

GERMANY

*(July 1999 - June 2000)***Table of contents**

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Executive Summary

1) *Legislation*

The 6th Amendment to the ARC¹ has been in force since 1 January 1999. The main content and objectives of the amendment were described in detail in previous Annual Reports. The Bundeskartellamt conducted various proceedings relating to offences newly introduced into the Act, for example the "refusal to allow another undertaking access to networks or other infrastructure facilities" or "using market power to offer goods or services below their cost price"². The amendments have already had an effect on merger control as well. Raising the turnovers to be achieved by the participating undertakings world-wide and on the domestic market (so-called thresholds) which trigger merger control and raising the *de minimis* thresholds has contributed to a reduction in the number of cases to be examined. In 1999, the Bundeskartellamt's statistics recorded 706 fewer merger cases than in 1998. However, the relatively brief experience does not yet allow any well-founded statements to be made on the effect of the new provisions. Comments on experience gained in applying the amendment will therefore be reserved for subsequent reports.

2) *Agreements / abusive practices by dominant firms*

In an effort to combat cartels in the first half of 2000 the Bundeskartellamt conducted search operations in two industries suspected of concluding price and quota fixings agreements. Undertakings operating in the field of ready-mixed concrete were again involved. This time, the investigation also included undertakings which provide ready-mixed concrete pumps on loan. New proceedings have been instituted against undertakings in the field of paper wholesale.

Abuse control measures essentially focused on the energy sector. The objective of the proceedings in the electricity and gas supply sectors was the implementation of the new provisions of the Energy Act with a view to market liberalisation. In its proceedings against major mineral oil companies, the Bundeskartellamt prohibited these companies from demanding higher prices for supplying medium-sized petrol stations not affiliated to them than they charge final consumers at their own petrol stations.

3) *Merger control*

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

- Prohibition or prevention of mergers
- Henkel/Luhns (all-purpose detergents); WAZ/OTZ (daily newspapers); Melitta/Schultink (vacuum cleaner bags)
- Clearance subject to conditions and obligations
- RWE/VEW (electricity, gas, waste disposal); VEW/Westfälische Ferngas/Westfälische Gasversorgung (natural gas)
- Important clearances
- Covisint (Internet exchange); Krauss-Maffei-Wegmann/MaK System GmbH/Alvis Vehicles (manufacture of an armoured transport vehicle); Holsten Brauerei AG/König-Brauerei GmbH & Co. KG (breweries); MZO/Nordmilch/MEN/Bremerland/Hansano (dairy products); Cisco/IBM (active data network components)
- For further proceedings that were cleared on conclusion of the main investigation, see footnote³.
- Withdrawal of applications
- VAW AG/Gränges AB (aluminium foils); Edeka/Markant (joint purchasing)

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

1) *Summary of new legal provisions of competition law and related legislation*

During the reporting period two amendments or supplements were introduced into the ARC:

1. A supplement to the rules on jurisdiction contained in the procedural provisions in Part III of the ARC came into force on 1 January 2000⁴. The changes arise from the "Act relating to the revision of statutory health insurance from the year 2000 onwards"⁵, which was passed by the German parliament (Deutscher Bundestag). Under this act, all disputes arising from the legal relationships between health insurance companies and so-called health care providers (e.g. doctors, dentists, pharmacies and hospitals as well as their associations) now come exclusively within the special jurisdiction of the social courts. This also applies to civil disputes arising from the ARC or from cartel agreements and cartel decisions. Before the ARC amendment, these cases came within the exclusive competency of the regional courts' ordinary jurisdiction. It is not yet clear whether, after the amendment to the Act, competition authorities will still be authorised under the ARC to intervene in the legal relationships between statutory health insurance companies and their health care providers, e.g. in the case of agreements on terms of delivery.

2. A further amendment came into force on 1 July 2000. It relates to resale price maintenance (RPM) for published products, which is regulated by law in Germany, and to the provision under Section 15 of the ARC resulting from it stipulating that the prohibition of agreements concerning prices or terms of business shall not apply to published products. In its pending proceedings relating to the permission of cross-border resale price maintenance for published products with regard to the relationship between Germany and Austria, the European Commission had informed the parties on 8 February 2000 that it was willing to accept the existing resale price maintenance for published goods in Germany and a statutory resale price maintenance for published goods to be newly established in Austria. The European Commission is also prepared to accept a provision regarding the re-importation of printed goods. It should be limited to cases in which it is obvious from the objective circumstances that these printed goods were exported exclusively for the purpose of re-importation in order to circumvent resale price maintenance in Germany. The German legislator complied with this desire by amending Section 15 (1) of the ARC which made clear that re-importing German books in order to circumvent national resale price maintenance is not permissible. Moreover, the supplement to the ARC made clear that the resale price maintenance of a German publishing house is not automatically violated if it cannot be ruled out that books subject to domestic resale price maintenance will be imported under European law which is not subject to resale price maintenance.

2) *Other relevant measures, including new guidelines*

3. In April 2000 the Bundeskartellamt published guidelines relating to the setting of fines ("leniency programme") for members of hardcore cartels who voluntarily come forward and make a decisive contribution to uncovering the cartel. The Bundeskartellamt wants to give incentives to refrain from participating in the cartel thus breaking up the cartel from within. The announcement is closely related to principles applicable within the EU and the USA. A fine is not generally imposed if the informant is the first person to provide information that makes a decisive contribution to uncovering the cartel before preliminary investigations into the cartel have been initiated. As a condition the Bundeskartellamt must be provided with all the relevant information as well as the available documents and evidence relating to the cartel available to the member of the cartel and he must cooperate with the Bundeskartellamt during the entire duration of the proceedings. In addition the member of the cartel must not have played a decisive role in the cartel and must discontinue his participation in the cartel generally as soon as the Bundeskartellamt initiates searches that have an effect on the public, at the very latest when the Bundeskartellamt has served written charges on the cartel members. Subject to the same conditions, the

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fine for informants who cooperate with the Bundeskartellamt at a later date will be reduced by at least 50 percent. Any other details provided by an informant which considerably contribute to the cartel being uncovered may also be considered for a reduced fine. It will still be possible for an enterprise that has been injured by a cartel to lodge claims for damages since these will not be affected by the notice.

