

GERMANY

(July 2000 – June 2001)

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EXECUTIVE SUMMARY

Legislation

1. In the period covered by the report, the competition authorities and the relevant courts applied the 6th Amendment to the ARC¹, which has been in force since 1 January 1999. An amendment only to Section 47 of the ARC came into force on 1 January 2001, which is elucidated under I (1)1.

2. The Law continues to meet the requirements of merger and conduct control, the control of abusive practices, and combating cartels. This has also applied up to now to developments in electronic trading, which poses a new challenge to cartel law and its users. This has become clear from several decisions which the Bundeskartellamt has already made in connection with the creation of so-called electronic marketplaces.

Agreements/abusive practices by dominant firms

3. A significant target of the fight against cartels remains the ready-mixed concrete industry. Again, this time near the cities of Osnabrück, and Bad Salzflen, ten undertakings were searched on suspicion of price and quota-fixing. The proceedings in the paper wholesale industry referred to in the last report have not yet been concluded. Investigations are being conducted on suspicion of price-fixing for the most widely used types of paper. One fixed-quota agreement between firms in the footwear industry was penalised with fines amounting to approx. DM 2.6 million.

4. The main areas of intervention in the control of abusive practices were very varied. Deutsche Bahn AG, with its structure of charges for the use of its routes, and the German Central Credit Committee, with its planned introduction of an interbank fee for the use of the eurocheque card were affected by this, as was once again the energy sector with its fixing of transmission fees.

Merger control

5. The following cases will be outlined in the report in section II (2)b

6. Prohibition or prevention of mergers:

- WAZ/OTZ (daily newspapers);
- Stilke Buch- und Zeitschriftenhandels-gesellschaft mbH/Axel Springer Verlag AG.

7. Clearances subject to conditions and obligations:

- Jahr-Verlag/top special-Verlag (sports and leisure magazines);

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- Contigas/Stadtwerke Heide;
- E.ON Energie AG/HEIN GAS Hamburger Gaswerke GmbH.

8. Clearances:

- Hamburgische Electricitäts-Werke/Veag/Laubag;
- The joint venture between DCX and T-Online AG (B2B Internet exchange);
- The joint venture RubberNetwork.com (tyre and rubber industry);
- The joint venture cc markets (B2B Internet exchange in the field of goods and services for maintenance, repair and operations);
- Callahan NRW/NetCologne (regional telecommunication services);
- Kirch Beteiligungsgesellschaft mbH/SPEED Investment Ltd.;
- REWE AG/ LTU Holding GmbH (flights and package holidays);
- Richemont-Gruppe/Les Manufactures Horlogères (luxury watches);
- 3M/Espe (dental products);
- Further proceedings that were cleared on conclusion of the main investigation are listed below.²

² Ruhrgas/Stadtwerke Neuss (gas industry), Flowserve/Ingersoll-Dresser-Pump (industrial pumps, in this case centrifugal pumps), Umweltschutz Nord/RAG/AB Umwelttechnik GmbH (disposal of contaminated soil), GKN/Opel/Saginaw (cardan shafts for motor vehicles), Thüga AG, E.ON. Stadtwerke Ansbach (supply of electricity, gas and water to end consumers), TBG Nord-Beton (Rollbeton/Norddeutsche Mischwerke/Lemke Baustoffhandel (ready-mixed concrete), Deutsche Telekom/debis (information technology and telecommunications), Exide/GNB Technologies (stationary batteries, traction batteries), General Electric/TIP Trailer Rental GmbH (goods trailer rental and leasing business), Dolphin Telecom/GMK (public professional mobile telephones), Saint-Gobain/Huta Szkla Jaroszwiec (cast glass in the building sector), Trienekens/Stadtwerke Köln (collection and transport of waste), Novartis/Wesley J./Vision Care (contact lenses), BASF/TAKEDA (vitamins), Bewag/HEW/E.ON/Southern Energy (electricity markets), Flughafen Hamburg/STARS/NTT/Stars Berlin (ground clearance services at airports), Haniel Bau-Industrie, Baustoffwerke Rhein-Ruhr GmbH, Kalksandstein Rheinland and others (masonry construction materials), easyplus/Stadtwerke Bremervörde/Stadtwerke Cuxhaven, Stadtwerke Emden and others (gas and electricity sector and invoicing and customer management services market), Gelsenwasser/Dortmunder Energie- und Wasserversorgung (water supply), Haniel Bau-Industrie, Haniel Baustoff-Industrie, Baustoffwerke Rhein-Ruhr, Rüskaamp and others (masonry materials), FBA/FBS/Frischbeton Wachau/Schwenk Transportbeton/Transportbeton Abel (ready-mixed concrete), FBS Lafarge/Lafarge Beton/FBS Fertig-beton/Btop BTG (ready-mixed concrete), Haniel Bau-Industrie, Haniel Baustoff-Industrie, H. Brinkhege Textil-Handel, KSB (masonry construction materials), MAN/Wohlenberg Buchbindesysteme/Wohlenberg Schneidesysteme/Wohlenberg Vertriebs und Service GmbH (paper-cutting machines), Sanyo/Toshiba (rechargeable batteries), Merkel – Freudenberg/Burgmann (industrial seals), Haniel Bauindustrie, Haniel Baustoff-Industrie and others (masonry construction materials), Trienekens, Gemeinschaftsmüllverbrennungsanlage Niederhein, Stadt Oberhausen and others (disposal, removal and processing of domestic waste).

