in Baden-Württemberg via the gas supply company Gasversorgung Süddeutschland GmbH, which it jointly controls with ENI SpA. In the new Länder EnBW holds interests in ENSO and DREWAG.

94. EWE is a regional supplier of electricity, gas and water. It also supplies electricity and gas in the Ems/Weser/Elbe region. In eastern Brandenburg and Rügen it is exclusively active as a supplier of gas. In addition, EWE has a 47.9 per cent stake in VNG. VNG is a grid gas company supplying the entire territory of the new Länder; its main activities being in the import, trade, transport and storage of natural gas and services related to these activities. ENSO and DREWAG procure their gas almost entirely from VNG.

95. The concentration concerns the electricity and gas sectors. With regard to the electricity market, there was no evidence which would indicate that EnBW is a member of a dominant oligopoly in the domestic markets for the first-time sale of electricity and its supply to industrial customers. In the gas market, on the other hand, the concentration would have led to a strengthening of dominant positions held by associated companies of EnBW and EWE in Eastern Germany. In particular, it was likely that the sales of the dominant grid gas company VNG would have been further secured in that the management boards of ENSO and DREWAG would have taken account of VNG's interests in their gas procurement strategies. In addition, without the obligation to divest ENSO's and DREWAG's dominant positions in their regional or local gas markets for the supply of distributors and household and industrial customers would have been strengthened, since they would no longer have had to fear any competition from VNG in these markets.

Clearances and withdrawal of application and authorization by the Federal Minister of Economics and Technology

96. The Bundeskartellamt cleared the acquisition of sole control of the Berliner Verlag publishing house by M. DuMont Schauberg.

97. In the opinion of the Bundeskartellamt, the concentration would not lead to the creation or strengthening of a dominant position of the companies concerned on the relevant reader and advertising markets and could therefore be cleared. Due to the different geographical areas of focus, the concentration did not create any overlaps in the publishing houses' activities in the distribution areas affected.

98. Berliner Verlag publishes the "Berliner Zeitung", "Berliner Kurier", the city magazine "Tip" and several regional advertising newspapers. It also controls the publishing house Hamburger Morgenpost Verlag.

99. The Cologne publishing house M. DuMont Schauberg is active mainly in the Cologne/Bonn area with its regional subscription dailies "Kölner Stadtanzeiger" and "Kölnische Rundschau" and the tabloid "Express" and has a stake in the publishing house "Bonner Zeitungsdruckerei und Verlagsanstalt H. Neusser GmbH". It also publishes subscription dailies in southern Saxony-Anhalt. In addition, the company has a stake in the publishing house Druck- und Verlagshaus Frankfurt am Main GmbH which publishes the "Frankfurter Rundschau" daily.

100. In the view of the Bundeskartellamt, due alone to the existing market structures, the acquisition would not result in a dominant position of the companies concerned on the Berlin and Hamburg reader markets for subscription dailies or over-the-counter newspapers. With the newspapers published by the Holtzbrinck and Axel Springer publishing houses there are competitors on the markets affected with comparable or even larger market shares. Moreover, the Bundeskartellamt did not expect the merger to strengthen existing market positions on the regional markets affected.

101. In April 2009 the Bundeskartellamt cleared the acquisition of all the shares in F.A. Brockhaus GmbH by Wissenmedia GmbH, a subsidiary of Bertelsmann AG.

102. The acquisition concerned the markets for German universal encyclopaedias, German thematic encyclopaedias, German specialized books and German children's and juvenile books. In the course of the examination proceedings it emerged that the markets for reference books are minor markets and therefore not subject to German merger control. The takeover was not expected to create or strengthen a dominant position on one of the other book markets either.

103. Brockhaus and Bertelsmann had been the major publishers of German universal encyclopaedias and German thematic encyclopaedias for years. However, the turnover achieved with reference books in Germany had significantly decreased in recent years, by more than 50 per cent since 2006. As a consequence, the market for universal encyclopaedias and the market for thematic encyclopaedias had become minor markets with a market volume in Germany of less than EUR 15 million each. This development was caused by a structural change in consumer behaviour and the growing significance of online encyclopaedias. This change is based on new technological developments and enhancements (Internet, weblogs, multimedia applications, etc.) their increasing acceptance and proliferation among consumers and the resulting new product offers (online encyclopaedias).

