

## GERMANY

-- July 2001 – June 2002 --

**Table of contents**

- 1. Executive Summary**
  - 1.1 Legislation
  - 1.2 Agreements / Abusive practices by dominant firms
  - 1.3 Merger control
  
- 2. Changes to competition laws and policies, proposed or adopted**
  - 2.1 Summary of new legal provisions of competition law and related legislation
  - 2.2 Other relevant measures, including new guidelines
  - 2.3 Government proposals for new legislation
  
- 3. Enforcement of competition laws and policies**
  - 3.1 Action against anticompetitive practices, including agreements and abuses of dominant positions
    - 3.1.1 Summary of activities of competition authorities and courts
    - 3.1.2 Description of significant cases, including those with international implications
      - 3.1.2.1 Agreements, action in the form of administrative fine proceedings against cartels
      - 3.1.2.2 Exemptions from the general ban on cartels
      - 3.1.2.3 Control of abusive practices by dominant firms / Supervision of price abuses by monopolists (utilities)
      - 3.1.2.4 Activities of the courts
  - 3.2 Mergers and acquisitions
    - 3.2.1 Statistics on the number, size and type of mergers notified and/or controlled under competition laws
    - 3.2.2 Summary of significant cases
      - 3.2.2.1 Prohibition or prevention of mergers
      - 3.2.2.2 Clearances subject to conditions and obligations
      - 3.2.2.3 Clearances
      - 3.2.2.4 Withdrawal of application
  
- 4 The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**
  
- 5 Resources of competition authorities**
  - 5.1 Resources overall
    - 5.1.1 Annual budget
    - 5.1.2 Number of employees
  - 5.2 Human resources (person-year) applied to enforcement against anticompetitive practices, merger review and enforcement and advocacy efforts
  
- 6 Summaries of or references to new reports and studies on competition policy issues**

## GERMANY

### 1. Executive Summary

#### 1.1 Legislation

1. The new law on resale price maintenance is expected to come into effect in Germany on 1 October 2002. This law will secure the resale price maintenance for books under European law. Section 15 of the Act against Restraints of Competition (ARC) has been amended in this connection.

#### 1.2 Agreements/Abusive practices by dominant firms

2. In the paper sector, a far-reaching cartel was uncovered in the previous year. This was the first major case for applying the leniency programme. Written charges were meanwhile served on the cartel members. Fines totalling approx. € 1.8 million were imposed on companies in the ready-mixed concrete sector on account of cartel agreements.

3. In the period covered by the report, a main focus of the Bundeskartellamt's abuse control was on the electricity sector. The 11th Decision Division set up last year initiated various abuse proceedings against electricity network operators on the suspicion of abusively excessive fees for network use. One further important and still pending abuse case concerns Lufthansa AG. The Bundeskartellamt saw Lufthansa's low price strategy as an attempt to squeeze its competitor Germania from the market.

#### 1.3 Merger control

4. The following cases will be outlined in Section II. 2.b):

5. Prohibitions:

- Sanacorp/Andrae-Noris Zahn (pharmaceuticals wholesale sector)
- Deutsche Post/trans-o-flex Schnelllieferdienst (parcel delivery)
- Deutsche Telekom (KDG) / Liberty Media (broad band cable network)
- E.ON/Gelsenberg (gas, electricity)
- E.ON/Bergemann (gas, electricity)
- Viterra Energy Services/Minol Messtechnik W. Lehmann, Brunata Wärmemesser Werner Lehmann, Brunata Wärmemesser (metering and billing of heating and warm water costs)

6. Clearances subject to obligations:

- Deutsche Lufthansa/Eurowings (air traffic sector)
- Shell/DEA (mineral oil)
- Deutsche BP/Veba Öl (mineral oil)
- Heraeus Medical Division/Getinge Industrier (operation table systems)

7. Clearances:

- Microsoft/Navision (enterprise resource planning software)

## **2. Changes to competition laws and policies, proposed or adopted**

### ***2.1 Summary of new legal provisions of competition law and related legislation***

8. In the period covered by the report, Section 15 of the ARC was amended. The resale price maintenance for published products undertaken by the market participants by concluding vertical agreements was previously regulated in Germany on the basis of this provision. The European Commission judged this system as critical under competition law aspects. In order to secure the resale price maintenance for books under European law, the German Bundestag passed a law on regulating the resale price maintenance for published products on 14 June 2002. The law limits the scope of application of Section 15 ARC to newspapers and magazines and creates a separate law on resale price maintenance for books. The law will come into force on 1 October 2002.

9. No further amendments were made to the ARC during the period covered by the report. Regarding the abolition of the Discount Law and the Bonus Regulation which came into force on 27 July 2002, see previous report (item I,1,3.).

### ***2.2 Other relevant measures, including new guidelines***

10. In May 2002 the Bundeskartellamt set up a Special Unit for Combating Cartels (SKK). It assists the relevant Decision Divisions in the Bundeskartellamt in uncovering cartel agreements by deploying specialised personnel and material resources. Moreover, it is above all the central contact partner for all those wishing to avail themselves of the leniency programme.

11. Apart from offering assistance with concrete cartel proceedings the SKK will take up and further develop basic conceptual issues involved in the uncovering and prosecution of cartels. The exchange of experience with national and international competition authorities in matters concerning combat against cartels is to be intensified. Another aim is to arouse awareness in companies that cartel agreements are no trivial offences.

### ***2.3 Government proposals for new legislation***

12. The Federal Government advocates a harmonisation at European level of the law against unfair competition which in Germany is regulated by the Act Against Unfair Competition. The aim is to create a European framework regulation comprising a general clause with supplementary special regulations, which ensure fairness in the economy. The protective effect aimed at equally covers consumers, competitors and the general public. The Federal Government set up a working group to prepare appropriate proposals. The working group is also in charge of preparing the reform of the Act Against Unfair Competition. The Act is intended to be adapted to the current needs of the consumers and companies. In terms of content it is to be oriented to the objectives which the Federal Government strives for in its initiative on harmonisation.