9. Withdrawal of application:
- Rethmann AG & Co./Interseroh AG (commercial waste);
 - Deutsche Lufthansa/Sky Shop Catering GmbH (in-flight catering).

1. Changes to competition laws and policies, proposed or adopted

Summary of new legal provisions of competition law and related legislation

10. The measures already announced in the last annual report to give the German Monopolies Commission³ easier access to statistical data came into force on 1 January 2001 in an amendment to Section 47 of the ARC. In the official statistics which provide the Monopolies Commission with the basis of its work in investigating concentrations, values have up to now been assessed treating individual undertakings as statistical units. Now business combinations in the form of concerns and other groups of undertakings are also taken into account. Under the observance of data protection and statistical confidentiality the collected data is conveyed to the Monopolies Commission by the Federal Statistical Office in fulfilment of the legal responsibilities of the Monopolies Commission under Section 44(1) sentence 1 of the ARC.

11. In keeping with the law on the euro-conversion of laws and ordinances falling under the jurisdiction of the Federal Ministry of Economics and Technology and the Ministry of Education and Research (ninth act on the introduction of the euro) amounts quoted in DM in the ARC (thresholds, fees, fines, bases of calculation) will in future also be expressed in euro. The law was passed by Parliament and will come into force in the second half of 2001.

12. The reform of the Law Governing Discounts and the Law on Bonuses referred to in the last report was passed by the German Bundestag on 13 July 2001. It came into force on 24 July 2001. As a consequence the Law Governing Discounts and the Law on Bonuses have been abolished and this legislation, extremely restrictive by European and international standards, adapted to the current needs and preferences of enterprises and consumers. This amendment is of particular significance in the light of the EC Electronic Commerce directive, according to which foreign suppliers selling products via the Internet need only observe the usually considerably more liberal discount laws applicable in their own countries (country of origin principle). The retention of this regulation in Germany would have led to discrimination against domestic suppliers.

Other relevant measures, including new guidelines

13. As indicated under item 6 of the 1999/2000 report the Bundeskartellamt has drafted principles of interpretation for the ban on sales below cost price (Section 20(4) sentence 2 of the ARC). A draft version

3 The tasks and the composition of the Monopolies Commission are laid down in Sections 44 and 45 of the ARC. It consists of five members who are appointed by the Federal President upon a proposal by the Federal Government. The appointment is limited to four years. The main task of the Monopolies Commission is to prepare an opinion assessing the level and foreseeable development of business concentration in the Federal Republic, to evaluate the application of the provisions concerning the control of concentrations and to comment on other topical issues of competition policy.

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of the principles of interpretation was sent to the trade associations of the branches of industry concerned for their comments in the summer of 2000. The Bundeskartellamt has received numerous ideas on this and suggestions for improvement. The suggestions made by the trade associations primarily concerned the calculation of the cost price and reasons for an objective justification for sales below cost price. The revised text was published on 12 October 2000.⁴ It is intended to clarify the protective effect of the prohibition, especially for small and medium-sized enterprises, and indicate the limits of acceptable (price) competition.

14 An 11th Division has been set up at the Bundeskartellamt with effect from 1 August 2001. Its scope of responsibility covers the electricity sector, which previously fell under the 8th Decision Division. It will be responsible in particular for enforcing the ban on abusive, obstructive and discriminatory practices, guaranteeing access to the network, removing hindrances to transmission and investigating fees for network use and energy prices. By taking on more staff, the Bundeskartellamt is reacting to the ongoing difficulties faced by small and foreign electricity suppliers in transmitting electricity to their clients using the networks of former monopolists. For this reason the new Decision Division will not limit itself to test cases but will also deal with individual cases.

2. Enforcement of competition laws and policies

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

a) Summary of activities of competition authorities and courts

15. For the first time during the period under report a prohibition was effected on the basis of the new Section 20(4) sentence 2 of the ARC. The regulation explicitly declares offering goods or commercial services not merely occasionally below cost price to be an unacceptable restraint of competition. Three supermarket operators were prohibited from selling certain basic foodstuffs below their cost price.

16. In the electricity sector almost three years after the Amendment to the Energy Industry Act, which opened up the energy market to effective competition, significant improvements have been made in liberalising the networks. This not only applies to the gas sector, where, however, the results have been insufficient. This is expected to become a focal point for the work of the Bundeskartellamt in the future (see also point III).

b) Description of significant cases, including those with international implications

aa) Agreements, action in the form of administrative fine proceedings against cartels

17. The Bundeskartellamt imposed fines amounting to a total of around DM 2.6 million on six undertakings in the German footwear 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

4 The text may be viewed at www.bundeskartellamt.de/kartellrecht.html.

against those involved and against officials of the contracting entity on account of active and passive corruption transferred the case to the Bundeskartellamt.

