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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- July 2005 - June 2006 --

This report is submitted by the German Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 18-19 October 2006.

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Executive Summary

1. *Legislation*

1. On 1 July 2005 the 7th Amendment to the Act against Restraints of Competition as well as the new Energy Industry Act came into force. Furthermore, the Bundeskartellamt published a new Leniency Programme.

2. *Agreements / Abusive practices by dominant companies*

2. In the period covered by the report the Bundeskartellamt continued its vigorous fight against cartel agreements. It imposed fines against industrial insurers and haulage contractors; further fines were issued in the ready mix concrete sector and the catering event sector.

3. Again, significant abuse proceedings were conducted in the energy sector, in particular concerning the exploitative gas sector. These concerned long-term gas supply contracts, excessive pricing by seven gas providers and the trading system of emission rights. Further abuse proceedings were conducted against Anton Schlecker, the company Soda Club and TEUTO Gewürzbetrieb GmbH.

3. *Merger control*

4. A number of significant proceedings in the area of merger control related to the media sector: The Bundeskartellamt prohibited the planned merger between Axel Springer AG and ProSiebenSat.1, whereas it cleared the acquisition of the sole control of the news channel n-tv by RTL Television since the conditions for the failing company defence were met. In the print media, the Berliner Verlag KG finally found a new owner.

5. Moreover, in the reporting period the Bundeskartellamt for the first time imposed fines for false information in merger control proceedings.

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

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

6. As was already reported in Germany's last annual report, the 7th amendment to the Act against Restraints of Competition came into force on 1 July 2005. The recent amendment implements the procedural requirements resulting from EU Regulation 1/2003 and adapts substantive German regulations to European competition law. The changes comprise, inter alia, the abolition of the obligation to notify and seek approval for agreements between undertakings.

7. The new Energy Industry Act also came into force on 1 July 2005. It transposes EU Directives into national law and provides for a comprehensive regulation of network access.

8. As regards further details in terms of content of the respective Acts, see last year's report, which already illustrated the legislative amendments (cf. para. 6 – 11, p. 3/4 in Germany: Competition Law and Policy 2004-2005, DAF/COMP(2005)32/01).

1.2 *Other relevant measures, including new guidelines*

9. On 15 March 2006 the Bundeskartellamt published a new Leniency Programme which replaces the previous regulation from 2000. With its Leniency Programme the Bundeskartellamt assures those cartel

participants wishing to leave a cartel and cooperate with the Bundeskartellamt in its uncovering immunity from or a reduction of their fines.

10. The new Leniency Programme contains the following new features:

- An applicant who is the first to come forward and cooperate with the Bundeskartellamt and enables it to obtain a search warrant against the other cartel members automatically obtains immunity from fines, which is assured to him in writing.
- A cartel member can still obtain full immunity from fines after the search has been conducted. The condition for this is that he is the first to cooperate with the Bundeskartellamt and submits evidence to prove the offence.
- Each cartel member which has lost the race for the first place can, as the second or third applicant, have his fines reduced by up to 50 per cent. Here again, the time of the announcement of intent to cooperate is decisive for the level of reduction in fines.
- As of now the Bundeskartellamt is to apply a so-called “marker system”. Whoever would like to cooperate with the Bundeskartellamt can place a “marker“ by providing a necessary minimum of information about the cartel. The marker assures the applicant his status as first applicant if he provides necessary additional information within a maximum period of eight weeks.
- In addition the new Leniency Programme offers considerable simplifications to companies willing to cooperate and leave a European-wide cartel. In future the status of priority of an applicant will already be guaranteed **by the placement of a marker**.

Furthermore, many of the 16 *Land* competition authorities (independent regional competition authorities of the *Länder*) have implemented or plan to implement a leniency programme identical or at least similar to that of the Bundeskartellamt.

11. In addition, new fining guidelines are envisaged after the 7th Amendment to the ARC changed the respective provisions for fining companies to a turnover-based approach.

1.3 Government proposals for new legislation

12. Section 20 (4) of the Act against Restraints of Competition prohibits the not merely occasional offer of goods or commercial services below their cost price unless there is an objective justification. In their coalition agreement the governing parties agreed to extend this prohibition with regard to food. In the future the occasional offer of food below the cost price shall also be prohibited. The government is elaborating a draft law to implement this agreement.

2. Enforcement of competition law and policy

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

2.1.1 Summary of activities of competition authorities and courts

13. In the period covered by the report, the Bundeskartellamt concluded its cartel proceedings against industrial insurers and imposed further fines totalling 20 million euros. Together with the fines imposed in

the last reporting period, the Bundeskartellamt has imposed fines totalling approx. 150 million euros against 17 industrial insurers and the directors involved. In cartel proceedings against six small and medium-sized haulage contractors it imposed fines totalling 2.4 million euros. In the ready-mix concrete sector further fines were imposed in connection with the cement cartel in 2002 (cf. para. 21, p. 6, in Germany: Competition Law and Policy 2002-2003, DAF/COMP(2003)15/01) and another fine of about 1 million euros in the Transportbeton Dresden case.

14. From July 2005 to June 2006 the Bundeskartellamt received altogether 14 leniency applications and conducted eight dawn raids in administrative offence proceedings, of which two were conducted on behalf of a foreign competition authority, 3 were inspections and examinations in administrative proceedings and 5 were inspections on behalf of the European Commission.

15. Regarding abusive market behaviour the Bundeskartellamt prohibited E.ON Ruhrgas's practice of long-term gas supply contracts, in particular with regard to their considerable market foreclosure effects. Also concerning the gas sector the Bundeskartellamt instituted abuse proceedings against seven gas providers on suspicion of their charging end consumers abusively excessive prices. The proceedings were discontinued on the basis of an offer made by the gas providers to private customers allowing them to switch providers. Based on several complaints the Bundeskartellamt is still investigating whether E.ON and RWE have been abusing their dominant position in the electricity market in connection with the trading system for emission rights.

