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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY**

-- July 2004-June 2005 --

*This report is submitted by the German Delegation to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 19-20 October 2005.*

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## Executive Summary

### Legislation

1. Amendments to the Act of Restraints of Competition and to the Energy Industry Act came into force on 1 July 2005.

### Agreements / Abusive practices by dominant firms

2. In cartel proceedings against industrial insurers the Bundeskartellamt has imposed fines totalling approx. 130 million Euro against 10 industrial insurers and the directors involved in March 2005.

3. Again, significant abuse proceedings were conducted in the electricity sector in which an energy supplier was prohibited from denying site network operators access to a medium-voltage network. Other abusive practices, e.g. by Deutsche Telekom AG, Deutsche Post AG and Toll Collect GmbH, have been dropped by the respective companies upon intervention of the Bundeskartellamt so that there was no need to initiate formal abuse proceedings.

### Merger control

4. A number of prominent proceedings in the area of merger control, where the number of cases slightly increased in 2004, related to the broadband cable networks and the waste management sector.

5. Moreover, in the reporting period the Bundeskartellamt prohibited hospital mergers for the first time.

## I. Changes to competition law and policy, proposed or adopted

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

6. The 7<sup>th</sup> Amendment, which came into force on 1 July 2005, fundamentally changes the ARC, which is the national working basis of the Bundeskartellamt and the competition authorities of the *Länder*. The amendment primarily implements the procedural adaptations to European law required by EU Regulation 1/2003 which came into force in May 2004. In addition it ensures the extensive adjustment of substantive German regulations to European competition law.

7. In German law, the current system of notification and authorisation of anti-competitive agreements is replaced by the principle of legal exception. Small or medium-sized cartels, however, are granted special status. These are granted entitlement to examination of their cooperation projects by the competition authorities over an interim period of four years as long as the agreement does not fall under Art. 81 EC. However, all agreements affecting cross-border trade are excluded from this entitlement. This means that in particular smaller regional cooperation within the competence of the competition authorities of the *Länder* may fall under this exemption.

8. In addition, as under European competition law the ban on cartels is also to cover vertical competition restraints. The elimination of exemption areas (credit and insurance industry, copyright collection societies and sports) is also a direct result of the primacy and applicability of European law on the basis of Regulation 1/2003. Moreover, the new German ARC also tightens the sanctions for cartels. The level of fines was raised and the calculation of fines is now closely linked to turnover.

9. The 7<sup>th</sup> ARC amendment also creates preconditions for improved cooperation not only between the Bundeskartellamt and other competition authorities, especially within the European Competition Network (ECN), but also with the competition authorities of the *Länder*. The changes ensure that in applying Articles 81 and 82 EC the Bundeskartellamt receives the necessary capacity to act in order to fulfil its role within the ECN; this applies for example in the area of information exchange and mutual assistance with investigations.

10. A further important legislative project of the Federal Government in the reporting period was the amendment of the Energy Industry Act. The new Energy Industry Act (EnWG) came into force with the ARC on 1 July 2005. This reform translates the so-called EU Acceleration Directives into national law. The new law provides for comprehensive regulation of the network area and it aims at overcoming the insufficient transmission competition in network based energy sector even six years after liberalisation of the affected markets.

11. In the electricity and gas markets this regulation covers network access, fees for network use and network connections. From July 2005 the Regulatory Authority for Telecommunications and Posts (RegTP), under the new name "Federal Network Agency", is responsible for regulatory tasks. Abuse control in upstream and downstream markets in the networks as well as the prosecution of cartels and merger control remain within the competence of the Bundeskartellamt or the competition authorities of the *Länder*.

## **II. Enforcement of competition law and policy**

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

#### *a) Summary of activities of competition authorities and courts*

12. In the period covered by the report, the Bundeskartellamt imposed fines totalling 130 million Euro in cartel proceedings against industrial insurers.

13. Furthermore, the Deutsche Post AG was enjoined from hindering or discriminating against rival small and medium-sized providers of postal services in their "mail preparation services". The immediate enforceability of this decision was confirmed by the Düsseldorf Higher Regional Court.

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

##### *aa) Agreements, action in the form of administrative fine proceedings against cartels / Boycotts*

14. In March 2005 in cartel proceedings against industrial insurers the Bundeskartellamt imposed fines totalling approx. 130 million Euro against 10 industrial insurers and the directors involved. It is to be expected that further fines will be imposed against other insurers this summer. The cartel law violation had a nation-wide and cross-industry effect on, in particular, the industrial property insurance sector (fire, consequential loss, EC and all-risk insurances, and technical insurances) as well as the transport insurance and the buildings/monopoly insurance sector.

15. According to the Bundeskartellamt's findings, in the middle of 1999 the relevant insurers agreed to put an end to the intense competition at that time in premiums and conditions and thus cause a turnaround in the market. The cartel, which in part continued even after the search operation conducted by the Bundeskartellamt in July 2002, was mainly based on agreements between the directors of the companies represented in the Special Committee for Industrial Property Insurance (FIS) of the German Insurance Association (GDV). Within the framework of so-called "FIS principles" the parties concerned

agreed inter alia not to reduce insurance contributions during terms of contract, not to make any backdated premium adjustments, to conclude new contracts only with opt-out and adjustment clauses and to consult each other more in “competitive cases”.