18. As already indicated in the last annual report, the Act on the revision of statutory health insurance passed at the end of 1999 contains inter alia an amendment which is to clarify that the legal relationships between the statutory health insurance funds and health care providers are of a purely social insurance character, i.e. health insurance funds do not operate as undertakings within the meaning of civil, competition and cartel law (cf. Annual Report 1999-2000, item 1). It remains to be seen to what extent the apparent objective of creating an exception to competition law for statutory health insurance funds can be realised in practice: The legal nature of a legal relationship is not in itself a deciding factor for the applicability of competition law. In any event, the Bundeskartellamt does not see any reason to prevent it from conducting administrative proceedings on the basis on European competition law. In February the Bundeskartellamt threatened the central associations of the statutory health insurance funds that it would prohibit their planned revision of fixed amounts for pharmaceutical products, whereupon the associations refrained from carrying out their plans for the time being.

bb) Exemptions from the general ban on cartels

19. The following table is a summary of the type and number of agreements under competition law that the Bundeskartellamt cleared in the reporting period on the basis of exceptions to the statutory prohibition contained in the ARC.

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Table 1

| Types of Cartels | Cartels Jan.-Dec.2000 | | Total number since 1958 | Still effective as of Dec. 2000 |
|---|-----------------------|-----------|----------------------------------|------------------------------------|
| | Additions | Deletions | | |
| Condition cartels Section 2(2) of the ARC | 3 | - | 71 | 46 |
| Rebate cartels (Section 3 of the old version of the ARC) ⁵ | - | - | 34 | 6 |
| Combined condition and rebate cartels | - | 1 | 15 | 2 |
| Crisis cartels Section 6 of the ARC | - | - | 2 | 2 |
| Standardisation cartels Section 2(1) of the ARC | 1 | - | 21 | 11 |
| Rationalisation cartels Section 5 of the ARC | 1 | 4 | 71 | 14 |
| Specialisation cartels Section 3 of the ARC | - | 6 | 129 | 25 |
| Co-operation cartels Section 4(1) of the ARC | 14 | - | 157 | 145 |
| Purchasing co-operation cartels Section 4(2) of the ARC | 5 | 9 | 25 | 15 |
| Export cartels Section 6(1) of the old version of the ARC | - | - | 130 | 36 |
| Import cartels Section 7 of the old version of the ARC | - | - | 2 | - |
| OTHER CARTELS SECTION 7 OF THE ARC | 1 | - | 1 | 1 |
| Emergency cartels Section 8 of the ARC | - | - | 4 | - |
| Total | 25 | 20 | 655 | 303 |

5 Under the 6th Act to Amend the ARC, in force since 1 January 1999, the criterion for exempting these cartels no longer exists.

20. During the last few months, the Bundeskartellamt has conducted preliminary talks with the ready-mixed concrete sector about the formation of a structural crisis cartel in Greater Berlin. In view of the considerable fall-off in activity in the building sector, which is not expected to pick up significantly in the long term, the ready-mixed concrete sector estimates its overcapacity there to be approximately 50 percent. With the formation of a structural crisis cartel, which 35 undertakings with 107 works have joined to date, an attempt is being made to reduce overcapacities. In view in particular of the fines proceedings against the ready-mixed concrete sector (cf. Annual Report 1999-2000, item 11) the Bundeskartellamt pointed out in the preliminary talks that the cartel members were only permitted to use the cartel to organise their reduction of capacities but not to make price-fixing and quota agreements or to periodically exchange up-to-date information on product indices.

21. The Federal Association of the German Ready-Mixed Concrete Industry (BTB), registered association, held talks with the Bundeskartellamt about introducing a nation-wide market information system for ready-mixed concrete. The undertakings participating in this system are to report their sales in the individual registration regions to a trustee each quarter. The trustee is then to return this information to the participants in aggregate form. The Bundeskartellamt has informed the Federal Association of the German Ready-Mixed Concrete Industry of its disapproval of this plan and has threatened it with a prohibition under Sections 1 and 32 of the ARC. It saw a collective increase in market transparency as a means to deter the undertakings involved from advancing competition as they would be afraid that other undertakings could find out about their market share gains, prompting them to take countermeasures. The association has meanwhile abandoned its plans.

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

22. The Bundeskartellamt is halting proceedings against Deutsche Bahn in connection with abusive route price structures. Proceedings against abuse were initiated following complaints by several private railway companies and government units responsible for local public transport. The Bundeskartellamt's investigation has shown that the route costs incurred when applying the current track pricing system "TPS 98" costs competitors 25 percent and in some cases more than 40 percent more than the costs incurred by DB Regio, a Deutsche Bahn subsidiary. Since the Bundeskartellamt is unable to prescribe any particular rail network price system itself, it was up to the Deutsche Bahn AG to take appropriate company policy measures to prevent the Bundeskartellamt from deciding to issue a prohibition order. Under the new "TPS 01" system now announced by Deutsche Bahn AG, the prices to be paid by private railway companies are made up of basic prices, which vary depending on the basis of different route categories and different product and loading factors, relating inter alia to the type of transport and the flexibility of the timetable. In accordance with 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 against Deutsche Bahn were based, are thus avoided in the new system.