## GERMANY

### 3. Enforcement of competition laws and policies

#### 3.1 *Action against anticompetitive practices, including agreements and abuses of dominant positions*

##### 3.1.1 *Summary of activities of competition authorities and courts*

13. Abuse control in the energy market was a focal area of the Bundeskartellamt's work in the past year. As announced in the last Annual Report, the Bundeskartellamt set up an 11<sup>th</sup> Decision Division in August 2001. It is responsible for enforcing the ban on abusive practices and discrimination, securing network access and assessing fees for network use in the electricity sector.

14. In the autumn of 2001, the Bundeskartellamt initiated investigatory proceedings against 23 electricity network operators on suspicion of their charging abusively excessive fees for network use and of impeding other electricity providers. These preliminary proceedings already had considerable effect, i.e. some companies reduced their fees for network use by up to 20 per cent. For reasons of competence the Bundeskartellamt referred some of the preliminary proceedings to the competition authorities of the Länder. Following the preliminary investigations the 11<sup>th</sup> Decision Division initiated 13 formal abuse proceedings against those companies where the suspicion of abusively excessive fees for network use had been confirmed after these initial investigations.

15. Merger control continued to be an important focal point of the authority's work. During the reporting period six planned mergers were prohibited. One of them, the merger of E.ON and Ruhrgas, is the subject-matter of a ministerial authorisation. The Düsseldorf Higher Regional Court has provisionally granted the appeals against the ministerial authorisation in the provisional legal protection proceedings on formal grounds.

##### 3.1.2 *Description of significant cases, including those with international implications*

###### 3.1.2.1 *Agreements, action in the form of administrative fine proceedings against cartels*

16. In June 2002 the Bundeskartellamt served written charges on seven companies and high-ranking persons in the paper wholesale sector on suspicion of their involvement in illegal price agreements. Those concerned, who face fines running into the millions, now have an opportunity to answer the accusations.

17. These proceedings are of particular significance since this is the first major case for applying the leniency programme. In April 2000 the Bundeskartellamt conducted a nation-wide search of the premises of companies in the paper wholesale sector. During the complicated and time-consuming investigations several companies were attracted by the benefits of the leniency programme and were prepared to cooperate with the Bundeskartellamt. They made a considerable contribution to uncovering the cartel.

18. According to the investigations made so far it can be assumed that a nation-wide cartel existed, including approximately a dozen regional cartels. The price agreements on coated freshet, offset and carbonless paper covered a major section of products in the sector. It emerged that illegal price agreements were in practice at least from the beginning of 1996 up to the Bundeskartellamt's search operation in April 2000.

19. Also in June 2002 the Bundeskartellamt imposed further fines on companies in the ready-mixed concrete sector for concluding anticompetitive agreements. The fines were imposed on seven companies in Lower Bavaria and totalled approx. € 1.8 million. The companies involved agreed with a competitor to buy its entire concrete production at a guaranteed price for years to come. As a consequence of this agreement this competitor no longer appeared as a supplier in the market. The Bundeskartellamt became aware of this case when the competitor concerned filed a lawsuit with the Munich Regional Court on account of one of its contract partners not complying with the cartel agreement. As early as last year the Bundeskartellamt concluded fine proceedings against 69 companies in the ready-mixed concrete sector and 51 responsible managers imposing fines totalling approx. 180 million Euro. All the leading companies in the sector had operated quota cartels over several years in Berlin, southeast Lower Saxony, parts of Saxony-Anhalt and in Chemnitz.

20. On 31 July 2002 the Bundeskartellamt conducted a search operation on the suspicion that removal firms have for several years concluded and operated price-fixing and market allocation agreements regarding contracts for shipping household effects of members of the US armed forces based in Germany. The investigations were carried out in close co-ordination with the US competition authorities. The US Department of Justice simultaneously conducted searches in several Federal States.

#### 3.1.2.2 Exemptions from the general ban on cartels

21. The following table gives an overview of the type and number of agreements under competition law which the Bundeskartellamt cleared in the period covered by the report on the basis of the ARC's provisions for exemptions.

## GERMANY

Table 1

Cartels	Cartels Jan – Dec 2001		Total number since 1958	Still effective (as of Dec 2001)
	additions	deletions		
Standards-and types cartels Section 2(1) of the ARC	-	-	21	11
Condition cartels Section 2 (2) of the ARC	1	3	69	44
Rebate cartels Section 3 of the ARC <sup>old</sup>	-	-	34	6
Combined condition and rebate cartels	-	-	15	2
Specialisation cartels Section 3 of the ARC	-	-	129	25
Cartels of small or medium-sized enterprises Section 4 (1) of the ARC	7	-	164	152
Purchasing co-operation cartels Section 4 (2) of the ARC	75	-	100	90
Rationalisation cartels Section 5 of the ARC	6	4	77	20
Structural crisis cartels Section 6 of the ARC	-	-	2	2
Export cartels Section 6 (1) of the ARC <sup>old</sup>	-	-	130	36
Import cartels Section 7 of the ARC <sup>old</sup>	-	-	2	-
Other cartels Section 7 of the ARC		-		
Ministerial authorisation Section 8 of the ARC	-	.	4	-
<b>Total</b>	<b>89</b>	<b>7</b>	<b>747</b>	<b>388</b>

22. The ready-mixed concrete sector's plan to establish a structural crisis cartel in the Berlin area (cf. Annual Report 2000-2001, No. 11) was abandoned. The proceedings could thus be terminated. The Bundeskartellamt cleared the establishment of a joint venture by two major German municipal utilities as a rationalisation cartel. The joint venture is intended to bundle the participants' supply of electricity and gas to large customers with a nation-wide purchasing structure, their energy trade, generation of electricity and procurement of electricity and gas. As a co-operative joint venture it was subject to control both under merger and cartel law. Clearance under merger control law did not raise any problems. Under cartel law the Bundeskartellamt refused to clear the project as a purchasing co-operation cartel or cartel of small or medium-sized enterprises, respectively. The preconditions for a rationalisation cartel were fulfilled, however, as there was sufficient proof of rationalisation effects due to the pooling of the utilities' energy trade divisions, their increased overall portfolio, the more efficient provision of reserve capacity, improved risk management and the possibility of balancing accounts within the framework of a balancing group (relating to the electricity sector).