16. These principles were supplemented by further agreements on premium and /or retention increases as well as on the adjustment of contract conditions. In addition, the industrial insurers participating in the cartel agreed “not to disrupt the restructuring measures” of their rivals and “not to undercut the improved premium” demanded and to inform each other at regular intervals on restructuring measures. By means of previous insurance enquiries and not submitting competing offers they aimed to avoid entering into new contracts with existing risks.

17. Relevant platforms and operation units to implement the cartel agreement were formed at director/ head of department level by the regionally active working and discussion groups or at regular meetings of representatives of the various rival companies. The objective of these meetings was to exchange in-depth information on company-specific restructuring criteria and revenue improvement measures, to further confidence building and to constantly manifest mutual reliability as regards market behaviour and non-competition. Insurers offering a more advantageous offer to insurance holders in individual cases were taken to task as “obstructors of improvement” to achieve market conformity. Another means of exerting pressure to enforce “market-conform behaviour” was to cancel co-insurance contracts. Here, in individual cases, the mandates of insurance brokers encouraging customers to change their insurer were revoked.

18. Fines were calculated on the basis of the additional proceeds obtained from the cartel agreement in the relevant period, i.e. the profits which could only have been gained by the companies concerned from their infringement of competition. The Bundeskartellamt multiplied the additional proceeds of the individual companies by the factor 2 or 1.5 depending on the respective role the companies played in the agreements. Actuarial factors were taken into account when calculating the additional proceeds.

bb) Exemptions from the general ban on cartels

19. The following table gives an overview of the type and number of agreements under competition law which during the reporting period were exempted by the Bundeskartellamt from the statutory prohibition on the basis of the ARC’s exemption provisions.

Table 1

			Proceedings concluded in the reporting period						
			Number of applications and notifications		Outcome of proceedings				
<i>Type of Cartel</i>			Still pending on 1.1.	new	Total proceedings concluded	Put into effect	Terminations		Proceedings pending our 31.12
							Applications/notifications withdrawn	Objection/authorisation refused	
<b>Sec2 (1)</b>	Standards and types cartels	2003		4	2	1	1		2
		2004	2		2	2			
<b>Sec2 (2)</b>	Condition cartels	2003	3	11	11	6	5		3
		2004	3	6	7	5	2		2
<b>Sec3</b>	Specialisation cartels	2003	1						1
		2004	1						1
<b>Sec4 (1)</b>	General cartels of small or medium-sized enterprises	2003	6	27	18	10	7		15
		2004	15	8	3	2	1	1	20
<b>Sec 4 (2)</b>	Purchasing cooperations/cartels of small or medium-sized enterprises	2003	22	14	18	9	9		18
		2004	18	4	16	9	7		6
<b>Sec5</b>	Rationalisation cartels	2003	4	2	2	1	1		4
		2004	4	2	2	1	1		4
<b>Sec 6</b>	Structural crisis cartels	2003	1						1
		2004	1						1
<b>Sec 7</b>	Other cartels	2003		2	1				1
		2004	1					1	1
<b>Sec 29 (1)</b>	Agreements and recommendations in the credit and insurance industry	2003	21	14	14	10	4		21
		2004	21	8	8	5	3		21
<b>Total</b>		<b>2003</b>	58	74	66	37	28		66
		<b>2004</b>	66	28	38	24	14	1	56

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

20. As regards end customer prices for gas, formal abuse control proceedings were initiated at the end of 2004 / beginning of 2005 against seven gas providers on suspicion of abusive pricing. The proceedings focused inter alia on the question of whether the price increases undertaken to link gas prices to oil prices merely reflected the increase in natural gas procurement costs or whether additional surcharges had been included. In June 2005 the Bundeskartellamt was still actively conducting one of the proceedings initiated. Four proceedings could be discontinued after some of the companies had agreed either not to impose certain price increases or to offer a fixed price tariff in the future that was independent of the development in oil prices. One of the proceedings could be discontinued after the company had made similar commitments. One of the proceedings which had been referred to the *Land* competition authority of Baden-Württemberg was discontinued by that authority.

21. In the case of some companies which in a nationwide comparison proved to be less expensive, the Bundeskartellamt refrained from initiating formal abuse proceedings after some of these companies had announced their intention to reduce planned price increases or not to implement any further increases in the current heating period and to reimburse their customers if the proceeds from the price increases undertaken exceeded their own increased procurement costs.

22. In the period covered by the report the Bundeskartellamt initiated abuse proceedings against Deutsche Post to examine whether Deutsche Post's practice of granting access to so-called mail preparation services was compatible with provisions under European and national competition law (Section 20 (1) of the ARC, Article 82 EC). In the course of its investigations the Bundeskartellamt came to the conclusion that Deutsche Post hindered competing providers of postal services in the sector of mail preparation services or discriminated against them. In February 2005 the authority thus prohibited this conduct by Deutsche Post and ordered immediate enforceability of its ruling.

23. Deutsche Post filed a complaint against this decision at the Düsseldorf Higher Regional Court and requested that the suspensive effect of the appeal be restored. With its decision of 13 April 2005 the Düsseldorf Higher Regional Court rejected this request. A decision on the merits is still pending.

24. After an examination lasting several months the Bundeskartellamt decided in June 2004 not to initiate prohibition proceedings against Deutsche Lufthansa for cancelling the basic commission it pays to travel agencies.

25. As the leading provider of air travel services in Germany Lufthansa is subject to abuse control, particularly as regards the dependence of the IATA travel agencies on the sale of Lufthansa flights. However, Lufthansa's decision to change its sales system to save costs cannot be considered as an unfair hindrance of its travel agency partners. For this assessment it was important that Lufthansa allowed the travel agencies an adequate readjustment period and the chance to charge their customers directly for their services. The Bundeskartellamt found that under these preconditions Lufthansa did not violate the prohibition of abuse of power under competition law.