23. 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. In this case, the three firms were also not selling merely occasionally below cost price as their prices were meant to run over long periods and lasted for more than two months. Selling these products below cost could not be objectively justified either. The goods were not perishable, and the three companies could not claim that they had matched their rivals' prices. They have not put forward any other

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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 the geographic area covered. 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. Wal-Mart has filed an appeal against the decision at the Higher Regional Court in Düsseldorf.⁶

24. The German Central Credit Committee (ZKA) has withdrawn the notification of its intention to introduce an inter-bank charge for eurocheque card payments. The Bundeskartellamt had informed the Central Credit Committee that it was planning to oppose the introduction of the inter-bank charge. It particularly took note of the fact that the agreement on an inter-bank charge, which would have amounted to a price cartel, would have served the interests of the banks by passing on costs to traders and thus to consumers. The ZKA had thereby pre-empted the Bundeskartellamt's likely decision to issue a final prohibition order.

25. The Bundeskartellamt has instituted proceedings against electric power supplier e.dis Nord AG on the suspicion that it is charging abusively excessive fees for using its network, thus 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 probably result from effective competition. A comparison of the network use fees charged to separate agreement customers published by the federal association of energy customers (VEA) shows that e.dis charges the highest average fees of all the 294 network operators covered by the survey with fees being up to 54 percent above the German average. On 18 July 2001, the Bundeskartellamt issued a warning letter to e.dis. The abuse proceedings that have been instituted are based merely on national examination standards. However, the overall German price level is suspected to be excessive. The Bundeskartellamt will also inquire into this matter and, if necessary, institute proceedings against grid operators, taking into consideration comparative foreign markets.

26. The Bundeskartellamt instituted administrative proceedings against two undertakings in the natural gas sector for impeding the transmission of natural gas. The undertakings had denied Enron Energie GmbH transmission (cf. Annual Report 1999-2000, item 21). After the Bundeskartellamt's intervention and following six months of negotiations, transmission was allowed from 1 October 2000 on the basis of provisional transmission fees well below those which network operators considered to be appropriate. The parties involved had agreed that an independent expert should determine what level of fee was appropriate. Subsequently, however, they were not able to agree on an expert. The Bundeskartellamt's proceedings were suspended since transmission on the basis of provisional transmission fees was not jeopardised. The parties are now required to settle the appropriate level of fees in civil court proceedings.

dd) Activities of the courts

27. 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 (cf. Annual Report 1999-2000, item 19.) Bewag had refused transmission, arguing that it required the limited capacities for its own use. However, the Bundeskartellamt

⁶ Due to the relocation of the Bundeskartellamt from Berlin to Bonn the Higher Regional Court in Düsseldorf has since 1 October 1999 been the competent court of first instance against Bundeskartellamt decisions and not the Berlin Court of Appeals.

decided that 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. Bewag lodged an appeal against the Bundeskartellamt's decisions. 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 acted accordingly, lifting all capacity-related restrictions of network access and declaring that all pending appeal proceedings against the Bundeskartellamt's decisions at the Berlin Court of Appeals⁶ had thus been settled. The Bundeskartellamt accepted to this declaration.

28. In the period covered by the present report, the Federal Supreme Court came to a decision on the Bundeskartellamt's appeal on points of law in connection with the ruling on abusive pricing against Deutsche Lufthansa (DL). The Bundeskartellamt had prohibited DL from charging over DM ten more for a ticket on the Berlin-Frankfurt route, which is not served by competitors, than it charges on comparable routes, which are also served by other airlines. The Berlin Court of Appeals, however, had revoked this ruling on the grounds that Lufthansa did not attain cost-covering prices in any of the markets concerned. The authority had filed an appeal on points of law against the decision with the Federal Supreme Court (cf. Annual Report 1999-2000, item 26). The Federal Supreme Court partly followed the argumentation of the Court of Appeals in its decision. The Federal Supreme Court considers avoiding losses in the dominated market to be a possible justification. Abuse control could not force any undertaking either to offer its service at prices that do not cover its costs or to withdraw entirely from competition. However, the legal presumption that in comparable markets the higher price could be pushed through simply because competition had failed in the dominated market could only be invalidated by an objective justification, for which the dominant undertakings had the burden of substantive proof. The Federal Supreme Court revoked the decision by the Berlin Court of Appeals and referred the case back to the Berlin Court of Appeals. In establishing the existence of a ruinous price situation, it was only permissible to take into account the costs that were not due to company-specific circumstances but to objective circumstances affecting each supplier in the same way. However, it had clearly been Lufthansa's intention not to make a profit in feeder traffic, a fact that the Berlin Court of Appeals had failed to take into account. A decision by the Berlin Court of Appeals is pending.

29. 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 than they charged end consumers at petrol stations they operated themselves (cf. Annual Report 1999-2000, item 23). The Bundeskartellamt also ruled that the decision should be put into effect immediately. The proceedings had been 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. 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. The Higher Regional Court in Düsseldorf therefore granted the parties' request for temporary legal protection. Apart from a few negligible exceptions, such price gaps have not occurred in Germany during the past six months. The Bundeskartellamt therefore no longer derives any rights from its ruling.

