

The Bundeskartellamt and its tasks

The Bundeskartellamt (Federal Cartel Office) is an independent higher Federal authority which is responsible to the Federal Ministry of Economics and Technology. As part of the relocation of the Federal Government the Bundeskartellamt has moved from Berlin to Bonn. The main task of the Bundeskartellamt is to apply the Act against Restraints of Competition (ARC), which was enacted for the protection of competition and came into force on 1 January 1958.

I. Competition

Why do we need competition?

In a market economy the activities of manufacturers and consumers are not planned by a central body but individually by economic agents. Competition is responsible for co-ordinating these plans. It enables prices to be determined in markets by the free interaction of supply and demand. These prices have an important control function for the trade in goods and services. The prices show the suppliers the areas in which they can use their production factors most efficiently. They are an indication for customers as to where they can meet their needs as economically as possible. A competitive system also tends to bring about reductions in prices or improvements in quality as a result of companies having to compete for customers. Competition encourages companies to perform better since their chances of making a bigger profit are increased by innovations or technical advances for example. On the other hand, it penalises poor performance with losses. Competition can therefore rightly be seen as the driving force behind the market economy.

Effective competition with a large number of competitors also prevents companies from becoming too influential in society and politics.

Why do we need an Act against Restraints of Competition (ARC)?

The fact that competition tends to result in price reductions or better quality means that the general public benefits from the positive contribution it makes to the overall economy. It would, however, be more lucrative for the individual businessman to sell a certain product or service at a higher price. There is

therefore an incentive for companies to impede or eliminate competition for example by agreements, mergers or abusive practices. A legislative framework is required to counter such a distortion of competition. This legislation gives enterprises the basic freedom to make decisions, subject to the proviso that competitive structures and the individual's freedom of action are maintained.

Who or what does the ARC protect?

The ARC is intended to protect competition. Restrictive practices by companies should be prevented to protect the market opportunities of other companies from interference. The maintenance of a competitive supply also protects the interests of the consumers. In view of the central importance of competition it is not an exaggeration to describe the ARC as the basic law of the market economy.

The ARC protects competition in the Federal Republic of Germany. This competition is to be protected against all forms of restriction, irrespective of whether the restriction results from actions taken within or outside Germany (Section 130 (2) of the ARC).

In principle, the ARC applies to the German economy as a whole. There are, however, exceptions to this rule. The ARC for example contains special regulations for certain sectors such as agriculture as well as banking and insurance. Moreover, exemptions relating for example to the transport and forestry sectors are provided for in special laws.

Since 1 January 1999 the ARC has afforded protection also to bidders for public contracts (see IX. Legal protection available in the field of public contracts).

What is the significance of "competition" as an aim compared with other political aims?

A competitive system operates more efficiently than other economic systems due to its inbuilt incentives. Competition is therefore primarily a means of efficiently achieving economic and political aims as for example prosperity or environmental protection. Competition in its role of guaranteeing liberty is, however, also an end in itself. Manufacturers and consumers are free to decide what they want to sell or buy. This does not mean, however, that everything which results from a competitive system is accepted in our society. Adjustments to the conditions brought about by the market are made in most cases for reasons of social justice.

When did the ARC come into force?

The ARC came into force on 1 January 1958. There have been six revisions of the Act since then; in 1966, 1973, 1976, 1980, 1989 and 1998. The second revision is of particular significance as regards competition policy due to the introduction of merger control.

II. The Bundeskartellamt

What are the tasks of the Bundeskartellamt?

The Bundeskartellamt proceeds against all restraints of competition which have an effect in the Federal Republic of Germany. Among its particular tasks is to enforce the ban on cartels, exercise merger control and control of abusive practices. The Bundeskartellamt is, however, only responsible for enforcing the ban on cartels and exercising the control of abusive practices if the restrictive effect on competition extends beyond the territory of one federal *Land*. If the effect is limited to a single *Land* only, the competition authority of that *Land* will proceed against the infringements of competition law. Merger control is, however, the sole responsibility of the Bundeskartellamt.

It is also the competent authority for all tasks assigned to the Member States by the competition rules of the EC Treaty.

And finally, based on its practical experience, the Bundeskartellamt comments on matters of competition policy and competition law.

Which other competition authorities are there?

Apart from the Bundeskartellamt each *Land* has its own competition authority. It is responsible for proceeding against infringements of competition which have an effect in its *Land*. As previously mentioned, only merger control is a responsibility solely for the Bundeskartellamt. In exceptional cases the Federal Ministry of Economics and Technology also acts as a competition authority: it can authorise cartels and mergers if they are necessary on public interest grounds (see III. Restrictive agreements and IV. Merger control).

The EC Commission in Brussels is responsible for enforcing European competition law (see VIII. Competition law within the European Union). In addition there are regulatory authorities whom the legislator has assigned competition law tasks in the liberalisation of formerly exempted sectors (see page 19).

Who decides on the cases?

Decisions on mergers, cartels and abusive practices are made by the Decision Divisions of the Bundeskartellamt, which are organised according to sectors of the economy. Each case is decided upon by a collegiate body consisting of a chairman and two other members. They must reach a majority decision. The Decision Divisions do not receive instructions from other bodies and make their decisions independently.