16. In addition to its examination of abusive conduct in the energy sector the Bundeskartellamt prohibited the abusive conduct of the company Soda Club in the market for the filling of cartridges with CO₂ for subsequent use in carbonation systems. Furthermore, it imposed fines against Anton Schlecker, head of a leading drugstore chain in Germany, for violating the ban on sales below cost price, and against TEUTO Gewürzbetrieb GmbH, a spice producer, for violating a prohibition decision of the Bundeskartellamt.

17. Finally, there are several proceedings in which the Bundeskartellamt has already issued a warning letter and which are nearly concluded. For example, the Bundeskartellamt has issued a warning letter to the regional lottery companies and the German Lotto and Toto Block. In the view of the Bundeskartellamt the State Lottery Treaty in its current form contains market allocation agreements which are prohibited under competition law and which thus violate Section 1 of the ARC and Article 81 EC. The warning concerns three forms of conduct: 1) The call of the German Lotto and Toto Block on lottery companies not to accept any stakes collected through commercial lottery agents at stationary lottery collection points; 2) The lottery companies' agreement to offer lotteries and sports betting services only in those *Länder* in which they are authorised to do so ("principle of regionality"), 3) The provision of information by the lottery companies to the *Länder* on stakes, processing fees collected and the proportion thereof collected through commercial lottery agents.

18. The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision in its cartel proceedings in the paper wholesale sector but considerably reduced the level of the fine. Moreover, it confirmed the immediate enforceability of the Bundeskartellamt's decisions in the E.ON Ruhrgas case and the Soda Club case.

19. The Federal Court of Justice acknowledged two decisions of the Bundeskartellamt (Stadtwerke Mainz, cf. para. 33, p. 8, in Germany: Competition Law and Policy 2002-2003, DAF/COMP(2003)15/01, and Mainova, cf. para. 35, p. 9, in Germany: Competition Law and Policy 2003-2004, DAF/COMP(2004)25/01) and one decision of the *Land* competition authority of Bavaria in abuse proceedings in the energy sector. It also released an important decision with regard to the calculation of additional proceeds obtained from a cartel.

2.1.2 Description of significant cases, including those with international implications

Agreements, action in the form of administrative fine proceedings against cartels / boycotts

20. As reported last year, in cartel proceedings against industrial insurers the Bundeskartellamt imposed fines totalling approx. 130 million euros against 10 industrial insurers and the directors involved in March 2005. In September 2005 the Bundeskartellamt imposed further fines totalling approx. 20 million euros against 7 industrial insurers and the directors involved. Together with the fines imposed within the last reporting period the Bundeskartellamt imposed fines totalling approx. 150 million euros against 17 industrial insurers and their directors. For further details on the proceedings see last year's report, cf. para. 14, p. 4, in Germany: Competition Law and Policy 2004-2005, DAF/COMP(2005)32/01.

21. The Bundeskartellamt imposed fines totalling 2.4 million euros against six small and medium-sized haulage contractors on account of price agreements. In the case of three of the companies involved the Bundeskartellamt applied its Leniency Programme as a mitigating measure in calculating the level of fines.

22. In 2001 and 2002 the companies had agreed prices for removal services for US soldiers under the deployment programme of the US military authorities. The price agreements applied to the packing of personal effects and their transport to a store, from where they were shipped by sea to the USA by other service providers. For their services the companies involved agreed a minimum rate and undertook not to offer their services to the prime contractors commissioned by the military authorities with the overall removal at a price lower than agreed.

23. The Bundeskartellamt had initiated the cartel proceedings in 2002 after tip-offs. In parallel proceedings the American antitrust authorities had opened investigation proceedings against the prime contractors operating in the USA and imposed fines totalling more than 10 million Dollars. It is noteworthy that in the course of the proceedings, and for the first time in the Bundeskartellamt's history, German and American antitrust authorities simultaneously carried out searches and cartel proceedings both in the USA and Germany. This case therefore clearly shows the international dimension of cartels and the need for increased cooperation between competition authorities at international level.

24. Some of the orders imposing fines are final. Three of the accused companies filed appeals against the fines at the Düsseldorf Higher Regional Court.

Exemptions from the general ban on cartels

25. The 7th Amendment to the ARC which entered into force on 1 July 2005 has abolished all existing exemption provisions under which the Bundeskartellamt could exempt agreements from the general ban on cartels. All existing exemption permissions of the Bundeskartellamt will expire on 31 December 2007.

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

26. Already in 2004, the Bundeskartellamt started to examine the problem of long-term gas supply contracts between gas transmission companies and gas distributors. A survey has shown that almost three quarters of the contracts concerned cover 100 per cent of the gas distributor's requirement or at least quantities of between 80 per cent and 100 per cent of the distributor's requirement. Almost all of these contracts run for more than four years, in some cases up to twenty years. This combination of long contract periods on the one hand and a high degree of requirement satisfaction on the other leads to considerable foreclosure effects.

27. The Bundeskartellamt initially tried to achieve a consensus-based solution in order to counteract this restraint of competition. It took up the problem of long-term gas supply contracts *ex officio* without immediately initiating prohibition proceedings against the companies. Instead the authority conducted numerous discussions with the gas transmission companies, trading companies and distributors. The purpose of these discussions was to find a solution which serves the interests of effective competition and provides both the established and new gas suppliers with a clear schedule for their planning processes. However, the attempt to open up long-term gas supply contracts by consensus failed, in particular due to the fact that the market leader, E.ON/Ruhrgas, was not prepared to sign the formal obligation required.