4. Since 1973 the tasks of the Bundeskartellamt include the control of concentrations of undertakings (merger control). The aim of merger control is to prevent concentrations of undertakings which create or strengthen dominant positions. Based on previous decisions and economic comments, the Bundeskartellamt drafted principles of interpretation intended to offer guidance in examining the question of market dominance. They are also intended to explain the competitive significance of individual criteria within the overall assessment that is required. The principles of interpretation shall be published and are to replace the first version of the principles of interpretation published in 1990 as a "check list" for merger control.

5. The revision became necessary on account of the change in the legal situation and the development of the practical application at the national (5th and 6th amendments to the ARC) and European levels. The new version not only takes into account the Bundeskartellamt's and the German courts' decision practices but also the merger control practice of the European Commission and the jurisdiction of the European Court of Justice including the court of first instance. In addition, administrative principles of non-European authorities were assessed, such as the Guidelines of the US competition authorities. Thus, in view of the growing significance of cross-border concentrations, merger control practice in Germany is increasingly being put into an international context. Against the background of the internationalisation of markets and the continuing technical development, updating the chapters "barriers to market entry/potential competition" and "market phase" was at the core of the new version. The statements regarding "oligopolistic market dominance" were substantially revised as well.

The updated principles are neither intended to exclude other interpretations of administrative practice and jurisdiction nor to impede further developments.

6. Examinations were instituted in various cases involving the food retail trade following complaints on suspicion of sales below cost price. The Bundeskartellamt subsequently drafted principles of interpretation for the ban on sales below cost price under cartel law (Section 20 (4) of the ARC). These principles will be published after interested associations have provided their comments. Under the ARC, undertakings with superior market power have been prohibited since 1999 from offering goods or services not merely occasionally below cost price unless there is an objective justification for doing so. The legislator assumed that the vague legal terms used in the provision, such as "cost price", would be specified through administrative practice and court decisions. Although the number of cases so far has been small and no court decisions are available, the Bundeskartellamt plans to start the process of defining concepts by drafting principles of interpretation. This will contribute to greater legal clarity. The comments made in the planned notice will mainly refer to the food retail trade since the Bundeskartellamt's investigations have so far been limited to this sector. In determining cost price, the Bundeskartellamt will base its calculations on the manufacturer's/supplier's list price, taking into consideration all the conditions which affect the price and are based on supply contracts. These include annual payments, but also additional goods-related agreements made in the course of a year. The Bundeskartellamt assumes that in principle all the conditions agreed between the supplier and the purchaser serve to increase sales of the item and are thus goods-related. The principles of interpretation can only serve as a guide, but cannot be a substitute for defining the specific cost price in individual cases.

3) *Government proposals for new legislation*

7. As part of the adaptation of laws containing signal amounts from DM to euro, it is planned to amend the ARC and the Law Governing Discounts, insofar as this act is still valid at the time in question.

This amendment concerns all the provisions of these acts which regulate fees, fines, administrative fines and bases of calculation.

8. In order to improve the German Monopolies Commission's⁶ records relating to concentration statistics, the introduction of a supplement to Section 47 of the ARC is intended. Under Section 44 (1) sentence 1 of the ARC, the statutory function of the Monopolies Commission regarding merger control is to outline and assess the development of business concentration. The data provided so far from official statistics are based on the survey units of undertakings representing the smallest legally independent unit in each case. Company associations in the form of groups of enterprises or other groups are not taken into account. As a consequence, part of the calculation of the relevant grades of concentration is substantially distorted which does not allow a reliable assessment for economic and competition policies. In order to solve this problem, a supplement to Section 47 of the ARC is intended to permit existing statistical data from economic statistics to be combined with data based on generally accessible sources. This amendment will be included in connection with the introduction of statistics on services. This "service statistics act" is intended to be put into force by 1 January 2001.

9. The EU directive's decree regarding electronic commerce which came into force on 17 July 2000 caused a debate in Germany on two provisions regulating discounts between suppliers and their customers. These are the Law on Bonuses which came into force in 1932 and the "law on price reductions (Law Governing Discounts)" which came into force in 1933. Both provisions in their current wording no longer comply with the requirements of the economy and consumers. They are considerably stricter than comparable regulations in the other EU Member States. They may lead to discrimination of residents since under the EU Directive "Electronic Commerce", foreign undertakings offering goods and services in Germany via the Internet merely have to comply with the law governing discounts of their respective countries which is much less restrictive. The Federal Government is therefore examining measures for reforming the discount and bonus laws. The examination will have to deal with the question whether the Unfair Competition Act (UCA)⁷ is to be adapted as well.

II. Enforcement of competition laws and policies

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

a) Summary of activities of competition authorities and courts

10. The work of the Bundeskartellamt in the reporting period focused on monitoring the ban on cartels and abuse control. The activities in the field of abuse control were essentially characterised by the liberalisation in the electricity and gas supply sectors. The Bundeskartellamt counteracted the foreclosure of the market by several decisions against energy companies that had refused third-party access to their networks. For the first time proceedings were conducted under Section 20 (4) of the ARC. This provision stipulates that it is not permissible for firms with superior market power to restrict small and medium-sized competitors by offering their goods or services not merely occasionally below their cost price.

