

Unclassified

DAF/COMP/AR(2011)37



Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

11-Oct-2011

English - Or. English

Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE

DAF/COMP/AR(2011)37  
Unclassified

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

-- 2010 --

*This report is submitted by Germany to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 19-20 October 2011.*

JT03308830

Document complet disponible sur OLIS dans son format d'origine  
Complete document available on OLIS in its original format

English - Or. English

## TABLE OF CONTENTS

Executive summary .....	3
1. Changes to competition law and policy, proposed or adopted.....	4
1.1 Government proposals for new legislation .....	4
1.2 Organisation of the Bundeskartellamt .....	4
2. Enforcement of competition law and policy .....	5
2.1 Action against anticompetitive practices, including agreements and abuses of a dominant position .....	5
2.2 Mergers and acquisitions .....	9
2.3 Sector inquiries .....	17
3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies.....	18
3.1 ICN.....	18
3.2 ECN/ECA .....	19
3.3 Annual Meeting of the Working Group on Competition Law .....	19
3.4 ICC.....	20
4. Resources of competition authorities .....	20
4.1 Annual budget (in EUR and USD) .....	20
4.2 Number of employees .....	20
5. References to new reports and studies on competition policy issues.....	21

## ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

*July 2010 – June 2011*

### **Executive summary**

#### *Legislation*

1. In view of the envisaged 8<sup>th</sup> amendment to the Act against Restraints of Competition (ARC) a white paper has been published, which forms the basis of the discussions.

#### *Organisation*

2. The Bundeskartellamt has further strengthened its focus on anti-cartel enforcement by creating a third decision division solely dedicated to prosecuting hard-core cartels.

#### *Agreements / abusive practices by dominant companies*

3. The Bundeskartellamt's modification of its approach in the recent past has led to an intensification of cartel prosecution. It has imposed fines, inter alia against manufacturers of fire-fighting vehicles and manufacturers of consumer goods.

4. The energy sector has remained a major area of focus in abuse control in the period under review.

#### *Merger control*

5. The number of merger cases has stabilized after a decrease in notifications in the previous year. Among the most significant cases were the prohibition of a joint venture between the two major private television groups RTL and ProSiebenSat1 in the video-on-demand sector, and two clearances subject to conditions: the acquisition of around 200 Trinkgut beverage stores by the leading retailer EDEKA group and the acquisition of the Dutch veal producer Alpuro by the Dutch company Van Drie. The envisaged creation of a joint venture between BHP Billiton and Rio Tinto was abandoned after the Bundeskartellamt had informed the parties that it would issue a statement of objections. Other competition authorities had also expressed concerns.

#### *Sector inquiries*

6. The Bundeskartellamt concluded two sector inquiries and initiated a third one. In January 2011 it published its report on the electricity production and wholesale market and in May 2011 its final report on the fuel market inquiry. The inquiry into the food retail market is still in progress. The sector inquiry on milk is being continued. An intermediary report was published in January 2010.

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

### ***1.1 Government proposals for new legislation***

7. The German Federal Ministry of Economics and Technology, which is in charge of competition policy within the Federal Government, has published its white paper on the 8th general revision of the ARC. In autumn this year, the Ministry of Economics and Technology plans to put forward draft amendments. The changes are foreseen to come into effect on 1 January 2013.

8. The Federal Ministry of Economics and Technology in particular suggests replacing the current dominance test in merger control with the SIEC (“significant impediment to effective competition”) test to further align it with European law. Other changes in the area of merger control include mirroring the EU exception of certain transactions on the stock-market from the stand-still obligation, provided that voting rights are not exercised. Other elements specific to German merger control such as the control of minority shareholdings, the possibility to balance anticompetitive effects with pro-competitive effects in other markets and the possibility of a ministerial authorization of mergers based on an overriding general public interest will be maintained.

9. In the field of abuse of dominance, the Ministry plans to prolong specific provisions to address price abuses in the electricity and gas sector. Specific German provisions on “relative” dominance, i.e. on undertakings with a strong position vis-à-vis small and medium-sized companies, will be maintained. The new law will clarify that the Bundeskartellamt has the power to impose structural remedies including the break-up of dominant undertakings in case of an abuse of such dominant positions.

10. With regard to the enforcement of the ARC, consumer organisations will have more rights in cases where a violation of the ARC has harmed a dispersed customer base. Class actions will not be introduced.

11. Enforcement by the Bundeskartellamt, in particular in cases of fines, shall be streamlined. Legal entities shall be obliged to provide specific data relevant for the calculation of the fine, in particular information regarding the entity’s economic capacity or its conceivable affiliation to an economic unit consisting of several legal entities. According to the white paper, it is intended to close loopholes in the current legislation that provide undertakings with opportunities to circumvent a fine by means of restructuring.

### ***1.2 Organisation of the Bundeskartellamt***

12. The re-calibration of the Bundeskartellamt’s focus has made cartel prosecution one of its central objectives. In the recent past the Bundeskartellamt has carried out a great number of organizational and structural changes and is now in an even better position to fulfil its task.

13. The Bundeskartellamt has established best practices for expert economic opinions. In these best practices the Bundeskartellamt strives to achieve more transparency and to improve the understanding of how cases are treated. The Bundeskartellamt’s notice, which includes quality requirements such as traceability or completeness of data, is intended to standardize the process of submission and evaluation of those documents. If the results or conclusions do not meet these standards, they will be deemed as less useful by the Bundeskartellamt and will therefore be considered to a lesser extent in an assessment of evidence. The notice is available in German and in English.

14. The Bundeskartellamt has also issued a detailed guidance document on substantive merger control for consultation. It is foreseen that it will be updated after the SIEC test has entered into force. The document is available in German and in English.

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

### ***2.1 Action against anticompetitive practices, including agreements and abuses of a dominant position***

#### *2.1.1 Statistics and summary of activities*

15. With regard to cartel detection, the Bundeskartellamt received 30 leniency applications from July 2010 to June 2011. It conducted 11 dawn raids relating to its own proceedings and 12 inspections on behalf of the European Commission. In the period covered by the report the Bundeskartellamt imposed several fines totalling approx. EUR 180 million.

#### *2.1.2 Description of significant cases*

16. Some of the cases described below are still pending and some decisions have not yet become final.

##### *2.1.2.1 Agreements*

17. In August 2010 the Bundeskartellamt imposed fines totalling approximately EUR 91 million against Alstom Power Systems GmbH and against two former directors for having engaged in customer allocation, price and quota agreements for utility steam generators.

18. The subject of the agreements was the supply of steam generators to five power stations. The boiler manufacturers arranged to receive bulk orders at excessive prices by determining in advance who should submit the most favourable bid. Afterwards they split the contract in order to enable all of them to operate at full capacity for the duration of the term agreed upon in the contract.

19. Because of the insolvency of the Babcock Group, which had integrated the activities of the manufacturers Lentjes and Steinmüller, the only cartel member which was still active in this area, and which therefore was the addressee of the fine, was Alstom Power Systems GmbH, which belongs to the French ALSTOM Group. In addition, several persons were subject to investigative proceedings by the Berlin Public Prosecutor's Office on suspicion of bid rigging and some of them had to pay fines.

20. In September 2010 the Bundeskartellamt imposed a fine of EUR 1.2 million on Condor Flugdienst GmbH for its participation in an illegal agreement that had ended in autumn 2009 after the discovery of the infringement during an internal audit. The agreement stipulated that SunExpress airline, a joint venture of Deutsche Lufthansa AG and Turkish airlines, had to offer its flights to Turkey at a price of EUR 99 or more. The price of an air ticket was to be set at no more than EUR 10 below the price offered by Condor. The agreement only concerned routes both airlines covered at the same time; only the seat-only business was affected.

21. The fine was imposed only on Condor because SunExpress benefited of the leniency programme. Condor, a fully owned subsidiary of Thomas Cook AG, agreed to a settlement with the Bundeskartellamt.

