GERMANY

(July 1, 1997 - June 5, 1998)

Executive Summary

1) Legislation

1. The focus of the legislative work in competition law and associated fields is on the amendment of the Act against Restraints of Competition (ARC), the amendment of the Energy Industry Act and the revision of the law governing public procurement. All three legislative projects were completed and adopted by parliament in spring and early summer this year. The ARC has been completely revised even in its sections, numbers etc., the law governing public procurement has become an amendment at the end of the revised ARC and the Energy Industry Act has changed the existing acts concerning energy law, i.e. the former Energy Industry Act in particular but also the former ARC and the Stromeinspeisungsgesetz (Act of Feeding Electricity from Renewable Resources into the Public Network). The new Energy [1]Industry Act came into force on 29 April 1998, the new ARC including the law governing public procurement will become effective on 1 January 1999.

2.) Agreements / abusive practices by dominant firms

- during the reporting period the Bundeskartellamt fined companies and their executives for having taken part in forbidden cartels. Producers of teaching aids, asphalt, power cables and traffic signs had to pay fines of nearly DM 18 million. Last year's record fines (more than DM 280 million) for the power cables hard-core cartel have become unappealable;

- the Bundeskartellamt instituted proceedings against the co-operation between United Airlines and Lufthansa. It is liaising closely with the EC Commission in this case;

- with regard to the supervision of price abuses the proceedings of the Bundeskartellamt against gas and electricity utility companies have been particularly successful.

3.) Merger control

- the most important merger cases could be settled by negotiations in order to modify the companies' original plans. Preussag has to divest LTU in order to merge with TUI;

- in the energy sector the Bundeskartellamt prevented utility companies from gaining a decisive influence on neighbouring utilities. Vis-à-vis the future implementation of third-party access the energy companies seem to be accelerating mergers among themselves whenever possible in order to prevent competition from the very beginning;

– most of the prohibitions or preventions of mergers refer to cases with regional markets within the territory of Germany.

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

2. The amendments of the Act against Restraint of Competition (ARC) mentioned in the 1995/1996 and 1996/1997 reports have been adopted by the Bundestag (the Lower House of Parliament) and the Bundesrat (the Upper House of Parliament) in May 1998. In the course of the revision, the Act, first promulgated 40 years ago, was completely modified and re-worded more concisely so as to make it more easily understandable. In substance, the amendment leads to a moderate harmonisation with European competition law while raising the level of competitive protection of the law as a whole. The most important legal revisions are the following:

3. In future, the ban on cartels already applies to the conclusion of restrictive practices agreements and not only to their implementation. The list of exceptions is reduced. Procedures governing exemptions from prohibition of restrictive practices are simplified. Under Article 85 (3), of the EC Treaty additional legal elements of exemption from prohibition of restrictive practices were introduced for specific co-operation arrangements.

4. Abusive practices by dominant firms will in future be directly prohibited by law in line with Article 85 of the EC Treaty, so that affected companies may enforce their rights themselves in civil courts. The cartel authorities' powers to investigate in the case of an offence against the law by dominant firms are enhanced. Access to networks and infrastructure facilities is governed by general legal elements in the ARC. Dominant companies are not allowed to sell merchandise below purchase price, unless this is justified by the facts and occurs only in exceptional cases.

5. The principle of prenotification will in future be applied in every merger control case, i.e. as provided for by EC legislation, all mergers above a certain threshold (ARC new: DM 1 billion world-wide turnover of the companies involved) will have to be notified in advance. Other companies may institute legal proceedings against merger clearances.

6. Exempted sectors such as agriculture, banking/insurance and transport are reduced significantly. Exemptions for the energy sector (electricity and gas) had already been cancelled in the course of the revision of energy industry legislation in March 1998. The sports sector was newly included in exemption regulations, allowing sports associations the central marketing of television broadcasting rights. In the interest of their responsibility for the public welfare (promoting young people's and amateurs' activities in the field of sport) the associations are to be given an adequate financial basis.

7. The amended ARC will become effective on 1 January 1999. In addition to restrictive practices provisions it will contain a section governing revised German procurement legislation (public procurement) that was also amended in May 1998.

II. Enforcement of competition laws and policies

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

a) Summary of activities by competition authorities

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

8. In the reporting period the Bundeskartellamt again proceeded against hard-core cartels constituting an administrative offence, i.e. in particular price-fixing and territorial agreements among competitors. Throughout Germany enterprises and associations of firms of the following industries were searched: tree nurseries, pipeline construction, telematics systems as well as polystyrene.

