

**GERMANY**  
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## **Executive Summary**

### ***Legislation***

1. During the reporting period the amendment of the Energy Industry Act entered into force. Accordingly, rulings on abusive practices issued by the competition authorities against energy network operators are now immediately enforceable as a statutory rule.

2. The 7<sup>th</sup> amendment to the ARC is currently under preparation, which is particularly intended to implement Council Regulation (EC) No. 1/2003 into national law.

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

3. A far-reaching market allocation and quota cartel was uncovered in the cement industry. In these proceedings fines totalling approx. EUR 660 million were imposed, the highest in the Bundeskartellamt's history.

4. In the waste management sector, fines were imposed on several companies and associations, including Duales System Deutschland AG ("The Dual System) on account of the call for a boycott or anti-competitive agreements.

5. Two significant abuse proceedings concerned the electricity sector. In early 2003 the Bundeskartellamt issued prohibition decisions against two electricity network operators on account of excessively high fees for network use.

### ***Merger control***

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

7. Prohibitions:

- Holtzbrinck / Berliner Verlag
- Nehlsen / Rethmann / swb / Bremerhavener Entsorgungsgesellschaft
- E.ON / Ruhrgas

8. Clearances subject to obligations:

- Deutsche Bahn / Stadt- und Regionalbus Göttingen
- BASF / Bayer Crop Science

9. Clearances:

- EMTV / Karstadt / DSF

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

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

10. During the reporting period the Energy Industry Act was amended. Rulings on abusive practices issued by the competition authorities against energy network operators under Section 19 (4) no. 4 of the Act Against Restraints of Competition (ARC) are now immediately enforceable under Section 6 of the Energy Industry Act. This means that appeals against such competition authority rulings have no suspensive effect as a statutory rule. This has improved the control of abusive practices under competition law in the network-based energy sector. Furthermore the amendment of the Energy Industry Act acknowledged the legal presumption of the “good professional practice“ of the Associations’ Agreements on gas and electricity which have thus been “juridified” to some extent. Nevertheless the control of abusive practices under competition remains fully applicable.

11. For the revision of Section 15 of the ARC (resale price maintenance for published products) which came into force on 1 October 2002, cf. previous report (para 8). No further amendments were made to the ARC during the period covered by the report.

#### *Government proposals for new legislation*

12. The Federal Government is currently preparing the 7<sup>th</sup> amendment to the ARC. The core element of the amendment is the implementation of Council Regulation (EC) No. 1/2003 of 16 December 2002 implementing the competition rules laid down by Articles 81 and 82 of the EC Treaty into national law. For European competition law Regulation 1/2003 means a system change. The currently applicable system of notification and authorisation of anti-competitive agreements will be replaced by the principle of legal exception with effect from 1 May 2004. Accordingly, anti-competitive agreements will be automatically regarded as exempted if they fulfil the exemption provisions of Article 81 (3) of the EC Treaty. At the same time the primacy of European law with respect to the admissibility of anti-competitive agreements and conduct within the meaning of Art. 81 (1) EC will be substantially extended. This will make substantial adjustments of national law necessary. In order to prevent cases concerning cross-border trade and cases which are subject to Regulation 1/2003 from being treated differently from purely national cases the Federal Government is planning to adopt the principle of legal exception in the ARC. This also involves the replacement of the current exemptions under German law by a general clause modelled on Article 81 (3) EC. Specific provisions of German competition law are to be maintained only in exceptional cases.

The adaptation to European law also includes the treatment of vertical restraints of competition. Under European law (Art. 81 EC) both vertical agreements restraining competition (distribution agreements) and horizontal agreements are subject to a prohibition with an authorisation proviso. Under the current ARC resale restrictions (as to prices and conditions) are prohibited per se. Other distribution agreements are in principle allowed but are subject to abuse control. Although the current German system is appropriate in terms of competition policy and leads to satisfying results from a practical point of view, the European model will in future nevertheless be adopted for vertical restraints of competition in view of the primacy of European law.

The absolute primacy of European competition law does not apply to abuse control of unilateral anti-competitive conduct. Consequently such cases can be regulated differently under German law than under Article 82 EC. And this possibility will continue to be made use of.