The organisation chart of the Bundeskartellamt is shown on the last page.

Why is it so important for the Bundeskartellamt to be an independent authority?

The Bundeskartellamt bases its decisions in administrative and administrative fine proceedings solely on competitive criteria. It receives no instructions from the Ministry of Economics and Technology. The reason why it is so important for the Bundeskartellamt to be independent of political influence is because competition is by no means a self-sustaining system. On the contrary, competition is constantly threatened with restriction or even destruction by sectional interests. The general public benefits from competition. Certain companies, however, find reasons to avoid competition, especially in times of economic crisis. If in such situations politicians, with good reason to be concerned for example about preserving jobs, were to put pressure on the Bundeskartellamt to make decisions based on criteria other than competition, the competitive system would be in danger of being undermined.

There are of course other important economic policy aims apart from competition. It is not the task of the Bundeskartellamt to articulate and implement these, however. If in individual cases restraints of competition are outweighed by advantages to the economy as a whole, or are justified by an overriding public interest, they can be given exceptional approval by the Federal Ministry of Economics and Technology (special cartels and ministerial authorisation in

merger control). The independent decision of the Bundeskartellamt is, however, important for making transparent the effects of restraints of competition.

Who works at the Bundeskartellamt?

The Bundeskartellamt has a staff of about 250, approx. 110 of whom hold senior positions and have degrees in law or economics (about 50% each).

III. Restrictive agreements

What is a cartel?

If several competing enterprises co-ordinate their market conduct for the purpose of eliminating competition this is called a cartel. Price, quota and market allocation agreements are cases in point. The enterprises achieve higher profits through cartelisation because the competitive pressure that would otherwise exist is relieved or removed. Cartels are particularly antisocial in that they usually raise prices to consumers.

In practice, cartels are often euphemistically referred to as "co-operation agreements" or "strategic alliances", which does not alter their restrictive character, however.

Why is there a general ban on cartels?

The ban on cartels is designed to prevent agreements between undertakings insofar as they perceptibly restrict competition between them. Section 1 of the ARC prohibits all agreements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition.

The 2nd Act to Amend the ARC in 1973 added a ban on concerted action to the ban on cartels. This ban on concerted action is meant to cover so-called "gentlemen's agreements" which are operated without formal agreements or decisions.

The ARC also forbids recommendations that are issued to circumvent the ban on cartels (Section 22 of the ARC).

A general ban is justified by the above-mentioned very antisocial character of cartels. Cartels may be authorised by the Bundeskartellamt only if certain strict conditions are satisfied.

How does the Bundeskartellamt proceed against cartels?

The Bundeskartellamt has extensive investigatory powers to enforce the ban on cartels (Sections 57 to 59 of the ARC). It may request information from enterprises, inspect business documents and, after obtaining a relevant order from a local court, search enterprises and seize evidence.

If an illegal cartel is detected, the Bundeskartellamt may impose high fines on the enterprises involved (see page 20).

When can cartels be authorised?

Cartels may be authorised, insofar as

- their subject matter is the uniform application of standards and types (standards-and-types cartels, Section 2 (1) of the ARC) or the uniform application of general terms of business, delivery and payment (condition cartels, Section 2 (2) of the ARC);
- their subject matter is the rationalisation of economic activities through specialisation (specialisation cartels, Section 3 of the ARC), or the rationalisation of economic activities, provided they are a suitable means of substantially increasing the efficiency or productivity of the participating undertakings in technical, commercial or organisational respects and of thereby improving the satisfaction of demand (rationalisation cartels, Section 5 of the ARC);
- they adapt production, manufacturing or processing capacity to demand in the event of a decline in sales due to a lasting change in demand. The conditions of competition in the economic sectors concerned must be taken into account (crisis cartels, Section 6 of the ARC);
- they contribute to improving the development, production, distribution, procurement, taking back or disposal of goods and services, while allowing consumers a fair share of the resulting benefit, provided the improvement cannot be achieved otherwise and is of sufficient importance when compared with the restraint of competition connected with it (Section 7 of the ARC);
- they lead to restraints of competition which are necessary for reasons concerning the economy as a whole and the public interest without authorisation under Sections 2 to 7 of the ARC being possible. Such cases involve special cartels that may be authorised by the Federal Minister of Economics and Technology (Section 8 of the ARC).

In principle the cartels referred to in Sections 3, 5 and 7 of the ARC must not result in the creation or strengthening of a dominant position.

To help small and medium-sized enterprises make up for structural - size-related - disadvantages in competition with powerful large enterprises, the ARC also provides for specific co-operation facilities for such firms (cartels of small and medium-sized enterprises, Section 4 of the ARC). Accordingly, for rationalisation purposes nearly all forms of co-operation between small and medium-sized firms are admissible insofar as they serve to improve the competitiveness of small or medium-sized enterprises and competition is not substantially impeded as a result. Joint buying arrangements between small and medium-sized enterprises can be exempted from the ban on cartels along the same lines. This shows that the ARC is distinctly pro-small business.

Authorised cartels are subject to abuse supervision (Section 12 of the ARC). The competition authorities may revoke an exemption or, in the event of an abuse, order the enterprises concerned to discontinue it.