26. In June 2005 the Bundeskartellamt conducted a search operation following tip-offs from travel agencies and the specialist press claiming that the four major tourist airlines had coordinated the termination of their agency agreements and the allegedly intended cancellation or reduction of the commissions paid by them.

## dd) Activities of the courts

27. The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's order to immediately enforce its prohibition order in the "Deutsche Post/partial-service access" abuse proceedings. With this order the Bundeskartellamt had prohibited Deutsche Post AG from refusing other postal service providers access to so-called partial services or the according partial-service discount. In order to guarantee the effectiveness of this order in practice the Bundeskartellamt had also ordered the immediate enforceability of its prohibition order. A decision in the main issue is pending at the Düsseldorf Higher Regional Court.

**II.2 Mergers and acquisitions**a) *Statistics on number, size and type of mergers notified and/or controlled under competition law***Table 2**

Mergers notified under Section 39 (6) of the ARC (Section 23 of the old version of the ARC) and effected from 1973 to 2004

<b>Year</b>	<b>Mergers</b>
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	1.138
2002	1.317
2003	1.135
2004	1206
<b>Total</b>	<b>33.234</b>



A breakdown according to examination category:

**Table 3**

	1997	1998	1999	2000	2001	2002	2003	2004
Mergers notified and reviewed prior to completion	1,207	1,300	1,147	1,359	1,122	1,272	1,111	1,184
Mergers notified after completion and subject to control	362	391	32 <sup>1</sup>	70	16	45	24	22
MERGERS NOT SUBJECT TO CONTROL	182	197	3	-	-	-	-	-
Completed mergers total	1,751	1,888	1,182	1,429	1,138	1,317	1135	1,206

A breakdown according to type of merger:

**Table 4**

	2003	2004
Acquisition of assets	302	299
Acquisition of shares	510	615
of which acquisition of minority interest	47	42
of which: acquisition of minority interest <i>without</i> control	38	35
acquisition of minority interest <i>with</i> control	9	7
of which: acquisition of majority interest	463	573
of which: acquisition of majority interest <i>without</i> control	51	42
acquisition of majority interest <i>with</i> control	412	53
Establishment of a joint venture (JV)	149	99
Establishment of a JV with joint control	100	91
Acquisition of control by rights, contracts, or other means	28	33
Joint control by rights, contracts, or other means	11	18
Change of control	17	40
Competitively significant influence	18	11
	1 135	1 206

Remark: These concentrations were adapted to the new changes in this area introduced in the 6th amendment of the ARC.

<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 been disregarded in violation of the ban on putting a merger into effect.

28. By type of diversification, horizontal mergers (1.002, of which 106 were without and 896 with product diversification) clearly dominated again in 2003 as in previous years. The number of notifications of vertical mergers dropped to 20 and the number of conglomerate mergers rose to 110.

*b) Summary of significant cases*

aa) Prohibition or prevention of mergers

29. In July 2004 the Bundeskartellamt prohibited the electricity and gas provider Mainova AG, Frankfurt am Main, from acquiring a 17.5 per cent stake in Aschaffenburg Versorgungs GmbH, the energy subsidiary of the Aschaffenburg municipal utilities.

30. The examination of the project showed that the planned participation was likely to result in a strengthening of dominant positions in the regional and local markets for gas sales. In particular, the markets for the supply of gas to distributors and to small customers were affected. In the view of the Bundeskartellamt a further strengthening of dominance would have increased the companies' scope for action, and thus also their leeway for setting prices, to the detriment of the consumers. The Bundeskartellamt continues to define markets in the gas sector, which is still characterised by a below-average transmission competition, in regional terms, according to the geographical range of the transmission networks. Thus, regional companies such as Mainova usually also have a dominant position that would be strengthened by a participation in a municipal utility as a customer. The companies appealed against this decision to the Higher Regional Court in Düsseldorf.

31. Furthermore, in August 2004 the Bundeskartellamt prohibited Gruner + Jahr AG & Co. KG, Hamburg, from purchasing the licence for publishing the German edition of "National Geographic". The concentration had already been realised in 1999. Although Gruner + Jahr had notified the Bundeskartellamt in 1998 of the establishment of the equal joint venture G+J/RBA & Co. KG with the Spanish enterprise RBA Publicaciones Internacionales, S.A., Barcelona, it failed to indicate the intended purchase of the licence for publishing the German edition of National Geographic. The Bundeskartellamt only gained knowledge of the licence purchase in the summer of 2003 when Gruner + Jahr enquired about the possibility of assuming sole control over the joint venture. In early 2004 the authority initiated ex officio proceedings on the licence purchase of 1999.

32. Although the German edition of National Geographic was not published before the licence purchase in 1999 the purchase nevertheless constitutes a concentration. The decisive factor here is that the brand name "National Geographic" of the US edition already had a market presence in Germany on which Gruner + Jahr could build when publishing the first German edition. Since Gruner + Jahr also publishes the journals "GEO" and "P.M." it had a dominant position on the German reader market for popular science journals even before the concentration with a market share of more than 60 per cent which was no longer subject to competition control. With the German edition of "National Geographic" the market share of Gruner + Jahr rose to approximately 75 per cent. Given the high market share, the significant increase in market share, the strong lead over other competitors, the high barriers to market entry and the integration of Gruner + Jahr in the financially strong and well-established Bertelsmann media group, the concentration had strengthened the dominant position of Gruner + Jahr and therefore had to be prohibited.