28. The Bundeskartellamt now tackles long-term gas supply contracts in prohibition proceedings. In January 2006, it released its first decision against the market leader E.ON/Ruhrgas. By this decision the Bundeskartellamt prohibits E.ON Ruhrgas' existing long-term contracts with distributors which cover more than 80 per cent of their actual gas requirements. These contracts are to be terminated at the latest by the end of the current gas year on 30 September 2006. As regards the conclusion of new contracts with regional and local gas companies, those contracts are to be prohibited which run for more than four years and which cover more than 50 per cent of actual gas requirements, or which run for more than two years and cover more than 80 per cent of requirements. Tacit extension clauses are also prohibited. The decision is immediately enforceable.

29. E.ON Ruhrgas filed a complaint against this decision at the Düsseldorf Higher Regional Court and requested the suspensive effect of the appeal to be restored. With its decision of 20 June 2006 the Higher Regional Court rejected this decision. A decision on the merits is still pending.

30. At the end of January 2006, after dramatic price rises since the previous October, the Bundeskartellamt instituted abuse proceedings against seven national gas providers on suspicion of their charging end consumers abusively excessive prices. The providers concerned are E.ON Thüringer Energie AG, E.ON Avacon AG (Saxony-Anhalt), RWE Westfalen-Weser-Ems AG, MITGAS Mitteldeutsche Gasversorgung GmbH, SpreeGas GmbH, ENTEGA Vertrieb GmbH & Co. KG and an independent company of Thüga AG.

31. A nationwide survey on gas prices conducted by the Bundeskartellamt and the competition authorities of the *Länder* at more than 700 gas providers had identified price differences of more than 40 per cent between the least and the most expensive providers. In addition to the proceedings instituted by the Bundeskartellamt (which is competent for 29 gas providers) the competition authorities of the *Länder* have instituted more than 80 proceedings against providers falling under their competence. Private consumers had not only complained about the high prices but also, and above all, about the fact that they were not free to switch gas providers.

32. The companies named above have now undertaken in writing to offer private customers the possibility to switch providers from 1 April 2006. E.ON has given this commitment on behalf of all its affiliated companies. As a consequence, the Bundeskartellamt decided to discontinue the proceedings.

33. The possibility to change provider runs under the rubric "provision", a market-opening regulation which is already applied in the telecommunications sector and electricity market. This practically involves a "triangular relationship". The private end consumer concludes a supply contract with the new supplier, who in turn buys the gas from an established local network operator on the basis of a "provision" contract.

34. The provision scheme only serves as an interim solution until an effective entry-exit system is in place for household customers which will allow the alternative gas provider non-discriminatory transmission through the network of the local network operator. The Federal Network Agency expects such an entry-exit system to start on 1 October 2006. But the effect of the interim solution is that the private end

consumer now has the possibility to choose another gas provider. Better possibilities to switch providers should ultimately be reflected in lower prices.

35. In the period covered by the report the Bundeskartellamt received a number of complaints with regard to the introduction of a trading system for emission rights for pollutants and its effect on electricity prices. According to the complainants the market leaders E.ON, RWE and other producers of electricity include the current stock market prices of allowances allocated to them in their electricity supply prices. The complainants basically accused the suppliers of achieving “opportunity gains” by including these costs in their supply prices, thus generally inflating electricity prices. According to the complainants, the emission allowances allocated free of charge represent imputed costs which cannot be accounted for by any actual costs.

36. The Bundeskartellamt is examining the complaints and investigating in particular whether E.ON and RWE as dominant companies have been abusing their dominant positions in the electricity market for major customers.

37. Furthermore, the Bundeskartellamt imposed fines against Anton Schlecker for violating the ban on sales below cost price. Anton Schlecker is the head of a drug store chain in Germany. The case involves the offer of digital photo processing services below Schlecker cost prices. Schlecker repeatedly failed to at least carry out supervisory measures to prevent its staff from violating the ban on sales below cost price.

38. According to the Act against Restraints of Competition unfair hindrance of competition exists if companies with superior market power sell their goods or services not merely occasionally below their cost prices, unless there is an objective justification for this. This is not a matter of protecting the existence of small and medium-sized companies but of fair practices in competition. If sales below cost price were allowed to squeeze competitors out of the market, competition would significantly decline. As a result the large companies remaining in the market would gain greater leeway for raising prices, for which consumers would have to pay dearly.

39. As there are small and medium-sized photo shops in all of the regional geographic markets and the effects of the violations were not limited to only a few regional markets but unfairly hindered Schlecker’s competitors in the whole of Germany, the Bundeskartellamt decided to impose fines against the company.

40. In February 2006 the Bundeskartellamt prohibited the company Soda-Club from abusing its dominant position.

41. The proceedings concerned Soda-Club’s conduct in the market for the filling of cartridges with CO₂ for subsequent use in carbonation systems. The carbonation systems with CO₂ cartridges are used by end consumers to add carbon dioxide gas to tap water. While the system itself can be used over a long period of time, the cartridges need to be exchanged regularly when they are empty. The end consumer takes the empty CO₂ cartridge to a retailer, who in return provides the consumer with a filled cartridge. The end consumer only pays for the filling itself. The filling of cartridges and re-filling of empty cartridges is carried out by filling companies. Originally all retailers and filling companies took back all cartridges circulating in the market and exchanged and filled them (exchange pool). Thus undistorted competition could develop in the market for filling these cartridges.

42. This competition was severely impaired by Soda-Club’s conduct. Soda-Club produces and distributes carbonation systems. It has a 70 per cent share of the market and is thus also the dominant filling company for CO₂ cartridges. Soda-Club used this dominant position to further restrain residual competition. Distributors were exclusively tied to Soda-Club, and independent retailers and filling

companies were barred from filling Soda-Club cartridges. The Bundeskartellamt prohibited Soda-Club from continuing this abusive conduct.