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

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

11. Also in this reporting period the Bundeskartellamt conducted nation-wide search operations as a result of suspicions of price-fixing and quota agreements. The suspicion mentioned in the last report that firms in the ready-mixed concrete sector had already been agreeing on prices and quotas for certain regions over several years was confirmed. The Bundeskartellamt has evidence of agreements involving a delivery volume of over 22 million m³, covering 11 regional markets in four federal states. As a result, the firms were able to achieve average additional proceeds of around DM 10.- per m³ of concrete for the duration of the cartel. The total fines imposed so far in these proceedings for an infringement of Section 1 of the ARC were more than DM 308 million. This breaks a new record for fines relating to proceedings of this kind. It is expected that other fines will be imposed. Another search operation carried out in March 2000 targeted companies in the ready-mixed concrete and concrete pump sector. The documents seized during this operation have not yet been assessed.

12. In addition, approximately 20 premises of firms in the paper wholesale sector were searched on account of the suspicion of illegal price-fixing agreements. The material seized during these searches is currently being evaluated. It is not yet possible to state whether the suspicions will be confirmed and lead to the imposition of fines.

bb) Exemptions from the general ban on cartels

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

Table 1

Types of	Cartels Jan.-Dec.1999		Total number since 1958	Still effective as of Dec. 1999
	additions	deletions		
Condition cartels Sec. 2 (2) ARC	2	-	71	46
Rebate cartels (Sec. 3 ARC ^{old}) ⁸	-	-	34	6
Combined condition and rebate cartels	-	-	15	3
Crisis cartels Sec. 6 ARC	-	-	2	-
Standardisation cartels Sec. 2 (1) ARC	1	-	20	10
Rationalisation cartels Sec. 5 ARC	2	-	70	18

Specialisation cartels Sec. 3 ARC	2	-	129	31
Co-operation cartels Sec. 4 (1) ARC	6	-	143	131
Purchasing co-operation Sec. 4 (2) ARC	10	-	20	19
Export cartels (Sec. 6 (1) ARC ^{old}) ⁸	-	-	130	36
Import cartels (Sec. 7 ARC ^{old}) ⁸	-	-	2	-
Other cartels Sec. 7 ARC	-	-	-	-
Emergency cartels Sec. 8 ARC	-	-	4	-
Total	21	0	639	300

14. In this connection special attention should be drawn to the first examination proceedings arising from the exemption criterion contained in Section 7 of the ARC, which was introduced by the 6th Act to Amend the ARC. In conformity with Article 81 (3) EC, Section 7 of the ARC contains a supplemental exemption clause for the cases that are not covered by Sections 2-6 of the ARC.⁹ This first case in which the provision was applied involved the plan of three newspaper publishers to offer a combination rate for job advertisements aimed at a nation-wide circulation area. For this purpose a joint venture was to be set up in which all three parties would be equally represented. The enterprises involved in the project jointly had a market share that was well above the permanently high market share of the largest competitor, which had had a leading position in the market concerned for some years. First of all the merger control law aspects of the project were examined and cleared because it was not expected that a dominant position would be created or strengthened. The examination of cartel law aspects showed that the project involved a cartel under Section 1 of the ARC that did not meet the exemption criteria of Section 7 of the ARC. The Bundeskartellamt considered it doubtful that the product would be improved within the meaning of the provision. The cartel involved standardising and consolidating the market strategy of the three firms concerned, resulting in a narrowing of the supply. In the Bundeskartellamt's opinion, the product would not undergo any changes over and above this restraint of competition associated with the narrowing of supply. It was, however, not certain that the improvement could not be achieved other than by the cartelisation. In its decision the Bundeskartellamt interpreted Section 7 of the ARC with regard to its wording, systematic context and its meaning and purpose in such a way that it is not sufficient if the change in the product or offer (here: supply of advertising space for nation-wide job advertisements) that is aimed at or brought about by the cartel results principally or solely from a concentration of market power. The cartel would instead have to bring tangible objective advantages in the production or distribution of the goods. In the Bundeskartellamt's opinion restraints of competition aimed at obtaining market power could not be legalised under Section 7 of the ARC. The parties concerned lodged an appeal with the Berlin Court of Appeals, which was subsequently dismissed by the court. The decisions of the Bundeskartellamt and the Court of Appeals are not yet final since the parties concerned have an opportunity to lodge an appeal on points of law against the dismissal with the Federal Supreme Court.

15. In the first case involving the new possibility introduced by the 6th Act to Amend the ARC of granting clearance subject to obligations the Bundeskartellamt gave the Fleurop association permission to set up a rationalisation cartel in accordance with Section 5 of the ARC. At the same time the obligation was imposed that Fleurop must cancel the exclusive dealing agreement of the Fleurop members set out in the Fleurop terms of business. Fleurop is an association of florists offering a flower delivery service. In the Bundeskartellamt's opinion, the anticompetitive agreements between the Fleurop retailers would streamline and thus increase the efficiency of the enterprises concerned because they would make a reliable flower

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delivery service possible and therefore improve the market supply from the customer's point of view. Despite Fleurop's dominant position the agreements were commensurate with the provision because Fleurop fulfilled the obligation to cancel the exclusive dealing agreements responsible for this dominant position. The applicant has in the meantime withdrawn an appeal it submitted to the Berlin Court of Appeals against the obligation. The Bundeskartellamt's decision is therefore final.

16. The Bundeskartellamt examined the proposed agreement of Deutsche Telekom Mobilnet GmbH (T-Mobil) and VIAG-Interkom GmbH & Co. on "National Roaming". Under this agreement it was agreed among other things to make a one-off purchase of a minute quota of T-Mobil that was intended to cover a large part of VIAG-Interkom's demand for a considerable period of time. The Bundeskartellamt considered such an agreement to be a restraint of competition within the meaning of Section 1 of the ARC (ban on cartels) in the highly concentrated mobile phone market because the obligation to pay a high purchase price would result in relinquishing the expansion of its own network in the long term together with the competitor providing the roaming service becoming dependent as a result. In addition, the Bundeskartellamt believed that the agreed roaming would only work if T-Mobil received continuous access to a variety of exclusive VIAG-Interkom information, in particular for the expansion of the network and impending product innovations. This would result in a restraint of innovative competition. Nevertheless the Bundeskartellamt did not object to the planned co-operation for three and a half years until 31 December 2003. VIAG-Interkom is after all still in the process of entering the market. In the Bundeskartellamt's opinion the enterprise would probably have had to exit from the market if it had not been able with a high quality service and competitive prices to quickly increase its stock of customers for a short period of time by means of national roaming, thus significantly increasing its level of competitiveness.¹⁰

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

17. Three sectors were at the forefront of the Bundeskartellamt's activities in this field: power sector (electricity, gas and oil supply), non-discriminatory access to infrastructures and the illegal sale below cost price in the food retail trade.