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2) *Mergers and acquisitions*

a) *Statistics on the number, size and type of mergers notified and/or controlled under competition laws*

Table 2

Mergers notified under Section 39(6) of the ARC (Section 23 of the old version of the ARC)

| Year | Mergers |
|--------------|----------------|
| 1973 | 34 |
| 1974 | 294 |
| 1975 | 445 |
| 1976 | 453 |
| 1977 | 554 |
| 1978 | 558 |
| 1979 | 602 |
| 1980 | 635 |
| 1981 | 618 |
| 1982 | 603 |
| 1983 | 506 |
| 1984 | 575 |
| 1985 | 709 |
| 1986 | 802 |
| 1987 | 887 |
| 1988 | 1,159 |
| 1989 | 1,414 |
| 1990 | 1,548 |
| 1991 | 2,007 |
| 1992 | 1,743 |
| 1993 | 1,514 |
| 1994 | 1,564 |
| 1995 | 1,530 |
| 1996 | 1,434 |
| 1997 | 1,751 |
| 1998 | 1,888 |
| 1999 | 1,182 |
| 2000 | 1,429 |
| Total | 28,438 |

30. A breakdown of the total figure by type of merger is as follows:

Table 3

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|--|--------------|--------------|--------------|--------------|-----------------|-------------|
| Mergers notified and reviewed prior to completion | 1,089 | 1,006 | 1,207 | 1,300 | 1,147 | 1359 |
| Mergers notified after completion and found to be subject to control | 276 | 280 | 362 | 391 | 32 ⁶ | 70 |
| Mergers not subject to control | 165 | 148 | 182 | 197 | 3 | - |
| Completed mergers total | 1,530 | 1,434 | 1,751 | 1,888 | 1,182 | 1429 |

31. A breakdown by type of merger (2000):

Table 4

| | |
|---|-----|
| Acquisition of assets | 311 |
| Acquisition of interests | 691 |
| Of which: majority interest acquisition | 641 |
| Joint ventures | 269 |
| Joint ventures with joint control | 93 |
| Contractual relations | - |
| Interlocking directorates | - |
| Competitively significant influence | 18 |
| Others | 15 |

32. By type of diversification: horizontal mergers (1,302), of which 207 were without and 1,095 with product extension, clearly dominated again in 2000. The number of notifications of vertical mergers dropped significantly from 58 to 14, whereas the number of conglomerate mergers rose from 81 to 113.

b) Summary of significant cases

33. As in the preceding reporting period, extensive merger control has been undertaken in the energy sector. In particular, there were several mergers of small regional suppliers.

34. A largely new phenomenon was the significant increase in the importance of the Internet as a medium of business transactions. An example is Covisint, the electronic marketplace already referred to under item 42 of the last report, involving the car producers Ford, General Motors, DaimlerChrysler and Renault/Nissan. A growing number of projects to create business-to-business (B2B) marketplaces, i.e. business transactions between firms via an Internet exchange, have been examined. In general, carrying out

7 Since 1 January 1999, all mergers subject to control have to be notified prior to completion. The notifications after completion concern cases in which, due to transitory provisions, this obligation did not apply or had simply been disregarded.

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transactions in this way can improve efficiency and promote competition. Problems may arise, though, when such platforms are used to pool demand or as a means of exchanging information and thus of coordination between competitors. Nonetheless, 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 Internet platforms examined during the reporting period were cleared, since their structures did not suggest that they contravened competition law in any way. However, the Bundeskartellamt reserved the right to subject all cases to a competition law examination at a later date when they are actually in operation.

aa) Prohibition or prevention of mergers

35. In March 2001 Deutsche Lufthansa AG was given a warning in connection with its plans to acquire shares in Eurowings. Examinations showed that Lufthansa's acquisition of shares in Eurowings would lead to a strengthening of its dominant position on the domestic flight market in Germany. The possible positive effects on competition in the European market for regional flights from Germany to neighbouring countries, especially to the hubs of Amsterdam and Paris, do not in any case outweigh the competitive disadvantages within Germany. The view of the Bundeskartellamt is based on the fact that currently 66 out of 86 routes on which Lufthansa offers domestic German flights are flown without competitors. The merger would remove from the market a further four competing domestic flights offered by Eurowings (Dortmund-Munich, Düsseldorf-Nuremberg, Munich-Paderborn and Nuremberg-Berlin). The only remaining significant competitor, Deutsche BA, would then be in competition with Lufthansa on only seven routes. In view of the considerable market entry thresholds for new competitors, the anticompetitive effect of the merger would be permanent and sustainable. The new flight connections to Paris, Amsterdam and Milan planned by the company would not lead to any fundamental improvement of competition in the European regional flight market. Since the companies involved have stated that they would propose measures to improve competition, thereby preventing prohibition, the prohibition period has been extended.

36. The Bundeskartellamt had prohibited the concentration of the Westdeutsche Allgemeine Zeitung (WAZ) and the Ostthüringer Zeitungs Verlag (OTZV), which had already been carried out (cf. Annual Report 1999/2000, item 32). The Higher Regional Court rejected the companies' appeal and did not allow an appeal on points of law. The companies have filed an appeal against this non-admission with the Federal Supreme Court. A decision is pending.

