

BUNDESKARTELLAMT



Our activities in 1999 and 2000

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Preliminary remarks

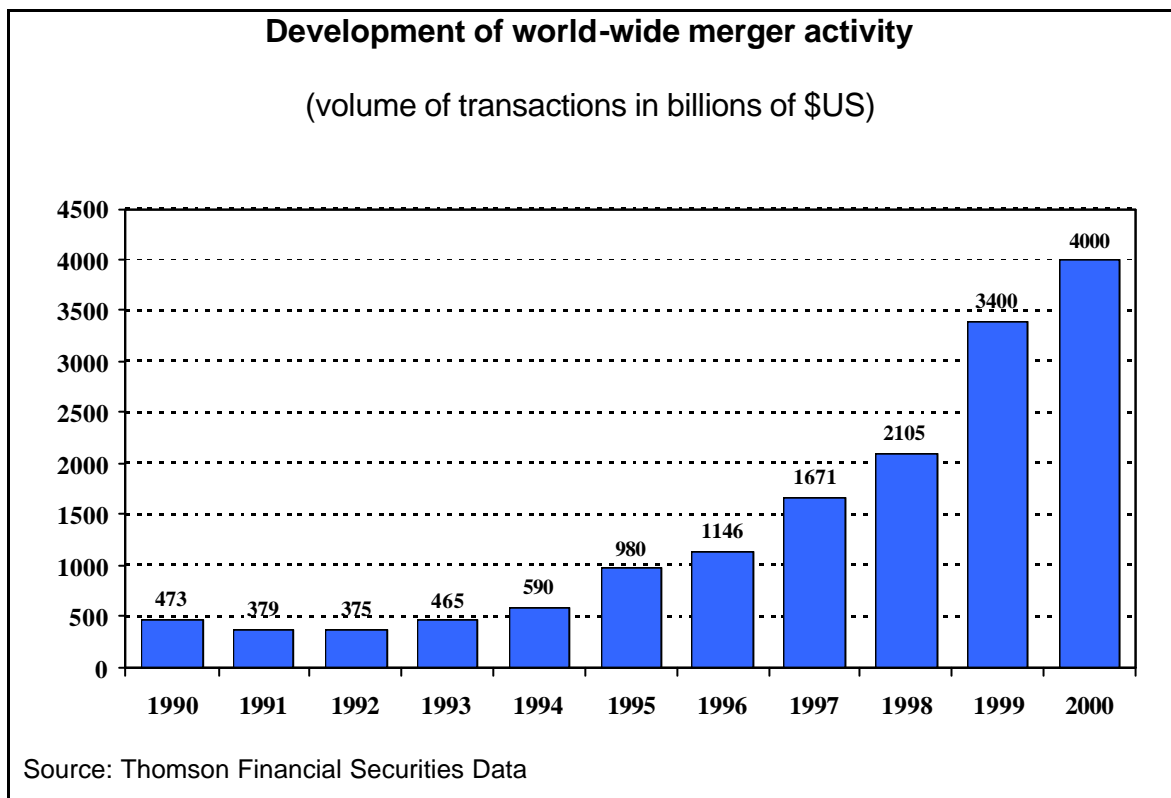
As part of the relocation of the German government, the headquarters of the Bundeskartellamt moved from Berlin to Bonn on 1 October 1999. This relocation brought in its wake fundamental changes for the Bundeskartellamt and its staff. It meant that a large number of staff left the Bundeskartellamt to be replaced by new staff. More than half of the Bundeskartellamt staff moved to the Federal Ministry of Economics and Technology in Berlin. In exchange, the Bundeskartellamt took on new members of staff from other Federal authorities, particularly from the Federal Ministry of Economics and Technology.

The fact that a large number of staff left the Bundeskartellamt and a correspondingly large number of new members of staff had to settle in to their new posts presented the authority with a challenge. Nevertheless, it successfully fulfilled all its tasks during this temporary upheaval. That applies not only to the field of traditional competition law, but also to public procurement law, for which the Bundeskartellamt took over responsibility with the entry into force of the 6th amendment to the Act against Restraints of Competition (ARC) on 1 January 1999.

The integration of the new members of staff into the Bundeskartellamt and of the authority into its new environment in Bonn, has been very successful. The transition phase resulting from the change of location is now over.

1. The development of competition

In 1999 and 2000 the development of competition continued to be marked more than anything else by a number of **mega-mergers**, which received a great deal of public attention. In the year 2000 the volume of transactions involved in company take-overs and participations rose significantly in terms of purchase prices in comparison with previous years. Estimates suggest that German companies were involved in concentrations valued at nearly DM 1 billion, more than double the value reached in 1999. However, this development is largely due to a small number of takeovers in which particularly high purchase prices were paid.



On the basis of the turnover revenues of the firms involved in the mergers, the following economic sectors in particular are affected internationally by mega-mergers:

- the oil industry,
- the chemicals and pharmaceuticals industry,
- the aluminium industry,

- energy requiring transmission lines and
- telecommunications.

Many mergers were an integral part of a comprehensive restructuring process by the firms involved aimed at concentrating their activities in one core business area. Thus, mergers and acquisitions served to strengthen such core areas, while peripheral business activities, although often of significant size, were hived off. Such restructuring to hone specialisations was a defining feature of merger activities, particularly in the chemicals and pharmaceuticals industry. In Germany, mergers in the electricity sector also played a significant role, as they represented consolidation following liberalisation of the sector.

In adopting the 6th amendment to the Act against Restraints of Competition as of 1 January 1999, the legislator created a new statutory definition of abusive conduct: The **sale** not merely occasionally **below cost price** by undertakings with superior market power to that of small and medium-sized competitors. The Bundeskartellamt has used this new regulation in proceedings against several large trading companies and has drafted principles for its interpretation. In so doing, the authority pointed out that the regulation neither called into question the principle of freedom to set prices nor invalidated confidential competition on conditions.

A largely new phenomenon during the period covered by this report was the significant increase in the importance of the **Internet** as a medium of business transactions. In the first years of its commercial use, the focus of interest was on business relations between firms and end customers via this medium. In this area there have been no competition law problems to date. Meanwhile, the field of business-to-business (B2B) has come to the fore, i.e. business transactions between firms via an Internet exchange. In general, carrying out transactions in this way can improve efficiency and promote competition. However, Internet exchanges can also raise competition problems. That is the case, for example, when they are used to pool demand or as a means of exchanging information and thus of coordination between competitors. For all the benefits of Internet exchanges, such potential for damage to competition cannot be conclusively

ruled out, and they thus pose special challenges to the competition authorities with regard to monitoring their conduct.

*The Bundeskartellamt dealt with the plan by Ford, General Motors, DaimlerChrysler and Renault Nissan to create a joint communication platform on the Internet, **Covisint**. It provides procurement, supply management and product development services to the whole of the automotive industry, including suppliers.*

The Bundeskartellamt cleared the project on 25 September 2000 following an in-depth examination, during which it maintained close contact with the American competition authority, the FTC.

The following factors were decisive in the Bundeskartellamt's decision:

Access to the exchange will be open to all interested firms and will be non-discriminatory. Use of the exchange will not require a binding exclusivity agreement to be concluded. The automotive producers involved will not pool their purchasing power. In its merger control examination of Covisint, the Bundeskartellamt was unable to establish that Covisint had a dominant position. There are unlikely to be any effects on the motor vehicle market that would give rise to competition concerns. The Bundeskartellamt will continue to carefully monitor Covisint's activities and will intervene if necessary.

The guidelines for setting fines published by the Bundeskartellamt in April 2000 are an instrument for more effectively enforcing the ban on cartels. This **leniency programme**, which is orientated to the European Commission's similar principles, is intended to make it easier for cartel members to leave a collusive system, thereby undermining the stability of cartels.