22. In October 2010 the Bundeskartellamt imposed fines of EUR 660,000 on two manufacturers of press room chemicals for their involvement in anti-competitive agreements concerning customer allocation and price increases. A third participant applied for leniency and therefore benefited of the respective program. The fact that the other two manufacturers fully cooperated was taken into account in the setting of the fines as well as the fact that only a comparatively low volume of turnover was affected by the price agreement.

23. In December 2010 fines of about EUR 15 million were imposed by the Bundeskartellamt on twelve companies in the chemical wholesale sector which had agreed on prices and supply quotas for standardized industrial chemicals (“commodities”) and concluded customer protection agreements. Six different regional cartels were discovered due to a leniency application. The cartels covered only the chemical wholesalers’ distribution business in several regions, and some had lasted for decades. Investigations in this sector are still continuing.

24. In February 2011, a cartel in the fire-fighting vehicle sector led to the imposition of fines of about EUR 20 million. Following an anonymous notification and assisted by the Austrian Competition Authority, the Bundeskartellamt became aware of the price fixing and quota agreements which allowed the cartel members to divide the market for fire-fighting vehicles among them. This conduct had caused considerable financial harm to many municipalities since 2001.

25. Regular meetings of the cartel members in Zurich and meetings at the sales manager level made it possible for the companies to define price increases and agree on so-called “target quotas” by which they granted each other a certain share of sales.

26. An accountant who was involved in the cartel was also fined. The proceeding against a fourth company is still pending. As the cartel members had cooperated with the Bundeskartellamt this was taken into account in the settlement.

27. In January 2011, the Bundeskartellamt imposed a fine of a total of EUR 1 million against five manufacturers and one wholesaler of paper plates. From 1999 to 2002 the companies had participated in a cartel involving price and customer protection agreements. The Bundeskartellamt started its investigations following customer complaints. Four of the companies applied for leniency and cooperated extensively, which was considered in the calculation of the fines. The proceedings were terminated by settlement.

28. A fine of EUR 38 million was imposed on three manufacturers of consumer goods in March 2011 on account of the illegal exchange of competition-relevant information.

29. The companies informed each other of the state of their negotiations with several major retailers and partly about plans concerning price increases in certain areas. They exchanged information that is usually treated confidentially. Just as agreements between market participants, the exchange of competition-relevant information can also restrict free competition and is thus illegal under German and European competition law. The information concerned various product areas, i.e. confectionery, ice cream, dry ready-to-eat-meals, frozen pizzas, pet food and detergents. All the companies agreed to have the proceedings terminated by settlement under the simplified procedure.

30. In the reporting period, the Bundeskartellamt also dealt with other types of agreements than hard-core cartels. In May 2011 the Bundeskartellamt examined, for example, the admissibility of a market information system in the milk sector. Agrarmarkt Informations-Gesellschaft mbH, Bonn (AMI) collects and publishes market data which companies in the agriculture-food sector are required to provide under European law. In addition to this AMI would like to publish additional market reports, inter alia on the monthly price a dairy pays its farmers for their raw milk. According to the Bundeskartellamt's preliminary assessment, a non-identifying market information system in the milk sector does not raise competition concerns under Section 1 ARC or Art. 101 TFEU if the published data are sufficiently aggregated.

#### *2.1.2.2 Abuse of a dominant position*

31. In July 2010 the Bundeskartellamt concluded most of its proceedings against gas and electricity suppliers. The gas and electricity suppliers agreed to renounce resale bans introduced by anti-competitive contract clauses.

32. The Bundeskartellamt obtained first indications of these clauses from the German Association of Industrial Energy Consumers and Generators and from its sector inquiry "Capacity situation in the German gas transmission networks" (published in 2009).

33. For efficiency reasons the investigation was focused on the major companies in the market. The Bundeskartellamt established that those clauses which contain a take-or-pay-obligation and oblige the customer to purchase a minimum volume of gas and electricity ("minimum take") while prohibiting resale of the minimum take are considered inadmissible.

34. In times of economic crisis where cutbacks in production are not unusual it is important that the companies are free to trade the energy they do not consume. A clause that obliges them to buy a certain amount without giving them a resale possibility therefore hinders trade and leads to the restriction of competition. The gas suppliers pledged to change their contracts and to eliminate such anticompetitive clauses.

35. In September 2010 the Bundeskartellamt successfully concluded its abuse proceedings against electric heating providers. The companies promised to implement measures to open up the market. 13 providers paid out reimbursements to their customers amounting to approx. EUR 27 million.

36. The electric heating market covers the supply of electricity for night storage heating and electric heat pumps. In Germany just under two million households (approx. 4 % of all homes) use electricity as a form of heating. The providers are practically without competitors in their respective supply areas. In contrast to the market for "normal" household electricity, there are a number of barriers to entry for newcomers and so far very limited possibilities for consumers to switch supplier.

37. Overall, the Bundeskartellamt examined 18 electric heating providers and seven low-price benchmark companies to compare revenue and costs from 2007 to 2009, covering more than 70 % of the electric heating supplied to private customers. While 24 companies, as well as others falling under the competence of the Bundeskartellamt, have pledged to implement a number of measures to open up the market, one procedure is ongoing.

38. In the course of the proceedings, all the companies promised to implement the following measures to open up the market: transparent publication of electric heating tariffs on the Internet; establishment and transparent publication of temperature-dependent load profiles by the network operator.

39. In addition, the companies have undertaken to apply or to continue to apply the low concession fee of currently 0.11 ct/kWh applicable to special contracts to all supplies of electric heating. Depending on the supply area, this will further ease the burden on consumers of electric heating.

40. The Bundeskartellamt's analysis has shown that some electric heating providers achieve comparably moderate profit margins and that also according to the efficiency standards of the Bundeskartellamt some of them even carry cost deficits. Those providers that had proven to be comparatively expensive in the examination promised to financially compensate their customers, either in the form of credit amounts in the customers' next bills or the non-implementation of price increases that were objectively justified by rising costs.

41. In spite of rising costs for the incoming supply of renewable energy many electric heating providers did not raise their prices in 2010, not least with regard to the proceedings. The costs which were not passed on amount to at least € 20 million for 2010.

42. In February 2011 the Bundeskartellamt closed its proceedings against Evonik Industries AG and RWE AG. It had initiated the proceedings on the suspicion that the companies had used anti-competitive

reimbursement clauses in electricity procurement contracts. In these contracts Evonik had undertaken to hold available a certain amount of power generating capacity for RWE and, inter alia, to reimburse RWE for capital service costs if electricity was marketed to third parties. The compulsory repayment obligation had the effect of hindering Evonik in its free marketing of electricity capacities to third parties. The proceedings were closed after the two companies had declared the respective clauses invalid.

43. Subsequently, RWE also stated that it would not exercise its option to extend its procurement of electricity from Evonik power stations in the Saarland and the Ruhr area beyond 2012. Consequently substantial capacity will be available in future from the Evonik power stations for marketing to third parties.

### *2.1.3 Activities of the courts*

44. In appeal proceedings against a formal decision of the Bundeskartellamt requesting information, the Düsseldorf Higher Regional Court examined whether a water provider, whose services to its customers were based on a public-law relationship (fees) and which had a monopoly in its area due to compulsory connection and use, constituted an undertaking under the ARC. The court stated that the provider did not constitute an undertaking within the meaning of competition law and therefore was not obliged to provide information under the provisions of the ARC. According to a functional definition of what constitutes an undertaking, the ARC did not apply to the sovereign activity of the state.

45. The court did not consider the activity of the supplier as an economic activity because of the element of compulsory connection and use. The ARC only applied if there were potentially competitive relations to third parties. According to the court, this is not the case if the water provider supplies consumers with drinking water in a public-law relationship on the basis of compulsory connection and use. In this case the state was not only active on a public law basis but also excluded any competition by third parties from the onset due to its (legally admissible) monopolisation. In this respect each case should be decided on a case by case basis and it should be determined whether the specific water provider performs an economic activity. The reference to the abstract possibility of water supply on a non-sovereign and economic basis therefore runs counter to the principle of case-by-case assessment.