Examples:

To prevent Berlin from becoming congested by construction traffic the Bundeskartellamt in 1993 authorised a **rationalisation cartel** in the context of the huge building site at Potsdamer Platz: The firm Baustellenlogistik GmbH co-ordinates the building site logistics for the construction companies erecting the Potsdamer Platz buildings. This saves up to 2,200 truck movements daily.

In 1997, the Bundeskartellamt authorised a **cartel of small and medium-sized enterprises** consisting of 8 small shipyards. The aim of the cartel was to make these shipyards competitive or to increase their competitiveness through joint R&D and also, in the case of large orders, through cooperating in their production.

In 1983, the Bundeskartellamt authorised a **crisis cartel** formed by the manufacturers of welded steel mesh. Over a period of five years the companies involved reduced their total capacities by about 40 per cent and thus adjusted them to the decreased demand. Owing to the planned capacity reduction, a number of efficient small and medium-sized firms were saved from disappearing from the market.

An example of a Section 8 cartel, a cartel authorised by the Federal Minister of Economics and therefore called a "**Ministerkartell**", are the agreements made by the German cigarette industry in the seventies which were designed to stop TV advertising for cigarettes. This cartel helped to attain a health policy goal more quickly than relevant legislation would have done.

How many such cartels are authorised?

About 780 applications for the authorisation of the above-mentioned types of cartels have been filed with the Bundeskartellamt since the ARC came into effect in 1958. At present, around 340 of the legalised cartels are still in operation, approx. 110 of which come under the responsibility of the *Land* cartel authorities. About 180 of these cartels involve agreements facilitating co-operation among small and medium-sized enterprises under Section 4 of the ARC.

Why is there no general ban on vertical restraints of competition?

Agreements between enterprises operating at different economic levels, for example exclusive dealing agreements, are admissible in principle. As they do not involve agreements between competitors such - vertical - agreements are not regarded as anti-competitive per se.

Such agreements are, however, subject to supervision for abuses by the competition authority. It may prohibit vertical restraints (for example restrictions imposed on the freedom to use or sell products) if competition in the relevant market is substantially impaired by the agreements (Section 16 of the ARC).

Why is resale price maintenance (RPM) prohibited?

Resale price maintenance agreements are vertical restraints prohibited by the ARC (Section 14 of the ARC). Resale price maintenance agreements can be concluded between enterprises operating at different stages of the economic process by which one party binds the other party to observe certain prices or terms when reselling goods to third parties. This may exclude price competition between traders. However, in a competitive system any enterprise should be free to determine its prices and terms of business as it chooses in relation to downstream stages of the economic process and to consumers. Therefore, to that extent it is not admissible to bind a party to a contract legally or economically.

However, even after the abolition of RPM for branded goods in 1973 RPM for published products continues to be admissible for reasons relating to cultural policy (Section 15 of the ARC).

Whilst RPM is forbidden in principle, manufacturers of branded goods may issue non-binding price recommendations (Section 23 (1) of the ARC). The Bundeskartellamt may prohibit such price recommendations if they are abusive. In particular recommendations of artificially high prices, enabling traders to advertise price cuts, are deemed to be abusive. Price recommendations must be expressly labelled as non-binding and no economic, social or other pressure must be exerted to enforce them.

IV. Merger control

What is a merger?

Unlike contractual restraints of competition where the participating enterprises remain legally independent, concentrations or mergers between enterprises are characterised by the fact that, through the acquisition of shares or assets, formerly independent firms are either merged into one uniform enterprise or at least capital links are created.

The restraints of competition that are associated with mergers are particularly obvious in the case - which is by no means hypothetical - where all competitors in a particular market merge and thereby obtain a monopoly position. Thus business concentration may restrain competition as much as cartelisation does. Since mergers are intended as lasting relationships, they even pose a more serious threat to competition than cartels.

Nevertheless, in the Federal Republic of Germany corporate mergers are allowed in principle. They are subject to control by the Bundeskartellamt only above certain turnover thresholds and subject to prohibition when the restraint of competition has assumed critical dimensions (market dominance).

A distinction is made between horizontal mergers (with the participating enterprises operating in the same market), vertical mergers (between enterprises operating in upstream and downstream markets) and conglomerate mergers (where the participating enterprises are active in entirely different markets).

Which mergers are examined by the Bundeskartellamt?