104. In the course of the market investigation the Bundeskartellamt also gained further insights into consumer behaviour in the relevant markets. Publishing houses and book stores participating in the market investigation expect a further decline in sales and see no scope for price rises, which indicates that the scope for setting prices has decreased for suppliers of printed encyclopaedias. The reason for this is seen

almost exclusively in competition from free offers on the Internet and the resulting price sensitivity of consumers.

105. In the end the question of what effect this structural and consumer behaviour change will have for Bertelsmann's market position after its acquisition of Brockhaus could remain unanswered since the investigation came to the result that the relevant markets were minor markets.

106. The Bundeskartellamt cleared plans by Humana Milchindustrie GmbH and Nordmilch AG to set up a joint venture (JV) to pool their main marketing activities. The JV will operate under the name Nord Contor GmbH.

107. The project affects the national sales markets for a series of dairy products. Except for the quark products market competition concerns could be dispelled from the outset. Although after the joint venture the market shares of the parties concerned in this market will more or less reach the threshold from which dominance can be assumed (33.3 per cent) and will be considerably higher than those of their competitors, the project was not expected to create or strengthen a dominant position. The relevant products of the parties concerned are so-called milk-basis products, which are produced or distributed by a large number of dairies. Among Humana's and Nordmilch's competitors in Germany are major companies such as the Campina/Friesland group, Ehrmann and Danone. Humana and Nordmilch are also faced with a highly concentrated and powerful opposite side of the market made up of companies from the food retail sector. Especially in the case of products which are not already "presold" due to their high brand status, these companies have sufficiently high buyer power to prevent an uncontrollable scope of action by the parties concerned. In addition, the parties also have customers in the food processing industry.

108. The joint venture will not create or strengthen a dominant position in the market for the acquisition of raw milk either. Both the German Farmers Association and the German Dairy Farmers Association asked to be admitted to the proceedings in order to represent the interests of the milk suppliers. In the view of the Bundeskartellamt, even after the joint venture the milk suppliers will still have a number of other dairies in all the regional markets affected to which they can sell their raw milk. Even though, under current market conditions (saturation of milk demand) switching to another dairy is only possible under difficult circumstances, this is insufficient reason to prohibit the project since it is not the cause of the current market situation. The joint venture will not further aggravate the situation. Contrary to complaints, the Bundeskartellamt does not expect that the pooling of sales will enable the parties to the concentration to pay such a high price for milk that the dairies named as their competitors will lose their raw material base and be forced out of the market.

109. The concentration between the two major dairies could be cleared because, firstly, in terms of sales markets, there are enough possibilities for the trade and other buyers on the demand-side to switch to alternative suppliers and secondly, there are still sufficient alternatives on the regional markets for the acquisition of milk for the milk producers concerned. In so far the case in question is different from previous other concentration projects in the dairy sector, some of which involved much smaller markets and market volumes, yet nonetheless raised competition concerns.

110. In December 2006 the Bundeskartellamt prohibited for the first time a merger between public-law hospital operators in the Greifswald University Hospital/Wolgast district hospital case. According to the Bundeskartellamt the merger would have led to a strengthening of the dominant position of Greifswald University Hospital in the Greifswald regional market for acute hospitals. Subsequently, Greifswald University Hospital filed an appeal at the Düsseldorf Higher Regional Court and, at the same time, applied for authorisation by the Federal Minister of Economics and Technology. Under Section 42 ARC, the Federal Minister of Economics and Technology 'shall, upon application, authorise a concentration prohibited by the Bundeskartellamt, if the restraint of competition is outweighed by advantages to the



economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest’.