18. As mentioned in the last report, the new Energy Act came into force in April 1998. This repealed the provision exempting the energy sector, with the exception of the water supply industry, from competition law. The Bundeskartellamt assessed the success of opening the market to competition from the very beginning as being irrespective from the access to the existing networks. The Bundeskartellamt was consequently involved in actually implementing non-discriminatory third-party access as well as the question of demanding transfer fees when a customer changes providers.

19. The Bundeskartellamt issued the Berliner Kraft und Licht AG (Bewag) with four prohibition decisions for abusively refusing to transmit electricity. Bewag, which is the dominant owner of the lines in the western part of Berlin, had applied for transmission in view of the limited capacities, which were already being fully utilised to transmit its own electricity. The Bundeskartellamt decided that the dominant owner of the lines could not in general claim preferential treatment for his distribution if capacity is limited. The Bundeskartellamt considered that the German Energy Act and the electricity guideline pointed to the fact that the network company is obliged to remain neutral and that the interests of newcomers to the Berlin electricity market rank equally with the operative interests of Bewag in using its own network. It was therefore ordered to distribute the limited capacity of the lines between Bewag and the new suppliers. This allocation was made in such a way that the external power supply companies had a right to supply their customers in the western part of Berlin to 20 – 30 percent by means of third-party access. This quota was based on the share of the overall consumption of the west Berlin network accounted for by the electricity obtained via the lines.

20. In response to complaints the Bundeskartellamt initiated abuse proceedings against the municipal power company Stadtwerke München GmbH in Munich because it refused to transmit electricity from rival suppliers to tariff rate customers in its own network area on the basis of standardised load profiles. The competitors would thus have had to install special meters in each individual customer's premises in order to supply them independently. The complainants considered that this would have resulted in prohibitive transmission costs. Stadtwerke München GmbH gave as the reason for its behaviour the lack of load models suitable for practical application and of appropriate billing systems. The Bundeskartellamt considered this behaviour to be an infringement of the German Energy Act. Under this legislation, network operators have to grant other companies third-party access on terms that are not less favourable than the terms they have actually or implicitly imposed in comparable cases for services within their own company. After threatening to impose a transmission order, and following a public hearing, the Bundeskartellamt discontinued the abuse proceedings when Stadtwerke München GmbH agreed to make it possible for electricity to be transmitted to tariff-rate customers (private households, business and agricultural customers) from May 2000 onwards by granting third-party access.

21. In the gas sector too, the Bundeskartellamt was involved in taking important steps to open up the previously largely sealed-off gas markets. In two proceedings involving the supply of municipal utilities by a subsidiary of the ENRON group the respective network owner refused to grant access to the network. The refusal of network access was mainly attributable to disagreements on how much ENRON was to pay for the use of the network.¹¹ After ENRON lodged a complaint with the Bundeskartellamt the parties concerned were willing to accept an interim solution, which granted ENRON immediate access to the network for a temporary charge. In the course of the proceedings pending the Bundeskartellamt will calculate the "adequate" remuneration within the meaning of German Act against Restraints of Competition. This will then be backdated and replace the interim solution. Apart from the energy sector the Bundeskartellamt was also active in other areas on suspicion of an abuse of a dominant position or the refusal to grant access to *essential facilities*.

22. The Bundeskartellamt prohibited Scandlines Deutschland GmbH, in which Deutsche Bahn AG and the Kingdom of Denmark each hold an indirect share of 50 percent, from refusing competing ferry companies access to the Puttgarden terminal on the German Baltic island of Fehmarn on payment of an adequate fee. The proceedings were based on complaints by two competitors, who wanted to start a ferry service on the Puttgarden to Rödby (Denmark) line, but whose application for the shared use of the Puttgarden ferry terminal was refused by Scandlines, the terminal owner. Back in 1993, the European Commission refused the Danish government to prevent another company from setting up a ferry service in Rödby. After conducting an investigation into the case the Bundeskartellamt established that the refusal infringed both Section 19 (4) no. 4 of the Act against Restraints of Competition as well as Article 82 EC. Under these provisions a dominant firm acts in abuse of its position if it refuses another company access to its essential facilities on payment of an appropriate fee when that other company is unable to start operations on a downstream market without such shared use. This is dependent on the shared use being possible and reasonable. In the Bundeskartellamt's view, Scandlines dominates the market, both as regards its terminal facilities on the Puttgarden-Rödby route and the downstream market for ferry services between Puttgarden and Rödby. The existing fringe competition from alternative ferry routes and the bridge across the Great Belt was not strong enough to prevent this market dominance by the Puttgarden-Rödby-Puttgarden transport route to Denmark. Legal and physical obstacles stood in the way of the construction of a new terminal in Puttgarden, whereas the shared use of existing terminal facilities by an additional ferry operator was possible following appropriate construction and organisational modifications. In the necessary process of weighing Scandlines' interest in having the unlimited use of its own terminal against the applicants' interest in starting up competing ferry operations, the decisive factor was the public interest in opening up the market to competition. The Bundeskartellamt ordered that the decision would have immediate effect. The parties concerned lodged an appeal with the Court of Appeals in Düsseldorf¹², which reversed the decision of the Bundeskartellamt in the main action. The Bundeskartellamt has filed an appeal against the refusal of leave to appeal on points of law with the Federal Supreme Court.