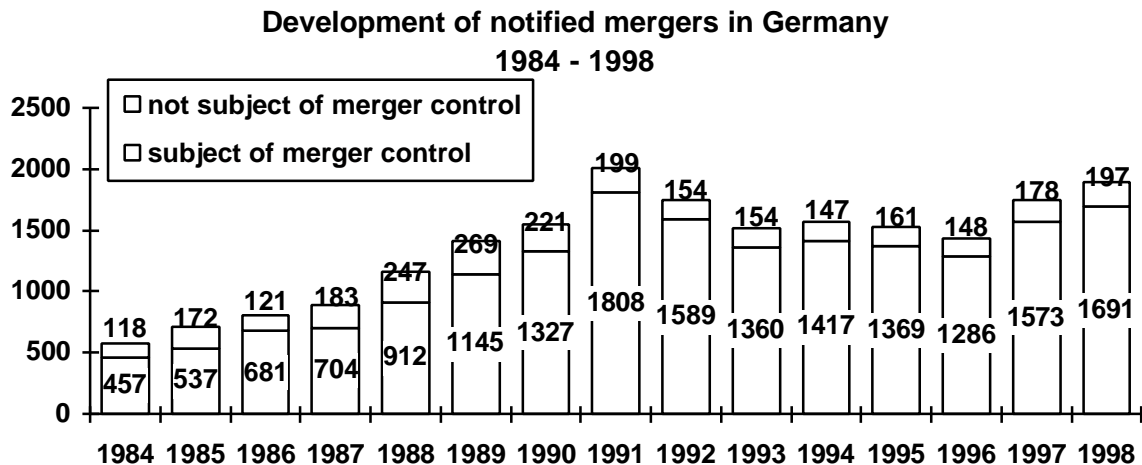
The Bundeskartellamt subjects mergers to scrutiny if the firms participating in the merger recorded a combined aggregate worldwide turnover of more than euro 500 million or if at least one of the firms participating in the merger recorded a domestic turnover of more than euro 25 million. All these turnover figures refer to the last completed business year preceding the merger. Where the turnovers of the participating firms exceed the euro threshold of 5 billion the European Commission has exclusive competence to examine the merger project (for the other requirements see VIII. Competition law within the European Union). Mergers involving firms with combined annual turnovers of less than euro 500 million are not subject to merger control in Germany.

Mergers subject to control have to be notified prior to being put into effect (Section 39 of the ARC).

The following transactions are deemed to be mergers within the meaning of the ARC (Section 37 (1) of the ARC):

- acquisition of all or of a substantial part of the assets of another firm;
- acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings;
- acquisition of shares in another enterprise if the shares, either separately or together with other shares already held by the acquirer, reach 50% or 25% of the capital or voting rights of the other undertaking;
- any other combination of undertakings enabling one or several undertakings to directly or indirectly exert a competitively significant influence on another undertaking.

The graph on the following page shows how merger figures have developed in Germany.



What are the stages of a merger control proceeding?

Once a proposed merger has been notified to the Bundeskartellamt, the competent Decision Division has a maximum of four months for deciding on the project. However, this four-month period is available only if the Division sends the so-called "one-month letter" within one month of receiving the notification. This letter informs the participating firms that the Division has initiated an examination of the concentration (main examination proceedings). The main examination proceedings are initiated if a further examination of the concentration is necessary. At this stage the Bundeskartellamt decides by way of a formal decision whether the concentration is cleared or prohibited. The clearance may be granted subject to conditions and obligations.

Before prohibiting a merger, the Bundeskartellamt has to give the firms an opportunity to comment. The Decision Division fully informs them of the arguments in support of prohibition so that the firms are still able to put forward counter-arguments. There is a right of appeal to the Higher Regional Court in Düsseldorf¹ against prohibitory decisions of the Bundeskartellamt. Appeals on points of law can be lodged with the Federal Supreme Court against decisions of the Higher Regional Court.

When does the Bundeskartellamt prohibit a concentration?

¹ Before the Bundeskartellamt moved to Bonn the Berlin Court of Appeals was the court responsible in such cases.

The Bundeskartellamt prohibits a concentration which is expected to create or strengthen a dominant position unless the participating undertakings prove that the concentration will also lead to improvements in the conditions of competition, and that these improvements will outweigh the disadvantages of dominance (Section 36 (1) of the ARC).

Dominance exists if an undertaking has no competitors or is not exposed to any substantial competition, or if it has a paramount market position in relation to its competitors. The determination of dominance requires the definition of the relevant market according to product type, location and in some cases also according to time.

To determine whether a paramount market position exists in substantive terms the Bundeskartellamt can refer to the structural criteria contained in the ARC (Section 19 (2) No. 2 of the ARC). These include in particular market share, financial power, access to supplies or markets, links with other undertakings, legal or factual barriers to market entry, actual or potential competition by undertakings established within or outside the area of application of the ARC, supply- or demand-side substitutability as well as the ability of the opposite side of the market to resort to other undertakings.

A dominant position may be held not only by a single undertaking, but also by a group of undertakings (so-called oligopolistic dominance).

Examples:

At the beginning of 1997, the Bundeskartellamt **prohibited** the Canadian Potash Corporation of Saskatchewan (PCS) from acquiring a majority stake in Kali und Salz Beteiligungs AG, which is owned by BASF. PCS is the world's largest producer of potash fertilisers. Kali und Salz has a market share of over 80% in the German market for potash fertilisers. This association of the only German supplier with the world market leader, PCS, would have secured the dominant position of Kali und Salz in the long term. At a global level, a relatively tight oligopoly exists involving only a few potassium suppliers. By restricting its own capacity utilisation, PCS is instrumental in maintaining the world market price. Following a concentration, Kali und Salz would no longer have had to take this most important potential competitor into consideration. The companies reacted to the prohibition of the Bundeskartellamt by applying for ministerial authorisation. The German Economics Minister refused to grant the authorisation, however.