23. Six authorised dealers of a major motor vehicle manufacturer notified the Bundeskartellamt of their intention to establish a joint venture in order to be able to co-operate in the sector of purchasing and selling spare parts as well as in the logistics sector. After the Bundeskartellamt had cleared the project under merger control law without any significant problems, the authority went on to examine whether the joint venture could also be cleared under cartel law. The joint venture could not be exempted as a cartel of small or medium-sized enterprises. However, the Bundeskartellamt intends to clear it as a rationalisation cartel. Rationalisation effects which were established include above all a reduction of staff numbers in the purchasing and sales divisions and a reduction of transport costs.

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

24. As mentioned above the Bundeskartellamt initiated investigatory proceedings against 23 electricity network operators on suspicion of their charging abusively excessive fees for network use and of impeding other electricity providers. The companies contacted in the course of the preliminary proceedings included public utilities, regional providers and grid companies with network areas covering several Länder. A comparison made on the basis of a survey of network use fees for industrial and commercial consumers conducted by the Federal Association of Energy Consumers (VEA) shows that the fees charged by the 22 companies concerned are between 10 per cent and 80 per cent higher than those charged by the network operators taken as a comparison, for example, RWE and Energie Baden-Württemberg. Comparisons of the network use fees in the tariff customer sector produced differences of up to 30 per cent. The Bundeskartellamt also examined whether network owners impede third electricity providers by cross-subsidising the procurement and distribution of electricity via charges for network use.

25. As a result of this examination the Bundeskartellamt instituted abuse proceedings against 13 electricity network operators on account of their charging excessively high fees for network use. Some of the preliminary investigations did not result in formal proceedings. Some of the companies had voluntarily reduced their fees for network use. Other preliminary proceedings were referred to the Land competition authorities for reasons of competence.

26. In four cases investigations were made difficult by the fact that the network operators refused to submit the basis for their calculations as requested by the Bundeskartellamt and had filed an appeal against the Bundeskartellamt's decisions requesting information at the Higher Regional Court Düsseldorf. Their argument was that abuse had to be established primarily on the basis of comparisons with other companies. The court meanwhile ruled that competition authorities can equally apply both the comparable market

## GERMANY

concept and cost control to establish abusive pricing, and therefore may request companies to submit the bases for their calculations. Meanwhile the first warning has been given – against Stadtwerke Mainz.

27. Furthermore, the Bundeskartellamt initiated abuse proceedings against the electricity network operators Bewag AG, EnBW Transportnetze AG, Hamburgische Electricitäts-Werke AG (HEW) and VEAG Vereinigte Energiewerke AG (VEAG) in October 2001 following complaints. In these proceedings the so-called balancing energy is given prime consideration. As energy cannot be stored the difference between the amount of electricity fed in and the actual amount of electricity used by the customer must be balanced out on a short-term basis (so-called balancing or regulating energy). Only network operators can procure and provide this balancing energy. The companies mentioned above are suspected of charging their competitors inappropriate, and in some case fictitious fees for balancing energy.

28. All the proceedings could meanwhile be discontinued. The companies stated that they will introduce tenders system for the procurement of balancing energy and invoice network users in the same way as practised for a long time by RWE and E.ON.

29. The Bundeskartellamt conducted further significant abuse proceedings against Deutsche Lufthansa AG (DLH). The competent 9<sup>th</sup> Decision Division saw the pricing strategy of Deutsche Lufthansa AG (DLH) as an attempt to squeeze its new competitor, Germania Fluggesellschaft mbH, Berlin (Germania) out of the market and feared that emerging competition would have been substantially impaired as a result. Consequently the authority prohibited DLH from demanding a price (including passenger fees) for a one-way ticket per passenger on the Frankfurt-Berlin/Tegel route which is not at least € 35 above Germania's price, as long as DLH does not have to charge more than € 134 as a result. The decision was declared to be immediately enforceable.

30. Germania started operating scheduled flight services between Berlin – Tegel and Frankfurt/Main on 12 November 2001. The company offered tickets at € 99 for a one-way, fully-flexible and rebookable flight. The conditions essentially correspond to DLH's economy tariffs suitable for business travellers. DLH reacted to this by also introducing a fully-flexible economy tariff of a total of € 200 for an outward and return flight to be booked separately, i.e. at an average of € 100 per single journey (including fees). Compared with the fully-flexible economy tariffs DLH previously offered exclusively this constitutes a price reduction by almost 60 percent. Since 1 January 2002 DLH has raised the price to € 105.11 (Berlin-Frankfurt) and 105.31 (Frankfurt-Berlin) by introducing a new price tariff.

31. With this price DLH has in effect clearly undercut Germania's price of € 99 as it includes services which are not offered by Germania. In addition to catering, these services include the miles&more programme for Lufthansa customers. The fact that DLH offers three times as many flights is another considerable incentive for business travellers to fly with DLH and not Germania. Other advantages of flying with DLH are its access to travel agencies and its substantial participation in the Amadeus reservation system, its integration in the Star Alliance network as well as the reputation it enjoys among long-standing business customers. Even on conservative estimates the Bundeskartellamt assumes a price advantage of approx. € 35 one-way.

32. The price DLH is asking is set clearly below its average operating costs per passenger. The only rational explanation for this pricing strategy is that it is an attempt to force Germania from this route and to recoup resulting losses at a later stage by discontinuing this price tariff and resorting to previous ones. Recent cases on the Munich-London/Stansted and Munich-Frankfurt routes are further evidence of this strategy. In both cases DLH significantly raised its prices after its rivals, Go-Fly and Deutsche BA, had abandoned these routes.