9. In proceedings against cartel agreements among companies from different sectors (teaching aids, traffic signs, asphalt and -in addition to last year's proceedings- power cables) the Bundeskartellamt imposed fines totalling over DM 17 million. Most of the fines have meanwhile become unappealable and most of last year's fines (record fines of more than DM 280 million) have been fully paid. Only minor payments have been deferred by the Bundeskartellamt. This is due to the financial problems some former cartel members are facing because, for example, prices for the formerly cartelized power cables have been reduced by about 50 percent. In order to prevent misunderstandings it should be made clear that the fines imposed have to be paid to the Federal Ministry of Finance. The Bundeskartellamt would never be able to make a profit from this.

bb) Exemptions from the general ban on cartels

10. The number and types of cartels legalised by the Bundeskartellamt and the Federal Minister of Economics can be seen from the table below.

Table 1

Types of cartels	Cartels Jan.-Dec.1997 additions	Cartels Jan.-Dec.1997 deletions	Total number since 1958	Still effective as of Dec. 1997
Condition cartels Section 2	1	-	70	45
Rebate cartels Section 3	1	-	34	6
Combined condition and rebate cartels	-	-	15	3
Crisis cartels Section 4	-	-	2	-
Standardisation cartels Section 5 (1)	-	-	17	8
Rationalisation cartels Section 5 (2)	3	-	24	2

Types of cartels	Cartels Jan.-Dec.1997 additions	deletions	Total number since 1958	Still effective as of Dec. 1997
Rationalisation cartels Section 5 (2) and (3)	-	-	43	14
Specialisation cartels Section 5 a (1) Sentence 1	2	4	68	18
Specialisation cartels Section 5 a (1) Sentence 2	-	2	57	13
Co-operation cartels Section 5 b	8	2	130	118
Purchasing co-operation Section 5 c	-	-	10	9
Export cartels Section 6 (1)	1	2	116	34
Export cartels Section 6 (2)	-	-	14	2
Import cartels Section 7	-	-	2	-
Emergency cartels Section 8	-	-	4	-
Total	**16**	**10**	**606**	**272**

11. There is no contradiction between the consistent enforcement of the German ban on cartels by the Bundeskartellamt and the provision of very wide-ranging possibilities of inter-company co-operation - in particular for small and medium-sized companies, but not only for them. According to the wording of the legal requirements for the legalisation of such cartels, the agreements should result in reviving competition by rationalisation or specialisation, for example. Authorisation as a rule is granted for a specific period and can be revoked once granted. It should be noted, however, that purchasing co-operation agreements operated exclusively by small and medium-sized firms have been explicitly exempted from the ARC since the 1990 amendment. The so-called small business co-operation agreements offer the co-operating companies better market chances when competing with powerful large enterprises. Under the new ARC (enforcement on 1 January 1999) even small and medium sized companies will have to notify joint purchasing although their co-operations have not been prohibited.

cc) Significant cases

12. The German Football Association (Deutscher Fußball-Bund, DFB) centrally markets the television broadcasting rights to the home matches of German clubs playing in the UEFA Cup and the European Cup Winners' Cup. It granted these rights as an overall package to two sports rights agencies for the six seasons from 1992/93 to 1997/98. The DFB transfers 10 percent of the revenues derived from these rights to the international associations, distributing the remainder among the German clubs taking part in the competitions and the other clubs of the two top national leagues ("Bundesliga" and "2. Bundesliga") according to a certain formula which is set from year to year. In 1994 the Bundeskartellamt prohibited this

central marketing of television rights to the European Cup home matches as being in violation of the ban on cartels (Section 1 of the ARC; already mentioned in report 95/96 no. 26). There exists a right to market an individual match played in the context of a competition and this right is co-created by essential services performed by the participating clubs. It is for this reason that at any rate the participants in the competition are the natural holders of the broadcasting rights and not the DFB which has taken over the exercise of these rights, thereby restricting competition among those marketing the rights. In the case of broadcasting rights, the higher prices which are possible as a result of a restraint of competition are in the end passed on to the consumer in the form of expenses incurred by business for television advertising and the TV licence fees. At the same time the formation of a cartel makes it easier to grant the television rights as a package to individual purchasers and thereby also exploit monopoly positions at the next stage of the marketing process. This may also have an effect on the broadcasting modality (free-TV or pay-TV) in which the European Cup home games are transmitted. Both the Berlin Court of Appeals and the Federal Supreme Court upheld the opinion of the Bundeskartellamt. In contrast the law-maker recently - obviously in view of imminent general elections in September 1998 - decided to satisfy the DFB's demand for a special exemption clause for sports in the new ARC (Section 31). This includes each centralised marketing of broadcasting rights by the German sport associations. The European Commission has already announced that such a national regulation would not exempt the parties involved from a violation of Article 85 of the EC Treaty.

13. In July 1997, the Bundeskartellamt imposed administrative fines totalling DM 2.75 million for an illegal cartel agreement on two corn mills and three responsible executives. The Hamburg-based VK Mühlen AG, Germany's market leader, had paid its competitor, the Rendsburg-based Getreide AG, DM 1.65 million in late summer 1995 for the latter's willingness not to engage in competition in future and for this purpose to close down its Berlin Osthafenmühle (the largest mill of the former GDR) and refrain from operating any corn mill on this site for a period of 10 years.