111. In April 2008 the Minister authorised the Greifswald/Wolgast concentration arguing that the merger could be justified by an overriding public interest in the long-term preservation of the medical faculty and the affiliated hospital of Greifswald University. A second overriding interest was the further development of the exploratory focus of "Community Medicine" as a unique selling point of the University of Greifswald. Both aspects are expected to lead to the creation of an exclusive model research region in Eastern Pomerania. An appeal against the ministerial authorisation filed by a competitor of Greifswald University Hospital was rejected by the Düsseldorf Higher Regional Court in September 2008 on procedural grounds. The competitor filed an appeal on points of law at the Federal Court of Justice against the decision of the Düsseldorf Higher Regional Court. The appeal is still pending.

112. In May 2008, following the appeal of Greifswald University Hospital, the Düsseldorf Higher Regional Court reversed the Bundeskartellamt's prohibition decision. The Court ruled that the total turnover of the University Hospital, which belongs to the federal state of Mecklenburg-Western Pomerania, did not exceed the turnover threshold of EUR 500 Mio. The Bundeskartellamt filed an appeal on points of law at the Federal Court of Justice against the decision of the Düsseldorf Higher Regional Court. The appeal is still pending.

#### Violations of merger prohibitions

113. The Bundeskartellamt imposed a fine totaling EUR 4.5 million against the American company Mars Inc., McLean (Virginia) for violating the prohibition to put into effect its acquisition of the American pet food manufacturer Nutro Products, Inc., City of Industry/California before the merger control proceedings were terminated. By completing its share acquisition Mars consciously defied provisions of German competition law. This was the first fine to be imposed for this category of competition law violation on the basis of the Bundeskartellamt's fine guidelines from the year 2006. This is the highest fine to be imposed by the Bundeskartellamt for a violation of the prohibition to put a merger into effect.

114. Mars is a manufacturer of pet food, confectionary (including the brand names Mars, Bounty, Milky Way, M&M's) and foodstuffs. In Germany its pet food products are sold under several brand names, including Royal Canin, Pedigree, Frolic, Chappi, Cesar, Whiskas, Kitekat und Sheba. In terms of dog and cat food sales Mars is by far the leading supplier of these products in Germany.

115. Nutro Products is an American producer of dog and cat food which in Europe has up to now distributed its products under the brand name Nutro Choice via independent distributors to specialised pet supply shops. The company has all its production sites in the USA. Its activities are concentrated in North America.

116. In May 2007 Mars notified its intention to acquire Nutro Products to the authorities in Germany, Austria and the USA. After clearance of the project by the American authorities and during the period of ongoing examination by the German and Austrian authorities, Mars acquired the majority of the shares in Nutro Products. By acquiring Nutro Products' trademark rights and production sites, Mars took possession of all the assets necessary to enable it to compete successfully. These are also the essential elements of competition potential behind Nutro's share of the domestic market. Only the distribution rights for Nutro products in Germany and Austria had initially been transferred to a company belonging to the seller. In autumn 2007 Mars abandoned its initial intention to acquire the German distribution company incorporated in this company after the expression of competition concerns regarding the sales market for dry dog food.

117. In the Bundeskartellamt's opinion the acquisition of Nutro would have strengthened Mars' dominant position in the dry dog food market in Germany. By realizing its share acquisition Mars consciously defied provisions of German competition law. In calculating the level of the fine, the Bundeskartellamt took consideration of the fact that Mars had been cooperative in eliminating the ongoing domestic effects of the merger. This happened in the summer of 2008 with the sale of the trademark rights to Nutro for Germany and Austria to an independent manufacturer specialising in pet food, which was also granted a licence for formulas and manufacturing know-how.

### 2.2.3 *Activities of the courts*

118. In its E.ON/Eschwege decision the Federal Court of Justice confirmed the prohibition of a participation by the energy provider E.ON in a municipal utility. This decision confirms the Bundeskartellamt's view that an oligopoly exists between E.ON and RWE in a market for the sale of electricity at the point of initial sale in which solely the companies producing and importing electricity are active as suppliers. Electricity wholesalers were not among the suppliers in this market. The confirmation is fundamentally important with regard to the issue of which requirements the Bundeskartellamt or the court of appeal, respectively, have to fulfil for proving the existence of an oligopoly. According to the court, the assessment of whether several companies form an oligopoly within the meaning of the ARC is to be based on an overall consideration of all circumstances relevant to competition. Essential indicators are a high degree of market transparency and effective deterrence and sanction mechanisms in the case of deviant market behaviour. As to the issue of the strengthening of an oligopoly the court held that in highly concentrated markets an insignificant interference on remaining or potential competition was sufficient. Legal or actual circumstances which with some probability, although not necessarily, create a more favourable competitive environment for the dominant company or oligopoly were sufficient in this respect.