Since the beginning of 1999, the Bundeskartellamt has made important rulings in the field of competition and public procurement law available to the public on its website (www.bundeskartellamt.de). These include all merger control decisions which enter main examination proceedings, i.e. both prohibitions and substantiated non-prohibitions. In so doing, the Bundeskartellamt ensures that the public at large is provided with as much information as possible about its activities, guaranteeing extensive transparency in the application of the law.

2. Division of tasks and international cooperation between the competition authorities

Globalisation means that markets are merging and expanding. This is a process involving breaks with the past and contradictory developments in some sectors. The processes of competition continue to take place at national or regional level. Thus, the question arises ever more frequently as to whether it would be better for certain cases to be processed by the national competition authorities or by the European Commission. This question plays an important role in the European Commission's current reform projects to revise European competition law (on the one hand in the field of cartels and control of abusive practices by monopolists and on the other in the field of merger control).

Under the principle of subsidiarity enshrined in Article 5 sentence 2 of the TEU, the European Union shall take action in areas which do not fall within its exclusive competence only "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community ". In other words, the goal aspired to should be implemented as effectively as possible. This basic assumption is that the level closer to the action is usually in a better position to achieve a result.

Against this background, the question as to whether the national or the European level is better suited to dealing with individual competition law cases must be answered primarily on the basis of the criterion of which level can better implement the principle of competition. Other legitimate demands, such as legal security for undertakings, a minimum of red tape for all involved and consistent application of the law, have to be optimised, the overriding goal being to effectively implement the principle of competition.

The Bundeskartellamt has in the past repeatedly called for the cases where the competitive focus is in one Member State to be dealt with by the competition authority in that Member State. This principle applies both to merger control and to the control of abusive practices and the enforcement of the ban on cartels.

There are growing demands on cooperation between the competition authorities when one case is dealt with by several competition authorities simultaneously. The Bundeskartellamt has thus sought contact to the authorities of other Member States more frequently than in the past. Conversely, these authorities have also approached the Bundeskartellamt. The Bundeskartellamt and the British Office of Fair Trading, for example, cooperated closely in the examination of the proposed merger of the London Stock Exchange and Deutsche Börse AG, which was ultimately abandoned. There is also a regular exchange of experience and views with the US antitrust authorities in specific cases, such as the Covisint Internet exchange in the automotive sector.

There is also a growing need for competition authorities to cooperate when they process cases where useful decisions can only be taken through close cooperation on account of the complexity of the subject matter. Most examples are still in the area of cooperation between the European Commission and the Bundeskartellamt rather than between the Bundeskartellamt and the other national competition authorities. Without a doubt, a prominent example was the special cooperation between the European Commission and the Bundeskartellamt in examining the mergers of Veba/Viag and RWE/VEW.

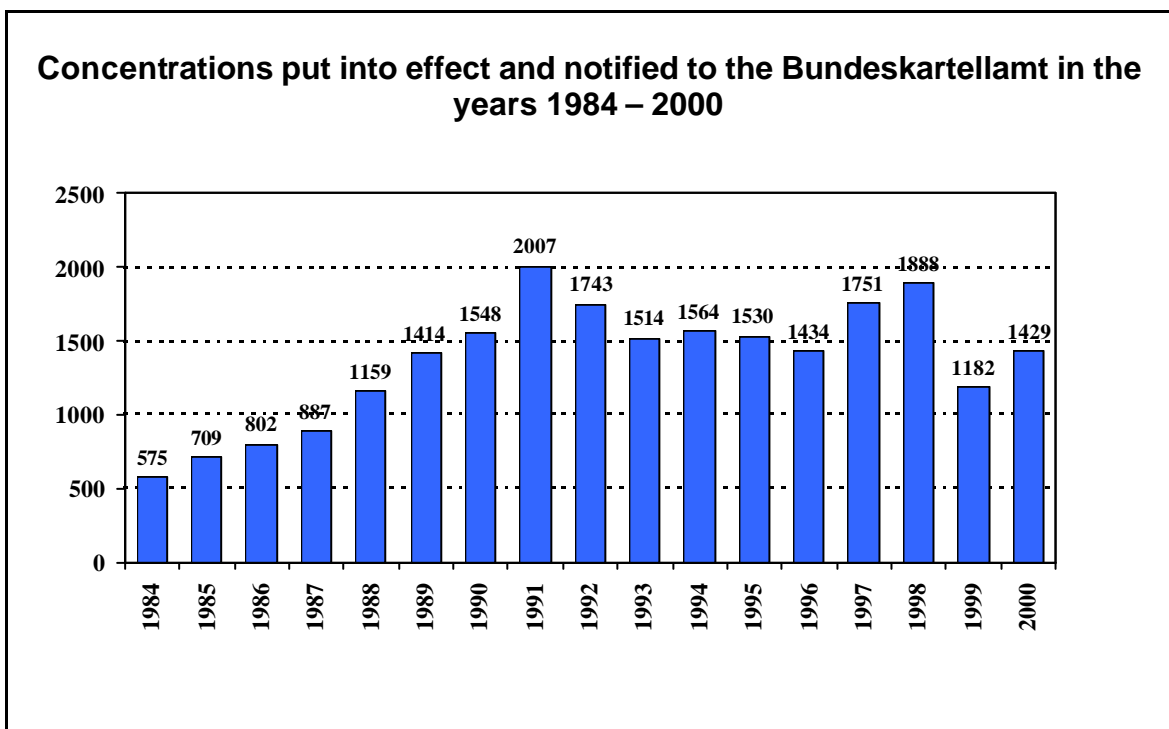
For its part, the European Commission has proposed the creation of a network of the European competition authorities for applying European competition rules in connection with the reform of procedural competition law. The network is intended to provide a framework for exchanging information on new and ongoing proceedings, allocating cases appropriately and resolving proceedings affecting several Member States. At the same time, the Commission has proposed that the competition authorities in the network exchange confidential information and that they could support one another in investigations. A consensus is not yet possible on the proposals as they now stand. From the point of view of the Member States, the Commission's draft does not guarantee any real cooperation in partnership among the authorities. However, the Bundeskartellamt explicitly welcomes the general objectives of the idea of a network.

Cooperation among the competition authorities should not be limited to cases subject to European cooperation rules. Under German law, the possibilities of

the Bundeskartellamt are limited to exchanging information and giving mutual support in investigations in accordance with the rather complicated legal assistance procedures. An alternative to this could be to further develop bilateral and multilateral cooperation agreements on the one hand and to amend national laws accordingly on the other. Some European countries have already made such changes.