46. Another decision of the Federal Court of Justice concerned the allegation of abusive pricing in the form of price discrimination by a supplier of natural gas. The supplier in question offered natural gas to customers outside its traditional supply area via an affiliated company at significantly more favourable conditions without making this service accessible to its customers in its traditional supply area, in which it is dominant. The court made it clear that price discrimination can be objectively justified if a dominant company intends to extend its activities to another market in which successful market entry only seems possible by temporarily and significantly underbidding the price level because there is no effective competition in the market. In particular, such pricing strategies could be considered as a means to remove barriers to entry in the gas supply market in the case in question. In such instances market entry only seems possible if customers' unwillingness to switch supplier can be overcome, which, in the case of a homogeneous product such as gas, is mainly possible by the offer of a significantly more favourable price.

47. According to the court, this attempt by the supplier to acquire customers in the new market by offering a product at lower prices and to establish itself as a new supplier should not imply that customers in the traditional area of supply are being exploited as long as the price difference is not disproportionate and is limited to the phase of market entry. The duration of the phase of market entry and what price differentiation is justified depend on the competitive conditions in the secondary market.

48. In a civil law dispute the Federal Court of Justice had to decide whether an independent garage was entitled to be admitted to the network of authorized garages of a utility vehicle manufacturer. The



court denied this claim on the grounds that the defendant manufacturer (MAN) was not dominant on the relevant market. Such authorization, it stated, applied to a market for the provision of maintenance and servicing of utility vehicles which was upstream of the end customer market. This upstream market included all products, services and rights which facilitate entry to the downstream market, such as the offer of spare parts, special tools and equipment. According to the court, this upstream market should be defined as a multi-brand market. The argument that the undertaking's admission as an authorized MAN garage was only possible with the cooperation of MAN, did not indicate that MAN held a dominant position in the market. The status of an authorized MAN garage, the court declared, was not a resource which was absolutely essential for entry to the end customer market.

## **2.2 *Mergers and acquisitions***

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

49. In the calendar year of 2010, 987 mergers were notified to the Bundeskartellamt. The number of mergers has remained relatively stable since 2009, after a decrease between 2008 and 2009. This decrease was attributable both to the economic crisis and to the 2nd domestic turnover threshold that was introduced into German merger control law in 2009.

50. Main examination proceedings were initiated in 15 cases. Five of these cases were withdrawn during these second phase proceedings. In 2010 the Bundeskartellamt prohibited one merger and cleared six mergers. Another three mergers were cleared subject to conditions and obligations.

51. About two-thirds of all notifications were submitted because the mergers fulfilled the criteria of an acquisition of control (in most cases in combination with a purchase of shares) under merger control law. Other types of concentration were of lesser significance.

### *2.2.2 Summary of significant cases*

#### *2.2.2.1 Prohibition of mergers*

52. In March 2011 the Bundeskartellamt prohibited the proposed joint venture by RTL and Pro7Sat1 for the creation and operation of an online video platform.

53. The RTL Group is the TV division of the Bertelsmann media group and one of the two major private TV broadcasting groups in Germany. Pro7Sat1, the second major German private TV broadcasting group, is owned and jointly controlled by the equity firms KKR and Permira. It is also active in the pay TV area. Like RTL, Pro7Sat1 is furthermore active in the areas of production and online/new media. The company controls the "maxdome" video on demand platform. According to the notified concept, the planned platform of the joint venture was to be used to set up a platform for catch-up TV, i.e. to give access to cross-channel content, which had already been broadcast on television, for a limited duration.

54. Besides RTL and Pro7Sat1, other German and Austrian TV stations were considered as potential clients for this service. The programme content was to be made available free of charge for seven days after broadcast on TV. The platform was to be launched under its own trademark and have a homepage with additional areas reserved for individual clients. Clients would have been able to place adverts in their own individual areas but not on the homepage. Every client was to market its advertising inventory in its own name and for its own account. Video advertising spots were to be made available before, during and following the chosen content. So was traditional display advertising.

55. The project would have mainly affected the German TV advertising market. The joint venture itself would not have become active in traditional TV advertising; however, the creation of the joint

venture would have significantly affected the competitive situation on the TV advertising market because there is a competitive link, at least in the form of competition from substitutes (i.e. products not belonging to the same product market), between TV advertising and the new form of advertising on which the joint venture would focus. In view of the already high level of concentration on the TV advertising market, this substitutability is highly relevant for competition in this market. As a result of the joint venture, in-stream video advertising would have been dispersed via the newly created platform. In-stream video ads are audio-visual advertising spots, similar to short commercials on television, which are played before, during or after a video selected by the user.

56. According to the results of the market survey, RTL and Pro7Sat1 form a dominant duopoly on the German TV advertising market (see also the “Springer/Pro Sieben II” decision of the Federal Court of Justice, 2.2.3). An overall appraisal of all the relevant circumstances and an analysis of the actual market situation show that there is no substantial competition between the two companies (lack of internal competition). Together they enjoy a paramount market position in relation to their competitors (lack of external competition). The structure of the TV advertising market suggests that permanent uniform conduct on the part of the two members of the duopoly is very likely. The economic incentives even after the merger were likely to support this conduct, to enable the parties to maximize their profits by aligning competitive factors. In addition, RTL and Pro7Sat1 collectively hold an overall paramount market position vis-à-vis other competitors and are not exposed to any significant external competition from the other TV channels. The market position of the parties is also not counterbalanced by the market power of the opposite side of the market or by competition from substitutes.

57. The notified merger project would have strengthened the collective dominance of the parties on the German TV advertising market. The envisaged business model would have enabled RTL and Pro7Sat1 to coordinate and harmonize important parameters of competition between them. Although these parameters of competition applied primarily to in-stream video advertising, they would have had direct consequences for the dominated TV advertising market. In-stream video advertising, which is increasingly being used, is a product, which due to its particular closeness to TV advertising, seems like no other likely to exert competitive pressure on the TV advertising market in the form of competition from neighbouring substitutes. In a competitive situation RTL and Pro7Sat1 would have to develop and implement individual strategies in reaction to the increasing possibilities of in-stream video advertising. However, by setting up the joint venture, instead of implementing their own individual parameters of competition, the parties would have applied a joint concept which would have given them a collective advantage over their competitors.

58. In addition to the possibilities already mentioned, the joint venture would also have increased incentives for the parties to foreclose access to content for competing platforms. The corporate links between the two parties would have also further increased the transparency of competitively relevant information and practices. This would have diminished competition from substitutes, further stabilizing coordination within the duopoly and helping to maintain the collective dominant position on the German TV advertising market. Only an open, purely technical platform would have ensured that these benefits outweighed the remaining anti-competitive effects. A central element of the notified project was that it limited access to the platform to TV channels and imposed restrictions on availability duration, availability dates and quality of content. In the authority's opinion, such a platform would have helped to maintain collective dominance and would have transferred it to the segment of video advertising in online video content.

59. The agreements which would have emanated from the joint venture would have appreciably restricted competition within the meaning of § 1 ARC, Art. 101 (1) TFEU for the same reason that they would have stabilized coordination within the duopoly. An exemption from the provision on anti-competitive agreements under Section 2 ARC or Art. 101 (3) TFEU was not possible. The efficiency gains

which the parties claimed would follow from the anti-competitive agreements could only be expected to materialize to a certain extent. The Bundeskartellamt has therefore prohibited the creation of the joint venture under Section 32 ARC. The decision is not yet final. The companies have appealed the decision at the Düsseldorf Higher Regional Court.

60. In October 2010 BHP Billiton and Rio Tinto abandoned their plans to set up a joint venture for the production of iron ore in Western Australia. The Bundeskartellamt had informed the parties that it would issue a statement of objections to their planned concentration. Other competition authorities had also expressed concern about the concentration's effects on competition.