In future the European Commission and the national competition authorities will work closely together within a network to control and punish infringements of competition. Under the reform, the

procedural rules of the ARC as well as investigatory powers of the Bundeskartellamt will thus be adapted to the new provisions of Regulation 1/2003. In addition further competition policy issues are to be taken account of in this amendment to the ARC. These include above all more effective procedural rules for merger control by the Bundeskartellamt and for the ministerial authorisation. The reform of German competition law should, if possible, come into force simultaneously with the new Regulation 1/2003, i.e. on 1 May 2004.

13. As a result of the new legal framework for telecommunications at EU level, the national regulation of telecommunications will have to be thoroughly restructured. The new EU telecommunications law, in force since early 2002, comprises four directives (universal service, access, licensing and framework directives) which are to be implemented into national law by mid-2003. The directives aim at a more flexible application of regulatory instruments with national regulatory authorities having more leeway in selecting measures, and at giving the European Commission greater influence on individual regulatory proceedings.

## **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*

14. The fight against cartels and the control of abusive practices have continued to gain significance in the Bundeskartellamt's activities. The Bundeskartellamt thus imposed fines totalling approx. 660 million euro on companies in the cement sector on account of market allocation and quota agreements. These are the highest fines ever imposed in the history of the Bundeskartellamt. Some of the proceedings are still pending. Above all, the Bundeskartellamt has intensified its abuse control activities in the network-based energy sector which was opened up to competition under the 1998 reform of the Energy Industry Act (cf. Annual Report 2002, para 24 ff). Once again, particular emphasis was placed on the electricity markets. In early 2003 formal prohibition decisions on account of excessive fees for network use were issued against two electricity network operators, i.e. Stadtwerke Mainz and Thüringer Energie AG.

15. During the reporting period the Federal Supreme Court dealt for the first time with the prohibition of sales below cost price (Section 20 (4) sentence 2 of the ARC introduced with the 6<sup>th</sup> amendment of the ARC). In its decision the Federal Supreme Court makes clear in particular that no other requirements need to be fulfilled for a prohibition decision than the statutory criteria for the abusiveness of sale below cost price. In particular, it is not required that the sale below cost price appreciably affects the conditions of competition.

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

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

16. On 31 July 2002 the Bundeskartellamt conducted a search operation on the suspicion that removal firms have for several years concluded and operated price-fixing and market allocation agreements in the case of contracts for shipping the household effects of members of the US armed forces based in Germany. The investigations are still in progress and are being carried out in close coordination with the US competition authorities. For example the search took place simultaneously to searches conducted by the US Department of Justice in several Federal States.

17. Together with investigating officers from the public prosecutor's office the Bundeskartellamt in August 2002 searched several companies and private premises in the pyrotechnic products and small

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fireworks sectors on the suspicion of cartel and submission agreements. The first written charges have been served upon those concerned.

18. In July 2002 the Bundeskartellamt conducted a search operation on the suspicion that several companies in the insurance sector had agreed premium increases in the industrial property and liability insurance business. In a first step, the Bundeskartellamt sent written charges to seven leading industrial insurers in July 2003.

19. The Bundeskartellamt imposed fines totalling approx. 2.7 million Euro against eight manufacturing companies and individuals in the ready-mixed concrete sector in the greater area of Bielefeld, Bad Salzuflen, Detmold and Osnabrück. These companies had conducted illegal price-fixing and quota agreements at least from 1990 to 2001 and had divided up their supply areas among themselves. The orders to impose the fines are final.

20. Of the orders imposing fines totalling 1.8 million euro issued in June 2002 against seven manufacturers of ready-mixed concrete in Lower Bavaria for operating anti-competitive agreements (see Annual Report 2002, para 19) six became final. The seventh is to be referred for decision to the Düsseldorf Higher Regional Court.

21. In cartel proceedings against companies in the cement sector, the Bundeskartellamt imposed first fines totalling approx. 660 million euro, the highest fines in the Bundeskartellamt's history so far. The administrative orders imposing fines were issued to the six largest German manufacturers, Alsen AG, Dyckerhoff AG, HeidelbergCement AG, Lafarge Zement GmbH, Readymix AG and Schwenk Zement KG. Five of the six accused companies have filed appeals at the Düsseldorf Higher Regional Court.