In October 1998, the Bundeskartellamt **prohibited** the plans of CLT/UFA (Bertelsmann) and the Kirch group to increase their respective participations in PREMIERE to 50%. PREMIERE is dominant on the German pay-TV market. If PREMIERE had become a company in which CLT/UFA and the Kirch group had each held participations of 50%, the dominant position they already hold would have been reinforced and would have created an oligopoly without any competitors in the free TV market. The pay-TV companies CLT/UFA and the Kirch group are also dominant on the free TV market, which is financed by advertising. CLT/UFA owns RTL, RTL2, SuperRTL and VOX and Kirch owns SAT1, DSF, PRO7 and Kabel1. The two groups of channels together have a share of around 90% of the German TV market. The departure of PREMIERE's previous proprietor would have opened up new opportunities for CLT/UFA and Kirch to coordinate their interests in pay-TV and free TV. In both markets, a dominant oligopoly would have been created or strengthened. The Kirch group meanwhile has acquired 95% of PREMIERE shares. From the point of view of competition, however, this is to be judged positively as it prevents the two groups of channels from colluding as described above.

How many concentrations are prohibited?

In over 20 years of decision-making practice, the Bundeskartellamt issued well in excess of 100 prohibitions, some of which resulted in court decisions. This makes for a largely transparent legal situation for the business community. Bearing this in mind, firms often choose not to bring to the Bundeskartellamt's attention those concentration projects which would obviously result in a dominant market position. When in doubt, firms approach the Bundeskartellamt to discuss projects before they ever reach the stage of notification. Many projects raising competition concerns are abandoned by firms at this early stage, after Bundeskartellamt officials have signalled that prohibition is likely. These cases are known as the Bundeskartellamt's pre-notification stage cases (Vorfeldfälle).

Example:

In 1997, six of the 1,751 concentrations examined were prohibited. Ten projects were abandoned in view of the competition concerns voiced by the Bundeskartellamt.

In 1998, six of the 1,888 concentrations examined were prohibited and there were also fourteen pre-notification stage cases.

Can the Bundeskartellamt also break up undertakings?

The Bundeskartellamt cannot break up undertakings that obtained a dominant position as a result of internal growth. However, a concentration which has been put into effect and which the Bundeskartellamt has prohibited, or whose clearance has been revoked, must be dissolved (Section 41(3) of the ARC). To this end, the Bundeskartellamt orders the measures necessary to dissolve the concentration.

What's special about ..press and broadcasting concentrations?

For press and broadcasting concentrations, the turnover thresholds that trigger merger control are lower: For the publication, production and distribution of newspapers, magazines and parts thereof, the production, distribution and broadcasting of radio and television programmes, and the sale of radio and television advertising time, twenty times the amount of the turnover must be taken into account when calculating the turnovers and market shares (Section 38 (3), Section 35 (2) sentence 2 of the ARC). This provision of the ARC allows for the special role diversity of opinion is considered to play in safeguarding democracy.

..share acquisitions by banks and insurance companies?

Credit institutions, financial institutions and insurance companies are exempt from merger control if they acquire shares in another undertaking for a limited period of time only in order to resell them within a year (Section 37 (3) of the ARC). However, they must not exercise the voting rights attached to those shares. Among other things, this provision is intended to prevent merger control from being triggered immediately by a bank or insurance company acquiring new shares when a joint stock company is created or its share capital is raised.

Does national merger control also work in international markets?

The ARC is intended to protect competition in the territory of the Federal Republic of Germany. This does not mean, however, that competitive influences originating from the growing globalisation of markets will be ignored by the Bundeskartellamt when assessing the conditions of competition. International markets and the

impact of international competitors are taken into consideration by including in the market volume products and services offered by foreign firms in the domestic market. Potential foreign competition is also taken into account by the Bundeskartellamt in its assessment of the conditions of competition.

What is ministerial authorisation?

As has been mentioned above, firms prohibited from merging have recourse to the courts if they disagree with the Bundeskartellamt's competition assessment. The courts may possibly rule differently from the Bundeskartellamt. However, like the Bundeskartellamt, the courts decide on competition grounds alone. Non-competition-based arguments may be advanced by firms when seeking authorisation for a concentration from the Federal Minister of Economics and Technology. In exceptional cases, the Economics and Technology Minister may authorise a concentration 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 (Section 42 (1) of the ARC). The fact that competition-based and politically-motivated decisions are made in a two-stage process and that authorisations are the exception rather than the rule have both proved useful in practice. Only 16 applications for authorisation have been filed in over 20 years, and ministerial authorisations were granted in only 6 cases.

V. Abuse supervision

What is dominance?

There are undertakings that may escape control by competition owing to their particularly strong market position. Their scope of action is not sufficiently controlled and therefore they are able to impose conditions on the other market participants.

The ARC subjects the conduct of dominant undertakings to stricter legal requirements than that of other market participants. The supervision of dominant undertakings for abuses is a form of government regulation designed to make up for the absence of substantial competition.

How does abuse supervision work?

The cartel authority may prohibit any conduct by undertakings and associations of undertakings which is in contravention of the ARC (Section 32 of the ARC).

Abuse of a dominant position

The abusive exploitation of a dominant position by one or several undertakings is prohibited (Section 19 of the ARC). The law provides for several presumptions of dominance to determine whether an undertaking holds a dominant position. A firm's market power in a particular market is measured by market structure - in particular the market share - and by market conduct.