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23. Under German competition law, firms with superior market power over small and medium-sized competitors may not use this to unfairly hinder such competitors directly or indirectly. Based on this provision, the Bundeskartellamt prohibited the oil companies DEA Mineralöl AG, Aral AG, Deutsche Shell AG, Esso Deutschland GmbH, Deutsche BP and Elf Oil Deutschland GmbH from demanding higher prices for supplying independent petrol stations than they charged final consumers at their own petrol stations. The large oil companies had opened up a price gap and were charging small petrol station operators higher prices at their refineries than the prices to consumers at their own petrol stations. This action was threatening the very existence of the small independent competitors and was already leading to firms having to leave the market. The Bundeskartellamt considered this to be unfairly hindering these competitors.

24. On the other hand no formal prohibition proceedings were instituted against Rewe-Zentral AG (Rewe) and Metro AG (Metro). In response to complaints by small and medium-sized food retailers the Bundeskartellamt had examined whether Rewe and Metro infringed the statutory ban on selling below cost price with prices that had been in force since the end of July 1999. Under the version of Section 20 (4) of the ARC that was introduced by the 6th Act to Amend the ARC of 1 January 1999, it is not permissible for firms with superior market power to restrict small and medium-sized competitors by offering their goods or services not merely occasionally below their cost price, unless there is an objective justification for this. The Bundeskartellamt's investigations did not confirm the suspicion that the law was violated. The sales prices of the companies concerned for the products of the food range, including detergents and cleaning agents, that were covered by the investigation were either not below the cost price or the Bundeskartellamt considered that facts existed which justified the pricing.

dd) Activities of the courts

25. As already mentioned in the last Activity Report, the Bundeskartellamt prohibited the Land of Berlin in 1997 from awarding public road construction contracts only to firms that had undertaken to pay Berlin union wage rates. The Berlin Court of Appeals (the court of first instance at the time) rejected the appeal of the Land of Berlin against the prohibition order. The Land of Berlin then filed an appeal on points of law with the Federal Supreme Court (court of second and final instance). During the appeal proceedings the Berlin Public Procurement Law came into force on 9 July 1999, which contains a provision corresponding to the practice of the Land of Berlin that had been prohibited earlier by the Bundeskartellamt. The Federal Supreme Court submitted the case to the Federal Constitutional Court for a decision on the question of whether this provision in the Berlin Public Procurement Law is compatible with the German Constitution¹³. The Federal Supreme Court was of the opinion that the Land of Berlin did not have the legislative power for this provision and that in addition the Berlin law infringed upon the constitutionally protected right of negative freedom of association. The Federal Constitutional Court's decision is still outstanding.

26. The 1996/1997 report included details of the Bundeskartellamt's decision relating to the price charged by Deutsche Lufthansa on the Berlin–Frankfurt route, which was not served by competitors. Deutsche Lufthansa was prohibited from charging over DM 10 more for a one-way ticket than on the Berlin–Munich route, which was open to competition. Deutsche Lufthansa filed an appeal against this decision with the Berlin Court of Appeal, which reversed the decision. The Court of Appeal based its decision inter alia on the consideration that under certain circumstances even a dominant company should be permitted to react to a competitive challenge by splitting prices. The Bundeskartellamt filed an appeal on points of law against the Court of Appeals' decision with the Federal Supreme Court. No decision has yet been reached on this appeal.

27. In November 1997 the Bundeskartellamt prohibited acquisition of a 24 percent stake in Stilke Buch- und Zeitschriftenhandels GmbH, Hamburg by Axel Springer Verlag AG (see 1997/98 Report). The

Berlin Court of Appeals upheld this in the first instance. The Court of Appeals agreed with the Bundeskartellamt that the acquisition of a 24 percent stake by Axel Springer Verlag AG would enable it to exercise a competitively significant influence on Stilke Buch – und Zeitschriftenhandels GmbH. Under German competition law this led to the proposed merger coming under merger control. Axel Springer Verlag AG lodged an appeal on points of law against the decision with the Federal Supreme Court. No decision has yet been reached in relation to this appeal.

2.) *Mergers and acquisitions*

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

Table 2
Mergers Notified Pursuant to Sec. 39 (6) ARC (Sec. 23 of the ARC^{old})

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
Total	27,009

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

Table 3

	1994	1995	1996	1997	1998	1999
Mergers notified and reviewed prior to completion	1,086	1,089	1,006	1,207	1,300	1,147
Mergers notified after completion and found to be subject to control	331	276	280	362	391	32 ¹⁴
Mergers not subject to control	147	165	148	182	197	3
completed mergers total	1,564	1,530	1,434	1,751	1,888	1,182

29. A breakdown by type of merger is as follows (1999):

Acquisition of assets	242
Acquisition of interests	589
Of which: majority interest acquisition	540
Joint ventures	282
joint ventures with joint control	37
Contractual relations	1
Interlocking directorates	-
Competitively significant influence	12
Others	6

By type of diversification, horizontal mergers (1043), of which 830 without and 213 with product extension) again clearly dominated in 1999. In addition 58 vertical and 81 conglomerate mergers were notified.

b) *Summary of significant cases*

30. In the field of merger control the number of notified cases fell by 706 (approx. 37.5 percent) compared with 1998/1999, not least due to the reduced "thresholds" introduced by the Act to Amend the ARC (Table 2). For the first time the Bundeskartellamt, in response to the plan of the car manufacturers Ford, General Motors, Daimler/Chrysler and Renault/Nissan, has investigated the competitive aspects of establishing Internet exchanges to pool activities in the areas of procurement (see no. 31.).

aa) Prohibition or prevention of mergers

31. In September 1999, the Bundeskartellamt prohibited the proposed merger of the companies Henkel KGaA and Luhns GmbH. The firms had applied to establish a joint venture. The purpose of the company was to manufacture detergents and cleaning agents that were to be sold exclusively to retailers who would offer the products under their own labels. According to the investigations carried out in the

market, the conditions for prohibition under Section 36 (1) of the ARC were only met in the market for all-purpose detergents. Under this provision, a concentration can only be prohibited if it is likely that a dominant position will be created or strengthened. Henkel, which produces the most important brands in this sector, already has a prominent position in the detergents market. The joint venture with Luhn's, a major manufacturer of own-label brands in this sector, would have strengthened Henkel's market position even further. The merger would have resulted in a large-scale expansion of the scope of action that Henkel has in relation to its competitors and the retail trade. The decision has become final.