37. In November 1997, the Bundeskartellamt prohibited the acquisition of a 24 percent stake in Stilke Buch- und Zeitschriftenhandels GmbH, Hamburg by Axel Springer Verlag AG (cf. Annual Report 1997-1998, item 36). The Berlin Court of Appeals upheld this decision in the first instance. Axel Springer Verlag AG lodged an appeal on points of law against the decision with the Federal Supreme Court (cf. Annual Report 1999-2000, item 27). The Federal Supreme Court rejected the appeal on points of law. The decision is thus final.

38. No new prohibitions were issued during the reporting period.

bb) Clearances subject to conditions and obligations

39. In the area of clearances subject to conditions, resales were a main focus during the reporting period. For example, the Bundeskartellamt cleared the foundation of a joint venture in the area of special interest magazines between Jahr-Verlag and top special-Verlag, which belongs to Axel-Springer Verlag, subject to the condition that the undertakings involved sell two magazines. The two undertakings supply special interest magazines on specific sports and other leisure activities (tennis, golf, angling etc.).

Problems relating to competition law resulted mainly in the market for angling magazines. The joint venture would have had a market share of 70 to 80 percent in this market, where the barriers to market entry are high on account of the high degree of specialisation. After the Bundeskartellamt had expressed concerns, the participating undertakings accepted that the angling magazines supplied by top spezial-Verlag had to be sold to third parties within a set period of time in order for the project to be cleared. This condition has meanwhile been met through the sale of the magazines to Möller Neue Medien Verlagsgesellschaft.

40. In addition to the conditions imposed on the sale, conditions aimed at liberalisation were also of great significance, particularly in the gas sector. These had two main purposes: to liberalise gas supply contracts through awarding special rights of termination as well as to improve transmission conditions. At the end of the year 2000, for example, the concentration of Contigas and the municipal utilities in Heide was cleared subject to conditions. One of these conditions was that long-term gas supply contracts with special-rate consumers in the area served by the municipal utilities in Heide could be terminated prematurely. Another was that network use fees and the basis on which they were calculated were published. In early 2001 the Bundeskartellamt laid down similar conditions in connection with the clearance of four other concentrations mainly affecting gas markets in southern Germany.

41. E.ON Energie AG notified the Bundeskartellamt of its intention to acquire 61.85 per cent of the shares in HEIN GAS Hamburger Gaswerke GmbH (Heingas) from Hamburgische Electricitätswerke (HEW) AG, thus raising its capital participation in Heingas to 89.9 per cent. Both Heingas and E.ON operate in regional gas supply markets in northern Germany. The examination of the planned concentration under competition law focused on the effects it would have as a result of the geographical proximity of Heingas and the E.ON concern's company Schleswig. Here, the firms had a dominant position and there was the danger that a concentration would strengthen this position. In this case, too, the conditions were set that transmission prices had to be published and the networks had to be made available for transmission. In the view of the Bundeskartellamt, however, these conditions could only partly compensate for the anticompetitive effects of the merger. It was nevertheless possible to clear the project without imposing any further conditions since there was evidence that the conditions of competition had improved in the balancing energy markets. Balancing energy is required to compensate for fluctuations in the amount of energy used by final customers. Within the meaning of the so-called consideration clause, Section 36(1) second clause of the ARC, the improvements of competition referred to above make up for the restraints of competition which continue to exist within the gas sector.

cc) Clearances

42. During the period covered by the present report, the plans of the energy supplier Hamburgische Electricitäts-Werke (HEW) to acquire the firms Veag and Laubag were cleared. The concentration took place subject to the fulfilment of a condition set last year in connection with the clearance of the RWE/VEW and Veba/Viag (now E.ON) concentrations (cf. Annual Report 1999-2000, item 37). The European Commission examined the merger of Veba and Viag, while the RWE-VEW merger fell under the auspices of the Bundeskartellamt. 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. One of the main obligations affected the eastern German energy supplier Veag. RWE/VEW and VBA/Viag held shares of more than 80 percent 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

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customers. This condition has now been fulfilled through the acquisition of Veag and Laubag by 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.

43. Another project that was cleared was the founding of a joint venture for the operation of an electronic multichannel portal on the Internet with the participation of the DaimlerChrysler subsidiary DCX.Net and T-Online AG. This portal is intended to be established as a business-to-consumer (B2C) exchange for DaimlerChrysler AG's Mercedes-Benz brand. It is to provide not only brand-specific products and services of DaimlerChrysler, but also so-called mainstream services, such as weather and stock exchange information, hotel bookings etc. As far as these mainstream services are concerned, it cannot be assumed that the exchange has a dominant position, as a large number of similar services are available. There were no major concerns relating to the products targeted at DaimlerChrysler customers either, however. While this will be the first portal of its kind in Germany, other car manufacturers have announced that they are going to set up similar services of their own. It is therefore unlikely that a permanent dominant position will be created. Nor will the portal lead to a strengthening of T-Online's position since it is possible to use the service using any Internet provider.