22. The accused companies operated anti-competitive market allocation and quota agreements, some of them since the 1970s, and continued to do so until 2002. The geographic markets affected were the four regional cement markets eastern Germany, Westphalia, northern Germany and southern Germany.

23. The success in breaking up the cartel is mainly attributable to the leniency programme published in 2000 and the establishment in 2002 of the Bundeskartellamt's Special Unit for Combating Cartels. Following information obtained from the construction industry the Bundeskartellamt carried out a nationwide search of 30 cement companies in July 2002. This was followed in January 2003 by further searches of eight small and medium-sized cement manufacturers in the southern German area. The evidence seized during the searches and the confessions by the large manufacturers, some of which confessed in full, confirmed the existing suspicions.

24. Without the comprehensive cooperation of some companies under the leniency programme the fines would have been considerably higher.

25. The Bundeskartellamt imposed fines totalling 4.4 million euro on Duales System Deutschland AG ("DSD"), the Trade Mark Association ("Markenverband"), the Confederation of German Trade Associations ("BDH"), the German Waste Management Association ("BDE") as well as Metro AG, RWE Umwelt AG and Rethmann Entsorgungs AG & Co. for calling for a boycott or entering into agreements restricting competition, respectively. The accused have filed appeals against the administrative fines at the Düsseldorf Higher Regional Court.

26. The German Packaging Ordinance requires producers of goods sold in packaging and retailers to take back used sales packaging. Those obliged to take back packaging can either fulfil this obligation themselves or call in a company offering self-management solutions. So far however, most companies have made use of the possibility to participate in the DSD dual system for the household-oriented collection of used sales packaging.

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27. The proceedings conducted by the Bundeskartellamt related to two subject matters:

28. The first part dealt with the attempt to prevent Belland Vision GmbH, which offered self-management solutions to those obliged under the Packaging Ordinance to take back sales packaging, from entering the market. In mid-2001 the dm and Schlecker drugstores announced that they would leave the DSD and organise the process of taking back sales packaging by means of a self-management solution offered by Belland. The intention was that the manufacturers who had so far paid licence fees to DSD would now pay these to Belland. This project immediately triggered massive resistance from DSD and the business circles supporting it. According to the Bundeskartellamt's findings DSD initiated a call for a boycott which was carried out by Metro AG and the Confederation of German Trade Associations (BDH). The Trade Mark Association also called for a boycott of Belland's concept several times.

29. The second part of the proceedings dealt with the intention of DSD, the German Waste Management Association (BDE) and several waste management companies to prevent the setting up of a second dual system beside DSD. For some time Landbell has been trying to establish a dual system beside DSD starting in Hesse. For this it is dependent on the co-utilisation of collection facilities which disposal companies have so far only provided for DSD. The competent environmental authority in Hesse had expressed its approval of this concept. Nevertheless DSD and BDE called several times upon the disposal firms active in Hesse to deny Landbell co-utilisation of the existing collection facilities. Upon the initiative of DSD and supported by the BDE the disposal companies agreed between themselves not to work for Landbell. They have therefore violated the ban on cartels. In the meantime the Hessian Ministry for the Environment has granted Landbell recognition under the Packaging Ordinance. This has for the first time made competition between different dual systems possible.

bb) Exemptions from the general ban on cartels

30. 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**

Cartels	Cartels Jan – Dec 2001		Total number since 1958	Still effective (as of Dec 2002)
	new	terminated		
Standards-and types cartels Section 2(1) of the ARC	2	-	23	13
Condition cartels Section 2 (2) of the ARC	-	1	69	43
Rebate cartels Section 3 of the ARC <sup>old</sup>	-	-	34	6
Combined condition and rebate cartels	-	-	15	2
Specialisation cartels Section 3 of the ARC	-	-	129	25
Cartels of small or medium-sized enterprises Section 4 (1) of the ARC	2	2	166	152

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Table 1 (cont'd)