3. Merger control

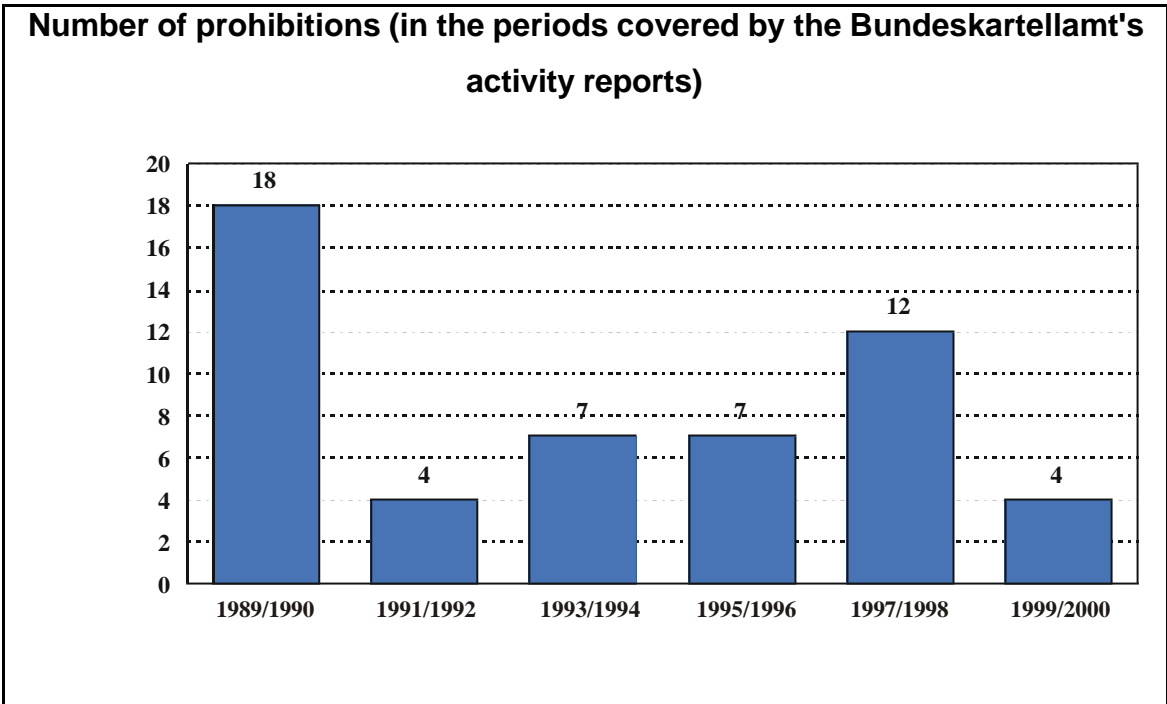
Since the late eighties, the number of merger cases examined by the Bundeskartellamt has held steady at the high level of approximately 1,500 per annum. The amendment to the ARC that came into effect on 1 January 1999, which raised the threshold values to be taken into account in the authority's examination of competition cases from DM 500 million to DM 1 billion, led to a reduction in the number of cases as expected, following a significant increase in 1997/98.



A growing number of mega-mergers with effects on German markets was subject to European merger control. As a national authority, the Bundeskartallamt is involved in the examination proceedings of the European Commission. The Bundeskartallamt makes intensive use of its opportunities to be involved in the Commission's proceedings in the interests of merger control, primarily in the Advisory Committee on merger control.

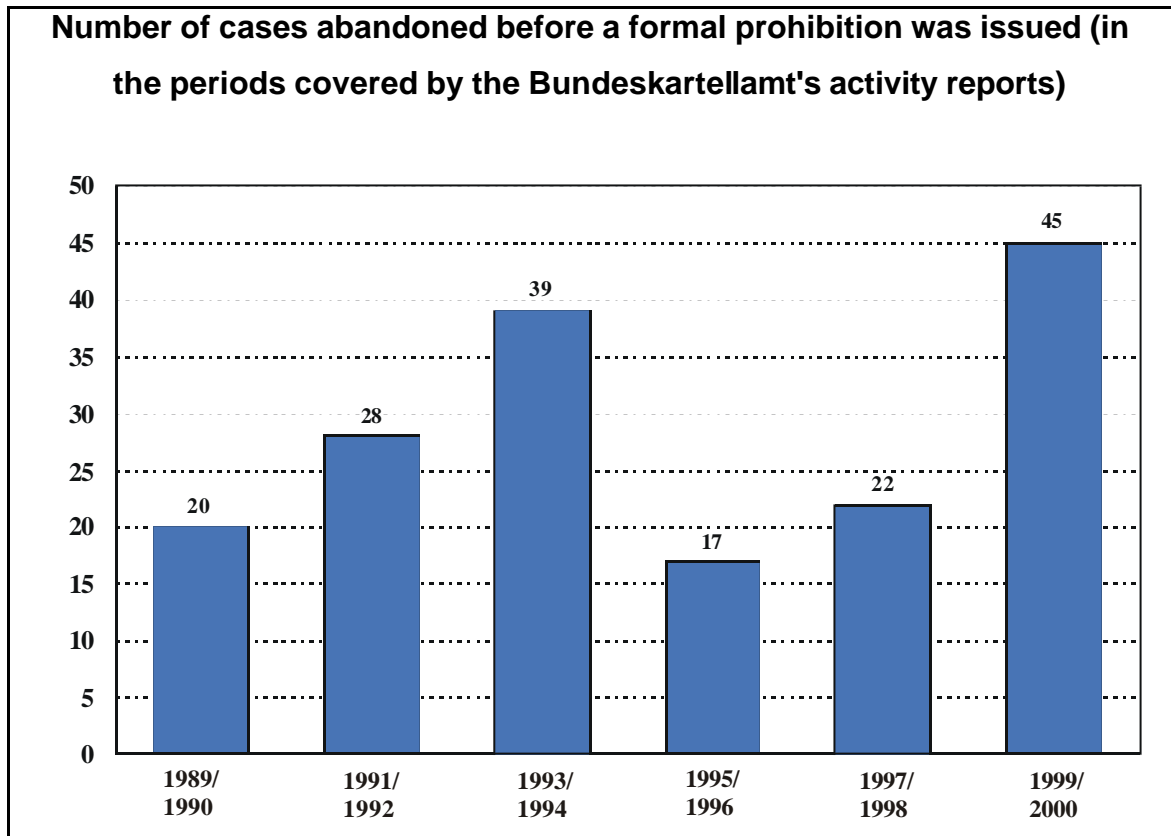
Following the entry into force of the 6th amendment to the ARC, merger control proceedings must be concluded by formal decision in all cases in which main examination proceedings have been initiated (Section 40 (2) sentence 1 of the ARC). If no decision is issued, the concentration is deemed to be cleared (Section 40 (2) sentence 2 of the ARC). In 1999 and 2000, the Bundeskartellamt concluded a total of 85 main examination proceedings with a formal decision, of which the concentration was prohibited in four cases and in which it was cleared subject to conditions and obligations in nine cases. The formal decisions may be viewed on the Bundeskartellamt's website at www.bundeskartellamt.de/fusion.htm.

The Bundeskartellamt has prohibited the following concentrations:
Betonschwellenwerk Coswig / Wayss & Freitag (railway sleepers), Henkel / Luhns (cleaning agents), Westdeutsche Allgemeine Zeitung / Ostthüringer Zeitung (daily newspapers), Melitta Bentz / Schultink (vacuum cleaner bags). In these cases, it was likely that a dominant position would have been created or strengthened by the concentration. The prohibitions in the first two of these cases are legally valid and in the other cases, appeals have been made against the prohibitions.



Since merger control was introduced in 1973, a total of 131 concentrations have been prohibited. 77 prohibitions are valid and in nine cases appeals or appellate procedures are pending. In 45 cases the prohibition was ultimately lifted or declared to have been settled.

In 1999 and 2000 the total number of proposed concentrations abandoned on account of a preliminary examination by the Bundeskartellamt or abandoned, modified or prohibited without a formal prohibition after notification rose by 45 cases to a total of 345 since the introduction of merger control. The Bundeskartellamt considers these figures to be an indication that merger control is effective since all of these cases raised significant competition concerns.



Applications for ministerial authorisation (clearance by the Federal Minister of Economics of a concentration that has been prohibited by the Bundeskartellamt) were not made in 1999 or 2000. Since merger control was introduced there have been a total of 16 applications for ministerial authorisation, of which six concentrations were cleared.

Concentrations in the energy sector

One focal area of merger control in the last two years has been in the field of energy.