61. The participating companies had notified the joint venture to the Bundeskartellamt in January 2010. Prior to this the EU Commission had informed the parties that their project did not fulfil the requirements of a concentration within the meaning of the European Merger Regulation. The Commission focused its further examination on whether the parties had entered into anti-competitive agreements within the meaning of Art. 101 TEUV. However, as the project constituted a concentration under the German Act against Restraints of Competition, competence for merger control remained with the Bundeskartellamt.

62. The parties to the project are two diversified, internationally active commodity companies with annual turnovers of approx. US\$ 50 billion (BHP) and US\$ 44 billion (Rio Tinto). In Germany the two company groups each achieved turnovers totalling more than € 1 billion. Both companies hold extensive iron ore deposits in the Pilbara Region in Western Australia. Apart from Brazil, this region is one of the largest mining regions for iron ore.

63. The parties planned to jointly operate their mines, railways and port facilities in Western Australia under the notified joint venture arrangement. They also intended to jointly explore new deposits, expand their infrastructure and standardize their products (iron ore in different qualities) in a few product blends. The volume and costs of production were to be split according to a fixed code whereas their (jointly manufactured) products were to be marketed separately.

64. With the launch of the joint production venture the participating undertakings would have collectively coordinated not only approx. 90 % of their production on the iron ore markets, but also approx. 90 % of their total costs. Furthermore, it could be expected from the contracts concluded that the parties would bring onto the market virtually identical volumes of identical products at identical production costs. In the Bundeskartellamt's view this would have led to the creation of a competitive unit between BHP Billiton and Rio Tinto from which, given their joint interests, no relevant competition between the parties could have been expected despite the fact that their marketing companies would have continued to operate separately.

65. In addition, in the Bundeskartellamt's opinion, the concentration would have strengthened a collectively dominant position held by the parties and the Brazilian mining company Vale on the international market for long-term seaborne traded fine ore. The concentration would have also created a single firm dominance of the parties on the international market for long-term seaborne traded lump ore.

66. Both markets affected are characterised by high levels of concentration and stable market shares. Together with their Brazilian competitor Vale, the parties have a 65% share of the market for seaborne traded fine ore. The joint share of BHP Billiton and Rio Tinto of the market for seaborne traded lump ore is already 55 %. These market shares, particularly in the case of fine ore, are even higher if long-term supply relationships are taken into account. However, due to insufficient data available, no separate market volume could be ascertained for long-term supply relationships with the result that the market volume taken as a basis also included short-term supply relationships (spot market), which was beneficial to the

parties. There has been no considerable change in market share in the last few years. Leading industry analysts also expect market shares to remain stable in the future.

67. According to the Bundeskartellamt there is already an uncompetitive oligopoly between the parties and Vale on the market for seaborne traded fine ore even before the concentration. Due to the structure of this market, permanent uniform conduct on the part of the members of the oligopoly would have been likely. In its various forms, iron ore can be considered as a homogeneous bulk product. The markets are characterised by a high supply/seller concentration, long-term and stable supply conditions, extremely high transparency, high investment costs and barriers to entry as well as low price elasticity of demand. In particular the high market transparency, which was increased by way of regular press releases by the 2 oligopoly members on competition-relevant topics, underpins effective coordination and credible sanction mechanisms.

68. In spite of certain asymmetries, particularly between BHP Billiton and Rio Tinto on the one hand and Vale on the other, and a strong increase in demand, no significant individual deviation by the oligopolists from coordinated price and volume equilibria could be observed in recent years. There is a strong incentive within the oligopoly to coordinate volume increases in such a way as to maintain supply shortages. In this way prices can be kept above the competitive level and higher profits achieved by the oligopolists in the long term. This incentive exceeds by far the lesser incentives for individual oligopoly members to deviate from the successfully coordinated equilibria in favour of maximizing profits in the short term. The scope of action of the uncompetitive oligopoly is not sufficiently limited by external competition either.

69. On the market for fine ore this dominant position of the oligopoly between BHP Billiton, Rio Tinto and Vale would have been strengthened by the concentration. The number of independently active members in the oligopoly would have been reduced from three to two. The already high transparency would have further increased and the coordination costs would have fallen. There would have been distinctly less incentive to deviate from the coordinated equilibria.

70. On the lump ore market a single firm dominance would have replaced the uncompetitive duopoly between BHP Billiton and Rio Tinto. Since BHP Billiton would have combined its production with that of its next and closest competitor, Rio Tinto, any residual competition between these two suppliers would have been eliminated. The resulting scope of action of the new competitive unit would not have been adequately controlled by external competition either.

71. The parties assumed that the concentration would release substantial rationalisation potential. However, the parties could not prove that the argued cost advantages and the claimed increases in volumes would have outweighed the negative effects of the project. Firstly, the advantages put forward did not fulfill the requirements of § 36 (1) ARC. Secondly, these advantages would not have benefited consumers but only the participating undertakings and their shareholders.

#### *2.2.2.2 Clearances subject to conditions and obligations*

72. In October 2010 the Bundeskartellamt cleared the acquisition of around 200 trinkgut beverage stores by the EDEKA group subject to conditions. A very large share of the domestic market volume of the German food retail market is accounted for by EDEKA, the Schwarz group, Aldi, REWE, Metro and Tengelmann. The merger project was cleared subject to the condition that the companies divest up-front about 30 outlets (trinkgut and Top beverage stores) in ten different markets, as well as the beverage logistics provider Maxxum, which so far had belonged to trinkgut.

73. The concentration concerned the market for the sale of beverages to end consumers in several regional markets, especially in North Rhine-Westphalia and Lower Saxony. With the merger EDEKA acquired a competitor with a similar sales concept in the beverage retail sector. Trinkgut was also the largest beverage store chain in Germany.

74. The Bundeskartellamt examined approx. 80 regional markets. In its investigation, it included all retailers with considerable market significance, as well as more than 100 small and large beverage stores. According to the Bundeskartellamt's findings, the concentration was likely to create or strengthen a dominant position of EDEKA in ten regional markets.

75. The concentration also led to an increase in EDEKA's purchase volume of beverages. In relation to smaller competitors, this enabled EDEKA to enforce better purchasing conditions and thus also gain a competitive advantage on the sales markets, which further secured its market position.

76. In addition, with the acquisition of the beverage logistics provider Maxxum, EDEKA would have been able to directly negotiate purchase conditions with manufacturers of beverages, independent of the market level of the specialised wholesale trade with beverages.

77. The Bundeskartellamt's investigation of the market conditions in the procurement markets had shown strong indication that EDEKA, REWE and the Schwarz group formed a dominant oligopoly on the procurement markets for manufacturers' brands in the area of non-alcoholic beverages. However, these results of the investigation were not sufficient to result in a prohibition of the merger project.

78. In December 2010 the Bundeskartellamt cleared the acquisition by Van Drie based in Mijdrecht, Netherlands of the veal producer Alpuro based in Uddel, Netherlands subject to conditions. The clearance decision was subject to the suspensive condition that Van Drie divested its calf fattening activities in Germany before the merger was put into effect.

79. Van Drie and Alpuro are leading producers of veal in Europe. Their business activities cover the entire veal production chain. They buy young calves for fattening, which they feed in their own or contract fattening farms. They then slaughter the fattened calves and sell the veal.

80. These two Dutch veal producers accounted for virtually all cross-border consignments of veal. The exports of national suppliers seemed very minimal by contrast. In the most important sales markets for veal (Germany, France and Italy) domestic production was not sufficient to satisfy existing demand. Furthermore, there were considerable differences from country to country in consumption patterns and proof of origin requirements for veal.

81. As a result of the merger Van Drie would have expanded its leading position on the German market for the sale of veal to wholesalers, industrial processors and the gastronomy sector. By acquiring Alpuro Van Drie would have improved its access to procurement markets with regard to the acquisition of young calves, fattening places and fattened calves. Due to shortages across Europe in access to fattening places and fattened calves and the concentration of demand on Van Drie and Alpuro, the market position of the parties could hardly be weakened by domestic suppliers. In addition to this, German suppliers of veal depended on Van Drie's contract fattening farms in Germany for their acquisition of fattened calves in order to reach their slaughter volumes. On account of the inadequate availability of fattened calves, it was not possible for domestic suppliers to expand their slaughtering capacities to a level which would allow competitive advances.