119. The court of appeal confirmed two further prohibition decisions issued by the Bundeskartellamt with regard to providing proof of the strengthening of a dominant oligopoly. In the Springer/ProSiebenSat1 case, a duopoly in the TV advertising market between the RTL group and the Pro7Sat1 group was assumed to have been strengthened by, among other factors, the increasing symmetry between the duopolists. Moreover, the dominant position held by the Springer media company in the reader market for tabloids ("Bild") would have been strengthened by the cross-media effects made possible by the merger of a powerful publishing company (Springer) and a large TV company (Pro7Sat1). The Higher Regional Court held that the Bundeskartellamt had proved the existence of a dominant oligopoly in the hearing aid market in its "hearing aid" prohibition decision. The court also commented in some detail on the admissibility of the Bundeskartellamt's prohibition under international law since the two companies were based abroad.

120. In its Faber/Basalt decision the Federal Court of Justice had to decide on issues relating to the prohibition of putting a concentration into effect: According to the court, the prohibition of putting a merger into effect under the German merger control regime applies to all concentration projects that have actually been notified, irrespective of whether the formal and substantive requirements for the prohibition of the concentration are fulfilled. If, however, the parties to the concentration apply for an exemption from the ban on putting a concentration into effect after appealing the prohibition decision, the court of appeal must make a decision within the framework of its competence for issuing preliminary injunctions.

## 2.3 *Sector Inquiries*

121. In May 2008 the Bundeskartellamt launched a long-term inquiry into competition in the fuel markets. As a first step the sector inquiry examined the general market conditions at various levels and in various markets of the fuel sector for possible distortions of competition. The interim report has now concluded the following results: The high vertical and horizontal concentration throughout the sector poses a significant hindrance to more competition in the fuel sector. The prevailing oligopolistic market

structures make it necessary to stop further concentration by applying restrictive merger control. The Bundeskartellamt took the appropriate measures while the inquiry was still in progress and prohibited mergers in the petrol station sector or only allowed clearance subject to conditions. Fuel sales and pricing structures at petrol stations are very transparent and favourable to pricing patterns such as higher prices at the start of the travel season, which are set by the companies without the need for collusion or coordination. The Bundeskartellamt will continue to closely observe endeavours by the mineral oil companies and their licensed petrol stations to acquire prompt information about competitors' prices and intervene in any violations of competition law.

122. With a modified approach the Bundeskartellamt will in future follow up the accusations that the pricing by integrated mineral oil companies of fuel they supply to independent petrol stations raises competition concerns.

123. Tank & Rast GmbH plans to restructure the decade-long system of issuing licences for the supply of fuel to motorway petrol stations which was based on the mineral oil companies' shares of fuel sales at ordinary petrol stations. The Bundeskartellamt will accompany this process to make sure that it is non-discriminatory, in particular in the interests of small to medium-sized mineral oil companies.

124. As the inquiry progresses the Bundeskartellamt will examine key aspects in greater detail. These include fleet card systems, agency agreements and econometric analyses of fuel prices, which will feature in the next stage of the inquiry. The inquiry will also examine the question, for example, whether fuel prices do in fact, as often claimed, react more quickly to rising rather than falling raw material costs.

125. In the sector inquiry in the dairy sector the Bundeskartellamt is currently analyzing the data. The inquiry encompasses the market levels of the milk producers, the dairies and the food retail sector. It aims at determining market mechanisms and potential problems regarding antitrust law.<sup>4</sup>

126. The Bundeskartellamt has also initiated sector inquiries in the field of transport and distribution of natural gas and in the field of electricity production and wholesale. There are no results that can be reported so far.