43. The Bundeskartellamt's prohibition decision is immediately enforceable. Soda-Club opposed the decision and its immediate enforceability by applying to the Düsseldorf Higher Regional Court for interim measures. In provisional proceedings the court has now confirmed the Bundeskartellamt's decision in all material respects.

44. In the reporting period the Bundeskartellamt also imposed a fine of 250,000 euros against TEUTO Gewürzvertrieb GmbH (TEUTO) for violating a prohibition decision of the Bundeskartellamt dating back to July 2002.

45. TEUTO belongs to the Fuchs group. In 2002 the Bundeskartellamt prohibited the Fuchs group from unfairly impeding the business activities of Hartkorn, one of the few remaining medium-sized spice producers. Fuchs' conduct resulted in systematically forcing competitors out of the market by paying retailers high contributions to advertising costs, which induced them to agree to stock exclusively Fuchs products.

46. Fuchs is the second largest spice producer in the world after US American McCormick and is the clear market leader in Germany and Europe. The company sells dried spices and herbs in household packages to food retailers in Germany via the distribution company TEUTO. With a market share of more than 70 per cent Fuchs has a dominant position in the German markets.

47. According to the Bundeskartellamt's investigations at least five violations of the prohibition decision were committed by TEUTO sales representatives after the decision had been issued in July 2002. These violations were made possible by the negligent breach of duty of supervision of the managing director at TEUTO who was responsible at that time for the company's marketing activities. The Bundeskartellamt punished this breach of duty of supervision in the fine proceedings which have now been concluded. TEUTO appealed against the decision at the Düsseldorf Higher Regional Court. The case is still pending.

Activities of the courts

48. In May 2004 the Bundeskartellamt imposed fines totalling 57.6 million euros against 12 companies and 46 persons responsible in the paper wholesale sector for illegal price agreements. With its decision of 27 March 2006 the Düsseldorf Higher Regional Court decided in one of the proceedings to confirm the Bundeskartellamt's decision on the merits, but to considerably reduce the level of the fine, as it based its calculation of the additional proceeds gained by the cartelists on different criteria (different group of customers) than the Bundeskartellamt. The Bundeskartellamt has appealed against this decision.

49. The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's order to immediately enforce its prohibition decision in the abuse proceedings against E.ON Ruhrgas. The Bundeskartellamt prohibited E.ON from pursuing its practice of concluding gas supply contracts with distributors in the combination of long-term purchase obligations and a high degree of requirement satisfaction. In expedited proceedings the court declared the immediate enforceability of the Bundeskartellamt's decision to be legitimate. The court emphasised in particular that the decision did not endanger the security of energy supply. A decision in the main issue is pending at the Düsseldorf Higher Regional Court.

50. Furthermore, the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's order to immediately enforce its prohibition decision in the abuse proceedings against Soda-Club. Although Soda-Club can still appeal against the Higher Regional Court's decision to the Federal Court of Justice, the

Higher Regional Court's decision implies that the numerous small and medium-sized bottling plants can now start to compete with Soda-Club and refill all cartridges circulating in the market.

51. The Federal Court of Justice released two decisions which are of great importance for the future work of the Bundeskartellamt. Firstly it confirmed the decision of the *Land* competition authority of Bavaria in its abuse proceedings in the Stadtwerke Dachau case and hereby confirmed the market definition in the gas sector which has also been used by the Bundeskartellamt in several proceedings. Secondly, according to the Bundeskartellamt's opinion and contrary to the Düsseldorf Higher Regional Court it stated in the Transportbeton Berlin case that according to the general experience of life and economic principles the initiation and implementation of a cartel regularly leads to the assumption that its members will gain additional profit from it. Here particular consideration should also be given to the duration of the cartel agreement and its intensity.

52. Moreover, the Federal Court of Justice confirmed two decisions of the Bundeskartellamt (Stadtwerke Mainz, cf. para. 33, p. 8, in Germany: Competition Law and Policy 2002-2003, DAF/COMP (2003)15/01, and Mainova, cf. para. 35, p. 9, in Germany: Competition Law and Policy 2003-2004, DAF/COMP(2004)25/01, in abuse proceedings. This shows that the German ARC is still a sufficient legal instrument for effective abuse control in the energy sector, even though the issues concerned in these proceedings are now largely dealt with by the new German regulatory authority, the Federal Network Agency for Electricity, Gas, Telecommunications, Posts and Railways.

2.2 Mergers and acquisitions

2.2.1 Summary of activities of competition authorities and courts

53. In 2005, 1684 mergers were notified to the Bundeskartellamt, of which 52 were not subject to control. Main examination proceedings were initiated in 54 cases.

54. In the period covered by the report the Bundeskartellamt prohibited two mergers (a total of 6 in 2005) and cleared 3 mergers subject to conditions and obligations (a total of 4 in 2005). Following the amendment to the ARC the parties are no longer obliged to notify the consummation of a proposed merger after review, so that in contrast to previous years the number of mergers that have been put into effect cannot be reported.

55. A number of prominent merger cases in 2005/2006 concerned the media sector: The Bundeskartellamt prohibited the planned merger between Axel Springer AG and ProSiebenSat.1. According to the Bundeskartellamt's investigations the merger would have led to a degree of market power which is unacceptable under competition law, not only in one but in several markets. By contrast, it cleared the acquisition of the sole control of the news channel n-tv by RTL Television since the conditions for the failing company defence were met. In the print media, Berliner Verlag KG finally found a new owner. After the Bundeskartellamt had prohibited the merger of Holtzbrinck KG with Berliner Verlag KG a second time, Berliner Verlag KG was sold to two British investors who primarily hold shares in the media sector (Veronis Suhler Stevenson International Ltd. and the Mecom Group plc.).