Nowadays the main objective of prohibiting such abuse is to maintain open markets without entry barriers, for new competition usually erodes existing dominant positions more quickly and effectively than do lengthy proceedings before the competition authorities and the courts.

The abuse of economic power consists of all practices that unduly impair the ability to compete of other undertakings (competitors, buyers or suppliers) or adversely affect the consumers.

A prohibited hindrance of competitors occurs for example when a dominant undertaking further strengthens its position vis-à-vis competitors or extends its influence to upstream or downstream stages in the economic process, or to third markets, without this practice being based on the market dominator's performance and if it is actually likely to result in a perceptible deterioration of the other firms' competitive chances.

If an undertaking uses its market power to charge excessive prices and/or to set unreasonable terms and conditions, this is deemed to be an abuse in the form of exploitation. The abuse criterion used by the cartel authority is the so-called comparable market concept, i.e. the allegedly excessive prices are compared with prices that have formed in competitive markets. However, in the light of past experience, action by the competition authorities against abusive price structures (e.g. abusive rebate or discount systems) is more likely to be successful than are measures against excessive prices.

Example:

At the beginning of 1997, the Bundeskartellamt prohibited Lufthansa from charging prices on the Berlin-Frankfurt/Main route which were higher than the prices Lufthansa itself charged on the comparable Berlin-Munich route. At the time of the prohibition, Lufthansa was the only airline operating on the Berlin - Frankfurt/Main route. In the Bundeskartellamt's opinion, the clearly higher prices on this monopoly route compared with other domestic German routes constituted an **abuse in the form of exploitation**. The Bundeskartellamt's decision was reversed by the Berlin Court of Appeals. The Federal Supreme Court reversed this decision and referred the case back to the Court of Appeals. The case continues.

Another case of abuse exists in an undertaking refusing to allow others access to its own networks and other essential facilities whose use is indispensable for operating as a competitor (Section 19 (4) sentence 4 of the ARC). This concept of abuse was introduced with the 6th Act to Amend the ARC. It makes clear that networks which in practice cannot be duplicated (e.g. telecommunications, energy supply, rail transport) must be made available for non-discriminatory use by other market participants. Competition can only develop in these markets if the networks are opened up in this way.

Example:

In September 1999 the Bundeskartellamt issued four prohibitory decisions in response to the Berlin power supply company Bewag unfairly refusing to grant **third-party access to the electricity market** in the western part of Berlin. Various parties interested in acquiring third-party access and various groups of buyers (commercial buyers from the industrial and service sectors, the public sector, tariff-rate customers) have benefited from these decisions. Bewag was refusing to grant third-party access, maintaining that it required the limited capacities itself. This argument did not hold water, however, because even in this special case of limited network capacity the dominant network owner cannot claim priority treatment for his distribution operations. The European electricity directive and the German Energy Act state that the network company is obliged to remain neutral, and that as far as the use of its network is concerned the interests of newcomers to the electricity market are just as important as those of the network company itself. The limited network capacity involved in this case was therefore divided between Bewag and the new suppliers in two partial decisions. The

Bundeskartellamt ordered all the decisions to be put into effect immediately. The decisions have not yet become final.

Unfair hindrance and discrimination

Dominant and powerful undertakings may not directly or indirectly hinder in an unfair manner other undertakings in business activities which are usually open to similar undertakings, nor treat them differently from similar undertakings without any objective justification (Section 20 (1) and (2) of the ARC). This is intended to prevent powerful undertakings from restricting the freedom of economic action and decision-making of other undertakings.

This ban is generally applicable to dominant undertakings. Moreover, it also applies to powerful undertakings on which small or medium-sized suppliers or buyers are dependent to such an extent that they do not have sufficient and reasonable possibilities of dealing with other undertakings. As a rule, only such undertakings are able to impair competition by discriminating against and hindering other undertakings.

A new provision was introduced that is intended to prevent powerful undertakings from unfairly hindering small and medium-sized competitors by systematically selling goods below cost price (Section 20 (4) sentence 2 of the ARC).

While the ban on hindrance mainly protects the competitors of the discriminators, the ban on discrimination ensures that buyers and suppliers are protected against unjustified discrimination in relation to their competitors.

Boycott

The ARC also forbids boycotts. Undertakings must not induce other undertakings to refuse to sell or purchase with the intention of unfairly harming certain undertakings (Section 21 (1) of the ARC).

VI. Exempted areas

Why exempt some industries?

Due to technological, structural and other peculiarities, certain areas of economic activity are partly exempt from the ARC. These include agriculture, the credit and insurance industry, copyright collecting societies and sports (Sections 28 to 31 of the ARC). Other exemptions for the transport, agriculture and forestry sectors are to be found in the corresponding special laws.

Some of these exemptions were justified by rationalisation advantages, others by the aim of ensuring a secure supply of basic commodities. Under the 6th Act to Amend the ARC, an exemption was introduced allowing sports federations to market the television broadcasting of sports events centrally. This resulted, incidentally, from a prohibition decision of the Bundeskartellamt against the German Football Federation (DFB) which was upheld by the Federal Supreme Court. The reason given by the lawmaker for introducing the exemption was that the federations had socio-political responsibilities with regard to promoting youth and amateur sports activities.