33. DLH's introduction of the new cut-price is a clear reaction to Germania's competition inroad. Not only the timing but also the scale of this reaction, which is limited to the Berlin-Frankfurt route, are clear evidence of this. On no other route has DHL offered comparable budget tariffs. In order to maintain the principle of proportionality the € 35 price difference demanded of DLH vis-à-vis its rival, Germania, is limited to a certain amount and a specific period. This restriction is justified in that within two years Germania should have gained sufficient recognition and established a clientele base. Germania's operational procedures and other competition factors should have also improved to such an extent that such a level of protection against predatory conduct as provided by this decision should no longer be necessary.

34. In a provisional decision the Higher Regional Court Düsseldorf largely confirmed the Bundeskartellamt's prohibition decision. The court made it clear that the decision, contrary to Lufthansa's position, did not constitute an active market structure control by the Bundeskartellamt. Instead, the Bundeskartellamt protected the newcomer Germania from being hindered by the dominant Lufthansa in a way which cannot be objectively justified. This protection was the primary task of abuse control. The freedom in price-setting existing in principle reached its limits where dominant companies apply pricing strategies which aim at and actually result in competitors being squeezed out of the market.

35. At the end of this July, the Bundeskartellamt had to initiate boycott proceedings against "Der Grüne Punkt – Duales System Deutschland AG" ("the green dot", DSD). DSD is the only nationwide system for the take-back and disposal of sales packaging. According to the latest stage of investigation, DSD and several associations have induced a boycott against alternative suppliers in order to protect DSD from competition. Moreover, the Bundeskartellamt has initiated formal examination proceedings as to whether the contract system of DSD is compatible with the ARC.

36. The Bundeskartellamt has prohibited Fuchs Gewürze GmbH & Co., Dissen, (Fuchs) from unfairly hindering its competitor, Hartkorn Gewürzmühle GmbH, Koblenz, (Hartkorn). Fuchs is Europe's largest supplier of spices and the second largest spices specialist in the world. Fuchs concluded supply contracts containing exclusivity clauses with several independent food retailers. At the same time Fuchs offered "contributions to advertising costs" under the condition that its competitor Hartkorn, an SME, is taken off the list or excluded from current negotiations.

#### 3.1.2.4 Activities of the courts

37. In addition to the already mentioned significant decisions by the Higher Regional Court Düsseldorf on the authority's right to request companies charged with abusive conduct to submit the bases for their calculations for the purpose of abuse control and the court's confirmation, for the most part, of the decision against Deutsche Lufthansa regarding the impediment of competitors (see above), a judgement has also been given during the reporting period on the appeal filed by WalMart.

38. In its decision of 7 September 2000 the Bundeskartellamt had prohibited the companies WalMart, Aldi-Nord and Lidl from selling certain basic foods (i.a. milk, butter, sugar, flour, rice and vegetable fat) below their respective cost prices. WalMart was the only company to appeal against this decision before the Higher Regional Court Düsseldorf which finally acknowledged WalMart's appeal.

39. As far as dairy products were concerned, it was established that WalMart matched competitive prices of its rivals Aldi-Nord and Lidl. Consequently, selling below cost price was objectively justified. With regard to vegetable fat the court considers it as established that the purchase prices WalMart had to pay had been forced up artificially by third parties. Therefore the court did not accept them as cost prices within the meaning of Section 20 (4) sentence 2 of the ARC.

## GERMANY

40. The Higher Regional Court Düsseldorf generally confirmed that WalMart has superior market power over small and medium-sized competitors. Moreover it established that the product sugar was sold below cost price which cannot be objectively justified. According to the court's estimation, however, this violation did not have an "appreciable" anticompetitive effect. The Bundeskartellamt does not go along with this restrictive interpretation of the ban on inadmissible sales below cost price. It therefore lodged an appeal on points of law at the Federal Supreme Court against the decision of the Higher Regional Court Düsseldorf.

41. In 1999 the Bundeskartellamt had to decide on the admissibility under competition law of a cooperation between Süddeutsche Zeitung, Frankfurter Rundschau, Die Welt and Welt am Sonntag in the market for job advertisements. The market for national job advertisements is dominated by Frankfurter Allgemeine Zeitung. In order to establish an alternative to the job advertisements provided by Frankfurter Allgemeine Zeitung, the publishers of Süddeutsche Zeitung and Frankfurter Rundschau as well as Axel Springer Verlag, which publishes Die Welt and Welt am Sonntag, founded a joint venture. This company was intended to produce a uniform job advertisement section under the heading "job market for Germany".

42. The three publishers applied for an exemption of their project from the prohibition of cartels of Section 1 of the ARC at the Bundeskartellamt. The application was based on the provision of Section 7 of the ARC which was newly introduced in 1999 and is modelled after the regulation on the exemption from the prohibition on cartels under Article 81 EC. Accordingly, the precondition for an exemption is that the agreement in question "contributes to improving the development, production, distribution, procurement, taking back or disposal of goods or services, while allowing consumers a fair share of the resulting benefit". A further precondition for an exemption is that "the improvement cannot be achieved otherwise by the participating undertakings and is of sufficient importance when compared with the restraint of competition connected with it, and the restraint of competition does not result in the creation or strengthening of a dominant position".

43. The Bundeskartellamt rejected the application for exemption. The examination had established that the requirements for an exemption were not fulfilled. The Bundeskartellamt took the view that the improvements achieved were too insignificant and were not suited to outweigh the restraint of competition involved. The Bundeskartellamt saw the joint venture as an association of the three most significant competitors of Frankfurter Allgemeine Zeitung. This would have led to the creation of a duopoly in the market which was already characterised by a high level of concentration.