82. To avoid a prohibition of the merger, Van Drie approached the Bundeskartellamt with the offer to undertake certain commitments. The sale of the companies in which Van Drie's calf fattening activities in Germany were concentrated, would mean the sale of approx. 30,000 fattening places, which was the

equivalent to approx. 20 % of all fattening places in Germany. Following intense negotiations on which form these commitments should take, the merger was cleared subject to the above obligations to divest.

### 2.2.2.3 *Clearances of mergers*

83. In March 2011 the Bundeskartellamt cleared the acquisition by EDEKA of six self-service stores, a specialist store and five cash & carry markets owned by RATIO KG, Münster. The merger project originally included more RATIO markets. However, its notification was withdrawn by the parties after the Bundeskartellamt had expressed competition concerns against the acquisition of these outlets. The project, which was re-notified, was cleared and was confined to the markets which are considered unproblematic from a competition law perspective.

84. An acquisition of all RATIO outlets by EDEKA would have faced prohibition. As in the recent EDEKA/trinkgut proceedings (see above 2.2.2.2 clearance subject to conditions and obligations) and the EDEKA/Tengelmann case (see Annual Report 2008 point 2.2.2 mergers and acquisitions) the Bundeskartellamt carried out a thorough examination of the affected markets and analysed shopping alternatives available to consumers. According to the authority's findings, the acquisition of certain self-service stores would have further strengthened EDEKA's already dominant position in the regional markets affected.

85. Equally, the acquisition of three RATIO cash & carry markets would have created a dominant position for EDEKA in the regional food cash and carry wholesale segments, which have to be assessed as a separate market. EDEKA's market shares in these markets lay between 90% and 100%. Even a consideration of the competitive pressure exerted at least to some extent by the wholesale delivery sector did not lead to a different result.

86. In April 2011 the Bundeskartellamt cleared the merger of the three health insurance funds AOK Rheinland-Pfalz, AOK Saarland and IKK Südwest under the new name AOK IKK Südwest.

87. The focus of the examination of the merger lay on AOK IKK Südwest's future position as a customer of health care providers on the markets for medical services for those insured under the statutory health system. AOK IKK Südwest's market shares were likely to be very high on regional markets or markets covering the federal states of Rhineland-Palatinate and Saarland. However, the relationship between the health insurance funds and health care providers was still largely characterised by collective agreements, i.e. contracts between several parties or their associations on both sides. This also applied to those areas in which so-called selective agreements or integrated care contracts were concluded on an individual basis. The health insurance funds were also faced with in some cases powerful health care provider associations. Both of these factors sufficiently constrained the market power of the new AOK IKK Südwest.

88. Finally, there were no major concerns about AOK IKK Südwest's future position as a provider of insurance services. In this respect the new health insurance fund stands in competition with other, mostly active health insurance funds and has only a minor share of this national market.

89. In April 2011 the Bundeskartellamt cleared the creation of the joint venture CPTN by the four companies Microsoft, Oracle, Apple. and EMC. CPTN was meant to acquire 882 software patents and patent applications from the American software company Novell and distribute them among the four parent companies following a mechanism that had been determined beforehand. The partners, furthermore, received licences for all patents. After three months CPTN was to be dissolved. The sale of the patents was contractually linked to the sale of Novell's operational business to Attachmate, which was cleared by the Bundeskartellamt in December 2010. The sold patents concerned, inter alia, the operating system "Linux".

90. The project had already been notified to the US Department of Justice (DoJ) and the Bundeskartellamt in December 2010. However, the notification was withdrawn at the end of December 2010 in response to competition concerns expressed by both authorities. These concerns related in particular to the markets for operational systems and virtualization software, in which Microsoft and EMC/VMware are, at least, powerful. On these markets, there is a general possibility to apply so-called FUD strategies ("Fear, Uncertainty, Doubt") against smaller competitors, which can be pursued by means of patent actions. Numerous complaints, in particular from the open source community, had also pointed this out.

91. The renewed notification therefore contained several amendments: Microsoft would sell on its future share of the patents in advance to Attachmate. EMC's share of the patents would not include a number of patents that appeared to be of relevance on the market for virtualization software. These commitments, as well as further changes to the parties' contracts to keep the Novell patents open for open source suppliers, allayed the competition concerns regarding the markets that had been identified as critical. As a consequence the Bundeskartellamt and the DoJ cleared the formation of CPTN and its acquisition of the patents from Novell. The DoJ indicated that it would continue to investigate the distribution of the patents to the individual owners.

92. As the participating companies had given their consent to the exchange of information (waiver) between the authorities, the DoJ and the Bundeskartellamt were able to cooperate closely and to coordinate their actions in a very constructive way.

93. Further clearance decisions after in-depth investigations by the Bundeskartellamt concerned the markets for delicatessen products, banking services and specialty chemicals.

#### *2.2.2.4 Violation of the prohibition to put mergers into effect*

94. In January 2011 the Bundeskartellamt imposed a fine of approx. EUR 400,000 on the ZG Raiffeisen central cooperative, Karlsruhe, for violating the prohibition to put into effect its acquisition of substantial assets of the insolvent Wurth Agrar GmbH & Co. KG, Appenweier.

95. In May 2011 the Bundeskartellamt imposed a fine amounting to approx. EUR 200,000 on Interseroh Scrap and Metals Holding GmbH, Dortmund, for violating the prohibition to put a merger into effect before notification.

#### *2.2.3 Activities of the courts*

96. In its "Springer/ProSieben II" decision the Federal Court of Justice confirmed in the last instance the 2006 prohibition of the plans by the publishing house Springer Verlag to acquire all the shares in the ProSiebenSat1 TV broadcasting group. The court held that the assessment by the court of lower instance, according to which a collective dominant position of ProSiebenSat1 and the competing broadcasting group RTL would have been strengthened on the TV advertising market, did not contain any errors of law.

97. With regard to establishing a duopoly of the two broadcasting groups the Federal Court of Justice issued another statement on the principles to be observed in the overall appraisal to be undertaken in examining the existence of collective dominance. The court held that it was particularly important to establish whether coordinated conduct by the members of the oligopoly could be expected as a result of the market structure. Market transparency and deterrence and sanctioning mechanisms were seen as decisive indications. According to the court, further criteria should also be taken into account. However, it was not decisive to have all these criteria fulfilled in the sense that the analysis of each individual structural factor per se would provide an indication of incentives for uniform conduct. The court held that it was of crucial importance to provide an overall appraisal in order to evaluate the individual factors with regard to their

significance for the market in question, and to examine whether and to what extent they are in fact likely to encourage uniform conduct by the companies concerned. If this appraisal revealed criteria which indicated a collective reaction by the companies, a further requirement would be that there was indeed no substantial competition between them.

98. The Federal Court of Justice also confirmed the assessment that the merger would strengthen the collective dominance as a result of its conglomerate effects. As a rule, the dominant position of an oligopoly will be strengthened even if only one of its members improved its market position. According to the court it was not necessary for the structural conditions of a permanent uniform conduct to be improved. The situation would have to be assessed differently only if a concentration changes the market structure in such a way that a revival of internal competition can be expected. The court therefore held that the contested decision was supported by the statement that effective means would have been available to the new Springer/ProSiebenSat1 group for cross-media advertising of the group's media.