The mergers of RWE and VEW (now RWE) and of Veba and Viag (now E.on) have led to a restructuring of the German energy sector. The European Commission examined the merger of Veba and Viag, while the RWE-VEW merger fell under the auspices of the Bundeskartellamt. The two authorities cooperated closely throughout the proceedings. There were competition problems particularly, but not exclusively, in the electricity markets.

It was only possible to clear the project by imposing far-reaching obligations. A dominant duopoly would otherwise have been created on several electricity markets.

The market share influenced by the duopoly was more than 70 per cent of large customers and more than 55 per cent of household customers. The next largest competitors had market shares of below 10 per cent. The market share of the new entrants amounted to a total of less than 2 per cent. Several hundred municipal utilities (Stadtwerke) held the remainder of the market.

In the field of electricity trading the duopoly achieved a market share of as much as 85 per cent. In this market, it largely controlled domestic production capacities and, as the owner of the majority of the cross-border network connections, it also controlled import opportunities.

After the merger the firms would have been much more powerful than the other competitors with regard to all relevant resources. The competitors did not have sufficient market power, however, to neutralise the competitive edge of the duopoly.

The competitive concerns were met by imposing obligations.

One of the main obligations affected the eastern German energy supplier Veag. RWE/VEW and Veba/Viag held shares of more than 80 per cent of Veag. Veag generates electricity from eastern German brown coal, but does not itself have any direct access to final customers. Against this background, the Bundeskartellamt and the Commission required the companies concerned to sell their respective shares in Veag, in its brown coal supplier Laubag and in the eastern German regional energy company envia to one single purchaser. The order to abandon the proposed acquisition of envia was based on evidence that Veag can establish itself through relevant sales contracts as an active competitive force in the field of large and household customers.

This condition has meanwhile been fulfilled through the acquisition of Veag and Laubag by Hamburgische Electricitäts-Werke (HEW). What was decisive for HEW's concept to be approved was the fact that HEW thereby gained an influence on the Berlin energy supplier Bewag. In so doing, the conditions for a strong grid were created. Together with other competitors, such as Energie Baden-Württemberg (ENBW), high-performing municipal utilities and domestic and foreign new entrants, this grid can put competitive pressure on the two market leaders, RWE and E.on.

Other obligations were also imposed with a view to creating the conditions for effective external competition in order to prevent oligopolistic parallel conduct by the firms.

Following the clearance of the RWE/VEW merger, a number of vertical and horizontal concentrations were notified to and cleared by the Bundeskartellamt, particularly involving the two large grids, RWE and E.on or their subsidiaries. Only a limited number of mergers by independent regional suppliers with each other, by independent regional suppliers with municipal utilities and by municipal authorities with each other have been observed, however.

Concentrations in telecommunications

In the field of fixed-network telecommunications there were a large number of concentrations involving competitors of Deutsche Telekom AG (DTAG). These concentrations were all cleared by the Bundeskartellamt, since the participating firms were unlikely to achieve dominant positions. That applied, for example, in the case of the acquisition of o.tel.o. communications GmbH & Co.'s fixed network operations by Mannesmann Arcor AG & Co. The latter thereby consolidated its market position as the second strongest supplier after DTAG.

On the mobile phone market, foreign suppliers have increasingly entered the domestic market. The Bundeskartellamt cleared the acquisition of the majority of the shares in debitel AG by Swisscom AG, for example. Cases cleared by the European Commission included the take-over of Mannesmann AG by Vodafone Airtouch Plc. (whereby conditions were imposed).

In the run-up to the auction of UMTS licences and shortly afterwards, the Bundeskartellamt also examined the creation of a number of supply consortia. There were no concerns in any case. The Commission has meanwhile approved the transformation of the two successful supply consortia France Telecom/MobilCom and Group 3G into fully-functioning joint-stock companies.

In implementing the announced sale of its broadband cable network, DTAG has divided up this network into nine regional companies. To date, majority shareholdings in the regional companies in North-Rhine/Westphalia and Baden-Württemberg have been hived off (in both cases to a supply consortium

associated with Callahan Associates International), as has also happened in Hesse (to a supply consortium associated with the British cable network operator NTL).

4. Control of positions of economic power

The dispute about network access has led to the control of abusive practices by dominant or powerful companies in the network-based energy sectors (electricity and gas) gaining considerably in importance. The new norm created in the most recent amendment to the law on competition was applied, which explicitly declares refusal of access to so-called "essential facilities" to constitute an abuse of a dominant position (Section 19 (4) 4 of the ARC).

A new field of abuse control that has been included in the list of abusive conduct is sales below cost price (Section 20 (4) sentence 2 of the ARC).

In controlling positions of economic power in telecommunications and the postal services, cooperation with the regulatory authority played an important role.

In addition, the traditional abuse control of dominant firms remains a core task of the Bundeskartellamt, as proceedings against the leading German oil companies show.

The oil industry

The Bundeskartellamt has countered the large oil companies' attempt to use abusive pricing to squeeze independent petrol stations out of the market

The Bundeskartellamt prohibited DEA Mineralöl AG, Aral AG, Deutsche Shell GmbH, Esso Deutschland GmbH, Deutsche BP AG and Elf Oil Deutschland GmbH from demanding higher prices for supplies to independent petrol station operators (plus a freight cost supplement) than they charged end consumers at petrol stations they operated themselves. The Bundeskartellamt also ruled that the decision should be put into effect immediately. The proceedings were preceded by numerous complaints from small and medium-sized petrol station operators and associations throughout Germany.

By opening up a price gap and charging higher prices to small and medium-sized petrol station operators at the refineries than they did to final customers at their own petrol stations, the large oil companies had unfairly hindered independent petrol station operators. This price policy meant that the independent petrol station operators were unable to make a profit from fuel sales and that their very existence was threatened as a result. In contrast to the large vertically-integrated oil companies referred to above, the small and medium-sized firms neither have access to the crude oil market nor to the financial resources to cushion any possible losses on the fuel market. If small and medium-sized independent competitors are squeezed out of the market, competition will be lost in the medium and long term, to the detriment of consumers.

All six companies concerned appealed against the decision and have applied for temporary legal protection. In its ruling of 13 November 2000 in the temporary legal protection case, the Higher Regional Court in Düsseldorf had serious concerns about the legitimacy of the Bundeskartellamt's decision. These doubts were mainly to do with the appropriacy of the Bundeskartellamt's reference to Section 20 (4) sentence 1 of the ARC to substantiate its decision and with its evaluation of the facts.

Telecommunications

The Telecommunications Act, which came into force on 1 August 1996, paved the way for competition to be introduced into the field of telecommunications. The legal monopolies remaining in speech telephony after the second reform of the postal services were suspended as of 1 January 1998 and the markets concerned opened up to competition. The Regulatory Authority for Telecommunications and Posts is responsible for enforcing the Telecommunications Act. One of the objectives of this Act is to promote competition in telecommunications by means of regulation (Section 1 of the Telecommunications Act). Three years on, there have been positive interim results towards liberalisation, at least as regards the long-distance and international calls. There are now more suppliers competing in this market with the former monopolist, Deutsche Telekom AG (DTAG). The consolidation

process now under way has already led to a few competitors leaving the fixed network markets.

The Regulatory Authority for Telecommunications and Posts will in particular control abusive practices as provided for in the Telecommunications Act; the provisions of the ARC do not generally apply. The tasks of merger control and the enforcement of the ban on cartels, however, will continue to be carried out by the Bundeskartellamt. That notwithstanding, the competition rules under the Treaty Establishing the European Community may be affected.