56. Further important merger proceedings concerned the waste disposal market ("Cleanaway/Sulo", "AWISTA/ATG&R"), the grocery retail market ("EDEKA/Spar") and transport services ("RBH/Railion"). Moreover, the Bundeskartellamt for the first time imposed fines for the submission of false information in merger control proceedings.

57. Of significance in the jurisdiction of the Düsseldorf Higher Regional Court was its confirmation of the Bundeskartellamt's prohibition decisions in the "Rethmann/GVA Köthen" case and the

“Melitta/Schultink” case. The Federal Court of Justice confirmed the Bundeskartellamt’s decision in the “DB Regio/üstra” case.

2.2.2 *Description of significant cases*

Prohibition or prevention of mergers

58. In July 2005 the Bundeskartellamt prohibited RUAG Deutschland GmbH from acquiring MEN Metallwerk Elisenhütte GmbH. The merger project would have created a de facto monopolistic position for RUAG on the German market for small calibre ammunition (also called small arms ammunition) for customers in the authorities sector and military sector.

59. RUAG Deutschland belongs to the worldwide active Swiss armaments group RUAG, which in recent years has acquired two leading European suppliers of small armaments, German Dynamit Nobel and Swedish Norma Precision AB. In Germany RUAG and MEN, which belongs to the MAN group, supply customers from the authorities sector such as the Police, criminal investigation offices, the courts, offices for the protection of the constitution, customs and the Federal Armed Forces with small calibre pistol and rifle ammunition of up to 12.7 mm.

60. The merger would have further worsened competitive conditions on this market, which is already highly concentrated. If the merger had been effected RUAG would have been able to use MEN’s product range, which is fully certified according to the Technical Guideline and partially patented. It would therefore have been in a position to fend off potential competition even more effectively than prior to the merger and to strengthen or establish an exclusive dominant position.

61. The parties to the merger appealed against the decision. On 3 January 2006 the appeal was dismissed by the Düsseldorf Higher Regional Court as inadmissible.

62. The merger proceeding attracting most attention in 2005/2006 was the planned merger between Axel Springer AG (“Springer”) and ProSiebenSat.1 Media AG (“ProSiebenSat.1”). Springer is one of the largest German newspaper and magazine publishing houses, ProSiebenSat.1 is a private broadcasting channel. The Bundeskartellamt prohibited the merger because it assumed that it would lead to a degree of market power which was unacceptable under competition law on the TV advertising market, reader market for over-the-counter newspapers and the national advertising market for newspapers.

63. According to the Bundeskartellamt’s findings ProSiebenSat.1 and the RTL TV group, which belongs to the Bertelsmann group, together have held a dominant position in the TV advertising market with a constant market share of approx. 40 % each over the last few years (a so-called “uncompetitive duopoly” without any substantial competition from outsiders). The merger would have led to a further assimilation of the corporate structures of the two conglomerates in the neighbouring markets for newspapers and magazines and would have resulted in a number of interlocks between Springer/ProSiebenSat.1 and Bertelsmann. This would have further secured and strengthened the duopoly. The interlocks would have resulted from mutual minority shareholdings of Springer and Bertelsmann in several private radio stations and in press distribution companies; in addition Springer and Bertelsmann mutually control a rotogravure company.

64. The merger would also have led to a strengthening of Springer’s dominant position in the national reader market for over-the-counter newspapers. With its newspaper “BILD” Springer holds a share of approx. 80 % in this market. The merger would have enabled Springer to further secure and strengthen BILD’S position through cross-media promotional and editorial measures (cross-media promotion).

65. Finally the merger would also have led to a strengthening of Springer's market position in the national advertising market for newspapers. With its newspapers "BILD" and "Die Welt" the Springer publishing house already holds a paramount market position with a share of approx. 40 %. The merger would have enabled Springer to offer coordinated product advertising campaigns in several media from one source and to launch cross-media advertising campaigns for third parties. Thus its market dominance in the advertising market for newspapers would have been further secured.

66. Following the Bundeskartellamt's prohibition decision the parties abandoned the merger project but appealed against the decision. The first issue now to be examined in the court proceedings is whether the appeal is admissible even though the merger project has been abandoned. The case is still pending.

67. 38. In the last OECD annual report on competition policy developments, Germany had reported on the prohibition of two hospital mergers (cf. para 40 – 47, p. 11 f in Germany: Competition Law and Policy 2004-2005, DAF/COMP(2005)32/01). The Bundeskartellamt had prohibited the mergers of Rhön-Klinikum AG with the hospitals in the administrative district of Rhön-Grabfeld and with the municipal hospital of Eisenhüttenstadt due to the expected strengthening of the dominant market position of Rhön-Klinikum AG. In both cases, the parties concerned lodged a complaint with the competent court; in the case of Eisenhüttenstadt, the complaint was withdrawn after the sale of the hospital to a third party. The complaint proceedings regarding the case of Rhön-Grabfeld have not yet been completed.

68. The seller of the district hospitals, the administrative district of Rhön-Grabfeld, in January 2006 submitted an application for a ministerial authorisation for the merger to the Federal Minister of Economics and Technology pursuant to Section 42 of the ARC. In the opinion of the district, the planned merger has only a minor negative impact on competition, which is perceptibly outweighed by the resulting advantages in the public interest. The following advantages in the public interest were mentioned:

- securing the local medical care at a high level;
- relieving the public budgets;
- reducing the hospital costs;
- securing jobs.

69. The Federal Minister of Economics and Technology has not granted the ministerial authorisation since the required preconditions pursuant to Section 42 of the ARC were not fulfilled. The merger has not been regarded as indispensable as required by the Act for producing the advantages in the public interest which the applicant mentioned. An alternative buyer, whose ability to act in the public interest was beyond all question, had submitted a binding offer. The determination of the offer was beyond reasonable doubt. In addition, a decision in which alternatives were considered came to the conclusion that the restraints of competition determined by the Bundeskartellamt were not outweighed by advantages to the economy as a whole and that the merger was not justified by an overriding public interest.