33. In a further decision the Bundeskartellamt also prohibited the intended purchase by Gruner + Jahr of all shares and therefore the sole control over the equal joint venture which was notified in April 2004. The proposed concentration would have led to a further worsening of the competitive situation on the reader market for popular science journals in Germany, because it would have secured and strengthened the dominant position of Gruner + Jahr.

34. The former Bundeskartellamt decision was overruled whereas the later was confirmed by the Düsseldorf Higher Regional Court. Both cases are now pending at the Federal Supreme Court.

35. In September 2004 the Bundeskartellamt prohibited the planned acquisition of all assets of AGRO Federkernproduktions GmbH (AGRO), Bad Essen, by the American Leggett & Platt Group. The planned concentration would have resulted in a dominant position of Leggett & Platt and AGRO in the national market for wire spring cores used in mattresses and upholstered furniture. Spring cores are used as an essential supporting component in mattresses and upholstered furniture. Bonnell spring cores and pocket spring cores are best known to consumers for their use in mattresses.

36. With a market share of close to 50 per cent, AGRO is the leading company in this market in Germany. After the concentration the combined market share of AGRO and Leggett & Platt would have amounted to more than 60 per cent. Other competitors are in particular small, privately run companies that would hardly be able to compete with the joint market power of AGRO and Leggett & Platt. Leggett & Platt is also the leading company in Europe, followed by AGRO. Their joint market share in Europe would have exceeded that in Germany. In the United States Leggett & Platt enjoys an almost monopolistic position. In addition, Leggett & Platt dominates the upstream market for machines used in the manufacture of spring cores via its subsidiary Spühl AG, Switzerland.

37. In March 2005 the Bundeskartellamt also prohibited S-W Verlag, Mayen, from acquiring three editions of the advertiser "Wochenspiegel" from S-W Lokalanzeiger-Wochenspiegel, Mayen. The merger dates back to 1996. At that time S-W Verlag had acquired the right of publication and title use rights of the Mayen, Cochen and Zell editions of the advertiser "Wochenspiegel" from S-W Lokalanzeiger-Wochenspiegel. The Bundeskartellamt gained knowledge of this in the summer of 2004 in another proceeding and initiated merger control proceedings. Originally these three editions were transferred from S-W Verlag to S-W Lokalanzeiger-Wochenspiegel on the basis of a final prohibition by the Bundeskartellamt in 1988 followed by a voluntary dissolution in 1989. The later re-acquisition by S-W Verlag, which insofar reversed the voluntary dissolution of 1989, had not been notified to the Bundeskartellamt.

38. Mittelrhein-Verlag and the Weiss group each hold a 50 per cent share in S-W Verlag. Mittelrhein-Verlag publishes the subscription daily "Rhein-Zeitung" in northern Rhineland Palatinate. It enjoys the position of sole newspaper in extensive parts of its area of distribution, for example in the Mayen area and in the administrative district of Cochem-Zell. The key business of the Weiss Group is offset printing. Advertisers, newspapers, brochures and magazines are printed in the group's printing houses.

39. The merger has strengthened the dominant positions held by Mittelrhein-Verlag in the regional advertising markets in the administrative district of Cochem-Zell and the Mayen area. On the whole the re-acquisition has further worsened competitive structures in the advertising markets affected. The scope of action of Mittelrhein-Verlag with its "Rheinzeitung" has further expanded, reinforcing its dominant market position. The companies can appeal against the Bundeskartellamt's decision at the Düsseldorf Higher Regional Court.

40. Moreover, in March 2005 the Bundeskartellamt prohibited two hospital mergers. Firstly, it prohibited Rhön-Klinikum AG (Rhön), Bad Neustadt/Saale, from acquiring the two hospitals of the administrative district of Rhön-Grabfeld in Bad Neustadt (200 beds) and Mellrichstadt (70 beds) in order to prevent a further strengthening of Rhön's dominant position in the markets concerned.

41. Rhön is one of the leading private hospital groups in Germany. The company's principal shareholders are Bayerische Hypo- und Vereinsbank and the Münch family. Rhön currently operates 30

clinics in Germany and achieves a turnover of more than 1 billion €. Since the summer of 2004 alone the company has taken over nine hospitals with more than 3,000 beds.

42. The product market affected by the takeover is the market for acute hospitals which covers all general hospitals and specialised clinics, but not rehabilitation and other nursing centres. A narrower market definition, e.g. covering specialised hospital departments, would not have been appropriate as the specialised departments of internal medicine, surgery and gynaecology found in almost any general hospital account for two thirds of all hospital beds anyway.

43. In geographic terms, the Bundeskartellamt has defined two relevant geographic markets, the Bad Neustadt / Bad Kissingen market and the Meiningen market. The geographic market definition was based on a comprehensive survey of patient flows within a greater area of about 100 x 120 kilometres. The investigations showed that a vast majority of patients only choose hospitals located within a relatively short distance to their home.

44. The planned concentration would have strengthened Rhön's existing dominant positions in the markets mentioned above. In the Bad Neustadt / Bad Kissingen market, an area in which Rhön already owns five clinics (as well as a further three clinics in the surrounding area), its market shares would have increased by approx. 25 per cent to approx. 65 per cent, and in Meiningen to approx. 60 per cent.