In order to ensure that uniform standards are maintained in sector-specific regulation under the Telecommunications Act on the one hand and general competition control under the ARC on the other, the Telecommunications Act provides for the Bundeskartellamt to cooperate in decisions taken by the Regulatory Authority for Telecommunications and Posts. Under Section 82 of the Telecommunications Act, the Bundeskartellamt must agree with the definition of product and geographic markets and in establishing the existence of a dominant position. In addition, the Bundeskartellamt is to be given an opportunity to make a statement concerning measures for regulating dominant firms (regulation of charges and network access as well as abuse control). Conversely, the Regulatory Authority for Telecommunications and Posts is to be involved in similar proceedings carried out by the Bundeskartellamt.

In 1999 and 2000 the Bundeskartellamt was involved in approximately 100 proceedings of the Regulatory Authority and made intensive use of its responsibility under the Telecommunications Act, in the interests of competition and the consumer. During this period, the Regulatory Authority made some important decisions. In particular, the Bundeskartellamt welcomed the fact that interconnection charges were lowered to better reflect actual costs.

The Bundeskartellamt also agrees with the Regulatory Authority that the national fixed-line network currently constitutes a separate product market, which may even need to be broken down into smaller markets. Mobile telephony and alternative access technology (e.g. using the power supply system, radio relay and broad-band cable) are thus not to be included in this market. None of the alternative telecommunications infrastructures is currently

in a position to have any adverse effect on DTAG's dominant position in the local networks. For potential competitors the basic problem continues to be that it is more difficult for them to gain access to the traditional telecommunications infrastructure, especially to the "last mile". If in future, however, alternative access technology is able to challenge DTAG's dominant position on most domestic telecommunications markets, the product market would have to be defined in broader terms accordingly.

Postal services

Although the Postal Law, which provides the framework for converting monopolistic market structures into a market system that is characterised by competition, has been in force for three years now, competition has only developed to a limited extent, at least in the area of letter delivery. Deutsche Post AG (DPAG) still has a market share of more than 99 per cent in deliveries of letters weighing up to 1000 grammes and of more than 95 per cent in deliveries of mailings of equal content (bulk/informative mailings). The Bundeskartellamt does not expect this situation to change substantially until the statutory exclusive license is abandoned because until then it will only be economically viable for competitors to set up their own networks in urban areas or conurbations due to the considerable investment costs and small number of mailings involved. From the point of view of competition, the abolition of the exclusive license provided by the Postal Law is therefore desirable. At the European level, however, the discussion on whether to open up postal markets completely to competition has been reopened. The German Cabinet has thus decided to postpone the complete liberalisation of the German postal markets until the end of 2007.

Network-based energy sector

The competition law privilege of demarcation and exclusive concession agreements in the network-based energy sector, which in the past practically ruled out competition in these markets, was abolished with the amendment to the Energy Industry Act which came into force in April 1998. From a legal point of view, this made the complete liberalisation of the German electricity and gas

markets possible and fulfilled a key prerequisite for the development of competition in the network-based energy supply sector.

A further decisive precondition is that electricity and gas providers have non-discriminatory and free access to the networks of established energy providers. In the interest of effectively opening up the market it has to be guaranteed that the fee charged for network access is appropriate and, in particular, not excessive. The lawmaker refrained from prescribing the details of network access in the electricity and gas markets in a law or provision. In amended Section 6 (1) of the Energy Industry Act, the lawmaker created a general right of access to electricity supply networks, which is not based on the criterion of market power. A smooth transmission system is to be developed through direct negotiations between market participants or their associations. Abuse control by the competition authorities pursuant to Section 19 (1) in conjunction with Section 19 (4) and pursuant to Section 20 (1) of the ARC has a key function in disputes relating to enforcing the right to network access as well as in regulating access conditions, in particular access fees.

In the **electricity sector**, tangible results have been achieved in opening up networks since the amendment of the Energy Industry Act came into force almost three years ago. In the gas sector, however, where EU Member States have been required under European law to partly open up their markets only since the summer of 2000, the results are still unsatisfactory.

The so-called Associations' Agreement concluded by the German Electricity Association (VDEW), the Association for the Industrial Energy and Power Industry (VIK), the Federal Association of German Industry (BDI) and subsequently the association of municipal enterprises (VKU) as representatives of important interest groups forms the basis for determining transmission fees in the **electricity sector**. The Associations' Agreement I of April 1998, which was still insufficient but was tolerated by the Bundeskartellamt in the interest of opening up the market, was replaced by a revised version, the so-called Associations' Agreement II on electricity in December 1999. It is a clear improvement on the first Agreement. In the Associations' Agreement II, the point-to-point system that had been applied previously was replaced by a network access fee that is not distance-related. In the former point-to-point

system, the electricity transmission fee was based on the distance between the feeding point and withdrawal point. Under the Associations' Agreement II, the network user now has to pay a fee based mainly on the overall service supplied, in addition to a network use fee (not based on the distance). However, the Associations' Agreement II provided for two trade areas within Germany, the northern and southern zones. When electricity was supplied across the border of a trade area, a transportation fee was charged, the so-called "t component". The undertakings involved in the RWE/VEW merger control proceedings carried out by the Bundeskartellamt and the Veba/Viag merger control proceedings carried out by the Commission were the first to stop charging the domestic t component. All the grid companies followed shortly afterwards.

Although the Associations' Agreement II on electricity involves a number of insufficiencies in practice, the conditions of network access in the electricity sector have improved to such an extent since the liberalisation of the energy markets that the Bundeskartellamt has switched from basing its prognosis on regional markets to assuming nation-wide markets in defining the relevant market for the purposes of merger control. Particularly in the area of small customers, fees for switching from one supplier to another, inappropriate fees and other strategies intended to impede competition stand in the way of the former regional monopolies penetrating each other's markets. In some network areas this may lead to a narrower definition of the geographic market.

Transmission is the essential precondition for creating competition in the energy markets. In cases where transmission is refused, the Bundeskartellamt shall apply the standard provisions on refusal of access to essential facilities (Section 19 (4) no. 4 of the ARC), which were introduced with the 6th amendment of the ARC.

*In the case of the Berlin energy provider Bewag, the Bundeskartellamt made four prohibition decisions in September 1999 on account of Bewag abusively refusing to allow the **transmission of electricity** into the western part of Berlin. The decisions were made in favour of various parties interested in transmission and various groups of customers (commercial customers from the industry and services sectors, the public sector as well as tariff customers).*

Bewag had refused transmission, arguing that it required the limited capacities for its own use. However, a dominant network incumbent may not claim general priority for its own supplies even in this special case of limited capacities. The European directive on electricity and the Energy Industry Act stipulate that network operators must take a neutral position and that the interests of new entrants to the electricity market rank equally with the network operators' own operative interest in using their own networks. The limited performance capacity that was at first to be assumed in this case was therefore divided between Bewag and the new providers in a separate partial decision for each new provider. It was ruled that all the decisions were to take effect immediately.

On 6 November 2000 the capacity bottleneck that had previously existed was removed. There were therefore no longer any technical reasons justifying the refusal of network access. Bewag took this situation into account. It lifted all capacity-related restrictions of network access and declared that all pending appeal proceedings against the Bundeskartellamt's decisions at the Berlin Court of Appeals had thus been settled. The Bundeskartellamt agreed to this declaration.

The Bundeskartellamt was able to conclude its proceedings against Stadtwerke Munich without making a formal decision after the third largest municipal provider had promised to allow tariff customers (households, commercial and agricultural customers) to be supplied through transmission from 1 May 2000. The network territory of Stadtwerke Munich accounts for a sales volume of about DM 600 million, which has thus been opened up to competition.

Stadtwerke Munich had stipulated that any customer who wished one of their rivals to supply him with electricity via their transmission network would have to install a meter. This would have made it uneconomical for any newcomer to supply customers in the network territory of Stadtwerke Munich. In the autumn of 1999, the electricity companies LichtBlick, Yello Strom and EnBW Energie-Vertriebsgesellschaft, which wished to supply electricity in Munich to household customers and to branches of the Schlecker drugstore chain, submitted complaints to the Bundeskartellamt.