70. The applicant also lodged a complaint against the Federal Minister's refusal to grant an authorisation.

Clearances subject to conditions and obligations

71. In August 2005, after intensive investigations in the main examination proceedings, the Bundeskartellamt cleared the acquisition of Norddeutsche Mischwerke GmbH & Co. KG (NMW) and Preusse Bauholding GmbH & Co KG by the Werhahn group, subject to obligations.

72. Werhahn and NMW are the largest manufacturers in Germany of asphalt mixes and crushed rock which are both essential primary products for road construction. In the case of asphalt mixes the participating parties concentrate their activities in different regions so that an overlap only occurs in certain regions. As asphalt mixes harden quickly they can only be used on construction sites within a distance of approx. 25 kilometres from the mixing plant. Therefore the competitive situation in the individual regional markets is the decisive factor.

73. The parties to the concentration could only prevent a prohibition by offering to accept about 40 obligations. In all regional markets concerned the parties have to sell asphalt mixing plants or certain stakes in other asphalt mix manufacturers. Further obligations to divest were imposed in the crushed rock sector where overlaps occur in various regions. The parties to the concentration have to sell their stakes in several quarries to solve the competitive problems which would otherwise be raised by the concentration.

74. In April 2006 the Bundeskartellamt cleared the takeover of Cleanaway Deutschland Holding GmbH ("Cleanaway") by Sulo GmbH ("Sulo") subject to conditions. At the request of the companies concerned the merger project was referred from the European Commission to the Bundeskartellamt for examination, although the total turnover involved exceeds the 5 billion threshold, because it affects almost exclusively German markets.

75. Sulo is a joint venture of the Blackstone Group and Apax Partners. The shares in Cleanaway are currently held by the Brambles company group (Australia/U.K.). Both Sulo and Cleanaway are active in all of the major German waste disposal markets. The merger would have created competition problems in several markets. It would have strengthened dominant market positions already existing in regional markets in several *Länder*, namely in Hesse (for the collection and transport of residual waste, waste paper, recovered glass and light-weight packaging and for the sorting of light-weight packaging), in Rhineland-Palatinate/Saarland (for the collection of residual waste and light-weight packaging and for the sorting of light-weight packaging) and in Saxony (for the collection and transport of residual waste). Even before the merger these markets were characterised by dominant positions because the leading suppliers in these markets jointly hold very high market shares, in some cases more than 50 per cent, whereas the market shares of their competitors, mostly small and medium-sized enterprises, are considerably lower.

76. Furthermore, the major waste-disposal companies are interlinked through joint participations, syndicates and subcontracting. Sulo and Cleanaway have pledged commitments for the markets affected, to compensate the strengthening effects. As part of these commitments Sulo and Cleanaway now have to sell assets to independent third parties which will eliminate the strengthening effects created by the merger in the respective product and geographic markets.

77. Moreover, the Bundeskartellamt has cleared the acquisition of GZS Gesellschaft für Zahlungssysteme mbH, ("GZS") by Telecash GmbH & Co. KG, ("Telecash") subject to the condition that GZS will sell its subsidiaries easycash Holding GmbH and easycash GmbH ("easycash").

78. Telecash is a subsidiary of First Data Corporation, USA, an internationally active payment service provider. GZS is currently owned by several companies in the banking and savings bank sector. The merger affects services connected with the processing of card payments, from the point of sale to the debiting of the customer's account.

79. The merger would have created a dominant position in the market for network services because the joint market shares of the parties to the merger would have added up to more than 50 per cent and the market share lead over the next largest competitor would have been significantly increased. In addition, there are legal and structural barriers to market entry in the market for network services, which means that a market entry of potential competitors is not likely, at least not in the near future.

80. To safeguard competitive structures the merger could only be cleared subject to the obligation that GZS sell its subsidiary easycash. Thus easycash remains an independent competitor on the market for network operators.

Clearances and withdrawal of application

81. In June 2005 the Bundeskartellamt cleared the merger of Deutsche Börse AG (DBAG) and London Stock Exchange plc (LSE). The planned takeover was notified to the Bundeskartellamt on 14 January 2005. The companies upheld the notification although DBAG has meanwhile withdrawn its takeover bid.

82. The examination of the concentration project showed that the activities of the parties to the merger overlapped mostly in the sector of stock exchange infrastructure for equities trading. However, a deterioration of the competitive landscape is not to be expected in this sector. No market share additions will occur in the sector of listing services or in the organisation of stock exchange dealings, as the participating parties are active in separate geographic markets. Furthermore it is not to be expected that potential competition will be affected, as market entry barriers to other national stock exchange markets are high. Particularly decisive in this respect is the liquidity of equities which is highest at the respective home stock exchange. Finally, DBAG's vertical market position in Germany will not be strengthened by a possible acquisition of the LSE.

83. In August 2005 the Bundeskartellamt cleared the takeover of SPAR Handels AG ("Spar") and Michael Schels & Sohn GmbH & Co. OHG ("NETTO Schels" by EDEKA Zentrale AG & Co. KG ("EDEKA")).

84. Spar and EDEKA are two of the biggest grocery chains in Germany with numerous grocery retailer markets all over Germany. Nevertheless, the merger could be cleared without obligations because it did not lead to the creation or strengthening of a dominant position in the food retail market either on the procurement or sales side.

85. On the sales side the Bundeskartellamt examined 90 regional markets nationwide. In approx. 20 of these the companies involved would achieve a market share of approx. one third or more following the merger, if the independent EDEKA grocery retailers were included in the calculation. However there was no geographic connection between these regional markets, and competitors of the parties to the merger also held large market shares in the markets concerned. Moreover, it had to be taken into account that the grocery retail trade is characterised by significant price competition on the sales side. Therefore, despite a comparatively high level of concentration the creation or strengthening of a dominant position of the parties to the merger could not be expected in any of the regional markets.