99. In a further collective dominance case the Düsseldorf Higher Regional Court overturned a Bundeskartellamt decision which prohibited a planned merger on regional petrol station markets in eastern Germany. The court confirmed the Bundeskartellamt's definition of separate retail markets for the sale of diesel and petrol and the finding of regional submarkets. However, the court denied that the five large vertically integrated oil companies held a collective dominant position. Although the structural conditions in the relevant markets, e.g. product homogeneity and market transparency, generally favoured a close collective reaction (implicit coordination) of the companies involved, the court held that no effective deterrence and sanction mechanism existed. This was deduced from the market developments observed, in particular from the companies' price-setting behaviour. The court focused on the fact that after price increases, which were generally initiated by the same companies, the price level did not remain constant but generally fell again. It also pointed out that one company which was alleged to be a member of the oligopoly regularly undercut the other nationwide petrol station operators by one cent. Low profit margins in the fuel sales markets were also considered to be an indication that there was no collective dominance.

100. In another case, following an appeal lodged by the parties, the Düsseldorf Higher Regional Court revoked a Bundeskartellamt decision which prohibited a merger between the publishers of neighbouring regional subscription dailies. The court largely confirmed the Bundeskartellamt's market definition which was limited to printing markets. Online advertising was taken into account in the context of the substantive analysis, but the investigations had shown that the competitive restraints exercised by online advertising were not sufficiently strong to include it into the same market. It also held that each of the newspaper publishers involved had a dominant position in the relevant reader and advertising markets. According to the court, the quasi-monopolistic position of their newspapers was not effectively restricted by the supply of information available on the Internet or Internet advertising opportunities.

101. However, the court denied the conclusion of a strengthening effect due to the loss of potential competition. Given that the newspapers whose circulation areas only marginally overlap were interlinked through several co-operations which were not terminable at short notice (provision of newspapers' main section and joint advertising section), the court held that it would be neither economically practical nor commercially sound for the parties to engage in competition. According to the court, the creation of competition through the acquisition of the target company by a third party and the termination of the co-operations could not be expected to occur in the future with any sufficiently high degree of probability.

102. In another proceeding the Düsseldorf Higher Regional Court rejected as unfounded the third-party appeal of a municipal utility against the Bundeskartellamt's clearance decision subject to remedies in the proceedings concerning the participation of EnBW in VNG Verbundnetz Gas AG (VNG). According to the court, the appeal would only be well-founded if the preconditions for clearance did not exist in the market in which the appellant is active and where only the appellant itself could be negatively affected by



the clearance. For this reason only a market for the supply of natural gas to distributors in southern Germany could be considered. However, the court held that in this market the loss of (potential) competition from VNG was not likely to create or strengthen a dominant position of Gasversorgung Süddeutschland (GVS), which is co-controlled by EnBW. The court even assumed that this product market was to be defined in geographic terms as being limited to the area of the network operator, in this case GVS. It was fully aware that the revision of the legal framework had considerably facilitated the entry of third parties to the network area and that an increased number of such market entries were now actually taking place.

103. However, a more detailed analysis was still required to ascertain to what extent reciprocal market entries had actually taken place within the companies' market area or even in the whole of Germany. According to the court a constant monitoring of this development was still required so that the decision in question did not set a precedent for future cases. In any case, no strengthening effect could be found to exist in the geographic market defined by GVS' network area. The position currently held by VNG in the market was inconsiderable, and VNG would still be unable to control the market behaviour of GVS in any significant way in the future.

### **2.3 Sector inquiries**

104. In January 2011 the Bundeskartellamt published its final report on the sector inquiry into the electricity wholesale sector which it had launched in March 2009. The object of the inquiry was to examine the competitive situation and pricing on the German electricity production and wholesale markets in 2007 and 2008.

105. The inquiry revealed that the competitive situation on the market for the first-time sale of electricity remains unsatisfactory. Just four companies hold a good 80 % share of the first-time sales market. The analysis of the competition situation suggested that these providers (RWE, E.ON, Vattenfall and possibly also EnBW) each have a dominant position in Germany. This resulted from the fact that each of them was indispensable for covering electricity demand over a significant number of hours in the period examined.

106. Based on extensive investigations on supply behaviour on the electricity exchange and the operational management of more than 340 power station blocks, the Bundeskartellamt examined whether there were indications of companies withholding power station capacities in order to force up the prices on the electricity exchange. On the basis of the data examined on the operational management of power stations and the cost situation of individual power stations, no evidence was found that substantial production capacities had been systematically withheld. Nonetheless the extensive empirical analysis of market activity revealed that the leading producers have the incentive and possibilities to considerably influence the electricity price by abusively holding back capacities. The sector inquiry has brought to light the main aspects on which abuse control under competition law should focus in this highly complex market. It raised a whole range of issues which require further discussion and clarification by the electricity providers.

107. It would therefore seem advisable in the future to continue to subject supply behaviour on the electricity exchange and the operational management of power stations to effective control by the competition authorities. The calculation model used by the Bundeskartellamt can identify any behaviour which is likely to raise concerns. The sector inquiry thus provided an analytical framework for detecting abuse in the form of capacity withholding in future cases.

108. In May 2011 the Bundeskartellamt published its Final Report on the Fuel Sector Inquiry presenting an in-depth analysis of the competitive conditions in the German petrol station markets. The

Bundeskartellamt found that a dominant oligopoly exists in the German petrol station markets between the five large oil companies BP (Aral), ConocoPhillips (Jet), ExxonMobil (Esso), Shell and Total. The report provided significant insights which led to this conclusion. The German petrol station market was also the subject of the Bundeskartellamt's Total/ OMV proceedings in 2009 (see also 2.2.3.).

109. The members of the oligopoly jointly hold high market shares with the absence of substantial competition between them. The large five account for 65% of fuel sales in Germany. Furthermore, the fuel markets are very transparent: Prices can be easily observed by all market participants. All of the five companies use a system for monitoring and reporting prices which makes it possible to react promptly to any changes. In its report the Bundeskartellamt also illustrated that the many links between the oil companies and interdependencies in a system of fuel exchange agreements made it difficult for members to break away from the oligopoly. Any deviating behaviour by a member could immediately be economically punished by the others.

110. In addition to examining the structures in the market, the Bundeskartellamt collected and analysed data on all price changes from 1st January 2007 to 30th June 2010 at more than 400 representatively selected petrol stations of 19 oil companies in the greater areas of Hamburg, Leipzig, Cologne and Munich. A differentiation was made between petrol and diesel fuel. The Bundeskartellamt's analysis was the first systematic examination of petrol station prices in Germany which was based on objective data. The results showed that the oligopolistic market structure enabled the large oil companies to set prices more or less uniformly at their petrol stations. As a result of the companies' systematic price monitoring and centrally controlled pricing, precise price-setting patterns have been established.

111. The results of the sector inquiry show that in nearly all cases Aral or Shell initiated the largely super-regional price increases, that the respective other company adjusted its price after exactly three hours, and that the other members of the oligopoly also followed suit in set time periods. The analysis showed that there are generally more individual price cuts than price increases but that these were localized and, on average, in much smaller cent amounts than the increases. Fuel prices were generally highest on Fridays and lowest on Mondays. The inquiry also confirmed the widely held assumption that the price level rises at the beginning of holiday periods, which, contrary to the assertions made by the mineral oil sector, could not be explained merely by particularly high demand.

112. The Bundeskartellamt will maintain its previous prohibitive stance in merger control in order to prevent a further concentration of the market. It will also initiate a number of proceedings to take action against established violations of competition law.

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

#### **3.1 ICN**

113. The Bundeskartellamt continued to actively participate in the working groups and conferences of the International Competition Network (ICN). It co-chairs the ICN Unilateral Conduct Working Group (UCWG) together with the US Federal Trade Commission and, from this year onwards, also with the Swedish Competition Authority. At the 10th ICN Annual Conference the UCWG presented its first chapter of the Unilateral Conduct Workbook on Assessing Dominance/Substantial Market Power.

114. On December 2 and 3 2010, over 150 delegates from 53 jurisdictions attended a workshop in Brussels, Belgium in which participants discussed challenges involved in addressing anticompetitive unilateral conduct of dominant firms. The UCWG also held three teleseminars in the reporting period dealing with unilateral conduct in the Pharmaceutical Industry (November 2010), Price Discrimination (March 2011) and Price-Cost Tests in unilateral cases (July 2011). All teleseminars were very well received.