45. The seller, the administrative district of Rhön-Grabfeld, has argued that the preconditions for a so-called reorganisation merger are fulfilled. The Bundeskartellamt could not subscribe to this view. The precondition for clearing a project as a reorganisation merger is that the conditions of competition would worsen even without the merger, because without the takeover the target company would disappear from the market and, as no alternative acquirer exists, the market shares would automatically fall to the sole acquirer. According to the Bundeskartellamt's findings in the present case at least one further potential acquirer exists whose acquisition of the district's hospitals would not cause any restraints of competition. At any rate the administrative district has not proven that the hospitals are unsellable. For this reason alone the preconditions for a reorganisation merger did not exist.

46. In a second hospital merger, the Bundeskartellamt prohibited Rhön-Klinikum AG (Rhön), Bad Neustadt/Saale, from acquiring the municipal hospital in Eisenhüttenstadt with more than 300 beds in order to prevent a further strengthening of Rhön's dominant position in the market concerned in the Frankfurt/Oder region.

47. The planned merger would have strengthened Rhön's already dominant position in the hospital market in the Frankfurt/Oder region because it already owns the local clinic which is the principal hospital for this region. With the acquisition of the neighbouring hospital in Eisenhüttenstadt Rhön's share of the market would have increased by around 20 per cent to over 75 per cent. Based on the knowledge acquired from the competitive bidding for the Eisenhüttenstadt hospital it can be assumed that there are other potential acquirers providing equivalent medical services who would not diminish competition.

48. Additionally, in June 2005 the Bundeskartellamt prohibited the merger between Volksfreund-Druckerei Nikolaus Koch GmbH, Trier, a member of the Holtzbrinck group, and TW Wochenspiegel GmbH & Co. KG, Monschau. The merger dates back to 1996. At the time Volksfreund-Druckerei, which publishes the subscription daily "Trierischer Volksfreund" in western Rhineland-Palatinate, had acquired a 24.9 per cent share in "Wochenspiegel", an advertising journal with a comparable regional circulation. The Bundeskartellamt gained knowledge of this acquisition in the summer of 2004 in another proceeding and initiated merger control proceedings. The merger strengthened the dominant position of Volksfreund-Druckerei in the regional advertising market covering the entire distribution area of Trierischer Volksfreund, and consequently secured it a dominant position in the relevant reader market.

bb) Clearances subject to conditions and obligations

49. In August 2004 the Bundeskartellamt cleared the planned acquisition of InVision Technologies, Inc., Newark (USA) by the General Electric Company, Fairfield (USA) subject to conditions. The project was also examined by other competition authorities in Europe and America and was dealt with by the Bundeskartellamt in close cooperation with the US Federal Trade Commission (FTC) in particular.

50. The case raised competition concerns in the field of x-ray systems for non-destructive testing (NDT). Such systems are used to detect material defects in all kinds of different products without destroying the product or reducing its quality. Since General Electric and InVision would have gained a dominant position in this market in Germany through the merger, the Bundeskartellamt only cleared the project under the condition that the InVision subsidiaries that are active in the same area were sold.

51. In the course of the US merger control proceedings the parties had also offered to sell the respective InVision subsidiaries. In close cooperation, the Bundeskartellamt and the FTC reached an agreement not only on the respective conditions and time limits but also on the nomination of a security trustee from the start to prevent potentially conflicting provisions.

52. What is more, in February 2005 the Bundeskartellamt cleared the takeover of RWE Umwelt AG ("RWE Umwelt") by Remondis Beteiligungs GmbH ("Remondis") subject to conditions and obligations. Remondis is part of the Remondis (formerly: Rethmann) group, currently the secondlargest waste disposal company in Germany. Following the Bundeskartellamt's decision shares in companies, facilities and collection contracts in the areas of the collection and transport of recovered glass, the reprocessing of recovered glass and the recycling of refrigerating and freezing equipment have to be divested as well as Remondis' share in Interseroh AG ("Interseroh"). Before the merger was notified about 30 per cent of RWE Umwelt's domestic turnover volume had already been hived off, e.g. some of RWE Umwelt's activities in North Rhine-Westphalia and the new German Länder as well as activities in Hesse and Lower Saxony. Foreign investments were also sold to third parties prior to the merger.

53. Both Remondis and RWE Umwelt are active in all of the major German waste disposal markets. The parties to the merger already eliminated obvious competition problems in the markets for the collection and transport of residual waste, in neighbouring collection markets and in the markets for the downstream disposal of municipal waste, particularly in North Rhine-Westphalia and the new German Länder by hiving off some activities of RWE Umwelt in the run-up stage. Therefore no further obligations and conditions were required for these markets.

54. However, the merger would have led to competition problems in several other markets. According to the Bundeskartellamt's findings a dominant oligopoly of Remondis and Interseroh would thus have been created in the market for the area-wide disposal of waste from commercial sources (e.g. retail branches). The main reason for this was the fact that Remondis holds a minority share in Interseroh and appoints the chairman of the supervisory board while RWE Umwelt is Interseroh's biggest competitor. A further special feature is the fact that Interseroh itself is not active in operations but uses other waste disposal companies, such as Remondis, for these activities, which to a large extent are themselves also shareholders in Interseroh. RWE Umwelt was one of the few large waste disposal companies which did not hold shares in Interseroh. The merger would have eliminated RWE Umwelt's competition potential. To prevent this the merger was cleared subject to the suspensive condition that before the merger is put into effect Remondis irrevocably transfers its shares in Interseroh to a trustee, sells them within a certain time limit and cuts all further links with Interseroh, particularly management interlocks.