32. The Bundeskartellamt prohibited the already completed concentration of the Westdeutsche Allgemeine Zeitung (WAZ) and the Ostthüringer Zeitungs Verlag (OTZV). Prior to the concentration, WAZ had a 60 percent stake in OTZV although all important company decisions required a voting majority of 70 percent under the partnership agreement. Under the current version of the ARC, such a concentration would be subject to control since WAZ had acquired the (sole) control of OTZV as a result of acquiring the stake. Since the concentration was to be judged on the basis of the version of the ARC prior to the 6th Act to Amend the ARC in January 1999 and this version did not provide for the "acquisition of control" as a criterion for a concentration, the companies concerned and the Bundeskartellamt disputed whether the acquisition of the stake constituted a process that was subject to control within the meaning of the old version of the ARC. In the former version of the Act, a condition for merger control was that the acquisition of shares involved any "other combination of enterprises as a result of which one or several enterprises are able directly or indirectly to exercise a controlling influence on another enterprise" (Section 23 (2) no. 5 of the ARC^{old}). The parties concerned have submitted an appeal to the Berlin Court of Appeals. No decision has yet been reached.

33. The Bundeskartellamt prohibited the Melitta group from taking over the vacuum cleaner bag business of the Belgian Schultink group. The formal decision related merely to a part of the original proposed merger since the participating enterprises restricted their project at short notice in order to prevent a prohibition.

34. Melitta is the clear leader in the market for vacuum cleaner bags in Germany and Western Europe as a whole with market shares of well over 50 percent and 40 percent respectively. The Schultink group is its largest competitor in Europe in terms of market share and is the number four supplier in Germany. In the Bundeskartellamt's opinion, Melitta already possesses a dominant position in Germany but also in the economically relevant European market. This is not only due to its extraordinarily high market shares and its lead in terms of market shares. The Melitta group in comparison to its competitors which are generally small and medium-sized enterprises also possesses far superior financial power as well as outstanding access to commerce, the most important trade channel for vacuum cleaner bags.

35. In the Bundeskartellamt's opinion, Melitta's dominant position would have been tangibly strengthened by the modified merger as well. The merger would have only led to a slight market share increase in Germany. However, the significantly stronger position Melitta would have achieved in other western European countries, also on account of market shares, would at the same time have had considerable repercussions on the domestic market, so that irrespective of the slight increase in market shares, a tangible qualitative strengthening of the already existing dominant position in Germany would have had to be expected.

36. With the revision of the Act against Restraints of Competition, the lawmaker explicitly confirmed that competitive potentials existing abroad and affecting the domestic competitive conditions, have to be taken into account in assessing a dominant position (Section 19 (2) sentence 2, no. 2 of the ARC).

At the end of the reporting period, the prohibition was not yet final.

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bb) Clearances subject to conditions and obligations

37. The Bundeskartellamt cleared the merger between RWE AG (RWE) and VEW AG (VEW) subject to certain obligations. Without the obligations the merger would have resulted in the creation or strengthening of dominant positions in the electricity, gas and waste disposal sectors.

38. In the electricity sector the merger in its original form would have led even in a nationally defined market to the creation of a dominant duopoly consisting of RWE/VEW and Preussen Elektra (Veba group)/Bayernwerk AG (Viag group). The markets supplying small-scale customers, customers with special contracts and the power trading market were particularly affected. Due to the fact that the undertakings referred to have interests in more than 100 municipal utilities and regional distributors serving local authority districts, the market share influenced by the duopoly was over 70 percent in the industrial customer market and more than 55 percent of the small-scale market. The next largest competitors have market shares of less than ten percent. The duopoly's share in the power trading market is as much as 85 percent. In this market it also controlled a large proportion of generation capacities within Germany (more than 80 percent) and, as the owner of most of the network connections to neighbouring countries, it also controlled the import opportunities. Following the merger, RWE/VEW and Preussen Elektra/Bayernwerk would in addition have strongly dominated their remaining competitors as regards all relevant resources. By means of creating effective external competition on the energy markets the obligations imposed on the companies concerned were intended to prevent the oligopolistic parallel conduct that would otherwise have been likely in a largely symmetrical duopoly.

39. The investigations of the Bundeskartellamt indicated that not a great deal of progress has yet been made in liberalising the gas sector. This means that gas customers cannot easily change suppliers at present. For this reason, the evaluation was still based on the gas suppliers' former territorial monopolies. The Bundeskartellamt ascertained that even before the merger RWE and VEW were dominant on various regional markets in Germany. There had been only limited competition from suppliers with their own supply networks to customers in the supply areas of RWE and VEW. Moreover, there were company-law and economic links between the parties to the merger and the largest German gas supplier, Ruhrgas AG. The latter also operates a gas supply network in the region. Against this backdrop, the merger would have led to a potential competitor, who could use branch pipelines to advance into the other company's field of activity, being squeezed out of the market. This would have resulted in the dominant positions of RWE and VEW being strengthened on their respective regional gas markets, insofar as these markets border on one another. If the obligations imposed on the companies concerned are not adequate to prevent the deterioration in the gas markets affected, this deterioration was more than outweighed by considerable improvements in the competition conditions on the electricity markets for balancing power¹⁵.