14. The competent decision-making division intends to prohibit under Section 1 of the ARC the agreement between Raab Karcher and Possehl on joint purchasing in the sanitary and heating installation business and it has informed the EU Commission accordingly in view of the pending application for exemption under Article 85 (3) of the EEC Treaty.

15. The commercial banks and savings banks that are members of the association "Zentraler Kreditausschuß" (ZKA) had intended to raise the maximum interbank commission for cash withdrawals using ATMs from DM 4.00 to DM 7.00. This commission is charged to credit institutions by other banks when the former's customers withdraw cash using the latter's ATMs. The Bundeskartellamt had informed the ZKA of its concerns about this agreement which might have had an indirect price-boosting effect also for the individual bank customer. The ZKA therefore abandoned its original plans. A solution that is unobjectionable in terms of competition law is now being discussed. It would provide that only the credit institution that installs the ATM determines the price for the use of its machines under conditions of free competition.

dd) Vertical restraints (RPM)

16. Violations of the ban on resale price maintenance (RPM) and the prohibition of binding price recommendations can be challenged in administrative fine proceedings. In the reporting period, the Bundeskartellamt therefore conducted searches on the premises of manufacturers suspected of exerting indirect pressure in order to enforce compliance with price recommendations. For example, the Stuttgart-based Benetton sales outlet was fined for having violated the ban on price recommendations and for having exerted pressure with a view to having its price recommendation complied with.

ee) Control of abusive practices by dominant firms

17. All enterprises have recourse to the civil courts in the face of any boycotts or in the face of anticompetitive practices by their market dominating competitors or suppliers. However, it is often difficult, if not impossible, for them to show that they are being discriminated against or hindered by dominating competitors without justifiable reasons. The Bundeskartellamt, by contrast, has a good insight into business practices in the marketplace and thus is in a position to conduct ex officio investigations there. The ARC therefore provides for different situations in which the competition authority can proceed against market-dominating competitors and suppliers to protect small and medium-sized firms, in particular. There have also been searches because of the suspected violation of prohibitions against discriminations (e.g. in the pharmaceuticals trade sector).

18. In the past few years there has been an increasing tendency for the public sector, i.e. in Germany Federal, Land and municipal authorities, to disregard the rules of free competition in order to indirectly realise topical political objectives. The Berlin Senate, for example, has required all companies taking part in tenders for building contracts to pay their employees the comparatively high collectively agreed wages prevailing in Berlin. This reduced the competitiveness of construction firms in the Brandenburg area that surrounds Berlin, which pay lower standard wages (although not dumping wages because all firms are bound by the minimum wages laid down in the so-called 'Entsendegesetz' applicable throughout Germany), and protected the Berlin construction industry from these competitors. On balance, this does not serve to preserve jobs or even create new ones but jobs only move elsewhere and the price of road construction contracts is artificially increased. In the Bundeskartellamt's view, the state of Berlin has a market-dominating position with regard to the awarding of road construction contracts which it abuses by discriminating against firms with lower wage costs (Section 26 (2) of the ARC). The clause containing a declaration of compliance with collective wage agreements ("Tariftreueerklärung"), under which firms that are awarded the contract must also bind their sub-contractors to observe this clause, violates competition law as well. The Berlin Senate thus infringes the ban on interference with the freedom of pricing of its contractors vis-à-vis third parties (Section 15 of the ARC - ban on RPM). The prohibitory decision issued by the Bundeskartellamt in November 1997 was fully confirmed by the Berlin Court of Appeals on 20 May 1998. If the Berlin Senate files an appeal on points of law, the Federal Supreme Court will have to decide on these issues which are of great importance also to public procurement law.

19. At the end of 1997, the Bundeskartellamt prohibited the Alois Müller dairy from granting so-called "hello money" to producers of raw milk if they changed to Alois Müller once their existing milk supply contracts with dairies in Saxony expired. This practice is an abuse in the form of hindrance vis-à-vis small and medium-sized dairies. While the payment of a generally higher milk price would be in line with the principles of free competition, the purely selective payment of supplements aimed at securing new milk suppliers by Müller is unfair. The reason for this is that the smaller dairies cannot defend themselves against Müller's attractive offer because of their far weaker economic potential.

ff) Supervision of price abuses by monopolists or market dominating companies

20. Nation-wide, regional or municipality-wide monopolies are held in Germany by public- or private-sector utilities, whose monopolies or market dominating positions due to former monopolies are largely based on ownership of a network (electricity, gas or water lines, telephone and cable TV network, rail network). Since so far they have been exposed to no, or only insignificant, competition, price supervision by the competition authorities is of particular importance. However, the relevant responsibilities are fragmented. The largely regional electricity supply companies are subject as a rule to supervision by the "Länder" governments, whereas responsibility for the telecommunications and postal

sector lies with the federal regulator of postal and telecommunications services and with the Federal Railway Office (Eisenbahnbundesamt) for the railways. Nevertheless price supervision, especially in the energy sector, can fall under the jurisdiction of the (Federal) Bundeskartellamt if the companies concerned supply customers beyond the state boundaries.