After being threatened with a transmission order and following a public hearing in January 2000, Stadtwerke Munich finally agreed to make it possible for electricity to be transmitted to small-scale customers without any metering from 1 May 2000.

The competition authorities of the Federation and the Länder have established a working group on electricity network use. Its purpose is to resolve quickly and efficiently the difficult questions arising in connection with the competition law assessment of the level of network use fees and other barriers to competition set up by electricity network operators, and to draft joint concepts for coordinated action by the competition authorities. In April 2001, the working group submitted its report on the scope of the standards of intervention applied under competition law for assessing the level of fees charged for using electricity networks as well as on the competition law relevance of network operators' conduct to impede network access.

The working group comes to the conclusion in its report that controlling domestic network operators' fees by means of abuse control under competition law on the basis of the comparative market concept is possible but involves problems in its practical application. If the overall domestic price level is suspected to be excessive, the only possible comparison would be with foreign undertakings. Making comparisons with foreign regulated undertakings, however, would be associated with additional uncertainties. Should the competition authorities be forced to introduce cost control (which is also dealt with in the report) they will face the additional new challenge of examining whether the costs of network operation estimated by the companies are appropriate.

The Bundeskartellamt has instituted first representative proceedings against e.dis Energie Nord AG on the suspicion that it is charging abusively excessive fees for using its network and that it is impeding other power supply companies.

There is a reasonable suspicion that e.dis' fees are not appropriate and that they differ from those that would most probably result from effective competition. This is evident from a comparison of the fees charged by other network operators in Germany.

A comparison of the network use fees charged to customers with special agreements published by the registered federal association of energy customers (VEA) shows that e.dis charges the highest average fees of any of the 294 network operators covered by the survey, both at the low and medium voltage levels.

The Bundeskartellamt has compared e.dis' fees with those charged by the network operator EWE AG of Oldenburg (EWE). Being a pure electricity supply company that does not generate electricity itself and having only limited maximum voltage networks, EWE's company structure is comparable to that of e.dis.

At the low voltage level, e.dis' average fee of 19.80 pfennig per kilowatt hour is 5.99 pfennig, i.e. 43.4 per cent, above EWE's average fee and 51 per cent above the average network use fees published by VEA. At the medium voltage level, the average fee of 9.63 pfennig per kilowatt hour is 3.79 pfennig, i.e. 64.9 per cent, above EWE's average fee and 54.3 per cent above the average network use fee published by VEA. The Bundeskartellamt considers the level of this difference to be a strong indication that e.dis is charging abusively excessive fees for using its network.

The abuse proceedings that have been instituted are based solely on national examination standards. However, the overall German price level is suspected to be excessive. The Bundeskartellamt will enquire into this matter and, if necessary, institute proceedings against grid operators, using comparative foreign markets as a comparison.

The **gas sector** has been opened up to a significantly lesser extent than the electricity sector. In the Bundeskartellamt's view, a general right to network access – corresponding to Section 6 (1) of the Energy Industry Act – is also necessary in the gas sector in order to create the preconditions for substantial competition in this sector.

An amendment to the Energy Industry Act implementing the European directive on gas is currently in preparation. It will place gas network

operators under the obligation to grant other companies non-discriminatory access to their supply networks for the purpose of transmission. Under Article 25 of the gas directive, an exception from this obligation to grant network access is to be made in particular if a particular gas supplier operating a network would experience substantial economic and financial difficulties due to its fixed payment obligations arising from gas supply contracts ("take-or-pay contracts"). The bill provides for the Federal Ministry of Economics and Technology to be responsible for assessing whether it would be reasonable to open up a network in such a case.

A general obligation of gas companies to open up their networks is to be welcomed from the point of view of competition. In assuming law enforcement functions in individual cases, a supreme Federal authority is subject to direct individual control by the Commission in this area under Article 25 of the gas directive. This is a novelty. The Federal Ministry of Economics and Technology is to be authorised to transfer to the Bundeskartellamt the task of assessing reasonableness exclusively on the basis of the competition criteria laid down in Article 25 of the gas directive. It is not clearly stipulated, however, to what extent this assessment competence of the Bundeskartellamt is to include the competence to take decisions. It is not clear either which criteria of Article 25 of the gas directive relate to competition and would thus be open to assessment by the Bundeskartellamt, and which are not. In its statement on 16 February 2001, the Bundesrat advocated transferring the entire assessment of reasonableness to the competition authorities in order to overcome those problems.

Since the summer of 2000 there has been an Associations' Agreement on network access in the natural gas sector between the Federal Association of German Industry (BDI), the Association for the Industrial Energy and Power Industry (VIK), the association of municipal enterprises (VKU) and the federation of the German gas and water industry (BGW). However, this agreement, which does not even go as far as the insufficient Associations' Agreement I on electricity, is not suitable in its present form to regulate free network access. On 15 March 2001, a first supplement to the Associations'

Agreement was passed, of which the content, however, still needs to be fleshed out. In contrast to the electricity sector, no substantial change in the definition of the gas market is likely at present on account of this situation. The Bundeskartellamt will continue to assume regional rather than national gas markets.

Transport

The liberalisation of the railway sector, which began with the railway reform of 1994 has so far only led to some first steps being taken towards rail transport services being opened up to competition. Some transport services in short-distance passenger traffic are in competition with Deutsche Bahn AG (DBAG), as are some first freight transport services. However, effective competition in the railway sector is still a long way off.

One of the reasons why competition is developing so sluggishly in the railway sector is the so-called network price system used by DBAG. This "TPS 98" system, which has been used since 1998, consists of two components, a fixed price component (so-called Infracard) and a variable price component. This means that greater use of the railway network leads to a fall in the average price per kilometre.

The Bundeskartellamt came to the conclusion that this system is abusive. The Bundeskartellamt's investigations showed that the route costs incurred when applying TPS 98 cost competitors 25 per cent and in some cases more than 40 per cent more than the costs incurred by DB Regio, a DB subsidiary. According to the Bundeskartellamt, this constitutes an illegal abusive practice by DBAG. Since the Bundeskartellamt cannot prescribe any particular rail network price system itself under competition law, it was up to DBAG to take appropriate measures to prevent the Bundeskartellamt from deciding to issue a prohibition order.

Under the TPS 01 system now announced by DBAG, the prices to be paid by private railway companies are made up of basic prices, graduated according to different route categories, and different product and load factors, relating inter alia to the type of transport and the flexibility of the timetable. Under the new system, all competitors providing a specific transport service on a

particular part of the rail network will pay the same price per kilometre of route travelled. The discriminatory effects which the Bundeskartellamt considered to be major components of the TPS 98 system, and on which its charges of abusive conduct were based, are thus avoided in the new system.

The further development will now depend on how DBAG puts the new network price system into practice. If there are any complaints about the practical application of the new TPS 01 system, the Bundeskartellamt will investigate them carefully and intervene if necessary.

The Bundeskartellamt is continuing to investigate the extent to which, under the new system, DBAG makes available sufficiently detailed information on the structure of the pricing system for use of its network and of the relevant network infrastructure (including route profiles and speed limits) to other companies demanding non-discriminatory access to its network. The Bundeskartellamt considers sufficient transparency to be a major element of non-discriminatory competition.

Trade

The 6th amendment of the ARC introduced in Section 20 (4) 2 a ban on undertakings with superior market power offering goods or services not merely occasionally below their cost price unless there is an objective justification for this. The Bundeskartellamt has carried out several preliminary investigations on the basis of this provision and has prohibited three undertakings from selling below cost price in prohibition proceedings. The Bundeskartellamt has also established principles for interpreting this provision in order to make its practice in this area transparent and to provide additional legal security for the undertakings concerned.