55. In the market for the collection and transport of recovered glass in the North Rhine-Westphalia area and the markets for reprocessing recovered glass and recycling refrigerating and freezing equipment

the merger would have resulted in Remondis having positions of single firm dominance. The company would have achieved market shares exceeding (in some cases considerably) the threshold for presuming dominance and gained a very considerable market share advantage over all other competitors. Under the obligations Remondis now has to sell, within fixed time limits, a total of twelve collection contracts for recovered glass in North Rhine-Westphalia and neighbouring Länder, three glass reprocessing plants and shares in two further glass reprocessing plants as well as three recycling plants for refrigerating and freezing equipment. In the market for the collection and transport of recovered glass in North Rhine Westphalia Remondis' market share will be smaller after the merger than it was before. There will be no market share addition in the market for glass reprocessing; in the market for the recycling of refrigerating and freezing equipment the addition will be marginal and will not result in Remondis' share exceeding 30 per cent.

56. In April 2005 in the hospital market, the Bundeskartellamt cleared the acquisition of a majority share in Landesbetrieb Krankenhäuser Hamburg GmbH (LBK Hamburg) by Asklepios Kliniken GmbH (Asklepios), Königstein-Falkenstein, under the condition that one of the LBK hospitals be sold to a third party. In this way a strengthening of the dominant position held by the companies concerned in the Hamburg hospital market was prevented.

57. The general hospitals of the City of Hamburg are centralized in the LBK Hamburg. LBK Hamburg consists in total of seven major hospitals, which in 2003 achieved a turnover of approx. 750 mio. Euro. LBK Hamburg has more than 5,000 beds and with 40 special disciplines and over 100 special departments covers the entire spectrum of medical care services. The City of Hamburg is to retain a minority shareholding and take co-control of LBK-Hamburg. The City of Hamburg also has further medical institutions such as the University Clinic in Eppendorf and in its capacity as hospital planning authority also determines the allocation of funds and the registration of hospitals in the municipal hospital plan of the City of Hamburg. Asklepios is one of the leading private hospital groups in Germany. Its sole shareholder is the lawyer and accountant Dr. Bernard Broermann. In Germany Asklepios operates approx. 50 institutions, including hospitals, rehabilitation clinics and other social institutions. Asklepios also holds management contracts with other hospital authorities. With its own clinics Asklepios achieves a turnover of more than 700 mio. Euro.

58. Due to the merger project the City of Hamburg's existing dominant position in the Hamburg hospital market (approx. 60 per cent market share) would have been strengthened, particularly because Asklepios is already active in the market with a hospital in Hamburg-Rissen. However these strengthening effects are compensated by the sale of one LBK Hamburg hospital because each of these hospitals has a considerably higher number of cases and therefore a greater market share than the Asklepios hospital in Hamburg-Rissen. The obligation to divest is to be fulfilled within a fixed time limit set by the Bundeskartellamt. The planned acquisition could thus be cleared.

cc) Clearances and withdrawal of application

59. In August 2004 the Bundeskartellamt cleared the planned acquisition of shares in Viva Media AG, Cologne, by Viacom Inc., New York. The takeover does not lead to the creation or strengthening of a dominant position in any of the markets concerned, in particular not in the television advertising market. Consequently it was possible to clear the project in the first phase.

60. Viacom is an American company with worldwide activities in various fields of the media and entertainment business. In Germany Viacom's business activities include the operation of the music TV stations MTV and MTV2Pop which are financed by advertising. Viacom is also active in Germany in the sale of licenses for films and television series as well as various other sidelines. Viva Media is a TV and communications company, whose core business is the operation of the music TV stations Viva and Viva

Plus which are financed by advertising. Viva Media's activities, among others, also include the licensing of its own TV productions via its subsidiary Brainpool TV GmbH, Cologne.

61. The merger mainly affects the television advertising market with advertising companies on the demand side and TV stations offering advertising slots on the supply side. MTV and Viva have only an insignificant market share of this market which is dominated by the two large TV stations RTL and ProSieben Sat1 so that the merger will not result in market structure changes which would be harmful to competition. Neither can market dominance be assumed when considering the age group targeted by the music TV stations, which is mainly an audience of 14-29 years of age, which is interested in music. According to the Bundeskartellamt's findings advertising customers targeting principally this age group also advertise via other large TV stations which generally have a significantly wider range of audience. Via these stations advertisers can reach a considerably larger audience among the above age group in particular through music programmes than they can achieve via the music stations. The larger TV stations are also in a position to increase their range of music programmes at any given time. Thus even with respect to such a narrowly defined advertising segment there can be no objection to the planned acquisition.

62. In the period covered by the report, apart from some smaller cases, the Bundeskartellamt had to decide on the jointly notified acquisition of the broadband cable networks owned by Ish (North Rhine-Westphalia), Kabel BW (Baden-Württemberg) and Iesy (Hesse) by Kabel Deutschland (KDG). Originally the European Commission had been in charge of examining the acquisition under merger control law. Upon request the proceedings were referred to the Bundeskartellamt.

63. Particularly affected by this concentration was the market for feeding in television programmes including the provision of technical services for free TV and pay TV. Extensive Bundeskartellamt investigations showed that the different transmission paths for TV signals (cable, satellite, terrestrial or DVB-T), are not interchangeable, but complementary. The suppliers of TV programmes thus cannot operate without feeding programmes into the broadband cable which reaches 56 per cent of all households. Moreover, under KDG's strategy of using its own digital platform for coding and decoding TV programmes, end customers could be forced in the future to acquire such a box, and the market could be foreclosed to other pay TV suppliers.