44. Another project cleared by the Bundeskartellamt was that of tyre producers Goodyear and Michelin to set up a joint venture called RubberNetwork.com. Other participating companies in this joint venture are Continental AG, Hannover, Cooper Tire & Rubber Company, Pirelli Pneumatic S.p.A. and Sumitomo Rubber Industries. RubberNetwork.com is intended to facilitate the purchase and sale of raw materials, primary products, products and services of significance in the tyre and rubber industry. No growth in market share is to be discerned, however, since there is no pooling of demand for any sector-specific products and services or for other products and services directly used by the founding members in their tyres and rubber products. Only in the case of so-called MRO (maintenance, repair, operations) products are there plans for demand to be pooled. This did not prevent the project being cleared, as the total market shares of the shareholders in these products currently amount to less than 1 per cent. RubberNetwork.com is open to all producers, customers and suppliers in the tyre and rubber industry.

45. Another B2B marketplace, with the participation of BASF AG, Degussa-Hüls AG, Henkel KgaA and the software company SAP AG, was also not prohibited. The aim of the joint venture cc markets is to meet the needs of the participating companies in MRO goods and services. The market for the provision of IT services for electronic transactions on the Internet and the markets for the goods and services on offer are affected by the concentration plans. The participants' respective market shares, the dynamism of Internet exchange set-ups and the fact that there is no pooling of demand led to the clearance of the project.

46. The concentration of Callahan Nordrhein-Westfalen (CNRW) and the regional telecommunications provider (a so-called "city carrier") NetCologne Gesellschaft für Telekommunikation mbH, Cologne was also cleared. The parent company of CNRW, CAI Lux, last year acquired a share of 55 per cent of the broadband cable network of Land North-Rhine/Westphalia from Deutsche Telekom AG (DT) and took over sole control. DT retained a 45 percent share in CNRW. CNRW enables programme providers in North-Rhine/Westphalia to feed in and transmit television programmes and other contents via the broadband network. The services offered by NetCologne include regional telephone services, in particular subscriber lines, local and long-distance calls, and online/Internet services, including Internet access. In addition, NetCologne also provides analogue and digital cable television.

47. The decision was taken on the basis of the so-called consideration clause, Section 36(1), second clause of the ARC. Under this clause, a concentration which is expected to create or strengthen a dominant

position shall be cleared if the participating undertakings prove that the concentration will lead to improvements of the conditions of competition, and that these improvements will outweigh the disadvantages of dominance. In this particular case, it was established that the concentration would lead to a strengthening of CNRW's dominant position in the market for feeding in and transmitting programme signals on the broadband cable network. This is because as a result of the concentration, the number of households directly connected to the CNRW network and obtaining their signals via the NetCologne broadband cable network in the municipal area of Cologne will rise by about 30,000. This will lead to a strengthening of CNRW's bidding power towards the programme suppliers. However, the concentration will also lead to improvements in other markets, which outweigh this disadvantage. Its broadband cable network, NetCologne, will enable CNRW to provide an alternative to subscriber lines on the fixed-line network, putting it in a position to offer subscriber lines, voice telephony and fast Internet access via the broadband cable network. In so doing, it will enter into competition with DT, which has so far had practically sole dominance of this market. The aim of CNRW is to enter into competition with DT on these markets, which previously did not feature a high level of competition. A careful examination of the entire set of agreements has shown that DT can only exert a limited influence on CNRW, in spite of its participation of 45 per cent in CNRW. The usual rights of co-operation, information and veto usually associated with a 45 percent participation have been practically excluded in the contracts.

48. As a result, it was established that DT can do little to effectively prevent Callahan's intended competitive inroads on the former monopoly markets of DT. Callahan has also taken specific steps to reduce its links to DT in procuring primary products (digital platforms, set-top boxes, encoding systems, invoicing software). Thus, the Bundeskartellamt came to the conclusion that the anticompetitive aspects were outweighed by the procompetitive aspects. One of the third parties summoned to attend proceedings has submitted an appeal against the decision, however. A decision is pending.

49. The Bundeskartellamt has allowed Kirch Beteiligungsgesellschaft mbH & Co. KG to go ahead with its planned acquisition of 49 per cent of shares in SPEED Investment Ltd., as well as allowing it an option to acquire further shares. SPEED was under the sole ownership of EM.TV+Merchandising AG and Mr Thomas Haffa. Together with the Bambino Trust (Ecclestone), SPEED controls SLEC Holdings Ltd., which owns the worldwide marketing rights to Formula 1. However, the concentration will not give the Kirch group access to the broadcasting rights for free or pay-TV in Germany, since these rights for specific licensing periods are hived off into separate companies sold by auction in neutral and open procedures. Unlike in other countries, granting broadcasting rights in Germany is a case of concentration and is subject to merger control, so that even if the Kirch group came out on top in this procedure by making the best offers, the acquisition is only possible if the project has been cleared under merger law in a separate procedure.

50. The acquisition of the supplier of package holidays and charter flights, LTU Holding GmbH, by REWE AG, one of the largest German retail chains, was cleared by the Bundeskartellamt, although it continues the concentration process that has been discernible for several years in the tourism industry. The concentration will have little impact on the travel agent and charter flight markets as LTU has few sales operations in these areas and Rewe does not own a charter flight company. Rewe will acquire market shares in the package holiday sector, however. It will become the leading German provider of long-haul trips without restraining competition. In the short and medium-distance sector it will continue to be well behind the largest German providers C&N and the TUI group. A major criterion for clearing the project was that WestLB, the largest shareholder in the TUI group's controlling company, had to give up its participation in LTU. In so doing, the structural link between the competitors TUI and LTU was broken, guaranteeing that competition would continue to be upheld in the future.