In its decision of 7 September 2000 the Bundeskartellamt prohibited the companies Wal-Mart, Aldi Nord and Lidl from selling certain basic foods (such as milk, butter, sugar, flour, rice and vegetable fat) below their respective cost prices.

The Bundeskartellamt established that owing to their size, market shares and resources these three firms have superior market power over the independent grocers that are their small and medium-sized competitors. The

three firms had been selling between five and ten items below cost price since the end of June 2000.

The manufacturers' selling prices, as confirmed by the suppliers, including all the price reductions, discounts and other price-related terms relating to the items in question, were decisive factors in determining the cost prices. In this case, the three firms were also not selling merely occasionally below cost price as their prices were meant from the very start to run over long periods and lasted for more than two months.

Selling these products below cost cannot be objectively justified either. They were not perishable goods, and the three companies cannot claim that they had matched their rivals' prices. They have not put forward any other reasons that could objectively justify their action.

Wal-Mart took the lead by cutting prices in mid-June not only legally undercutting the sales prices of its competitors, but also illegally undercutting its own cost prices. Aldi Nord reacted to Wal-Mart's price campaign, not only matching its competitive prices, but also undercutting them. In addition, Aldi Nord lowered its prices below cost price in regions in which Wal-Mart does not operate and where no such competitive price existed. Aldi Nord's reaction to the prices was therefore inappropriate with regard both to the extent of the price reduction and to the geographic area covered. It was not justifiable for this reason. Lidl for its part merely matched the Aldi Nord prices, but did so not only in Aldi Nord's geographic area of business but also in the south of Germany where Aldi Nord does not operate. Thus Lidl's actions also cannot be objectively justified.

The Bundeskartellamt will continue to maintain effective competition for the benefit of consumers. A precondition for this is the existence of competitive structures which are not determined by market power alone. Small and medium-sized undertakings, too, have to face the challenges of competition. However, they must not be squeezed out of the market through unfair pricing strategies by large enterprises with superior market power if they would be able to operate efficiently under fair competition.

In introducing the new Section 20 (4) 2 into the ARC, the lawmaker assumed that certain legal terms such as "cost price" would be defined in more detail

through administrative practice and decision-making. In spite of the small number of proceedings carried out so far and a lack of court rulings in this respect, the Bundeskartellamt has decided to start defining such terms by establishing principles for interpreting this provision, thereby at the same time contributing to greater legal clarity and security. In addition, the Bundeskartellamt assumes that the preliminary effect of the principles of interpretation will be to combat unfair price-setting practices intended to squeeze competitors out of the market, independently of individual proceedings carried out by the Bundeskartellamt.

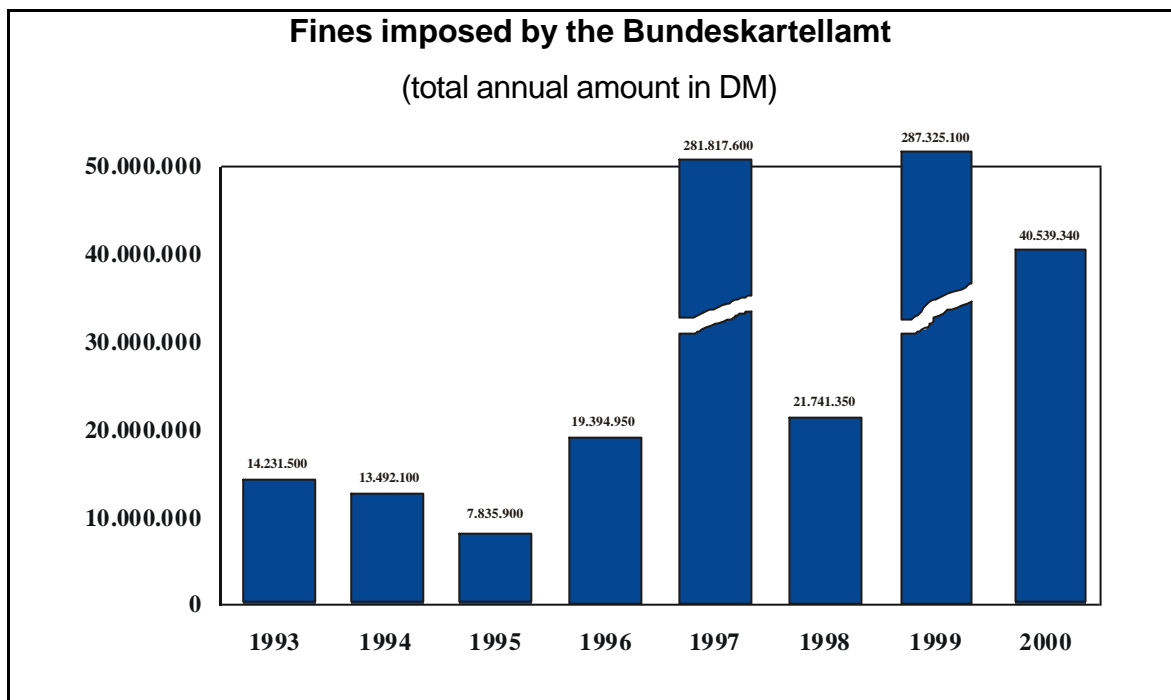
The principles of interpretation are tailored to the trade sector in accordance with the meaning and purpose of Section 20 (4) 2 of the ARC. In the manufacturing and service sectors the general rules on the abusive setting of prices through sales below cost price deriving from court decisions will continue to apply.

The principles of interpretation establish that the Bundeskartellamt includes all the price-effective conditions that arise from supply contracts in the cost price, taking the manufacturer's invoice price as its starting point. These include annual discounts but also product-related additional agreements concluded during the year. The Bundeskartellamt assumes that all the conditions agreed between the supplier and the buyer in principle serve to sell the product and are thus product-related. In addition to directly-assignable deductions, such as cash discounts and rebates, further conditions may be considered, such as annual bonuses, allowances for advertising costs and sales promotion costs, even if these are contracted only for a particular product, temporary sales operations or particular distribution channels. This is intended to prevent any inappropriate manipulation of the selling price. That notwithstanding, it would be conceivable in individual cases not to include certain conditions in the cost price, for example if these were obtained illegally.

The publication states that beginning to charge lower competitive prices, *inter alia*, may be a justification for sales below cost price. This does not apply, however, if the illegality of such competitive prices is evident or has been established by an authority or a court. The Bundeskartellamt accepts as justification neither undercutting competitive prices nor "overshooting the mark"

in the price reaction through covering an excessive regional area or going beyond the product group in question. This limitation prevents a downward price spiral as a result of unfair practices. Sales below cost price may be justified when an undertaking enters a market for the first time. However, when a firm changes hands or when a merger is involved this is not considered to be a “new entry“.

5. Cartels



The prosecution of price, quota and submission cartels was again a main focus of the Bundeskartellamt’s activities in 1999 and 2000. The Bundeskartellamt uncovered a number of cartel agreements and carried out proceedings against both those directly involved and against those in charge of supervision within the undertakings. In addition, fines, some of them substantial, were imposed on the undertakings in question. The total amount of fines imposed was DM 287.3 million in 1999 and DM 40.5 million in 2000. Special mention should be made of the proceedings against undertakings in the ready-mixed concrete sector.

In its largest cartel proceedings ever, the Bundeskartellamt imposed fines amounting to a total of around DM 370 million on 69 manufacturers of ready-mixed concrete and on 51 managing directors. They were involved in illegal quota agreements over several years in Berlin, south-east Lower Saxony,

Saxony-Anhalt and Chemnitz. All the leading companies in the sector were involved. During an investigation in May 1999 covering several Länder the Bundeskartellamt seized extensive evidence proving that the agreements were based on an extensive cartel accounting system. So far, 58 of the fines imposed have become final.