21. The Bundeskartellamt as well as several "Länder" (state) cartel authorities recently investigated the prices of gas utilities. Natural gas prices differed considerably between different utilities, even though these sometimes had the same supplier. However, under the special rules for the energy sector contained in the ARC (Section 103-105) before the Energy Law Reform Act (*Gesetz zur Neuordnung des Energiewirtschaftsrechts*) came into force on 29 April 1998, it was held to be an abuse of a dominant position if a utility charged higher prices than comparable utilities, unless it was able to prove that the price difference was justified for structural reasons which could not be influenced by the utility itself. After rulings by the Kammergericht (Berlin Court of Appeals) and the Bundesgerichtshof (Supreme Court) had clarified doubts as to the interpretation of the law (cases: "Gaspreis" against Stadtwerke München and "SpreeGas" against a utility company in the state of Brandenburg), the cartel authorities were able to convince a large number of gas utilities to reduce their prices for household gas to, or close to, the price level of the cheapest comparable gas suppliers. The proceedings resulted in price reductions up to 30 percent in individual cases. Nevertheless gas prices in Germany are still considerably higher than in most of our neighbouring countries.

22. Since the new Energy Law came into force, which opens up utilities' former closed territories to competition via third-party access, the special rules for the energy sector contained in the old ARC have been abandoned. The abuse of market power by energy utilities is now governed by the ARC's general provisions on the abuse of a dominant position (Section 22 and 26).

23. The Bundeskartellamt discontinued the proceeding brought against the east German Vereinigte Energiewerke AG (VEAG) for suspected excessive electricity prices on the ground that higher prices resulted from VEAG inevitably having to generate electricity from brown coal. It was found though that the east German regional distribution companies supplied by VEAG charged significantly different prices. Some of these companies come within the Bundeskartellamt's responsibility because they engage in activities beyond their respective Federal Land. Otherwise, the responsibility lies with the energy authorities of the different states (Länder), which are part of the respective ministries. The Bundeskartellamt instituted price abuse proceedings against the five distribution companies that charged prices up to 22 percent higher than those of comparable utility companies. When the enterprises reduced their prices significantly (less than 5 percent difference in relation to the cheapest comparable utility companies) the Bundeskartellamt stopped its proceedings.

24. Deutsche Telekom AG's statutory monopoly on voice telephony was lifted on 1 January 1998. As a result subscribers can now decide for themselves which telecommunications operator should handle their telephone calls generally (preselection). Moreover, they can select a telephone company for each call by dialling a certain code (call-by-call selection) The rates charged by Deutsche Telekom AG, the dominant operator, are subject to approval by the newly established regulatory authority. Under the Telecommunications Act, rates have to be based on the "costs of efficient service provision".

a) Telekom AG rates for granting access to subscriber lines

25. Since the lines to end users' homes have so far been owned almost exclusively by the former monopolist Deutsche Telekom, all competitors depend on Deutsche Telekom's local network. However, some competitors have started establishing their own networks, at least for long-distance calls. As far as

interconnection fees (on average 2.7 Pfennig per minute) are concerned, the question therefore arises as to whether and how to distinguish between network operators and mere resellers, which only lease networks.

b) Prices charged to subscribers by Deutsche Telekom for local calls

26. In the absence of significant new competition in the area of local calls, the relevant prices charged by Telekom AG - unlike those for long-distance calls - have hardly decreased. The Regulatory Authority for Telecommunications and Posts has not objected because it prescribes benchmarks and rates of change for a basket of combined local and long-distance services (price-cap system).

c) Prices charged by Deutsche Telekom for switching subscribers to another telecoms operator (preselection):

27. In comparable international markets a fee ranging from DM 3 to 10 is charged for this service. Telekom AG sought approval for a rate of DM 42, whereas for the time being the regulator considers DM 20 acceptable.

d) Deutsche Telekom rates for the use of the broadband cable network (TV network)

28. Telekom AG raised the monthly fees for the use of its - according to its own statement -loss-making broadband cable from DM 22.50 to DM 25.90 (reception of roughly 32 different TV channels but not yet on a digital basis). As from 1 January 1999, the regulatory authority will cut this price rise by about 64 percent (to DM 23.63). One of the reasons why the broadband cable network is in deficit is that some of the frequencies have been set aside for digital transmission, which is, however, still generating insignificant income. Moreover the broadband cable network can be extended so that it can be used for voice telephony or other interactive services. As long as Deutsche Telekom AG fails to extend the network and put it to additional uses on the one hand and on the other hand refuses to sell it without undue delay to third parties, the Bundeskartellamt is of the opinion that the network cost involves inefficiencies which should not be passed on to consumers.