86. Nor is the creation or strengthening of a dominant position to be expected in the procurement markets, which the Bundeskartellamt generally defines as national markets. The market shares of the parties to the merger clearly remain under one third, the threshold from which dominance can be presumed, and other competitors also have comparatively high market shares.

87. The Bundeskartellamt has cleared the acquisition of RAG Bahn und Hafen GmbH ("RBH") by Railion Deutschland AG ("Railion"), which belongs to the Deutsche Bahn AG group.

88. Where transport services effected within Germany are concerned, irrespective of whether these involve purely domestic German or cross-border transport, the Bundeskartellamt's investigations concluded that Railion has a market share of well over one third. However, the merger does not lead to a strengthening of an alleged dominant position. Firstly, RBH undertakes few transport services for third companies on the assumed market. Secondly, Railion already carried out transport services in cooperation

with RBH before the merger. Furthermore, the fact that in the course of the proceedings the companies concerned sold 200 goods wagons for transporting coal to a commercial hirer has allayed reservations previously expressed by the Bundeskartellamt. RBH also terminated rental contracts for approx. 1.100 goods wagons to the end of the agreed contract period.

89. With the sale of the coal wagons and the termination of existing rental contracts the Bundeskartellamt estimates that an adequate quantity of competitive wagons will come onto the market in the short term which will allow competitors to offer coal transports themselves and establish themselves as competitors to Railion. Against this background the merger project was cleared.

90. In the reporting period the Berliner Verlag KG finally found a new owner. After the Bundeskartellamt twice prohibited the merger of Holtzbrinck KG with Berliner Verlag KG (once in 2002, cf. para. 48, p. 12, in Germany: Competition Law and Policy 2002-2003, DAF/COMP (2003)15/01, and once in 2004, cf. para. 47, p. 12 in Germany: Competition Law and Policy 2003-2004, DAF/COMP(2004)25/01) the Berliner Verlag KG was then sold to two British investors, Veronis Suhler Stevenson International Ltd. ("VSS") and the Mecom Group plc. ("Mecom"). The Bundeskartellamt cleared the acquisition in November 2005.

91. The merger affected the reader markets for subscription dailies, over-the-counter newspapers and city magazines, and the advertising market for newspapers in the Berlin area. Neither VSS nor Mecom were active in the markets concerned before the merger, be it directly or indirectly via participations. Consequently the merger project could be cleared.

92. In the media sector the Bundeskartellamt also cleared the acquisition of the sole control of the news channel n-tv by RTL Television GmbH since it fulfilled the failing company defence. RTL already held 50 per cent of the shares in n-tv Nachrichtenfernsehen GmbH & Co.KG, and intended to take over the remaining 50 per cent stake held by its co-partner CNN/Time Warner.

93. The concentration affects the national TV advertising market in Germany. In this market the RTL group with its TV channels RTL, VOX, Super RTL and n-tv, already holds a collective dominant position as a duopoly with ProSiebenSat.1 GruppeMedia AG. The Bundeskartellamt's competitive assessment that the exclusive control of the n-tv news channel by the RTL group will strengthen the duopoly's dominant position in the TV advertising market remained unchanged. However, investigations concluded that n-tv's market potential and advertising customers would go to RTL or the duopoly even if the merger were prohibited because the channel would have to be discontinued if the takeover did not materialise. No other potential acquirers came forward due to n-tv's economic situation and market conditions. In such a case German law allows for the approval of the merger project according to the failing company defence.

94. In June 2006 the Bundeskartellamt cleared the acquisition of 49 per cent of the shares in AWISTA Gesellschaft für Abfallwirtschaft und Stadtreinigung GmbH ("AWISTA") and of 51 per cent of the shares in ATG & Rosendahl GmbH & Co. KG ("ATG&R") by Remondis, the largest German waste management company, without any obligations. AWISTA has the power of disposal over capacities at the waste incineration plant in Düsseldorf. ATG&R operates treatment and sorting facilities for various waste fractions. Both companies are active in North Rhine Westphalia only.

95. Despite the fact that Remondis will strengthen its market leadership in several waste markets in North Rhine Westphalia the merger did not raise any competition concerns because Remondis' market shares will not exceed the market share thresholds of one third above which dominance is assumed. Before the merger Remondis had withdrawn from syndicates in the affected markets for the collection and transport of waste. In its competitive assessment the Bundeskartellamt also took into account that the competitor EGN - Entsorgungsgesellschaft Niederrhein mbH, is very active in the markets affected by the

merger. Therefore, it was examined whether the merger would strengthen an uncompetitive oligopoly between Remondis and EGN. However, even assuming that the largest companies would constitute an uncompetitive oligopoly in this market, the merger would not strengthen its market position because only market shares have been exchanged between the two oligopolists, Remondis and EGN.

96. In the merger control proceedings concerning Nordson Corporation (USA) / hhs Leimauftrags-Systeme GmbH the parties to the merger have finally decided against the merger project and withdrawn their notification.

97. The Bundeskartellamt issued a warning letter about the merger project in mid-May 2005. According to a preliminary assessment by the Bundeskartellamt the planned merger would have strengthened Nordson's dominant position in the domestic market for hot melt application systems.

Fines in merger control proceedings

98. In the period covered by the report the Bundeskartellamt for the first time imposed fines for false information in a merger notification case. It imposed fines totalling 250,000 euros against INVISTA Resins & Fibers GmbH, Hattersheim, a subsidiary of the American Koch group based in Kansas, for submitting incorrect information in the notification of a merger in 2004. Company representatives responsible for notifying the merger had deliberately given incorrect information about market conditions.