64. In a preliminary evaluation of the projects the Bundeskartellamt concluded that the concentrations were likely to strengthen KDG's dominant position as, on the one hand, they would lead to an extension of KDG's scope of action to other networks and, on the other, they would affect potential competition between KDG and Ish, KBW and Iesy. Clearing the proposed concentrations by applying the balancing clause could not be considered as the parties did not prove that the concentrations would have led to improvements on the markets for broadband Internet access or broadband Internet use dominated by Deutsche Telekom, or the end consumer market for pay TV dominated by Premiere.

65. After the Bundeskartellamt had informed the notifying parties of its preliminary evaluation of the concentrations they announced that they would give up the projects and withdrew the notifications.

66. By contrast, in the summer of 2005 the Bundeskartellamt cleared the mergers for the acquisition of control of Kabelnetz NRW HoldCo GmbH (Ish), Cologne, notified both by Iesy Repository GmbH (Iesy), Hamburg, and BC Partners Holdings Ltd. (BC Partners), Guernsey.

67. Both proposals are the subject of separate merger control proceedings referred to the Bundeskartellamt by the European Commission. The decision by the owners of Ish as to whom the company should be sold is independent of the examination by the Bundeskartellamt and still pending. According to the Bundeskartellamt's estimation none of the two merger projects would result in the creation or strengthening of a dominant position of the participating companies in the affected markets.

68. Other than in the Iesy / Ish case or in the KDG / Ish / Iesy / KBW merger project examined in 2004 the BC Partners / Ish case does not involve a horizontal merger of competitors on network level 3, but the first significant case of vertical integration on network levels 3 and 4 since the Bundeskartellamt's decision in the Liberty / KDG case in 2002. The Bundeskartellamt does not visualize a strengthening effect in the input market in this specific case since the ensuing loss of infrastructure competition from BC Partners or its subsidiary TeleColumbus by the construction of their own network level 3 systems, is estimated to be very negligible. There is also no indication in the case under examination of a worsening of structural conditions in the end customer markets since the significant competition for licence agreements will not be affected due to the loss of TeleColumbus as an exclusively network level 4 operator. Finally, in the Bundeskartellamt's view any relevant securing of sales opportunities by Ish in the signal supply markets is unlikely due to the possibility of competitors to supply end customers directly via licence agreements and in view of TeleColumbus's already limited opportunities to switch to alternative areas.

69. In December 2004, the Bundeskartellamt cleared the acquisition of all the shares in the DPC Digital Payout Center GmbH, Unterföhring, of Premiere Fernsehen GmbH & Co. KG, Unterföhring, by SES Global Europe S.A., Betzdorf/Luxemburg. The takeover affects the market for broadcasting satellite programmes and the pay TV end consumer market in Germany.

70. SES Global operates the ASTRA satellite fleet in Europe and in particular provides transponder capacity to broadcasting service providers for the transmission of programmes via satellite to end consumers (DTH "direct to home"). DPC currently provides Premiere with intracompany technical services for pay TV (so-called digital platform: encoding, SmartCard management, set-top boxes). On conclusion of the takeover, SES Astra will open up this digital platform, which until now has been owned by Premiere, to all interested pay TV providers.

71. The merger will lead to a strengthening of SES Astra's dominant position in the national market for DTH transponders. However, the unbundling of the digital platform for pay TV from Premiere will result in improved conditions of competition in the national pay TV market and on this basis the planned merger was to be cleared (balancing clause). The strengthening of SES Astra's dominant position results from the vertical integration of the dominant satellite provider with the only service provider which is able to grant access to the Premiere set top boxes for satellite reception. Thus, two essential technical components of pay TV advance services with net characteristics are bundled under one provider.

72. In June 2005 the Bundeskartellamt also cleared the acquisition by Deutsche Post AG of KarstadtQuelle's logistics sector "large and part-load operations" and the GPL Gesellschaft für Privatkundenlogistik mbH & Co KG ("GPL").

73. Firstly, the planned concentration concerns large and part-load operations at the goods distribution centres of the mail order companies Quelle and Neckermann and the delivery of the goods stored there to end customers. Secondly, Deutsche Post AG acquires approx. 90 per cent of the shares in GPL in which it has already held an approx. 10 per cent share.

74. At the end of last year the Bundeskartellamt already cleared Deutsche Post AG's acquisition of KarstadtQuelle AG's logistics activities in the stationary retail sector. The concentration project now cleared does not cover Quelle's and Neckermann's so-called "parcel factories" where the traditional mail order parcels are packed.