29. In the spring of 1998, the Bundeskartellamt initiated proceedings against Deutsche Telekom AG on suspicion of having abused a dominant position in the market for the provision of directory information. These files are needed to be able to provide directory services or to compile directories in printed or CD-ROM form. According to information provided by competitors, Deutsche Telekom charges up to 27 times the price charged for directory information by firms in foreign markets. Under the new Telecommunications Act, the dominant firm has to make directory information available to other operators in voice telephony for a fee based on the costs of efficient service provision. The Bundeskartellamt initiated proceedings after the newly established regulatory authority for telecommunications and posts had found the matter not within its competence.

b) Summary of activities by courts

30. As already mentioned in the previous report (no. 26), the Bundeskartellamt's decision prohibiting the exclusivity agreements of the tour operators TUI and NUR with Spanish hotel owners was fully upheld by the Federal Supreme Court on 7 October 1997. In its decision the Federal Supreme Court also approved the application of Community competition law by the Bundeskartellamt.

31. The Berlin Court of Appeals rejected the Bundeskartellamt's decision to prohibit Deutsche Lufthansa from charging more for one-way tickets on the route Berlin-Frankfurt than on the Berlin-Munich route, which is also served by competitors. Lufthansa argued that these prices did not cover costs, but the Bundeskartellamt countered that neither dominant companies nor companies in competition have a right to full cost recovery. Lufthansa has filed an appeal with the courts against this price abuse decision.

32. In January this year, the Federal Supreme Court also upheld the Bundeskartellamt's prohibition (see no. 22 in report 95/96) of the "carpartner-system" which had been organised by six important insurance companies in order to depress prices in the so-called rental car replacement business.

2. Mergers and acquisitions

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

Mergers Notified Pursuant to Section 23 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

Year	Mergers
1992	1 743
1993	1 514
1994	1 564
1995	1 530
1996	1 434
1997	1 751
Total	**23 939**

Table 2

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

	1993	**1994**	**1995**	**1996**	**1997**
Mergers notified and reviewed prior to completion	1 050	1 086	1 089	1 006	1 207
Mergers notified after completion and found to be subject to control	310	331	276	280	366
Mergers not subject to control	154	147	165	148	178
completed mergers total	**1 514**	**1 564**	**1 530**	**1 434**	**1 751**

34. A breakdown by type of merger is as follows (1997):

Acquisition of assets	423
Acquisition of interest:	836
of which : majority interest acquisition	753
Joint venture	443
Contractual relations	13
Interlocking directorates	5
Competitively significant influence	3
Others	28

35. By type of diversification, horizontal mergers (1 484, of which 1 173 with and 311 without product extension) again clearly predominated in 1997. In addition 51 vertical und 213 conglomerate mergers were notified.

b) Summary of significant cases

36. In November 1997, the Bundeskartellamt prohibited the already completed acquisition of a 24 percent stake in Stilke Buch- und Zeitschriftenhandels GmbH, of Hamburg, by the Hamburg-based Axel Springer Verlag AG. Stilke is engaged in press retailing in northern Germany with a total of 67 sales outlets (mostly railway station bookshops). Springer Verlag holds dominant positions on the markets for kiosk-sold newspapers and regional subscription dailies in the Hamburg area. Springer's entry to the last stage of press distribution would have resulted in considerable structural changes in favour of Springer Verlag in a sector that is still largely characterised by medium-sized firms . Moreover the structure of the German press distribution system - the supply of medium-sized press retailers by wholesalers and of medium-sized railway station bookshops by publishers - previously guaranteed a large degree of neutrality which ensured that every publication had an equal opportunity of being sold. The vertical integration would enable Springer to influence the last stage of the press distribution system and thus achieve improved access to the sales markets, to make access more difficult for actual competitors and to create higher market entry barriers for potential competitors.

37. As far as the press sector and, here specifically, regional and local dailies are concerned, the Bundeskartellamt defines narrow geographic markets. Therefore, also in the period under review several relevant mergers were prohibited in view of the probable creation or strengthening of a dominant position (Westdeutsche Allgemeine Zeitung/Iserlohner Kreisanzeiger; Hessische Niedersächsische Allgemeine/Werra Rundschau).

38. The Bundeskartellamt has prohibited the two largest German slaughterhouses (A. Moksel AG, Buchloe, and Südfleisch GmbH, Munich) from forming a co-operative joint venture for the new Länder. Apart from the intended concerted practices in east Germany (violation of the ban on cartels), it was also to be feared that the parent companies would co-ordinate their competitive behaviour on their principal markets in southern Germany, which would have led to the creation of a market-dominating oligopoly of the firms involving market shares of up to 60 percent.

39. The merger between the Canadian Potash Corporation of Saskatchewan (PCS) and Kali- und Salz-Beteiligungs AG (K+S AG) was prohibited in February 1997 (see report 96/97 no. 52). The enterprises submitted an application to have the merger authorised by the Federal Minister of Economics under Section 24 (3) of the ARC. This was rejected, however, making the prohibition unappealable.