### 3.2 *ECN/ECA*

115. In 2010 the European Competition Network (ECN) continued to be a fruitful forum for the discussion and exchange of good practices on the enforcement of EU competition rules. By the end of June 2011 a total of 1379 cases had been posted on the joint intranet of the competition authorities, among them 143 cases notified by the Bundeskartellamt. Use has also been made of the authority's competence in the areas of exchange of information and official assistance. On several occasions in the last year the Bundeskartellamt exchanged confidential information with other competition authorities in the ECN on the basis of Article 12 of Regulation 1/2003 and was involved in proceedings conducted under Art. 22 of Regulation 1/2003. Also, the Commission was informed under Article 11(3) of Regulation 1/2003 of 148 new case investigations launched by National Competition Authorities (NCAs) between July 2010 and June 2011. 17 of these investigations were accounted for by the Bundeskartellamt.

116. The Bundeskartellamt actively participated in all of the Advisory Committees dealing with the Commission's antitrust cases. It also continued to participate in several ECN Working Groups (Cooperation Issues, Cartels and Sanctions, Competition Chief Economists, Horizontal Agreements and Vertical Restraints). The Working Group on Cooperation Issues and Due Process, as the most comprehensive one in view of the interface of European and national competition law, has been chaired by Germany since 2004. It worked on overviews about decision-making powers and the different systems and procedures for antitrust investigations within the member states of the EU. Particularly the work results of the Working Groups on Horizontal Agreements and Vertical Restraints contributed to numerous revisions of regulations and guidelines that were adopted by the Commission in 2010. For example, the Commission adopted a revised Block Exemption Regulation and Guidelines regarding Vertical Agreements, new rules and Guidelines for the Assessment of Horizontal Cooperation Agreements as well as the new Insurance Block Exemption Regulation and the new competition rules for agreements between vehicle manufacturers and their authorised dealers, repairers and spare parts distributors.

117. Members of the Bundeskartellamt were also involved in the work of all ECN sectoral subgroups where they shared their experience of case handling in sectors such as banking and water supply, contributed to several internal reports, for example in the food and retail sector, and served as rapporteurs for their groups in other specialised forums.

118. A new Merger Working Group has been established with the aim of further fostering the work within the ECN. This group is co-chaired by the Irish Competition Authority and the Bundeskartellamt as well as the European Commission. Currently the Merger Working Group is developing best practices on cooperation. The draft best practices have been published for consultation.

119. The Bundeskartellamt continued to contribute to the ECN Brief. The ECN Brief as the official newsletter of the European Competition Network was first published in February 2010. The ECN Brief aims at informing the interested public (lawyers, companies or jurisdictions) of the activities of the ECN and of important decisions of its members. A link to the ECN Brief can be found on the Bundeskartellamt's homepage.

120. This year's annual meeting of the heads of authorities within the ECA forum (European Competition Authorities) took place in Warsaw/Poland. This meeting dealt, inter alia, with the economic downturn and ways for competition authorities to deal with the upcoming problems as well as with finding solutions for competition in the public services. The orientation of future ECA work was also discussed.

### 3.3 *Annual Meeting of the Working Group on Competition Law*

121. On 7 October 2010, at the invitation of the Bundeskartellamt, the Working Group on Competition Law met in Bonn to discuss the topic of divestiture of undertakings as an instrument in competition law

enforcement. The Working Group meets once a year to discuss fundamental issues of competition policy. Among the participants are primarily university professors from economic and legal faculties as well as judges from the competition law chambers of the Düsseldorf Higher Regional Court and the German Federal Court of Justice. In the preparation of the 8th amendment to the Act against Restraints of Competition this instrument was envisaged and discussed.

### 3.4 ICC

122. From 13 to 15 April 2011, the Bundeskartellamt organized the 15th International Conference on Competition in Berlin. The conference has been held every two years since 1982 and assembles representatives of competition authorities and other competition experts. This year's conference topic was "A Spotlight on Cartel Prosecution". The then Federal Minister of Economics and Technology, Rainer Brüderle, the Vice-President of the European Commission and Commissioner for Competition, Joaquín Almunia, and the CEO of Deutsche Bahn AG, Dr Rüdiger Grube, delivered keynote speeches.

123. The four panel discussions examined international cartel prosecution as this has become a major activity of most competition authorities. The subject of the first panel discussion was which type and level of sanctions are efficient. The topic was discussed by participants from academia and practice from different points of view. The necessity of cooperation and convergence of dispositions was discussed in the second panel. The next panel then turned to "Requirements of proof in court - the economic approach". The International Conference on Competition ended with a panel highlighting the evaluation of agency activities. It dealt with the question of what consequences the actions of competition authorities might have for the economy as a whole and how authorities can inform the public about the importance of their work.

124. Cartel prosecution has become an international task and the conference helped to improve the cooperation needed between the authorities.

## 4. Resources of competition authorities

### 4.1 Annual budget (in EUR and USD)

Budget 2011	Change over 2010
EUR 23.9 million	- 0.5 million
USD <sup>1</sup> 34.5 million	+ 4.6 million <sup>2</sup>

### 4.2 Number of employees

	2011*	Change over 2010
Economists	48	+4
Lawyers	82	+4
Other experts	9	+2
Support staff	152	-6
<b>Total</b>	<b>291</b>	<b>+4</b>

Updated: 30 June 2011

\*Full-time equivalent.

<sup>1</sup> European Central Bank: Exchange rate as of 30 June 2011: 1 EUR = 1.4453 USD <http://www.ecb.int/stats/exchange/eurofxref/html/eurofxref-graph-usd.en.html>

<sup>2</sup> Major changes in the exchange rate lead to the result that the absolute change in USD is positive although the Budget in EUR has decreased.