Cartels	Cartels Jan – Dec 2001		Total number since 1958	Still effective (as of Dec 2002)
	new	terminated		
Purchasing cooperations Section 4 (2) of the ARC	-	-	100	90
Rationalisation cartels Section 5 of the ARC	4	4	81	20
Structural crisis cartels Section 6 of the ARC	-	-	2	2
Export cartels Section 6 (1) of the ARC <sup>old</sup>	-	-	130	36
Import cartels Section 7 of the ARC <sup>old</sup>	-	-	2	-
Other cartels Section 7 of the ARC	2	-	2	2
Ministerial authorisation Section 8 of the ARC	-	.	4	-
<b>Total</b>	<b>10</b>	<b>7</b>	<b>757</b>	<b>391</b>

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

31. As reported in the Annual Report 2002 (para 24 ff), since autumn 2001 the Bundeskartellamt has examined the fees for network use charged by 23 electricity network operators, first in informal preliminary proceedings. By the end of 2002 twelve formal abuse proceedings were initiated. In two of these proceedings, i.e. against Stadtwerke Mainz and Thüringer Energie AG, formal prohibition decisions were issued in early 2003. The companies concerned have lodged appeals against them.

32. In August 2002 the Bundeskartellamt gave a warning to Stadtwerke Mainz AG on the suspicion of excessive fees for network use. Investigations had shown that, based on the comparative market concept, the fees for network use charged by Stadtwerke Mainz were clearly higher than those of the comparative company RWE Net AG. The basis for this result was a comparison of the respective revenue from the fees for network use in relation to the respective length of the distribution network (revenue per kilometre of transmission line). Such a revenue-based comparison is substantially more precise than comparisons based on single purchases because it allows for a complete quantity weighting of the fees for network use. Quantity weighting, which takes into account a network operator's customer structure, was not possible before as the necessary figures were not publicly available.

33. In the present case the Bundeskartellamt established that Stadtwerke Mainz as a municipal utility derived clearly higher turnovers from network use than RWE Net AG which was taken as a comparison. However, the level of the differences established in the turnovers achieved per km of transmission line is partly justified since the costs for laying and maintaining electricity lines (which due to its urban structure are higher in the Mainz supply area than in the RWE supply area which has a predominantly rural structure) are to be taken into account in favour of Stadtwerke Mainz. In addition, the higher fees charged by the upstream high voltage network operator in comparison to RWE Net were taken into account in



favour of Stadtwerke Mainz. However, even taking into account these cost disadvantages in favour of Stadtwerke Mainz, its revenue per kilometre of transmission line is still higher than that of RWE Net.

34. Even taking into account the fee reductions meanwhile carried out, the suspicion remained that the fees were abusively excessive. A prohibition decision was therefore issued to Stadtwerke Mainz in April 2003. The case is pending before the Düsseldorf Higher Regional Court.

35. In the proceedings against Thüringer Energie AG (TEAG) the appropriateness of its fees for network use was assessed under economic aspects on the basis of a cost evaluation. The basis for cost control are first of all the criteria laid down in the report by the "working group on electricity network use" of the Federal and *Länder* competition authorities.

36. If non-accountable cost items are deducted, TEAG's network costs, which form the basis for calculating its fees for network use, are reduced by about 10 per cent. In February 2003 a prohibition decision was issued. The case is pending before the Düsseldorf Higher Regional Court.

37. In early 2003 the Bundeskartellamt issued a ruling on abusive practices against the electricity network operator RWE Net AG on account of excessive metering and billing prices. In addition the Bundeskartellamt has been working towards creating a more competitive environment for the procurement of balancing energy. The Bundeskartellamt was able to discontinue its proceedings against several electricity network operators suspected of charging inappropriate and in some cases fictitious costs for balancing energy to companies requesting network access, without issuing a ruling after the network operators had agreed to introduce tendering systems for the procurement of balancing energy which conform to the principles of competition.

dd) Activities of the courts

38. In 2000 the Bundeskartellamt prohibited the companies WalMart, Aldi-Nord and Lidl from selling certain basic foods (two milk, sugar and vegetable fat products, respectively) below their respective cost prices under Section 20 (4) sentence 2 of the ARC. As reported in the Annual Report 2002 (para 38 ff) the Düsseldorf Higher Regional Court reversed the Bundeskartellamt's ruling against WalMart following an appeal filed by WalMart.