40. In March this year, the Berlin Court of Appeals reversed the Bundeskartellamt's decision to prohibit the merger of the construction companies Hochtief AG and Philipp Holzmann AG (see report 96/97 no. 55). The Court of Appeals was of the opinion that the Bundeskartellamt did not correctly define the term "merger participants" when dealing with the matter of extending the deadline. The markets in the building construction sector were also considered to have been incorrectly defined. The major orders the Bundeskartellamt considered to be decisive in this case only made up a fraction of the overall market. Furthermore, there was evidence of intense competition for tenders and a wide array of large competitors. The Bundeskartellamt has filed an appeal on points of law with the Federal Supreme Court.

41. The Bundeskartellamt cleared the proposed mergers between Preussag/Hapag-Lloyd and Preussag/TUI after WestLB, in a contract under public law, agreed to sell all of its shares in the LTU group. Both merger projects had originally been notified to the European Commission. At the request of the Bundeskartellamt the Commission had referred the cases (markets for air package tours, deep sea cruises, charter flights) to the Bundeskartellamt to be handled at national level. The remaining markets affected by the mergers were examined by the Commission itself and the projects cleared to that extent. As the largest minority shareholder of Preussag and the LTU group, WestLB has a competitively

significant influence on both firms. Consequently WestLB, as a result of the mergers, would have obtained a significant influence on Hapag-Lloyd, which has a 30 per cent share in TUI, as well as further strengthened its existing influence on TUI (in which WestLB has a 30 per cent share). Since competitive structures would have deteriorated as a result of the mergers, the leading operators in both markets were unlikely to ensure substantial competition among them in the long run. To avert prohibition, WestLB concluded a public-law contract with the Bundeskartellamt. Under its terms, WestLB agreed to sell its shares in the LTU group to an unaffiliated firm within a reasonable period. The shares are to be transferred to a trustee who is to sell them and to exercise the voting rights. If the sale is not completed within a reasonable period, the Bundeskartellamt, at its discretion, can sell the shares itself or through third parties.

42. The Rheinmetall/British Aerospace/STN Atlas merger case, which was cleared eventually after the merger was modified, was special in that the Bundeskartellamt explicitly required a joint venture to be formed by all competitors, rather than just allowing it to go ahead. All tank manufacturers in Germany (i.e. Rheinmetall, Krauss-Maffei and Wegmann & Co.) depend on STN Atlas Elektronik's armoured vehicles control and information systems technology. Had Rheinmetall and British Aerospace acquired STN Atlas in its entirety - as originally intended - the competitiveness of the remaining tank manufacturers, Krauss-Maffei and Wegmann & Co., would have been jeopardised. For this reason the strategically decisive vehicle systems and anti-aircraft division was therefore hived off from STN Atlas to a joint venture in which Rheinmetall, British Aerospace, Krauss-Maffei and Wegman hold a 25 percent share each, and to which all the partners have equal access.

43. The German subsidiary of Gaz de France has purchased 38.16 percent of the shares of the Berlin gas supply company GASAG AG from the federal state of Berlin. The Bundeskartellamt cleared the purchase after Gaz de France had committed itself in a contract of undertaking to reduce its stake in the immediately neighbouring gas distribution company Erdgas Mark Brandenburg to 20 percent at the most. The connection between GASAG and Erdgas Mark Brandenburg must not lead to interdependence if the companies are to compete with each other.

44. The Bundeskartellamt also cleared the purchase of a majority shareholding in BEWAG AG (electricity supply company of the federal state of Berlin) by a consortium of PreussenElektra AG, VIAG AG and the American company Southern (Southern Energy Holding Beteiligungsgesellschaft mbH). The proposed acquisition - in another form - had been notified to the EC Commission, which referred it to the Bundeskartellamt in July 1997 for further examination. The Bundeskartellamt had raised objections to the original plans of the acquiring parties because the agreements would have given PreussenElektra, an energy supply company active in the areas bordering with Berlin, too great an influence on the corporate policy of BEWAG. This would have strengthened the market-dominating position of PreussenElektra even further in its own supply areas around Berlin. Under the cleared project, PreussenElektra's share in the capital of BEWAG is limited to 23 percent. The company has given a binding commitment to exercise at the most 20 percent of the voting rights in the general meetings of BEWAG shareholders and it will no longer have a right of veto either.