44. The Federal Supreme Court has now upheld the companies' viewpoint. As ground for its decision the court referred above all to the special characteristics of the job advertisement market. This market was characterised by demand concentrating automatically on the strongest supplier. This concentration on the strongest supplier resulted in an effect similar to that of agreeing on a meeting point. Thus, the competitors of Frankfurter Allgemeine Zeitung would hardly stand a chance without co-operating with each other. In the Federal Supreme Court's view, these circumstances exceptionally justified a co-operation. The co-operation created a new product which had the chance of being perceived as an alternative to the market leader's offer. This would make competition likely to be stimulated.

45. The last Annual Report outlined proceedings against Deutsche Lufthansa. The Bundeskartellamt had prohibited Deutsche Lufthansa from charging prices on the Berlin-Frankfurt/Main route which were more than DEM 10 (approx. € 5) higher than those charged on comparable routes. The Berlin Court of Appeals, which was competent at the time, had revoked this decision. The Federal Supreme Court applied to, however, had referred the case back to the Court of Appeals to review it again. A decision by the Berlin Court of Appeals is pending.

46. The last report also mentioned the Düsseldorf Higher Regional Court's decision to reject the appeal filed by the companies WAZ and OTZV against the prohibition of their planned merger and not to allow an appeal of points of law before the Federal Supreme Court. The companies had filed an appeal from refusal to grant leave with the Federal Supreme Court, which has now been rejected.

### 3.2 *Mergers and acquisitions*

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

**Table 2: Mergers notified under Section 39 (6) of the ARC  
(Section 23 of the old version of the ARC)**

Year	Mergers
1973	34
1974	294
1975	445
1976	453
1977	554
1978	558
1979	602
1980	635
1981	618
1982	603
1983	506
1984	575
1985	709
1986	802
1987	887
1988	1,159
1989	1,414
1990	1,548
1991	2,007
1992	1,743
1993	1,514
1994	1,564
1995	1,530
1996	1,434
1997	1,751
1998	1,888
1999	1,182
2000	1,429
2001	1,141
<b>Total</b>	<b>29,579</b>

## GERMANY

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

**Table 3**

	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
Mergers notified and reviewed prior to completion	1,089	1,006	1,207	1,300	1,147	1,359	1,450*
Mergers notified after completion and found to be subject to control	276	280	362	391	32 <sup>1</sup>	70	16
Mergers not subject to control	165	148	182	197	3	-	-
Completed mergers total	1,530	1,434	1,751	1,888	1,182	1,429	1,141**

48. A breakdown by type of merger:

**Table 4**

	<b>2000</b>	<b>2001</b>
Acquisition of assets	311	229
Acquisition of interest	691	503
Of which: majority interest acquisition	641	453
Joint ventures	269	237
Joint ventures with joint control	93	98
Contractual relations	-	37
Interlocking directorates	-	-
Competitively significant influence	18	13
Others	15	21

49. By type of diversification: horizontal mergers (1,080) of which 195 were without and 885 with product extension, clearly dominated again in 2001. The number of notifications of vertical mergers dropped to 10, whereas the number of conglomerate mergers was 45.

### 3.2.2 Summary of significant cases

50. The Bundeskartellamt prohibited six planned mergers during the period covered by the report. It prohibited Liberty Media's planned acquisition of Deutsche Telekom AG's broadband cable networks owned by its subsidiary KDG. Since Liberty also provides programme content and furthermore planned to distribute specific decoders, KDG's dominant position was likely to be strengthened.

\* Not all cases have been analysed statistically as yet.

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

\*\* Three cases had been concluded under the previous law.

51. In early 2002 the Bundeskartellamt prohibited the acquisition by E.ON of majority stakes in both Gelsenberg and Bergemann. By means of these two transactions E.ON would have acquired a stake in Ruhrgas which would have increased its market dominance in the electricity and gas markets. E.ON applied for ministerial authorisations for both mergers. A final decision is still pending.

52. In the mineral oil sector the Shell/DEA and Deutsche BP/Veba Öl mergers could be cleared subject to obligations. Moreover, numerous obligations were imposed on Lufthansa's acquisition of Eurowings.

53. The competition authorities in Germany, the United Kingdom, Italy and Spain have for the first time referred a planned merger notified at national level to the European Commission for examination (Art. 22 (3) of the European Merger Control Regulation). This involved the intention of Promatech S.p.A. (Italy) to take over the weaving machine business of Sulzer AG (Switzerland). The European Commission was not responsible for the merger project from the start because of the level of turnover of the companies involved. Within the framework of the newly established network of competition authorities of the Member States (European Competition Authorities) the authorities involved were able to apply for a referral to the Commission in close co-operation. In view of the markets affected Europe-wide and the Community-wide significance of the project an examination by the Commission rather than by the Member States was considered to be desirable. This represented a proper division of work between Commission and Member States and hence was consistent with the principle of subsidiarity.

54. A further referral to the European Commission was made regarding the merger of General Electric Engine Services Inc. (based in Cincinnati/USA) and Unison Industries Inc. (based in Jacksonville/USA). The Bundeskartellamt had come to the conclusion that the merger threatened to strengthen General Electric Company's dominant position in the relevant market, i.e. the global market for aircraft engines. Germany referred the case to the Commission in close co-operation with the ECA member states as it was of the opinion that measures for preventing competition concerns in a global market should be determined on a uniform basis.

### 3.2.2.1 Prohibition or prevention of mergers

55. The Bundeskartellamt prohibited Sanacorp e.G. Pharmazeutische Großhandlung, Planegg, (turnover achieved in Germany: approx. DEM 3.89 billion) from acquiring a majority share in Andreae-Noris Zahn AG, Frankfurt/Main (turnover achieved in Germany: approx. DEM 4.9 billion). The merger would have resulted in the companies involved achieving dominant positions in particular markets in the pharmaceuticals wholesale sector in southern Germany and Mecklenburg-Western Pomerania. Today the German pharmaceuticals wholesale sector is already characterised by a very narrow market structure with only four companies operating at the national or cross-regional level. A merger of the third and fourth largest pharmaceuticals wholesalers to become the market leader in Germany would have resulted in the degree of concentration being raised also at the national level.