40. In the waste disposal sector the merger in its original form would have led to a bundling of the extensive waste disposal activities carried out by the companies. Prior to the merger the waste disposal subsidiaries of RWE and VEW held the number 1 and number 3 positions in the German waste disposal market. The Bundeskartellamt established that the merger in its original form would have resulted in the creation or strengthening of the firms' dominant positions in several waste disposal markets in Germany. The obligations imposed ensured that market shares were reduced and merger-related dominant markets were weakened.

41. In the gas supply sector the Bundeskartellamt cleared the proposal of Westfälische Ferngas-AG, Westfälische Gasversorgung AG & Co. KG, VEW AG and VEW Energie AG, all based in Dortmund, to merge Westfälische Ferngas-AG and Westfälische Gasversorgung AG & Co. KG subject to obligations. The restructuring of the interests held and of the company activities as well as the elimination of potential competition between the two previously neighbouring gas suppliers could have led to a strengthening of the dominant positions of Westfälische Ferngas-AG and VEW Energie AG in the geographically limited market for natural gas supply to end consumers and supply to distributors, and of VEW Energie AG in the market for electricity supply to end consumers and supply to distributors. In addition, it had to be taken

into account that particularly in the natural gas supply sector, the instrument of granting access to supply networks with the aim of introducing competition to the market had not been sufficiently developed to give rise to expectations that the dominant positions of the participating enterprises would be eliminated in the foreseeable future. Therefore, the clearance decision was only possible on the basis of a regulation which eliminated the unfavourable effects the merger would have on competition and which led to improved competitive conditions. The newly emerging enterprise was therefore obliged inter alia to give its buyers the possibility of purchasing certain supply quantities from other suppliers, to limit the duration of supply contracts concluded by 31 December 1999 to 31 December 2004 at the latest, to grant other gas suppliers non-discriminatory access to its own supply networks and to publish the prices and conditions of access.

cc) Clearances

42. In the field of e-commerce the Bundeskartellamt investigated the proposal of the automobile producers Ford, General Motors and Daimler Chrysler to set up an Internet exchange together with Renault/Nissan. The e-commerce firm "Covisint" which is in the process of being established is to act as an "electronic marketplace" for business-to-business (B2B) transactions in the auto industry including suppliers and provide services in the fields of purchasing, supply management and product development. The Bundeskartellamt's examination of the case was primarily based on the contractual agreements between the enterprises concerned. A large number of German automobile suppliers were also asked to provide a competitive evaluation of this exchange. The Bundeskartellamt was particularly interested in questions such as the free access to the exchange, the guarantee of confidential exchange of data and the risk of concerted practices. The US Federal Trade Commission had already started to examine the project some time earlier, and had given its approval without imposing any conditions or obligations. The Bundeskartellamt also cleared the project but reserved the right to re-examine the competition law aspects of the exchange once it starts to operate.

43. In the armaments industry the Bundeskartellamt did not prohibit the formation of a joint venture that had been notified by an international consortium for the development of an armoured transport vehicle. The starting point for the vehicle's development was an international treaty between several Nato partners. The narrowing of the market to the production of a specific vehicle for military purposes, its possible use in other fields e.g. the police service was irrelevant and the fact that the company to be established would not be a full-function joint venture were decisive factors in not prohibiting the project. Its sole purpose was to support the international partners in processing the specific contract. The creation or strengthening of a dominant position was therefore not to be expected. Nor did the proposed joint venture constitute a merger within the meaning of Article 3 (2) of EC Regulation No. 4064/89 of the Council on the Control of concentrations between undertakings.

44. The Bundeskartellamt cleared the concentration between Holsten-Brauerei AG, Hamburg and König-Brauerei GmbH & Co. Kommanditgesellschaft, Duisburg. The purpose of the concentration was the acquisition of König-Brauerei by Holsten-Brauerei. The Holsten group is the second-largest German brewery group on account of its domestic sales. Based on the turnovers of the companies concerned and the market investigations carried out by the Bundeskartellamt, the acquisition could have resulted in creation or strengthening of a dominant position (Section 36 (1) of the ARC). In the course of the examination procedure Holsten-Brauerei proved by submitting a contract that it had sold the licensing and manufacture of a brand of beer owned by its group. In the Bundeskartellamt's opinion, this corporate decision was an appropriate means of compensating for the increased market shares arising in of Holsten-Brauerei's main sales area. The proposed concentration was not prohibited for this reason.

45. The Bundeskartellamt cleared the merger of four dairies in the north of Germany. The large share of the firms involved in collecting raw milk made it necessary to examine the merger in detail with respect to its effects on the procurement market for milk in north-west Germany. The Bundeskartellamt based its decision on a geographically defined market covering the territory of the federal states of Lower Saxony

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and Schleswig-Holstein and parts of North Rhine-Westphalia. After the merger, the participating enterprises had a market share in this area of well over one third. The Bundeskartellamt did not believe that this concentration would lead to a dominant position, however. Its opinion was largely based on the rapid growth in the size of the milk producers in the federal states concerned, making it profitable even for more distant dairies to collect milk. Another decisive factor for the clearance was that the parties involved also compete with large Dutch and Danish milk processing companies.

46. The Bundeskartellamt cleared the planned transaction by Cisco Systems, Inc. (Cisco) to acquire the business activities of IBM International Business Machines Corporation (IBM) in the field of active data network components using open transmission technologies. The transaction was cleared although Cisco had already achieved a market share in Germany of around 40 percent before the acquisition and only two of its competitors had reached market shares of over ten percent. The Bundeskartellamt based its investigations on the market for active data network components even though both a general market for telecommunication equipment and the definition of the market according to network levels, technical product categories, technical standards or capacity classes had been rejected. An essential factor in assuming that despite its high market share Cisco did not have a dominant position and would not acquire one as a result of the merger was the actual and potential competition, which benefited from the low barriers to market entry. The fact that other market entries were to be expected as a result of the great increase in the market volumes was also decisive.

dd) Withdrawal of application

47. VAW Aluminium AG (VAW) and Gränges AB (Gränges) also prevented a prohibition by withdrawing their notification. VAW planned to purchase the Eurofoil plants in Luxemburg, Belgium and Sweden from Gränges. The Bundeskartellamt had ascertained that the merger would have led to VAW gaining a dominant position on the European market for aluminium foils used for aseptic packaging. The parties to the merger were the biggest producers on the relevant market, considerably ahead of their competitors. VAW's financial power as a subsidiary of the (former) Viag group and its better access to the sales and procurement markets than its small and medium-sized competitors were factors that also had to be taken into account. In line with the practice of the EU Commission and the decisions of the Federal Supreme Court, the Bundeskartellamt defined the product markets in accordance with the specific purpose of the products and assumed that there was a separate market for thin aluminium foils for aseptic liquid packaging.