These areas are subject to abuse supervision by the competition authorities.

The exemptions from the ban on cartels are incidentally being seen more and more in a critical light. The approach to monopolies, which in the past were considered indispensable in some areas, is now more differentiated. International experience has shown for example that the security of the supply of goods such as electricity and gas is not jeopardised if they are sold or bought competitively. The exemption for energy supply via networks was abolished as a result by the amendment of the Energy Act. Monopolies can also be restricted to performing very few functions, as is evident from the example of telecoms liberalisation. In addition, some of the exemptions contained in the ARC can no longer be implemented because the competition rules of the EC Treaty can be applied to those exempted areas.

Who controls the liberalisation of former exempted areas?

In some cases the lawmaker decided to introduce independent regulatory authorities as part of special competition law provisions contained in sector-specific laws. A regulatory authority for telecommunications and posts was set up as a result. It exercises special abuse control for example of the level of charges

and the network access vis-à-vis dominant undertakings of the relevant sectors. This abuse control under federal law has priority over the ARC.

The federal *Länder* introduced in their areas of responsibility a special control of media concentration in private television companies. They set up a media concentration commission, the "*Kommission zur Ermittlung der Konzentration im privaten Fernsehen*", for this purpose to protect the basic right of freedom of information and opinion. The media-specific concentration control of the German *Länder* and the merger control provisions under the ARC can be applied concurrently.

VII. Enforcement of competition law

How does the Bundeskartellamt get the information it needs?

Under Section 59 of the ARC the Bundeskartellamt has extensive investigatory powers. It may request information from undertakings, inspect business documents and, pursuant to an order from a local court, search undertakings and seize evidence.

What decisions can the Bundeskartellamt take?

The Bundeskartellamt may

- impose fines for infringements of the ARC or decisions of the Bundeskartellamt,
- prohibit concentrations,
- prohibit practices which are forbidden under the ARC, and skim off the additional proceeds obtained,
- grant exemptions in respect of certain agreements and decisions.

What sanctions can the Bundeskartellamt impose?

The Bundeskartellamt may impose administrative fines of up to euro 500.000 for violations of the prohibitions contained in the ARC. It may also impose fines of up to three times the additional proceeds obtained as a result of the infringement (Section 81 (2) of the ARC). The fines are allocated to the budgets of the public authorities.

Examples:

In August 1997, the Bundeskartellamt imposed **fin**es totalling DM 280 million on 15 power cable manufacturers, two cable industry organisations and 25 persons in charge. Based on a quota system, those concerned had been dividing up the market for power cables among themselves for decades in a cartel covering the entire sector. The system involved sharing enquiries from all customers - power supply companies, municipal undertakings, industrial customers and wholesale companies - among the cartel members in such a way that at the end of a fixed reference period every manufacturer's market share corresponded to his allotted quota. The agreed quotas were implemented by means of price fixing or rebate agreements.

The Bundeskartellamt is currently conducting extensive fine proceedings against companies in the ready-mixed concrete sector. The companies involved have participated over several years in quota agreements based on a comprehensive cartel accounting system. The fines imposed in these proceedings will probably reach a total of more than DM 300 million.

What legal steps can undertakings take against Bundeskartellamt decisions?

Firms may file an appeal with the Higher Regional Court in Düsseldorf against decisions of the Bundeskartellamt. Appeals on points of law may be filed with the Federal Supreme Court against the decisions of the Higher Regional Court.

VIII. Competition law within the European Union**Why do we need a European competition law?**

The European Coal and Steel Community (ECSC) and the European Economic Community (EEC) were established in the fifties. The aim of both Communities has been to set up a Common Market involving, among other things, the free movement of goods between the Member States. This aim cannot be achieved if undertakings engage in private market-sharing agreements and other restrictive practices when governmental barriers to trade have been removed. To prevent that happening, and at the same time to create uniform conditions for undertakings, competition rules were laid down (Articles 65 and 66 of the ECSC

Treaty and Articles 81 and 82 of the EC Treaty). In addition, the EC Merger Regulation came into force in 1990.

Does German competition law differ from European competition law?

German competition law and European competition law are related in principle. Both provide for a ban on cartels, some of which are eligible for exemption, a ban on abuse by dominant (or powerful) undertakings and merger control whose substantive criterion for intervention is the creation or strengthening of a dominant position. However, as far as the competent institutions are concerned, the two legal systems differ: In Germany, as mentioned above, competition law is enforced at federal level by an independent authority (with a separate procedural possibility of exemption by the Economics and Technology Minister). Decisions under EC law, on the other hand, are made by the EC Commission in Brussels, which in its capacity as a political body is also responsible for other economic and political decisions.

When are restraints of competition within the European Commission's competence?

All restraints of competition that affect trade among the Member States are within the European Commission's competence. The national competition authorities may also apply the competition rules of the EC Treaty if the European Commission has not initiated its own proceedings. The Bundeskartellamt has already prohibited restraints of competition which violate EU competition rules in several proceedings.