99. Although clearances of merger projects obtained on the base of false information can be revoked by the Bundeskartellamt, in the case of merger control proceedings with time limits correct and complete information is indispensable for their orderly processing. It is important to gauge from the beginning of the examination period what further investigations are necessary. Otherwise the Bundeskartellamt could be restricted in its decision-making and would have to revoke the clearance on the knowledge that false information had been submitted. The German legislator has therefore made such conduct an explicitly punishable offence.

Activities of the Courts

100. In 2005/2006 the merger control decisions taken by the Düsseldorf Higher Regional Court mainly focused again on the "print media" sector (cf. "Gruner+Jahr/National Geographic" and "DuMont/Bonner Generalanzeiger"). The Düsseldorf Higher Regional Court confirmed a prohibition decision taken by the Bundeskartellamt in the "Rethmann/GVA Köthen" case concerning the waste disposal market. After the Düsseldorf Higher Regional Court had overruled the Bundeskartellamt's prohibition decision in the "Melitta/Schultink" case in 2003, the Federal Court of Justice referred the case back to the Düsseldorf Higher Regional Court for further hearing and this time the latter finally confirmed the Bundeskartellamt's decision.

101. The Federal Court of Justice decided several merger control cases. Of significance is the "DB Regio/üstra" case, where it confirmed the Bundeskartellamt's opinion that merger control finds unlimited application in the public transport sector, whereas the parties to the merger had claimed that competition law is not applicable.

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

102. In the reporting period the Bundeskartellamt continued to promote the principle of competition in various ways at both national and international level.

103. It continued to actively participate in conferences and several working groups of the International Competition Network (ICN). In 2005/2006, it led the ICN project on “Interaction between public and private enforcement” of the Cartels Working Group. In addition since May 2006 the Bundeskartellamt co-chairs the newly established Unilateral Conduct Working Group together with the US Federal Trade Commission and the subgroup “Dominance/Market Power” of this Working Group together with the Russian FAS. Last but not least the President of the Bundeskartellamt still chairs the ICN Steering Group.

104. The EU Regulation 1/2003 has been in force since May 2004. Simultaneously the European Competition Network, of which the Bundeskartellamt is a member, was launched. More than two years of practice have shown that the competition authorities of the Member States and the European Commission have successfully used the cooperation possibilities offered by Regulation 1/2003.

105. By the end of 2005 a total of 505 cases had been posted on the joint intranet of the competition authorities. The Bundeskartellamt itself notified 56 of its own cases. Use has also already been made of the competences on the exchange of information and official assistance. In one case the Bundeskartellamt carried out a search on behalf of the European Commission according to Article 22 of Regulation 1/2003. This case concerned an agreement of flat glass producers who were suspected of taking part in an agreement to refuse delivery to and impose discriminatory trading conditions upon a particular customer in Germany who was also a potential competitor on the upstream market. In addition the Bundeskartellamt questioned witnesses on behalf of the Italian Competition authority, following a search carried out the previous year (cf. para. 81, p. 18, in Germany: Competition Law and Policy 2004-2005, DAF/COMP(2005)32/01.). An exchange of confidential information took place between the Bundeskartellamt and other competition authorities in the ECN in these and several other cases on the basis of Article 12 of Regulation 1/2003.

106. Within the scope of the forum of the European Competition Authorities (ECA), which has been in existence since April 2001 and unites the competition authorities of the states of the European Economic Area, the European Commission and the EFTA supervisory authority, meetings took place between the heads of the authorities in London in April 2005 and in Nice in May 2006. The London meeting dealt inter alia with merger control issues and competition issues in financial services, air traffic and energy. In Nice it was decided that the conclusions of each meeting and the preparation of the next one should be followed up by a rotating “ECA troika” in order to ensure continuity between successive general meetings. The troika should consist of the last two hosts of ECA general meetings as well as that of the following one. Within the ECA the Bundeskartellamt chairs the ECA Air Traffic Working Group which published a report on loyalty programmes in civil aviation and on code-sharing agreements last year.

107. At national level the Bundeskartellamt once again organised the annual meeting of the Working Group on Competition Law in 2005 at which university professors from law and economics faculties as well as judges from the cartel divisions of the Düsseldorf Higher Regional Court discussed not only the role of private enforcement in competition law today but also its perspectives. This event met with great interest among the professional public.

108. Finally the Bundeskartellamt has contributed to several legislative projects at European level as well as national level by offering its comments. At European level it has commented on the draft amendments of directives concerning public procurement. At national level it has commented on draft amendments of the Telecommunications Act (Telekommunikationsgesetz, TKG). Of particular relevance to competition law was the introduction of a new paragraph to protect “new markets”. In the reporting period the Monopolies Commission presented its opinion on the planned merger of Rhön Klinikum and Landkreis Rhön Grabfeld, one of the two hospital mergers which were prohibited by the Bundeskartellamt last year (cf. para. 41ff, p. 11f, in Germany: Competition Law and Policy 2004-2005, DAF/COMP(2005)32/01; cf. para. 38 of this year’s report).

4. Resources of competition authorities

4.1 Overall resources

4.1.1 Annual budget (in euros and USD)

Budget 2006		Change over 2005
Euros	16.7 mio	-0.3 mio
USD ¹	19.22 mio	-1.83 mio

4.1.2 Number of employees

	Number	Change over 2004
Economists	45	-6
Lawyers	79	+6
Other experts	4	-3
Support staff	161	+9
Total	289	+6

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4.2 Human resources (person-year) applied in enforcement of abuse control of anticompetitive practices, merger review and enforcement and advocacy efforts

109. It is not possible to give a staff breakdown based on the above areas as the Bundeskartellamt's tasks are structured according to sectors of the economy and not types of procedures.

¹ Exchange rate as of 2 August 2006; 1 euro = 1.15080095 USD.

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