56. Moreover, the Bundeskartellamt prohibited the takeover of trans-o-flex Schnell-Lieferdienst GmbH, Weinheim by Deutsche Post AG (DP AG). The merger would have resulted in the creation of a dominant position by DP AG in the market for business customer parcel services or to a consolidation of its existing dominant position in the market for B2C standard parcel services ("mail-order parcels"). The prohibition covers both DP AG's acquisition of a 24.8% stake in Deutsche Post AG already effected in July 1997 and the planned increase of this share to 100% of the company shares notified in July 2001. Deutsche Post AG therefore has to abandon its stake in trans-o-flex.

57. In February 2002 the Bundeskartellamt prohibited Liberty Media's planned acquisition of Deutsche Telekom AG's broadband cable networks (KDG). The merger would have resulted in

## GERMANY

strengthening dominant positions in the supply market for broadcasting signals to final customers (final customer market: cable television), the market for feeding signals into broadband cable networks (input market) and the market for the supply of network level 3 signals to operators of network level 4 (signal supply market). From the consumers' point of view, terrestrial or satellite reception of TV signals and reception via broadband cable are not interchangeable and thus have to be assigned to different markets. Many consumers do not have an alternative to broadband cable reception anyway, since legal provisions and actual circumstances prevent reception by satellite.

58. The prohibition was based on the following considerations: The acquisition of the broadband cable networks does not constitute a replacement of the dominant company Deutsche Telekom AG by Liberty which would be neutral under cartel law and thus not raise competition concerns. Liberty is both programme content provider and at the same time already active in the final customer market for cable television (supply of television signals to households). It is thus at least a potential competitor of Deutsche Telekom. Liberty's planned distribution of decoders or set-top boxes would tie customers to Liberty as the owner and operator of the signal-decoding devices. This is because the decoders would still be owned by Liberty and can only decode Liberty's signals. This would block any chance of opening competitive cable access right from the outset. KDG's dominant position in the market for feeding content into the cable network would be strengthened as a result of the combination with Liberty's activities in the content sector. Since Liberty would supply around 60 per cent of all broadband cable customers in Germany and use the network for distributing its own content, the merger would also strengthen Liberty's dominant position in this respect.

59. In January 2002 the Bundeskartellamt prohibited the acquisition by E.ON AG, Düsseldorf, (E.ON) of a majority stake in Gelsenberg AG, Essen. By means of this merger E.ON would have indirectly acquired a minority share in Ruhrgas. The merger would have strengthened dominant positions both in the gas and electricity sales markets. There was the danger that the combination of E.ON and Ruhrgas in a time of emerging liberalisation in the gas markets would cement Ruhrgas' dominant position.

60. Ruhrgas is the largest German grid gas company. Its domestic gas sales account for nearly 60 per cent of the total domestic natural gas output. At the grid gas level Ruhrgas' market share in the supply of gas distributors, i.e. excluding the direct supply of bulk buyers, is at least 88 per cent in the company's distribution area and at least 58 per cent in the whole of Germany. Moreover, Ruhrgas is the only grid gas company with paramount access to all gas production sources relevant for supplying the German market (Norway, Russia, the Netherlands, Great Britain, domestic sources). It has the largest grid gas network which gives it paramount access to both suppliers and buyers. Additionally, the company has the largest storage capacities in absolute numbers which are significant for balancing fluctuations in sales.

61. In February the Bundeskartellamt also prohibited E.ON AG, Düsseldorf, (E.ON) from acquiring Bergemann GmbH, Essen (Bergemann), again preventing it from taking indirect control of Ruhrgas AG. The examination showed that the effects on competition and consumers to be expected would be more serious both in qualitative and quantitative terms than in the case of the acquisition of Gelsenberg which had already been prohibited by the Bundeskartellamt.

62. In its examination the Bundeskartellamt particularly focussed on the following arguments: At the grid gas level the merger of Ruhrgas and E.ON would strengthen Ruhrgas' dominant position in the supply of gas distributing companies. Ruhrgas would to a great extent be able to secure its sales to E.ON affiliates and associates and deny competitors market access.

63. E.ON affiliates located in Ruhrgas' transmission area would be able to strengthen their dominant positions in supplying large gas end customers and local gas distributors (municipal utilities) since after the merger they would no longer have to expect potential competition from Ruhrgas. This would in particular

further strengthen the position of those E-ON companies supplying electricity as well as gas since they would have better opportunities in future to bundle gas and electricity supplies. Direct access to gas imports and domestic production via Ruhrgas would offer them a considerably greater degree of flexibility in their terms of offer. This would create more market barriers for companies operating purely in the gas supply sector which cannot benefit from comparable synergy effects.

64. As a consequence of the merger Ruhrgas' stake in the grid gas company VNG Verbundnetz Gas AG (VNG), Leipzig, would increase to 42 per cent. At the gas grid level a strengthening of VNG's dominant positions in the supply of gas transmission companies could be expected because it would secure sales to E.ON holdings and associates. The dominant positions of E.ON affiliates and associates located in VNG's grid gas transmission network in the supply of major industrial/commercial customers and local gas distributors (municipal utilities) are likely to be strengthened as a result of the elimination of potential competition from VNG.

65. In the electricity sector the merger would also strengthen E.ON's and RWE's dominant positions in the market for the supply of major industrial/commercial customers and electricity distributors. Natural gas is the most promising primary energy source for generating electricity. The merger would give E.ON considerable influence over the most important supplier of domestic primary energy, Ruhrgas. Moreover, anti-competitive effects are likely since having gained indirect control of Ruhrgas, E.ON would also have control of Ruhrgas' stake in municipal utilities supplying electricity. Hanover's municipal utility (Stadtwerke Hannover) would, for example, be eliminated in future as an independent external competitor for the dominant duopoly E.ON/RWE.

66. The commitments proposed by the companies went no further than those offered in the E.ON/Gelsenberg proceedings. They were of little significance in competition terms and thus not appropriate to prevent the strengthening of the dominant positions in the gas and electricity markets.