Example:

In applying European competition law, the Bundeskartellamt prohibited the travel agencies TUI and NUR from implementing selective exclusivity clauses in agreements relating to the purchase of room quotas in certain Spanish hotels. The Bundeskartellamt held that the object and effect of such agreements, which excluded certain other tour operators from making bookings in the hotels concerned, was a restriction and distortion of competition within the common EU market when they are concluded by powerful tour operators. By hindering and excluding other operators TUI and NUR could avoid a direct comparison being made between their prices and those of their competitors.

However, enforcement of European merger control is the European Commission's exclusive responsibility. All concentrations with a Community dimension are subject to European merger control.

A concentration is deemed to have a Community dimension if certain turnover thresholds are met. This is the case if the combined aggregate worldwide turnover of all the undertakings concerned is more than 5 billion euro and the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than 250 million euro. This is essentially intended to ensure that concentrations of undertakings with high turnovers are covered by European merger control.

At the same time the EU Commission has a responsibility to take on cases in order to avoid multiple notifications: concentrations which have their effect in three or more Member States and might trigger merger control proceedings in each of these states are examined centrally in Brussels in certain circumstances.

How do the authorities of the Member States influence the decision-making process in Brussels?

The Member States are represented in the so-called Advisory Committees, which submit their own opinions to the Commission in all formal proceedings. In addition, the Member States may submit comments on individual cases to the Commission at any time.

More generally, there is close liaison between the national authorities and the EC Commission, which is reflected in regular exchanges of information and staff.

IX. Legal protection available in the field of public contracts

Since 1 January 1999 rules relating to the procedures and legal protection associated with the award of public contracts have been incorporated into the ARC (Sections 97 to 129 of the ARC).

Who must comply with the provisions relating to the award of public contracts?

There are six categories of contracting entities that have to observe the new law on public procurement. These are above all the typical contracting authorities, especially the Federation, *Länder* and municipalities. Under certain

circumstances the provisions relating to the award of public contracts must also be applied by undertakings operating in the fields of drinking water, energy, transport or telecommunications (so-called sectoral contracting entities).

Public procurement law under the ARC only applies to contracts exceeding 200,000 euro (for supplies and services) or 5 million euro (for building contracts).

How are public contracts awarded?

In principle public contracts are awarded on the basis of a competitive award procedure which must be transparent and non-discriminatory. The expertise, efficiency and reliability of the bidders must meet certain requirements. Other or more far-reaching requirements may be set only if federal law or the laws of a *Land* provide for this. In principle the contract is awarded to the bidder submitting the most economical offer.

Public contracts can be awarded in open procedures, restricted procedures or negotiated procedures. The traditional contracting authorities always give priority to the open procedure. This involves issuing a public tender for which each interested party can submit an offer.

How are awards of public contracts reviewed?

Public contracts are reviewed mainly by the public procurement tribunals established by the Federation and each individual *Land*. The public procurement tribunals of the Federation, responsible for examining the award of public contracts falling within the scope of responsibility of the Federation, are located at the Bundeskartellamt. They take their decisions - similarly to the procedure adopted by the Decision Divisions of the Bundeskartellamt in cartel and merger cases - through a chairperson and two associate members, one of whom serves in an honorary capacity.

The public procurement tribunal can initiate a review procedure only on the basis of a written application. Such an application may be filed in particular by any bidder whose offer was not accepted and who claims the provisions governing the award of public contracts have been violated.

Appeals against decisions of a public procurement tribunal of the Federation can be brought before the Higher Regional Court in Düsseldorf.

Bundeskartellamt

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Tel.: ++ 49 (228) 9499-0**Activity Reports of the Bundeskartellamt**

Year	Bundestagsdrucksache Publications	Date
1958	3. Wahlperiode Drucksache 1000	–
1959	3. Wahlperiode Drucksache 1795	–
1960	3. Wahlperiode Drucksache 2734	–
1961	IV/378	–
1962	IV/1220	–
1963	IV/2370	–
1964	IV/3752	–
1965	V/530	–
1966	V/1950	–
1967	V/2841	–
1968	V/4236	–
1969	VI/950	11 June 1970
1970	VI/2380	28 June 1971
1971	VI/3570	19 June 1972
1972	7/986	5 September 1973
1973	7/2250	14 June 1974
1974	7/3791	18 June 1975
1975	7/5390	16 June 1976
1976	8/704	4 July 1977
1977	8/1925	–
1978	8/2980	20 June 1979
1979/80	9/565	25 June 1981
1981/82	10/243	13 July 1983
1983/84	10/3550	26 June 1985
1985/86	11/554	25 June 1987
1987/88	11/4611	30 May 1989
1989/90	12/847	26 June 1991
1991/92	12/5200	24 June 1993
1993/94	13/1660	14 June 1995
1995/96	13/7900	19 June 1997
1997/98	14/1139	-

The Bundestagsdrucksache publications can be obtained from the Bundesanzeiger Verlagsgesellschaft mbH, Postfach 1320, D - 53003 Bonn, Tel.: ++49 (228) 382080.

The current edition of the report for 1999/2000 can also be obtained direct from the Bundeskartellamt for a nominal charge of euro 6.

The decisions of the Bundeskartellamt as well as the appellate courts are published for example in the journal "Wirtschaft und Wettbewerb" (WuW). This journal also contains brief descriptions of important mergers which have not been prohibited.

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