## 5. References to new reports and studies on competition policy issues

Bardong, Andreas	Die zweite Inlandsumsatzschwelle - Kein Änderungsbedarf! in: Wirtschaft und Wettbewerb; 61 (2011), Issue 4; pages 350-359
Bardong, Andreas	Merger control and (non-controlling) minority interests – the experience in Germany, in: Concurrences, Issue 3 (2011), www.concurrences.com
Baron, Michael	More Economic Approach und Fusionskontrolle in: Schwerpunkte des Kartellrechts 2007/2008/FIW-Seminar.- Köln, 2009. VIII, pages 109-125
Baron, Michael	Überlegungen zur Revision der Vertikal-Gruppenfreistellungsverordnung: Weiter so wie bisher oder Aufbruch zu neuen Ufern? in: Schutz von Kreativität und Wettbewerb.- München, 2009.-; pages 423-435
Barth, Uli	Lokale Teilmärkte: ein Stiefkind der Marktabgrenzung in: Recht, Ordnung und Wettbewerb/Bechtold, Stefan.-Baden-Baden, 2011.; pages 47-61
Böge, Ulf	Wettbewerbliche Würdigung einer Verlängerung der Laufzeiten für Kernkraftwerke: Kurzstudie/ von Ulf Böge. Auftraggeber: 8KU Berlin.- Meckenheim, 2010.
Bongard, Christian	Mehrerlöse, Mengeneffekte und volkswirtschaftliche Kartellschäden: ein ökonomischer Kommentar zum Urteil des OLG Düsseldorf gegen Zementhersteller in: Wirtschaft und Wettbewerb; 60 (2010) Issue 7/8; pages 762-772
Bongard, Christian; Wied-Nebbeling, Susanne	Endogen bestimmte Anzahl an Anbietern bei Cournot- und Stackelberg-Wettbewerb; aus WiST; 34 (2005), Issue 3; pages 128-132
Christiansen, Arndt; Locher Lieselotte	Die neuen Standards des Bundeskartellamtes für ökonomische Gutachten in der Kartellrechtsanwendung in: Wirtschaft und Wettbewerb; 61 (2011) Issue 5; pages 444-453
Christiansen, Arndt	The „Best Practices for expert economic opinions“ by the Bundeskartellamt and their international context, in: ANTITRUST. Revue of Competition Law, Issue 2 (2011), pages 66-73.
Ewald, Christian	Ökonomie und Kartellrecht: Vom more economic approach zu sachgerechten Standards forensischer Ökonomie in: Zeitschrift für Wettbewerbsrecht; 9 (2011) Issue 1; pages 15-47
Ewald, Christian	Organizing economics in competition law enforcement: Varying solutions, constant challenges, in: Concurrences, Issue 2 (2010), www.concurrences.com
Gleave, Sandro	Marktabgrenzung und Marktbeherrschung auf Elektrizitätsmärkten; aus: Zeitschrift für Energiewirtschaft; 34 (2010); pages 101-107
Gussone, Peter	Die Gestaltung der europäischen Energiemärkte durch Verpflichtungszusagenentscheidungen der Kommission (Teil 1) in: InfrastrukturRecht; 8 (2011) Issue 3; pages 50-52
Gussone, Peter	Die Gestaltung der europäischen Energiemärkte durch Verpflichtungszusagenentscheidungen der Kommission (Teil 2) in InfrastrukturRecht; 8 (2011) Issue 4; pages 74-76
Gussone, Peter; Michalsczyk, Roman	Der Austausch von Informationen im ECN- wer bekommt was wann zu sehe4n? in: Europäische Zeitschrift für Wirtschaftsrecht; 22 (2011) Issue 4; pages 130-134
Hartog, Johanna	Der Zusammenschlusstatbestand des wettbewerblich erheblichen Einflusses-Frankfurt/M. (u.a.): Lang, 2010,- X.- (deutsches und europäisches Wirtschaftsrecht; 26)
Haucap, Justus	Energiemarkt-Liberalisierung: Was bleibt zu tun? in: Energiewirtschaftliche Tagesfragen; 60 (2010) pages 18-21
Haucap, Justus	Legal and illegal cartels in Germany between 1958 and 2004/Justus Haucap; Ulrich Heimeshoff; Luis Manuel Schultz.- Düsseldorf: Heinrich- Heine- Universität; 2010.- (DICE Discussion Paper; 8)
Haucap, Justus	Competition in the Turkish mobile telecommunications market: price elasticities and network substitution/ Justus Haucap; Ulrich Heimeshoff; Mehmet Karacuka,- Düsseldorf: Heinrich-Heine-Universität, 2010.-21 S. (DICE Discussion Paper; 12)
Heitzer, Bernhard	Innovation und Wettbewerb aus kartellrechtlicher Sicht in: Innovation und Wettbewerb/FIW-Symposium-Köln (u.a.), 2009. VIII, pages 1-8
Jungheim, Stephanie	Die kartellrechtliche Bewertung von Kooperationen im Medienbereich in der Praxis in: Wettbewerb in Recht und Praxis; 57 (2011) Issue 5; pages 159-526

Jüntgen, David Alexander	Kartellgerichtliches Beschwerdeverfahren und effektiver Rechtsschutz in: Wirtschaft und Wettbewerb; 61 (2011) Issue 4; pages 340-350
Keske, Sonja E.	Group litigation in European competition law: a law and economics perspective- Antwerp (u.a): Intersentia, 2010.- XVIII,- (European studies in law and economics; 1)
Klaue, Siegfried	Einige Bemerkungen zur kartellrechtlichen Missbrauchsaufsicht in der Wasserwirtschaft in: Zeitschrift für Neues Energierecht; 14 (2010) Issue 3; pages 233-235
Klaue, Siegfried	Einige Bemerkungen zum Bericht des Bundeskartellamtes über die Evaluierung der Beschlüsse zu den langfristigen Gaslieferverträgen in: Zeitschrift für Neues Energierecht; 14 (2010) Issue 4; pages 360-361
Klaue, Siegfried	Einige Bemerkungen zu dem Urteil des BGH „Entega II“ in: Zeitschrift für Neues Energierecht; 15 (2011) Issue 3; pages 278- 280
Klaue, Siegfried; Schwintowski, Hans-Peter	Einige Bemerkungen zu den Marktgebieten in der Gaswirtschaft in: Netzwirtschaften & Recht; 7 (2010) Issue 4; pages 204-207
Klockner, Peter	Karlsruhe Iocuta oder Reden ist Gold! in: Wirtschaft und Wettbewerb; 61 (2011) Issue 3; pages 244-254
Kühnen, Jürgen	Die richtige Beschwerdeart bei Verfahren nach § 3 Abs. 3 GasNEV in: Wirtschaft und Wettbewerb ; 60 (2010) Issue 6; pages 637-642
Kühnen, Jürgen	Wohin führt uns die 8.GWB-Novelle in der Fusionskontrolle? in: Kölner Schrift zum Wirtschaftsrecht 2011; Issue 1; pages 3-9
Kühnen, Jürgen; Kizil, Baran C.	Vollzugsverbot und Zivilrechtsschutz: Kann bei einem Verstoß gegen das Vollzugsverbot aus § 33 Abs. 1 Satz 1, Abs. 3 Satz 1 GWB geklagt werden? in: Zeitschrift für Wettbewerbsrecht; 8 (2010) Issue 3; pages 268-277
Mundt, Andreas	Energiemärkte im Spannungsfeld von Transparenz und Wettbewerb: Editorial in: Netzwirtschaften & Recht; 7 (2010) Issue 4; pages 193
Mundt, Andreas	Competition, sanctions and due process in troubled times in: Journal of European competition law and practice; 1 (2010), Issue 5; pages 377-378
Mundt, Andreas	Wettbewerbschutz durch Kartellrecht: Ordnungspolitische Entwicklungslinien von Kartellrecht und Kartellrechtsdurchsetzung in: Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb e.V.: Wettbewerbspolitik und Kartellrecht in der Marktwirtschaft.-Köln (u.a), 2010. XI; pages 253-274
Mundt, Andreas	Die Finanzmarktkrise aus Sicht der Wettbewerbsbehörden in: Wettbewerb in der Finanzkrise- Lehren für die Zukunft/ FIW-Symposium; Köln (u.a.), 2010; pages 47-64
Mundt, Andreas	Kartellverfolgung im 21. Jahrhundert: erfolgreich durch wirksame Abschreckung in: Recht, Ordnung und Wettbewerb/Bechtold, Stefan.- Baden-Baden, 2011; pages 427-440
Ost, Konrad; Gussone, Peter	Why Should One Size Fit All? A Call for a Differentiated Look on the Renewed European Approach Towards Private Enforcement in: Compensation of Private Losses/ Reiner Schulze- München, 2011; pages 239-245
Podszun, Rupprecht	Aufgreifkriterien der Fusionskontrolle in : Wirtschaft und Wettbewerb; 60 (2010) Issue 11, pages 1128-1141
Roesen, Katrin	Mehrfache Sanktionen im internationalen und europäischen Kartellrecht- Köln (u.a.): Heymann, 2009.- XV (FIW-Schriftenreihe; 225)
Sattler, Sven	Standardisation under EU competition rules- the Commission's new Horizontal Guidelines in European law review; 32 (2011) Issue 7; pages 343-349
Schwensfeier, Roland	§ 10 Fusionskontrolle in: Fallhandbuch Europäisches Wirtschaftsrecht/Pache, Eckhardt (u.a.)-Stuttgart, 2010. XV, 250 S.; pages 152-174
Töllner, Wilko	Die Ermittlungsbefugnisse der Kartellbehörden in Deutschland: 2. Speyerer Kartellrechtsforum 2010. Europäisches Wirtschafts- & Steuerrecht; 22 (2011) Issue 1-2; pages 21-25
Vollmer, Christof	Settlements in German competition law in: European competition law review; 32 (2011) Issue 7; pages 350-355
Wagemann, Markus	Verfahren bei Kartellordnungswidrigkeiten aus der Sicht des Bundeskartellamtes in: Verfahren und Rechtsschutz im europäischen Wirtschaftsrecht/ Schwarze, Jürgen.- Baden-Baden, 2010.-141p.; pages 82-99