In its "conduit pipe construction" proceedings the Bundeskartellamt imposed fines amounting to a total of DM 1.1 million on seven undertakings and their representatives on account of submission agreements between 1993 and 1996. The fines imposed are final.

In further proceedings, the Bundeskartellamt imposed fines amounting to a total of around DM 1.2 million on seven undertakings in the deep underground conduit pipe and pipeline construction sector and their responsible representatives on account of illegal submission agreements in 1996.

The Bundeskartellamt imposed fines amounting to a total of around DM 2.6 million on six undertakings in the German shoe industry as well as on four individuals for participating in illegal quota agreements. From 1996 to 1997 the undertakings had collusively agreed on the volumes they would offer in four tenders by the Federal Government relating to the supply of combat shoes thus practically eliminating competition in the tendering procedure. The public prosecutor who carried out proceedings against those involved and against officials of the contracting entity on account of active and passive corruption transferred the case to the Bundeskartellamt.

Further proceedings have not yet been concluded:

Proceedings were instituted against undertakings in the ready-mixed concrete and concrete pump sectors through searches of 48 undertakings in March 2000. The suspicion of quota and price agreement in this case relates to south-western Germany, Saxony and Thuringia.

In December 1999, a nation-wide search of suppliers of bulk material processing equipment was carried out in cooperation with several criminal investigation authorities of the Länder.

In April 2000, the Bundeskartellamt carried out a search of undertakings in the paper wholesale sector on suspicion of price agreements regarding the most common types of paper.

Collusive agreements between enterprises on the setting of prices or sales quotas as well as on market sharing are serious restraints of competition and highly damaging to society. As a rule, such illegal agreements are concluded under highly conspiratorial circumstances. The detection of such agreements is therefore difficult and often depends on information being obtained from the members of the cartel or their associates. The fact that cartel members who wish to discontinue their anticompetitive behaviour and to inform the Bundeskartellamt about the secret agreement also face a fine, which is basically necessary, not least as a deterrent, counteracts the disintegration of a cartel.

In order to remedy this situation, the Bundeskartellamt published guidelines relating to the setting of fines ("leniency programme") on 17 April 2000. This announcement, which is closely related to concepts applied at the European level and in the USA, may be applied in accordance with the existing fine regulations without amending the law.

The Bundeskartellamt will not generally impose a fine if the informer is the first to provide information that makes a decisive contribution to uncovering the cartel before investigations are instituted. In addition, he has to provide all the available documents and evidence and cooperate continuously and unreservedly with the Bundeskartellamt throughout the entire duration of the proceedings. Besides, he must not have played a decisive role in the cartel and he must discontinue his participation in the cartel at the request of the Bundeskartellamt.

If a cartel member cooperates with the Bundeskartellamt at a later point, the fine will be reduced by at least 50 per cent, provided the above conditions are fulfilled. Any other information provided by an informer which makes a decisive

contribution to uncovering the cartel may be taken into account in reducing the fine. The leniency programme applies to both undertakings and their staff. Damages claimed by undertakings harmed by the cartel, however, are not affected by the leniency programme and can therefore still be claimed.

The new leniency programme has not been applied yet, but experiences have shown that it takes several years for such a programme to become fully effective. That was the case in the USA, where such a programme has been in force since 1993. The number of informers has gradually increased from one or two per year when the programme came into force to currently one or two per month.

6. Legal protection regarding the award of public contracts

Since 1 January 1999, the Bundeskartellamt has been responsible for reviewing the award of public contracts by the Federation. Two Public Procurement Tribunals have been established for this purpose.

The Bundeskartellamt considers the protection of public procurement law to be a part of its overall task of protecting competition in all sectors of the economy. The reform of procurement legislation reinforces the principle of competition in the award of public contracts and thus serves the aim of using public funds as economically as possible. At the same time, the award procedure becomes more transparent and the bidders are provided with more effective legal protection. Tight deadlines ensure that there are no protracted procedures which might block public investments.

Under public procurement law, public contracting entities are generally obliged to award contracts through competition and by way of transparent procedures. Contractors have to meet certain requirements regarding their competence, efficiency and reliability. Other or more far-reaching requirements may be set only if this is provided for in Federal law or the laws of a *Land*. The contract is generally awarded to the bidder with the most economical offer. Open procedures principally have priority, i.e. the contract is publicly put out to tender and any interested undertaking may submit an offer.

In the first two years of their existence, the Public Procurement Tribunals established at the Bundeskartellamt have dealt with around 80 cases. More than 50 proceedings were concluded by formal decisions. In quite a number of cases, decisions had to be taken on fundamental issues. Accordingly, the 1st Public Procurement Tribunal of the Federation deduced from the constitutional guarantee of effective legal protection that the contracting entity has to inform the bidders of its decision a good time before it awards the contract. This advance notice is important in the interest of legal protection because a contract cannot be cancelled once it has been awarded. The obligation to inform the bidders before awarding the contract has meanwhile been laid down in new procurement rules. In further decisions, a number of unresolved issues regarding the admissibility of a request for review by the Public Procurement Tribunal have been clarified. In the area of substantial procurement rules the Public Procurement Tribunals' decision-making practice has made a decisive contribution to defining the requirements of an appropriate award procedure.

7. Prospects

The task of protecting competition from restraints and distortions arises anew every day.

Combating cartels therefore remains a permanent issue. Recent successes must not obscure the fact that anticompetitive agreements are still made in many sectors. Many of these agreements are not uncovered for many years. This is where the Bundeskartellamt's leniency programme sets in to uncover pricing and quota agreements even more effectively. A cartel member's risk of being exposed and punished by substantial fines is significantly higher.

In the area of **abuse control**, securing undertakings' non-discriminatory access to third-party networks using the instruments available under competition law will continue to be among the Bundeskartellamt's major tasks. Above all, this will affect the network-based energy sector, as has been the case in the past two years. Liberalisation in these areas stands or falls with the solution of the transmission problem. In this area it will be essential to persistently continue the competition authorities' work, in spite of the considerable resistance that still stands in the way of a genuine liberalisation of the market, particularly in the

gas sector. In spite of all the criticism the achievements made so far have received, the German model of negotiated network access combined with the competition authorities' enforcement of non-discriminatory network access should not be abandoned over-hastily in favour of a sector-specific regulation. The success achieved within Germany in opening up energy markets stands any comparison in Europe.

Merger control will continue to be a task of central importance. Enhanced cooperation between the European competition authorities and beyond with a view to dealing coherently with cross-border mergers will become more and more important. New approaches in this area, in particular cooperation between national European competition authorities, have to be enhanced.

At the **European level**, the reform of European cartel procedural law (follow-up to Regulation 17/62) will be at the centre of the discussion, in addition to a review of the Merger Regulation which is likely to focus mainly on procedural questions. The planned reform poses fundamental questions about the relationship between national and European competition law as well as about the future scope of established national legal systems. The idea of a "competition authority network", which the Commission itself has put forward in connection with the reform of procedural competition law, must be achieved in the form of cooperation between authorities as equal partners. The aim of any reform efforts must always be to effectively enforce the principle of competition in all areas. The Bundeskartellamt will continue to take an active part in shaping developments at the European level and to contribute its experiences and proposals.

The Bundeskartellamt's full activity report of 1999/2000 is available on the Internet as a Bundestags-Drucksache.

For detailed information, please refer to the Bundeskartellamt's website at www.bundeskartellamt.de/tatigkeitsbericht.html

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