39. Following an appeal on points of law filed by the Bundeskartellamt the Federal Supreme Court meanwhile confirmed the judgment of the Düsseldorf Higher Regional Court on the pricing of two products. As regards the pricing of the remaining four products, however, the judgment was reversed and in one case the proceedings were referred back to the Düsseldorf Higher Regional Court for re-examination and decision. In this case the Federal Supreme Court for the first time commented on the interpretation of Section 20 (4) sentence 2 of the ARC which had been newly introduced with the 6<sup>th</sup> amendment of the ARC in 1999.

40. The Federal Supreme Court made clear in particular that, in contrast to the view held by the Higher Regional Court, the unwritten criterion "appreciability" should not be added to the preconditions of Section 20 (4) sentence 2 of the ARC. The Higher Regional Court had not regarded the sale below cost price of the two sugar products as sufficient to fulfil the preconditions for a prohibition because this had not resulted in an appreciable effect on competition.

41. Regarding the pricing of vegetable fat the Federal Supreme Court established that WalMart's conduct was ultimately objectively justified since other competitors had ensured that WalMart's cost prices for the products concerned were substantially raised and since WalMart had simply continued to sell these products at their old prices - until the establishment of new supply relationships. The Federal Supreme Court thus ultimately confirmed the Düsseldorf Higher Regional Court's position although the Higher

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Regional Court had denied, in contrast to the Supreme Court, that the circumstances in question even fulfilled the preconditions of Section 20 (4) sentence 2 of the ARC.

42. Regarding the pricing of milk the Federal Supreme Court referred the proceedings back to the Düsseldorf Higher Regional Court for retrial and decision. Unlike the Higher Regional Court the Federal Supreme Court is hesitant to regard the fact that WalMart's sale of milk below cost price was intended to prevent competitors from making illegal sales below cost price as an objective justification. This contradicted the purpose of protection of Section 20 (4) sentence 2 of the ARC since such conduct was all the more at the expense of small and medium-sized competitors which, however, were the very object of protection of this provision.

### 2. *Mergers and acquisitions*

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

43. Mergers notified under Section 39 (6) of the ARC (Section 23 of the old version of the ARC) and effected

**Table 2**

*1973-2002*

<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
<b>Total</b>	<b>30,893</b>

44. A breakdown of the total figure by examination category:

**Table 3**

	1996	1997	1998	1999	2000	2001	2002
Mergers notified and reviewed prior to completion	1,006	1,207	1,300	1,147	1,359	1,122	1,272
Mergers notified after completion and subject to control	280	362	391	32 <sup>1</sup>	70	16	45
Mergers not subject to control	148	182	197	3	-	-	-
<b>Completed mergers total</b>	<b>1,434</b>	<b>1,751</b>	<b>1,888</b>	<b>1,182</b>	<b>1,429</b>	<b>1,138</b>	<b>1,317</b>

45. A breakdown by type of merger:

**Table 4**

	2001	2002
Acquisition of assets	229	274
Acquisition of interest	503	643
Of which: acquisition of majority interest	453	601
Joint ventures	237	236
Joint ventures with joint control	98	103
Acquisition of control by contract	37	38
Change of joint control	-	-
Competitively significant influence	13	6
Others	21	12

46. By type of diversification, horizontal mergers (1,213, of which 212 were without and 1001 with product diversification) clearly dominated again in 2002 as in previous years. The number of notifications of vertical mergers rose to 31 and the number of conglomerate mergers to 73.

*b) Summary of significant cases*

47. Despite a worldwide decline in merger activity merger control remained an important focal area in the Bundeskartellamt's work. A number of sectors revealed keen merger activity. In addition to the network-based energy sector and the chemical and pharmaceuticals industry particular reference should be made to the utility industry and the local public transport sector. In total the Bundeskartellamt prohibited two planned mergers in the period covered by the report. Six merger projects were cleared with conditions and obligations.

*aa) Prohibition or prevention of mergers*

<sup>1</sup> As of 1 January 1999 all mergers subject to control have to be notified prior to completion. The notifications after completion concern cases in which, due to transitory provisions, this obligation did not apply or had simply be disregarded in violation of the ban on putting a merger into effect.