51. In the high-price watch sector, the Richemont group's acquisition of Les Manufactures Horlogères (LMH) was not prohibited. Rolex continues to be the market leader. Other leading competitors

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are financially strong groups. The presumption that an oligopoly existed, which was supported by the figures, is to be seen as having been rebutted since there are repeated shifts in the market shares, particularly those of the largest competitors.

52. The take-over of the German producer of dental products, Espe Dental AG (Espe) by the Minnesota Mining and Manufacturing Company, USA (3M) was cleared. A dominant position was unlikely to be created or strengthened on any of the submarkets concerned. Concerns that a mixer designed and marketed exclusively by Espe for the company's own products might lead to market foreclosure have been dispelled, as Espe does not in principle prevent competitors from producing compatible materials. Although Espe will gain 3M's considerable financial clout, this alone is not sufficient to extend Espe's scope to any significant degree in comparison with the situation before the concentration.

53. A number of concentrations in the construction materials and concrete sectors were cleared. Haniel Bau-Industrie and Haniel Baustoffindustrie GmbH acquired a number of smaller producers of masonry materials, which operated on regional markets. In addition, Lafarge Fertigtebeton GmbH acquired several producers of ready-mixed concrete, which operated regionally. Market dominance was unlikely to be created in any of these cases.

dd) Withdrawal of application

54. Rethmann AG & Co. has withdrawn the notification of its intention to acquire a majority holding in Interseroh AG, Cologne. In addition, it will reduce its current shareholding in Interseroh AG to a maximum of 15 percent. Last year, the Bundeskartellamt issued a statement of objections concerning both the notified merger and also the minority participation already existing on account of the resulting considerable influence of Rethmann AG & Co. on Interseroh AG. Interseroh AG already had a dominant position in the market for commercial waste disposal throughout Germany (e.g. return system for transport packaging and the complete disposal of undertakings' waste, with a wide branch network). Through a merger with Rethmann AG & Co., one of Interseroh's largest competitors in this sector, its dominant position would have been considerably reinforced. If the company had not withdrawn its notification itself, the Bundeskartellamt would have had to serve a prohibition order as already announced.

55. Following a warning by the Bundeskartellamt, Deutsche Lufthansa AG is to give up its plans to acquire all the shares in SSC Sky Shop Catering GmbH. Sky Shop Catering, a subsidiary of Aero Lloyd Flugreisen GmbH & Co Luftverkehrs-KG, produces on-board meals on passenger flights. The direct acquirer was to be the Lufthansa second-tier subsidiary Lufthansa Service Gesellschaft Europa/Afrika GmbH (LSG). The LSG group is one of the world's leading suppliers of in-flight catering services, with a considerably larger share of the German market than its nearest competitor, the flight catering group Gate Gourmet, and its other small and medium-sized competitors. At Frankfurt and Munich airports, which were particularly affected by the concentration, LSG's market share is well over 50 percent. The LSG group's far superior capacities also contribute to its paramount market position. They are due to the fact that Lufthansa's demand for flight catering services from within the concern is far greater than the total volume of the free market. If the concern had not withdrawn its plans, the Bundeskartellamt would therefore have had to serve a prohibition order on the company as already announced.

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

56. 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, has been

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.

57. In the electricity sector, tangible results have been achieved in opening up networks. The so-called Associations' Agreement concluded by the representatives of important interest groups of the energy industry forms the basis for determining transmission fees. The conditions of network access in the electricity sector have improved to such an extent 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. The abuse control carried out by the Bundeskartellamt, especially 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 the enforcement of the right to network access as well as in regulating access conditions, in particular access fees.

58. 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. The working group comes to the conclusion in its report issued in April 2001 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 involve 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.

59. In the gas sector, where EU Member States have been required under European law to partially liberalise their markets only since the summer of 2000, the results are still unsatisfactory. 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.

60. 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.

61. 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

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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 these problems.

62. Since the summer of 2000 there has been an Associations' Agreement on network access in the natural gas sector. However, this agreement is not suitable in its present form to regulate free network access. 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.

4. Resources of competition authorities

1. Resources overall (current figures and change over previous year)

Annual budget (in our currency and USD)

| Budget 2001 | Change vis-à-vis 2000 |
|-------------|--------------------------|
| DM 33.2 m | - DM 2.0 m |
| Euro 17.0 m | - Euro 1.0 m |
| USD 15.0 m | - USD 0.9 m ⁷ |

Number of employees (person-years)

| | item of employees | Change |
|---------------------|-------------------|--------|
| Economists | 49 | - 1 |
| Lawyers | 59 | 0 |
| Other professionals | 10 | - 23 |
| Support staff | 142 | + 22 |
| All staff combined | 260 | - 2 |

2. Human resources (person-year) applied to:

- enforcement against anticompetitive practices;
- merger review and enforcement;
- advocacy efforts;
- it is not possible to give a breakdown of staff working in the above three fields as;

8 Exchange rate as of 1 August 2001

- tasks at the Bundeskartellamt are allocated according to sectors of the economy;
- rather than according to specific types of procedures.

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