48. After the Bundeskartellamt had expressed its concerns the companies Edeka and Markant withdrew the notification of their plan to establish several joint ventures in order to cooperate in the field of purchasing. Following extensive investigations the Bundeskartellamt came to the conclusion that the participating firms had a strong position as buyers of various groups of products sold in chemist shops. The market shares were above the one-third threshold for the presumption of dominance.¹⁶ As a result it would have had to be examined whether the planned co-operation would have led to a dominant position in the procurement markets for food, detergents, cleaning agents and toiletries. The question was also raised as to whether the co-operation would restrict demand-side competition between the two groups, thereby infringing the ban on cartels.

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

49. The policy of liberalising markets and creating a procompetitive environment was continued. At the centre of this was the further application of EU guidelines in the energy sector. The signing of the Associations' Agreement (Verbändevereinbarung) for electricity and gas was an important step towards more competition in the energy markets in Germany. As in the electricity market, the gas market is now

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NOTES

1. Act against Restraints of Competition
2. For examples see Section II a) and cc)
3. Beek/Homann (foodstuffs, delicatessen salads); Texas Instruments/ISS (high pressure sensors); Saarferngas/Südwestgas/VSE AG (natural gas); Kamps/Wendeln (bread and baked goods); Beck/NOMOS (legal periodicals and specialised books, online services); ROBA/VBU (asphalt mixture); Siemens/NEC (RAN products for third-generation mobile telephony networks); Checkpoint Systems/Meto (electronic safety devices for items); Krautkrämer/NUKEM (ultrasonic checking devices and systems); Norddeutsche Affinerie/Hüttenwerke Kayser (copper scrap and cathodes); Xerox/Tektronic (laser colour printers); Progas/Westfalengas/caratgas (gas supplied in tanks); Microsoft/Visio (software); Dana/GKN (propeller shafts); Dürr/Alstom (automotive varnishing); Ansell/Johnson&Johnson (medical gloves); REWE/DER (air package tours, travel agencies); Cisco/IBM (active data network components); Saft/Tadiran (industrial batteries); Rheinmetall/KUKA (armoured military vehicles); TNT-NET Express/NET Nachtexpress (express services); Deutsche Post/trans-o-flex (express freight, parcel services); Quelle/Neckermann/InfoScore/Schober (direct marketing services, risk management); Corning/RXS (cable fitting for telecommunication cables); Douglas/Yaska (cosmetic and perfumery products); Lafarge/Braas/Tonindustrie Heisterholz (roofing materials).
4. A supplement to Sections 87 (1) and 96 of the ARC clarified the fact that the social court and no longer the regional court has jurisdiction for disputes concerning the legal relationships between statutory health insurance companies and their health care providers.
5. The 5th volume of the Social Security Code sets out the rules on statutory health insurance.
6. The tasks and the composition of the Monopolies Commission are laid down in Sections 44 and 45 of the ARC. It consists of five members who are appointed by the Federal President upon a proposal by the Federal Government. The appointment is limited to four years. The main task of the Monopolies Commission is to prepare an opinion assessing the level and foreseeable development of business concentration in the Federal Republic, to evaluate the application of the provisions concerning the control of concentrations and to comment on other topical issues of competition policy.
7. The UCA contains provisions aiming at combating unfair business practices. Its objective is not only to protect competitors but also the general public from abuses of competition.
8. Under the 6th Act to Amend the ARC, in force since 1.1.1999, the criterion for exempting these cartels no longer exists.
9. Section 7 (1) of the ARC: Agreements and decisions which contribute 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, may be exempted from the prohibition under Section 1 provided 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.
10. In response to a notification under Council Regulation No. 17/62 by the parties to the agreement, the European Commission also examined the case in parallel proceedings and advised in a comfort letter that the agreement did not constitute a restraint of competition within the meaning of Article 81 (1) EC.
11. Section 19 (4) no. 4 of the ARC: An abuse exists in particular if a dominant undertaking, as a supplier or purchaser of certain kinds of goods or commercial services refuses to allow another undertaking access to its own networks or other infrastructure facilities. Against adequate remuneration provided that ...

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12. Following the relocation of the Bundeskartellamt from Berlin to Bonn with effect from 1 October 1999, the jurisdiction of the court of first instance was transferred from the Berlin Court of Appeals to the Düsseldorf Court of Appeals.
13. Under Article 100 (1) of the German Constitution, only the Federal Constitutional Court in Germany has the jurisdiction to declare a law as not being compatible with the constitution.
14. Since 1 January 1999, all mergers subject to control have to be notified prior to completion. The 32 notifications after completion concern cases in which, due to transitory provisions, this obligation did not apply or had simply been disregarded.
15. Section 36 (1) of the ARC: A concentration which is expected to create or strengthen a dominant position shall be prohibited by the Federal Cartel Office unless the participating undertakings prove that the concentration will also lead to improvements of the conditions of competition, and that these improvements will outweigh the disadvantages of dominance.
16. Section 19 (3) sentence 1 of the ARC: An undertaking is presumed to be dominant if it has a market share of at least one third.
17. Exchange rate as of 30.06.2000