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48. The Bundeskartellamt prohibited Holtzbrinck KG (Tagesspiegel, city magazine Zitty) from acquiring control of Berliner Verlag KG (among others Berliner Zeitung, Berliner Kurier and the city magazine Tip). The merger would have led to the creation of a dominant position held by Holtzbrinck in the reader market for regional subscription dailies in Berlin and the Berlin reader market for city magazines. With more than 60% Holtzbrinck would have held a market share almost twice as high as the one held by its closest competitor, Axel-Springer-Verlag. Holtzbrinck might have secured or even further expanded this advance by taking strategic measures such as designing newspapers specifically for the eastern and western parts of Berlin or by advertisement price strategies. This must be seen particularly against the background of the strong links existing between readers and "their" newspaper (reader-newspaper relationship). These links are stronger in the case of regional subscription dailies than with other consumer goods.

49. Holtzbrinck would not have obtained a leading position in the advertising market as a result of the merger. However, Axel-Springer-Verlag's still stronger position in this market segment would have been reduced in the long term in favour of Holtzbrinck due to the close connection between reader and advertising markets. Consequently, Holtzbrinck's dominant position in the reader market is not relativised by the market conditions in the advertising market.

50. In the event of a merger Holtzbrinck would furthermore secure a dominant position with "Tip" and "Zitty", by far the two city magazine leaders.

51. After the Bundeskartellamt's prohibition decision the parties to the merger applied for a ministerial authorisation from the Federal Minister of Economics and Labour.

52. If the Bundeskartellamt prohibits a concentration for competition law reasons, firms may seek authorisation for their planned concentration from the Federal Minister of Economics and Labour by advancing non-competition based arguments. In exceptional cases the Minister may authorise a concentration if the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest (Section 42 (1) of the ARC). Prior to the decision an opinion of the Monopolies Commission is to be obtained. In the Holtzbrinck/Berliner Verlag case it is claimed that without the merger the Tagesspiegel would have to be discontinued. The ministerial authorisation would consequently ensure diversity of the press in Berlin, which would be in the public interest.

53. The decision by the Minister of Economics and Labour should in principle be made within 4 months. In the Holtzbrinck/Berliner Verlag case, however, this time-limit was deferred. Holtzbrinck was given the opportunity to re-examine whether there was a buyer for the Tagesspiegel, which would independently operate the newspaper in Berlin. The possibility of such third-party acquisition would make the ministerial authorisation unnecessary for ensuring diversity of the press in Berlin.

54. The Bundeskartellamt also prohibited the planned Nehlsen / Rethmann / swb / Bremerhavener Entsorgungsgesellschaft merger referred by the European Commission under Article 9 of the EMCR. According to the Bundeskartellamt, the merger would have resulted in single or collective dominant positions in regional markets for the disposal, collection and recycling of domestic and commercial waste in the Bremen/Lower Saxony area. The project was also prohibited because it violated the ban on cartels.

55. In early 2002 the Bundeskartellamt had already prohibited the acquisition by E.ON AG Düsseldorf, of a majority stake in Gelsenberg AG, Essen and Bergemann GmbH, Essen, because in its view it would have strengthened dominant positions in the gas and electricity sales markets (cf. Annual Report 2002, para. 59 ff).

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56. After the Bundeskartellamt had issued a prohibition decision the companies concerned filed an appeal at the Düsseldorf Higher Regional Court and applied to the Federal Economics Ministry for a ministerial authorisation. On 5 July 2002 the ministerial authorisation was granted subject to obligations. The main reason the Ministry gave for the authorisation was that this would increase Ruhrgas's international competitiveness on the procurement side. According to the Ministry, the long-term purchase of inexpensive natural gas, particularly from Russia, will improve the security of supply in Germany.

57. On 11 July 2002, following complaints filed by competitors of the participating companies against the ministerial authorisation, the Düsseldorf Higher Regional Court ruled that the authorisation was to have suspensive effect. On 18 September 2002 the Ministry confirmed its authorisation subject to more rigid obligations. However, the Düsseldorf Higher Regional Court upheld its preliminary injunction in its ruling of 16 December 2002.