67. If the Bundeskartellamt prohibits a concentration under competition law, firms may seek authorisation for their proposed concentration from the Federal Minister of Economics and Technology by advancing non-competition based arguments. In exceptional cases, the Economics and Technology Minister may authorise a concentration if the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest (Section 42 (1) of the ARC). Prior to the decision an opinion of the Monopolies Commission shall be obtained.

68. E.ON AG applied for a ministerial authorisation under Section 42 of the ARC in both cases. The authorisation was granted against the opinion of the Monopoly Commission and has meanwhile been legally challenged by competitors of the parties to the merger. The Düsseldorf Higher Regional Court has provisionally granted the appeals against the ministerial authorisation in the provisional legal protection proceedings on formal grounds. A final decision is still pending.

69. In May 2002 the Bundeskartellamt prohibited the intended acquisition by Viterra Energy Services AG (belonging to the E.ON group, Düsseldorf) of the companies Minol Messtechnik W. Lehmann GmbH & Co. KG, Brunata Wärmemesser Werner Lehmann GmbH & Co. KG and Brunata Wärmemesser GmbH based in Leinfelden-Echterdingen and Stuttgart, respectively. The companies involved operate in the area of consumption-based metering and billing of heating and hot water costs. According to the Bundeskartellamt's findings, Viterra and the market leader, Techem AG, Frankfurt, already had joint dominance of this market before the merger. As a result of the merger the two companies would have had a joint market share of nearly 60 percent and thus would have further strengthened their market positions.

## GERMANY

### 3.2.2.2 Clearances subject to conditions and obligations

70. During the reporting period the Bundeskartellamt cleared several concentrations subject to obligations or conditions. As a consequence of the clearance of the Lufthansa/Eurowings merger, for example, conditions and obligations took effect which prevented a consolidation of Lufthansa's dominant position in domestic German air traffic and allowed the entry to the market of a new operator – European Air Express (EAE) based in Mönchengladbach.

71. The obligations included a transfer of parts of Lufthansa's and Eurowings' domestic air services to EAE. EAE's market entry will be protected from competition for six flight plan periods. Furthermore, in the event of EAE extending their flight services, Lufthansa and Eurowings were obliged to give up take-off and landing slots at Düsseldorf, Munich or Frankfurt Airport. Lufthansa is obliged to open up the Miles & More customer loyalty programme to EAE and all other existing or future competitors on domestic routes. Furthermore, in the event of the entry of a new operator, the merging companies will be required to reduce their services accordingly on the routes previously flown exclusively by Eurowings and to relinquish the respective number of slots.

72. In order to facilitate the start-up of scheduled flights on new routes the Bundeskartellamt has ordered Lufthansa and Eurowings to allow other competitors in domestic German air traffic which are planning to set up domestic flight connections with Düsseldorf, Munich or Frankfurt as airports of origin or destination, three take-off and three landing slots from their own allocation, if slots are not available from other sources. In the legal dispute over this obligation, which subsequently developed, the Düsseldorf Higher Regional Court ruled that in relinquishing slots under this obligation, Lufthansa does not have to comply with the exact take-off and landing times desired by its competitors.

73. In December 2001 the Bundeskartellamt cleared the planned mergers of Deutsche Shell GmbH, Hamburg (Shell) with DEA Mineralöl AG, Hamburg (DEA) and Deutsche BP AG, Hamburg (BP) with Veba Oel AG, Gelsenkirchen (Veba Oel) subject to strict obligations. With the agreement of the Federal Ministry of Economics and Technology, the Bundeskartellamt had successfully filed an application with the European Commission for referral of both cases. In order for the planned mergers to be cleared, the companies undertook to reduce their market shares to a level below the threshold for collective market dominance by selling petrol stations. Besides this limitation of the level of concentration in the petrol station market, further obligations will ensure that particularly the supply of fuel to independent petrol station operators will be guaranteed in the future.

74. The most important conditions include the following commitments: Shell/DEA and BP/Veba Oel will sell 5.3 per cent and 4 per cent, respectively, of the total sales volume of their domestic petrol stations to third companies. With a network comprising around 16,000 petrol stations, this will involve the sale of approx. 1500 petrol stations. In order to give the buyers of the petrol stations the possibility to establish a stable competitive position, Shell/DEA will supply fuel to refinery-independent buyers on favourable terms for a period of up to five years. Shell/DEA will sell a share of 45 per cent of the nominal capital of Bayernoil Raffineriegesellschaft GmbH to a third company.

75. One further important concentration case which could only be cleared subject to obligations concerned the acquisition of Heraeus Medical Division by Getinge Industrier AB, Sweden. With its subsidiary Maquet GmbH, Rastatt, Getinge holds a dominant position in the market for operation table systems for hospitals and clinics. By acquiring Heraeus Medical Division, the leading company in the market for surgery lamps, Getinge would have strengthened its dominant position, if the case had been cleared without obligations. Getinge, as the sole manufacturer of both operation table systems and surgery lamps, would have been able to supply package solutions at a lower price and to squeeze competitive products out of the market. These obligations now prevent Getinge from offering package solutions with

the intention of squeezing competitive products out of the market through specific price or terms concessions. At the same time the obligations guarantee that in future specialised dealers will not be subject to actual or legal restrictions in marketing products that are in competition with Heraeus products. This ensures that Getinge's position in the market for table systems will not be strengthened.

### 3.2.2.3 Clearances

76. The vast majority of cases was cleared also in this year. A merger which was also examined by other competition authorities was the planned acquisition of control of Navision Damgaard A/S, Vedbaek (Denmark) by Microsoft Corporation, Redmond (USA). The merger concerns activities of the parties involved in the area of standard application software for business management (Enterprise Resources Planning – ERP). The project was to be cleared since according to the Bundeskartellamt's investigations the merger is not expected to lead to the creation or strengthening of a dominant position in the product markets affected in the ERP sector.