75. The acquisition of the "large and part-load operations" logistics sector and the GPL could be cleared because it does not lead to the creation of a dominant position held by Deutsche Post AG in the affected markets for contract logistics and handling of packaged goods. The planned concentration also affects the downstream market for parcel transport services in so far as the goods are delivered to end



customers in the form of parcels. There is a close competition-relevant relationship between the upstream market for contract logistics and the downstream market for parcel transport as a company which offers both services can achieve cost advantages due to synergy effects. This was confirmed by comprehensive surveys of buyers of parcel services and companies which offer parcel services themselves. Deutsche Post AG is dominant in the market for transporting commercial customers' parcels to private end customers. This dominant position, however, will not be strengthened as the annual volume of parcels dispatched by the business sector to be taken over is assessed as negligible in comparison to both the total market volume and the volume of parcels otherwise dispatched by KarstadtQuelle AG.

dd) Activities of the Courts

76. During the reporting period the Federal Supreme Court decided several merger control cases. In the "Sanacorp/ANZAG" case it gave its opinion on the geographic definition of regional market segments. In the "vacuum cleaner bag market" it stipulated that the relevant geographic market under merger control should be defined according to economic aspects and is not necessarily limited to the scope of application of the law. (cf. Section 19 (2) sentence 3 of the ARC). In the "Deutsche Post/trans-o-flex" case the Federal Supreme Court specified that a merger strengthens the dominant position of a company if it secures this against competition to be expected in the future from a further competitor and by doing so already influences the current market position of the dominant company.

77. The merger control decisions taken by the Düsseldorf Higher Regional Court focused mainly on the "print media" sector (cf. the "Georg von Holtzbrinck/Berliner Verlag" and "Lausitzer Rundschau/KG Wochenkurier") cases as well as "local public transport" (cf. "DB Regio/üstra" and "Deutsche Bahn/KVS" cases).

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

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

79. It continued to actively participate in conferences and several working groups of the International Competition Network which was established in 2001. In September 2004 the President of the Bundeskartellamt was elected Chairman of the ICN. In June 2005 the Bundeskartellamt hosted the fourth ICN Annual Conference with over 400 participants from more than 80 competition authorities. This conference took place in Bonn back to back with the 12. International Conference on Competition under the theme "The Competition Principle as a Guideline for Legislation and State Action – The Responsibilities of Politics and the Role of Competition Authorities". As always, the panellists included politicians, entrepreneurs and academics.

80. When the EU Regulation 1/2003 came into force on 1 May 2004 the European Competition Network, of which the Bundeskartellamt is a member, was launched. One practical aspect of this new network is that the competition authorities of the EU member states and the Commission now inform one another of ongoing proceedings. By establishing the European Competition Network (ECN) considerable progress has been made in combating cross-border restraints of competition. Practice has shown that the competition authorities of the Member States and the European Commission have used the cooperation possibilities offered by Regulation 1/2003 successfully.

81. By the end of 2004 a total of 301 cases had been posted on the joint intranet of the competition authorities. The Bundeskartellamt itself notified over 34 of its own cases. Use has also already been made of the new competences on the exchange of information and official assistance. In one case the

Bundeskartellamt carried out a search on behalf of the Italian competition authority. In this case, in which extensive market investigations substantiated the suspicion of price fixing and a sealing-off of the Italian market for baby milk, the Italian competition authority asked for a search to be conducted in Germany as part of the cooperation outlined in Article 22 of Regulation 1/2003. In another case the Bundeskartellamt received official assistance from the Austrian competition authority (suspicion of anti-competitive agreements in the purchasing of waste paper). An exchange of confidential information took place between the Bundeskartellamt and other competition authorities in the ECN in this and other cases on the basis of Article 12 of Regulation 1/2003.

82. Within the scope of the forum of the European Competition Authorities (ECA), which has been in existence since April 2001 and unites the competition authorities of the states of the European Economic Area, the European Commission and the EFTA supervisory authority, meetings took place between the heads of the authorities in Oslo in September 2003 and Trier in May 2004. The Oslo meeting dealt inter alia with competition issues in air traffic, energy and health. In Trier the competition authorities of all the new member states which joined the EU on 1 May 2004 were represented for the first time in the ECA. Here it was decided to maintain the existing working groups “Multijurisdictional Mergers” and “Air Traffic” and also to create a joint platform for the organisation of the exchange of officials between the national competition authorities.

83. At national level the Bundeskartellamt again organised the annual meeting of the Working Group on Competition Law in 2004 at which university professors from law and economics faculties as well as judges from the cartel divisions of the Düsseldorf Higher Regional Court and the Federal Supreme Court discussed the role of consumer interests and the application of new economic methods in the protection of competition. This event met with great interest among the professional public.

84. Finally the Bundeskartellamt has contributed to the legislative process with its own comments on both the ministerial draft of the Federal Ministry of Economics and Labour and the government draft on the seventh amendment of the ARC. This also applies to legislative projects in the telecommunications and energy sector. In the reporting period the Monopolies Commission presented its 15th opinion and several special opinions on the telecommunications and postal sector and waste management and recycling sector, on the reform of the Telecommunications Act and the ARC and two opinions on the planned merger of Georg von Holtzbrinck GmbH & Co. KG with Berliner Verlag GmbH & Co. KG.

#### **IV. Resources of competition authorities**

##### ***IV.1 Overall resources***

###### *a) Annual budget (in Euro and USD)*

<b>Budget 2005</b>		<b>Change vis-à-vis 2004</b>
Euro	17.0 mio	+0.1 mio
USD <sup>2</sup>	21.05 mio	+ 0.124 mio

<sup>2</sup> Exchange rate as of 5 August 2005; 1 Euro = 1.2381 USD.

b) *Number of employees*

	<b>number</b>	<b>Change vis-à-vis 2004</b>
Economists	51	+8
Lawyers	73	-6
Other experts	7	-2
Support staff	152	+7
Total	283	+7

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**IV.2** *Human resources (person-year) applied in enforcement of abuse control of anticompetitive practices, merger review and enforcement and advocacy efforts*

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

**V. Summaries of or references to new reports and studies on competition policy issues**

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