45. Under the provisions of the ECSC Treaty, the European Union has examined the legal aspects concerning coal, iron and steel of the plan by Ruhrkohle AG, Essen (RAG) to acquire all the shares of Saarbergwerke AG, Saarbrücken and of Preussag Anthrazit GmbH, Ibbenbühren. The Bundeskartellamt was responsible for investigating the other aspects of the plan. The Saarbergwerke will give RAG decisive influence over Saar Ferngas AG, which covers more than 90 percent of its total gas requirements from the market-dominating Ruhrgas AG. RAG also has a stake in Ruhrgas AG. To avert a prohibitory decision, RAG AG entered a public law contract with the Bundeskartellamt whereby it agrees to endorse the vote of

the other shareholders in the decision-making bodies of Saar Ferngas AG, without taking account of Ruhrgas AG, on all decisions that directly or indirectly affect the gas purchases of Saar Ferngas AG.

46. The inspection of technical equipment and installations is being liberalised and deregulated by the EU. The technical control boards that formerly held regional monopolies wish to counter the increasing pressures of competition and rationalisation by merging with one another. Insofar as they continue to have statutory monopolies (e.g., for the inspection of steam boilers and driving licences), competition is excluded by law anyway. In the sectors that are no longer monopolised the pressures of competition are so heavy (DEKRA AG, independent experts, consulting firms) that the competent decision-making division of the Bundeskartellamt has so far not prohibited the inter-firm concentration processes.

47. The Bundeskartellamt has cleared the purchase of 45 percent of the shares of Clariant AG (Clariant) by Hoechst AG (Hoechst). This share purchase was closely related to the take-over of the special chemicals business of Hoechst by Clariant and represented part of the financing for this transaction. The EC Commission had cleared the take-over of the Hoechst special chemicals business under the Merger Regulation (IV/M.911 - Clariant/Hoechst of 10.06.1997), the purchase of 45 percent of the Clariant shares by Hoechst was, however, judged to be an independent venture not subject to the Merger Regulation since Hoechst did not acquire control of Clariant either legally or de facto. There are close oligopolies in the markets for textile dyestuffs in both Germany and Europe involving the four large European suppliers (Dystar [= Hoechst and Bayer], Ciba-Geigy, Clariant, BASF). The merger could therefore indirectly create a potential for Clariant and Dystar to engage in concerted practices and co-ordinate their activities. The arguments in favour of a clearance outweighed these concerns, however (existence of substantial competition in the oligopoly, heterogeneous range of products, order-related pricing negotiations, pressure on prices as a result of the decline of the textile industry in Europe, competition from suppliers outside Europe).

48. The Bundeskartellamt examined the acquisition of a majority stake in Tarkett AG by French Sommer Allibert S.A. and did not prohibit it. The merger led to considerable additions in domestic market shares and gave the parties concerned a significant lead in the market for PVC floor coverings for private households. The creation of a market-dominating position could, however, be ruled out since other competitors with great resources are present both in this market and in the neighbouring market for "property business" (hospitals, airports, office buildings etc.). Their scope of action will continue to be controlled by the competition from other floor covering substitutes (in the household sector particularly carpeting and tiles, but also wood and laminates for example).

49. Merck KGaA has appealed against an order of the Bundeskartellamt prohibiting the take-over of KMF Laborchemie HandelsGmbH. Merck has challenged the Bundeskartellamt’s market definition, arguing that first, there is no such market as "trading of chemicals" and second, the market for laboratory chemicals should not have been divided into further sub-groups. The case is now pending before the Berlin Court of Appeals (Kammergericht).

50. The merger of Bertelsmann AG with Random House was given the green light by the Bundeskartellamt in May 1998, and has since also been cleared by the US Federal Trade Commission (FTC). The merger will not have any significant effects on the German-language book market because in the USA approximately 90 percent of all copyrights are not granted world-wide but only for specific language areas.

51. The proposed merger of Bayerische Vereinsbank and Bayerische Hypo-Bank was also cleared because in view of the powerful private banks with nation-wide activities on the one hand and the savings

banks and the industrial and agricultural credit co-operatives on the other hand, the parties would not have obtained dominant positions even in the regional Bavarian markets.

52. Krupp AG, Essen, did not comply with its undertaking given during the Krupp-Hoesch merger proceedings to sell Brüninghaus. However, after Krupp sold other divisions in the competitively relevant sector to an Italian competitor, the Bundeskartellamt considered the undertaking as complied with, even though in modified form.

Other important clearances

53. Siemens AG/Westinghouse (turbines, generators); Deutsche Post AG/McPaper der HerlitzAG (stationery trade); Daimler-Benz-Aerospace (Dasa)/Siemens-Geschäftsbereichs Wehrtechnik; NordLB und Land Niedersachsen/Preussag Stahl AG; Hoechst/Clariant; Aon Holdings B.V/Jauch & Hübener KGaA; Sara Lee Corp./Bama Werke Curt Baumann OHG; Sara Lee Corp./Bi Strumpffabrik; Motorola/Bosch Betriebsfunk; WalMart Stores, USA/Wertkauf-Gruppe, Karlsruhe; America Online, USA/Bertelsmann AG (joint venture)

c) Mergers which were within the sphere of competence of the European Commission but which solely or mainly affect the German market:

54. Based on the allocation of competencies according to quantitative thresholds, if undertakings achieve high aggregate world-wide or European turnovers, the European Commission has sole responsibility for deciding on mergers even if this involves cases in which the economic emphasis clearly lies in only one Member State. The most recent example of this is the proposed co-operation between Bertelsmann, Leo Kirch and Deutsche Telekom in the sector of pay-tv in Germany. Bertelsmann and Kirch had already enquired some time ago as to how the Bundeskartellamt judged the proposed co-operation of the two companies in terms of competition law. The decision-making division responsible made it clear that the proposed operations in their intended form (monopolisation of pay-tv by Premiere, implementation of the d-box as the only standard in decoder technology) were being met with very grave competition concerns and probably would not be approved. Nevertheless, Bertelsmann and Kirch even extended their plans and included Deutsche Telekom. The merger fell within the responsibility of the European merger control. In the end, however, Bertelsmann did not accept the Commission's conditions for authorising the merger with the result that it was prohibited at the end of May 1998.

55. After the German Federal Minister of Economics had rejected an application of the Canadian-based Potash Corporation of Saskatchewan and Kali und Salz Beteiligungs AG to have their merger cleared under Section 24 (3) of the ARC, the European Court of Justice (ECJ) overruled a decision of the European Commission (EC) in the previous case. In the aftermath of German reunification the west-German potash producer Kali und Salz acquired a majority stake in Mitteldeutsche Kali AG, which is based in east Germany. The EC cleared the merger after having accepted certain undertakings from K+S concerning their relationship with the French competitor Entreprise Minière et Chimique (EMC). EMC and the French Government appealed against this decision. While the ECJ agreed with important parts of the Commission's reasoning, it reversed the whole decision on factual grounds. Holding that the EC may in principle apply merger control law to oligopolies as well, it ruled that the EC has not sufficiently proved the existence of oligopolistic structures in the present case. The EC therefore has to start investigating the merger anew.

56. The acquisition of joint control by Bayernwerk AG, Energie Baden-Württemberg AG (EBW) and Nordostschweizerische Kraftwerke AG of the Swiss electricity supply company Watt AG only affects the German and Swiss electricity markets. The market-dominating position of EBW would have been strengthened as a result of the merger in the areas of supply bordering those of Watt AG. Such competition concerns were, however, reduced by the parties once again committing themselves in the notification of this case to an undertaking they had already given to the Bundeskartellamt in a parallel proceeding affecting the same markets: Badenwerk, a subsidiary of EBW, will renounce its demarcation agreements and its sole and exclusive rights from concession agreements in its supply area if these prevent third parties from supplying electricity to the supply area of Badenwerk. On the basis of this commitment, the Commission cleared the merger on 4.12.1997 by a decision under Art. 6 (1) b of the Merger Regulation.

57. By purchasing a 36 percent share package Veba AG has gained control of Degussa AG. The structural link with Veba would considerably weaken Cabot's position as an independent competitor after the Veba/Degussa merger and thus lead to the parties acquiring a market-dominating position for pyrogenic silicic acid. For this reason, Veba had already promised at an earlier stage of the proceedings to sell its stake in the Cabot/Hüls GmbH to a third party within a short period. This removed the competitive concerns and the merger was cleared by the Commission subject to certain obligations.

58. Siemens AG has acquired control of Elektrowatt AG, Zürich. Elektrowatt is active particularly in the fields of building management systems, safety systems, telephone systems and systems and services for power supply companies. There were competitive concerns on the other hand in the market for public payphones in Germany. The only purchaser of public telephones (160,000 - of which 96,000 are cardphones) is Deutsche Telekom. Until 1995 there were three suppliers: Siemens, Elektrowatt/Landis&Gyr and Bosch Telekom. Bosch Telekom, however, has since stopped developing public payphones. After the merger, Siemens would therefore be the only supplier of the new generation of cardphones ("Eurochip") to be introduced as from the end of 1997. To remove the competition concerns of the Commission, Siemens committed itself to selling off its entire "Public and Private Payphones" division of Landis&Gyr Communications within a certain deadline to an independent third party. In view of the fact that the commitment aims to guarantee that two suppliers will remain present in the German market, the Commission cleared the merger.

59. As already mentioned in the previous report (no. 53), due to the Bundeskartellamt's concerns Illinois Tool Works (ITW) and P.W Lenzen GmbH&Co. KG abandoned the plan to buy Titan Umreifungstechnik GmbH, Schwelm, a subsidiary of Hoesch-Krupp, which makes steel hoops and the mechanical equipment used in their production. Meanwhile the parties involved have enlarged their plans by means of a co-operation with Thyssen AG in order to fall under European jurisdiction. The EC Commission cleared the merger in spring this year. In contrast to the national expert opinions of six countries (including apart from Germany also Great Britain and France), the EC Commission stated that there is an overall market for all strappings of steel or plastic.

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