### 3.2.2.4 Withdrawal of application

77. The Bundeskartellamt has cleared the planned acquisition of the electricity plants of RWE AG, Essen (RWE) located on the right bank of the Rhine by the local supplier GEW AG, Cologne (GEW). RWE's plan to acquire a share in GEW Rheinland could no longer be prohibited under merger law once the share involved had been reduced to 20 per cent.

78. According to the original notification to the Bundeskartellamt RWE was to acquire a 25.1 per cent share in GEW. The Bundeskartellamt, however, signalled to the company that the merger could not be cleared in this form. It would have strengthened RWE's and EON's joint dominant position in the German electricity markets. The companies subsequently modified their plans and reduced RWE's share in GEW to 20 per cent without further shareholder rights. In this form a prohibition of the planned merger under competition law by the Bundeskartellamt is no longer possible.

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

79. The course Germany took in 1998 in amending its energy law (implementing the European Electricity Directive) with a view to open up energy markets, is based on the concept of the conditions of network access being negotiated between the market participants, which is protected by abuse control under competition law. In view of the complex market structures in the network-based energy sector in Germany with several hundreds of network operators in the electricity and gas sectors, this approach is appropriate and, at least in the case of Germany, more convincing than a comprehensive regulatory regime.

80. The Associations' Agreements, which are negotiated between the relevant associations of the sides of the market involved, are crucial for the well-functioning of negotiated network access. In the electricity sector the Agreements have been revised continually and improved in terms of competition. Since December 2001, we have the Associations' Agreement on electricity II plus. While some improvements have been achieved, individual aspects of the Associations' Agreement still raise competition law problems. This applies in particular to the so-called "criteria for establishing prices" that are part of the Associations' Agreement II plus.

## GERMANY

81. In the final report of their “working group on electricity network use” (April 2001), the competition authorities at Federal and Länder level in Germany already laid forth, among other things, what kind of conduct by electricity network operators, particularly in setting the fees for network use, they consider to be a violation of competition law. Beyond its significance for the competition authorities’ law application practice, the report also serves as a guideline for the civil courts. The Associations’ Agreement, too, must be measured against the assessments set down by the competition authorities.

82. In the gas sector, where the liberalisation process was initiated at a later stage, the market result of liberalisation and the degree to which the respective Associations’ Agreement is guided by competitive criteria clearly lag behind the situation in the electricity sector. With the Associations’ Agreement on gas II concluded in the spring of 2002, the gas sector has entered into a market liberalisation process which in the electricity sector was already launched some years ago. In the gas sector, the Associations’ Agreement on gas II, with all its substantial deficits in central competition points, thus only marks the beginning of a development which in the electricity sector is already clearly at an advanced stage.

83. An integral part of the concept of negotiated network access implemented in Germany with a view to open up markets is effective abuse control under competition law of dominant energy network operators. In order to make this control instrument more effective, a separate Decision Division was set up at the Bundeskartellamt in the summer of 2001 which specifically prosecutes abusive conduct by electricity network operators. Its activities focus on examining fees for network use with regard to possible abusive fee-structuring. Moreover, it conducts proceedings relating to the provision of balancing energy and invoicing of metering services.

84. In the autumn of 2001 the Bundeskartellamt initiated preliminary investigations against 23 network operators in order to assess network use fees in the electricity sector. It conducted formal proceedings against 13 companies. In the course of these proceedings the Düsseldorf Higher Regional Court expressly confirmed that the Bundeskartellamt may also apply cost control in addition to the comparative market concept. As a result the competition authorities’ instruments of investigation and establishing evidence have been improved in one important area.

85. The reform of the Energy Industry Act planned for this year, which was intended to give the system of negotiated network access a new direction, has not passed into law in the current legislative period. One objective of the reform was to incorporate the legal presumption that a network operator which observes the Associations’ Agreement II plus acts according to “good professional practice” and thus in conformity with competition law. Network operators whose conditions and fees for network use do not meet the regulations of the Associations’ Agreements in terms of competition, would thus come under enormous pressure to justify themselves.

86. The necessity of control under competition law manifests itself even more clearly in the gas sector which, in parallel to the electricity sector, is affected by the “juridification” of the Associations’ Agreement on gas II (limited until the end of 2003). In view of the striking insufficiencies of the Associations’ Agreement on gas II, abuse control under competition law is of key significance in this area.

87. In addition, the reform of the Energy Industry Act, which has not been enacted during this legislative period, provided for decisions on transmission and the level of fees for network use being immediately enforceable as a general rule. Thus, if a decision on network use by a competition authority were to be appealed against, this would no longer delay network access and thus the creation of actual competition by months or even years.

88. In some respects the conditions for competitors entering the network-based energy markets have improved. However, the optimistic forecasts on the creation of competition have not yet come true. For this

reason the Bundeskartellamt revised some areas of its market definition approach in the electricity sector. In the area of the supply of industrial customers and distributors the Bundeskartellamt still assumes nationwide markets. As regards the supply of household and small commercial customers, however, it has returned to defining regional markets which are determined by the network of the respective regional network operator.

## 5. Resources of competition authorities

### 5.1 Resources overall

#### 5.1.1 Annual budget (in Euro and USD)

Budget 2002		Change vis-à-vis 2001
Euro	15.0 million	-2 million
- USD <sup>2</sup>	14.7 million	-1.9 million

#### 5.1.2 Number of employees (person-years)

	Number	Change vis-à-vis 2001 <sup>3</sup>
Economists	51	-
Lawyers	68	-
Other experts	11	-
Support staff	137	-
All staff combined	267	-

### 5.2 Human resources (person-year) applied to enforcement against anticompetitive practices, merger review and enforcement and advocacy efforts

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

<sup>2</sup> Exchange rate as of September 1, 2002; 1 Euro = 0,98060 USD.

<sup>3</sup> The last report stated the number of employees and not person-years. Therefore a comparison with the previous year is not possible.

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GERMANY

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