58. There was no decision on the merits after all appellants had withdrawn their appeal. This had happened against the background of agreements between the parties concerned in which E.ON/Ruhrgas undertook a commitment to compensate the appellants. E.ON now has to fulfil the obligations. First decisions on the sale of certain companies are now forthcoming as well as the start of the Gas Release Programme.

bb) Clearances subject to conditions and obligations

59. The Bundeskartellamt has approved plans of Deutsche Bahn AG to acquire a 49.9% share in the company Stadt- und Regionalbus Göttingen GmbH (SRG) via its subsidiary Regionalbus Braunschweig GmbH (RBB) only under strict obligations. This was cleared with the aim of opening up the local public transport market affected in the Göttingen area to competition in future.

60. As the majority shareholder in SRG, Göttingen City Council has undertaken to offer through open procedures all contracts for transport services falling within its competence as the authority granting local transport passenger-operating concessions for public tender Europe-wide within a period of four years. The invitation to tender should be announced in time to enable the award-winning transport company to start up operations by 1 November 2006 at the latest. This obligation will offset the strengthening of RBB's dominant position in the local public transport market in the Göttingen area and open up the market to more competition in future.

61. The merger project was notified to the Bundeskartellamt by the companies concerned last December. SRG is a subsidiary company of Göttingen City Council and is to incorporate the existing transport companies of Stadtwerke Göttingen AG. RBB is one of a total of 18 regional bus companies integrated in the DB concern. It is by far the leading operator of regular regional bus services in the Göttingen, Brunswick and Hildesheim area. On account of an overlap in the areas of operation of SRG and RBB in the Göttingen area, which would have resulted in a joint market share of well over 80 %, a strengthening of RBB's already dominant position would have been expected in view of relatively weak residual competition in the local public transport sector. With SG RBB would acquire its leading rival as regards competition for the issue or re-issue of concessions for regular services. The worsening of the structural conditions for competition in the Göttingen area expected from this could only be avoided by opening up the local transport market in this area to effective competitive bidding for tenders. Of particular importance here is competition for transport markets on expiry of the respective transport contracts and concessions for regular services. Furthermore competition in the local public transport sector is virtually non-existent due to the formation of associations of transport companies which is desirable from a transport policy point of view.

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62. Within the merger control proceedings which have now been completed the Bundeskartellamt has for the first time comprehensively defined and evaluated the regulatory framework and conditions for competition in the local public transport sector. Like other network-based service sectors before liberalisation (e.g. energy supply) one particular feature of the local public transport sector is that its market structure is currently characterised by regional monopolies. The currently low intensity of competition in the local transport sector is due primarily to how the regulatory framework has been applied in practice, especially the respective regulations of the Passenger Transportation Act. According to this every transport company requires a state permit (concession) to operate a regular service. This exclusive concession is granted for a limited period of time so that the regional monopoly of a transport company can in principle be challenged in the event of expiry of the concession.

63. The low intensity of competition in the local public transport sector has led to initiatives at European level which are aimed at extending the obligation to tender to transport services. However no one can predict when this political process will be completed and what form it will take. Nevertheless the growing pressure to liberalise has led many transport companies in Germany to consider how they can adapt to the competition expected in the future. In many cases cooperation with transport companies with strong market positions such as DB AG have played an important role in this. As a result of the regulatory and competition conditions currently prevailing there is the danger that the liberalisation successes envisaged will be impeded if the transport companies first secure and strengthen their dominant positions in the form of mergers. On the other hand the Bundeskartellamt is also fully aware that a change in the corporate structure of business is also necessary to bring about liberalisation in the public transport sector.

64. The decision which has now been taken takes this conflict of objectives into consideration. On the one hand it will not prevent the large number of local transport companies, which themselves admit to their currently low competitiveness, from cooperating with other companies in the local transport sector. On the other hand it avoids jeopardising the liberalisation successes strived for in the local public transport sector. Making it obligatory to simultaneously issue public invitations to tender Europe-wide will achieve the objective of opening up the local public transport sector to competition for the respective regional market affected.

65. The Bundeskartellamt has cleared BASF AG's acquisition of certain crop protection segments of Bayer Crop Science AG subject to obligations. According to the Bundeskartellamt's findings this concentration in the market for fungicides for the treatment of wheat leaves would have enabled BASF to acquire a paramount market position over its competitors. In order to prevent the Bundeskartellamt from prohibiting the concentration BASF has agreed to grant an interested third party an exclusive marketing licence for at least 5 years, which can also be sub-licensed, for certain cereal fungicides.