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

#### **3.1 ICN**

127. The Bundeskartellamt continued to actively participate in the conferences and working groups of the International Competition Network (ICN). The Bundeskartellamt co-chairs the ICN Unilateral Conduct Working Group together with the US Federal Trade Commission. For the 8<sup>th</sup> ICN Annual Conference in Zurich, Switzerland, the Working Group presented reports on tying and bundled discounting and single product loyalty rebates. The Working Group also held a workshop in Washington, D.C. in March 2009 to investigate more extensively the issues raised in its recommended practices and conduct reports. Almost 130 delegates from 35 jurisdictions participated in person and an even greater number attended via a live webcast

#### **3.2 ECN/ECA**

128. The European Competition Network (ECN) has recently celebrated its fifth anniversary. The ECN was created by virtue of Regulation 1/2003. By the end of June 2009 a total of 1059 cases had been

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<sup>4</sup> Bundeskartellamt: Activity Report 2007/08, p.39.

posted on the joint intranet of the competition authorities. The Bundeskartellamt itself notified 107 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 11 proceedings conducted under Art. 22 of Regulation 1/2003.

129. The Bundeskartellamt was once again an active participant in a great number of Advisory Committees dealing with individual antitrust and merger cases as well as several ECN Working Groups covering more general matters. Most Block Exemption Regulations are about to expire in 2010. The revision of these Regulations and the Guidelines accompanying them is currently one of the major topics discussed within the ECN. Another major topic has been the Commission's Guidance Paper on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

130. 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, the European Commission and the EFTA supervisory authority, the annual meeting of the heads of the authorities took place in April 2009 in Madrid. This meeting dealt, inter alia, with the issue of the derogation from suspension of concentrations, EU competition policy developments and the relationship between competition authorities and the judiciary. The ECA Working Group on Commitment Decisions presented its report at the meeting which was subsequently discussed.

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

131. On 18 September 2008, at the invitation of the Bundeskartellamt, the Working Group on Competition Law met in Bonn to discuss the topic *Buyer Power in Competition Law – Status and Perspectives*. The Working Group meets once a year to discuss fundamental issues of competition policy. Among the participants are, primarily, university professors from economic and legal faculties as well as judges from the competition law chambers of the Düsseldorf Higher Regional Court and the German Federal Court of Justice. As in previous years, this year's conference was attended by the Director General for Competition of the European Commission, Philip Lowe.

132. Buyer power has recently been the subject of an increasing number of discussions on competition policy. The discussion centred on a thorough analysis of the topic in economic and competition law terms in light of the current debate on competition policy concepts (structural or efficiency-based approach) and on key issues of abuse control and merger control.

### **3.4 International Conference on Competition**

133. From 27 to 28 April 2009 the Bundeskartellamt held its 14th International Conference on Competition (IKK). This year for the first time the conference venue was Hamburg. Since 1982 every two years the IKK brings together representatives of competition authorities and other competition experts from all over the world. It has become one of the most internationally renowned events on competition policy. Over 300 participants from more than 60 countries attended the conference in Hamburg. The general theme of this year's conference was: *Dominant Companies: The Thin Line between Regulation and Competition Law*. In two panel discussions individual aspects of dealing with market dominance were discussed in more detail. One discussion dealt with the topic *Release from Regulatory Control*. It focused on the delimitation between regulatory and competition law control, the transition from the one regime to the other and examined the significance of the criterion of dominance in this assessment process. The second discussion was about *Dominant Companies – Consequences of a Categorisation under Competition*

*Law.* Taking a step back from the delimitation between competition law and regulatory law this panel discussed issues and problems arising from the categorisation of a company as dominant.

#### 4. Resources of competition authorities

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

Budget 2009	Change over 2008
EUR 21.7 million	+ 3.4 million
USD <sup>5</sup> 30.7 million	+ 4.8 million

##### 4.2 Number of employees

	number 2009*
<b>Economists</b>	46
<b>Lawyers</b>	73
<b>Other experts</b>	7
<b>Support staff</b>	151
<b>Total</b>	<b>277</b>
<b>Updated: 30 June 2009</b>	

\*Full-time equivalent; not comparable to figures of previous years.

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