66. Through this sale Bayer Crop Science fulfils an obligation imposed in 2001 in respect of the merger of Bayer and Aventis Crop Science which was examined by the European Commission. At the time Bayer had committed itself to sell certain crop protection segments or to license production and/or marketing to third parties in order to avoid a prohibition.

### cc) Clearances

67. Again this year a vast majority of cases were cleared. One example is the clearance of the acquisition of control of DSF Deutsche Sportfernsehen GmbH, Ismaning and the online sports portal Sport 1 GmbH, Ismaning, by a consortium formed by EM.TV & Merchandising AG, Unterföhring, and Karstadt Quelle AG, Essen. The TV channel DSF produces sports-related programmes and coverage and holds licences for broadcasting football and Formula 1 events. Both DSF and Sport 1 are part of the now insolvent KirchMedia group.

68. An examination of the merger project has established that it is not expected to create or strengthen dominant positions. In the German television advertising market EM.TV (including Tele München Gruppe in which it has a share) and DSF are positioned well behind the two leading TV broadcasting groups RTL and ProSiebenSat.1. Furthermore, the separation of DSF and ProSiebenSat. 1, which originally both belonged to the Kirch group, represents a deconcentrative effect. In the TV production sector the project will not alter the market structure in a way which would pose a problem under competition law.

dd) Withdrawal of application

69. In the 2001/2002 period there were 46 cases which, on account of a preliminary examination by the Bundeskartellamt or after notification, were abandoned, modified or terminated without a formal prohibition. The total number thus rose to 391. In the Bundeskartellamt's view these figures are a clear indication of the effectiveness of merger control as in all cases there were considerable competition concerns within the meaning of the prohibition criteria.

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

70. With the collaboration of the Bundeskartellamt there has been a distinct further development in the forms of cooperation and exchange between the competition authorities at European and international levels .

71. In April 2001 the competition authorities of the countries within the European Economic Area, the European Commission and the EFTA supervisory authority combined to form the "European Competition Authorities" forum (ECA). ECA aims at a more effective and more efficient enforcement of national and European competition law and sees itself as a platform for the exchange of experience and information between the participating authorities.

72. Besides regular meetings of the heads of the authorities, the subject-related working groups on cooperation in leniency programmes in cartel cases, cooperation in merger cases which have been notified in several countries, and on the enforcement of competition law in the air traffic sector have already achieved concrete results. For instance, a Procedures Guide was drawn up for mutual information on multiple filings of merger projects which has significantly improved the exchange and cooperation between the authorities concerned.

73. In combating cartels cooperation within the framework of ECA has also led to first experiences in the joint processing of cases. This applies for example to the Bundeskartellamt's collaboration with the Netherlands Competition Authority in a cartel case in the fisheries sector as well as to simultaneous investigations undertaken by the Bundeskartellamt and the Norwegian competition authority in the sector of special chemicals.

74. Among other objectives, the new European regulation 1/2003 implementing the rules on competition aims at setting up a network of the Member States' competition authorities and the European Commission for the application of the European rules in respect of the prohibition of cartels and abuse control (Art. 81, 82 EC) – the "European Competition Network" (ECN). This new network will be able to benefit from the preparatory work done by way of cooperation within the framework of ECA.

75. As of May 2004 Regulation 1/2003 will provide the competition authorities of the Member States and the European Commission with various instruments for cooperation in individual cases, e.g. legal bases for information exchange and mutual official assistance in investigations. These instruments are of great importance for the realisation of one of the Regulation's major concepts – decentralising the

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application of European competition law. In future the Member States' competition authorities will apply European law in many cases which they had so far processed under national law or which had to be dealt with by the European Commission.

### IV. Resources of competition authorities

#### 1. Resources overall

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

Budget 2003		Change vis-à-vis 2002
euro	15.3 million	+0.3 million.
USD <sup>2</sup>	17.14 million	+0.34 million

##### b) Number of employees

	Number	Change vis-à-vis 2002
Economists	46	-7
Lawyers	73	+4
Other experts	10	-1
<i>Support staff</i>	146	+9
All staff combined	269	+2

Updated: 30.6.2003

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

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

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<sup>2</sup> Exchange rate as of September 11, 2003; 1 Euro = 1.12 USD.



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