

(Some) Recent Developments in German Merger Control

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- **Preliminary remarks on the institutional set-up**
- **Facts and figures**
- **Some recent developments**
 - **Substantive issues**
 - **Collective dominance**
 - **Hospital mergers**
 - **Formal / Procedural issues**

The institutional set-up

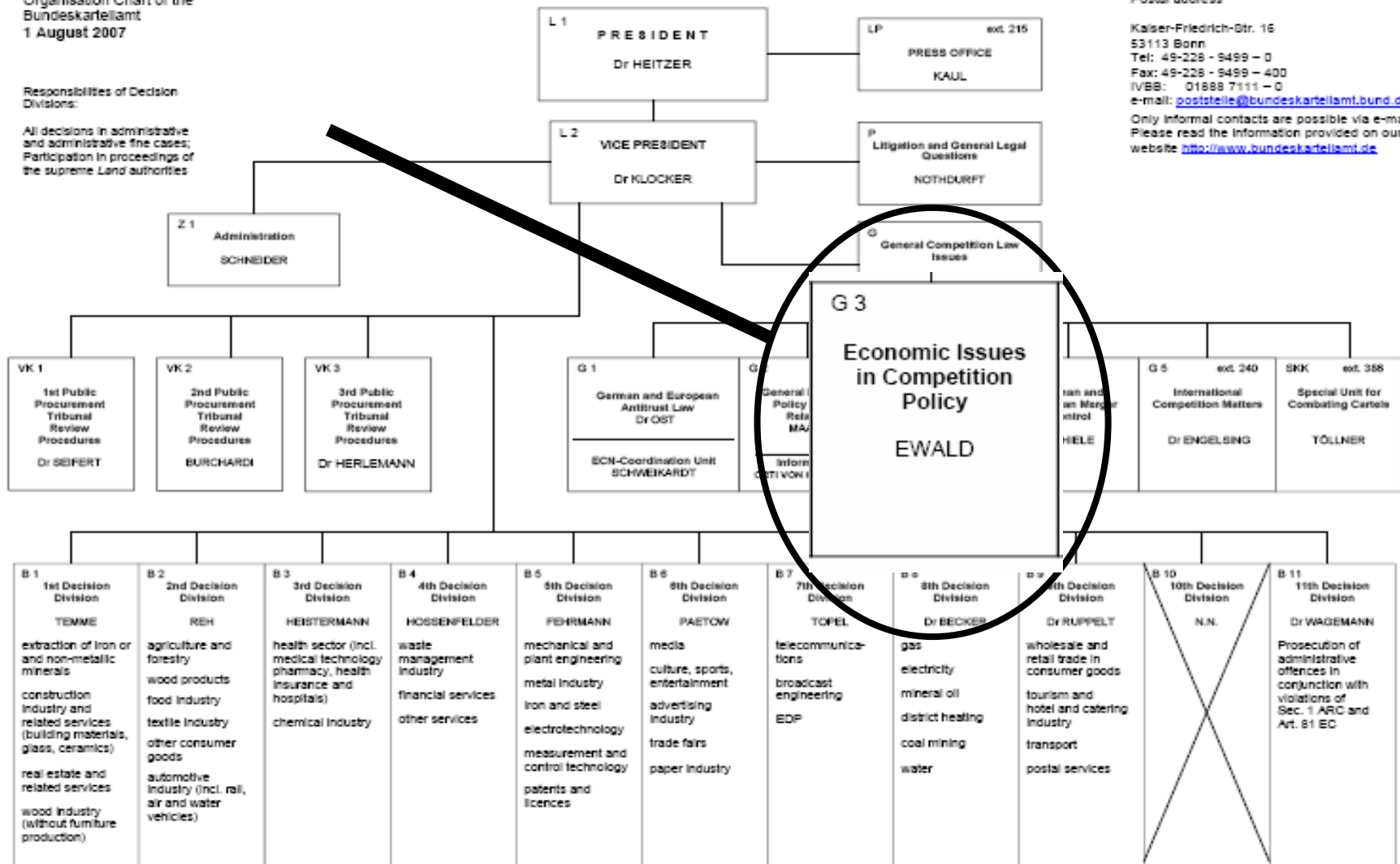


BUNDESKARTELLAMT

Organisation Chart of the Bundeskartellamt
1 August 2007

Responsibilities of Decision Divisions:

All decisions in administrative and administrative fine cases; Participation in proceedings of the supreme Land authorities

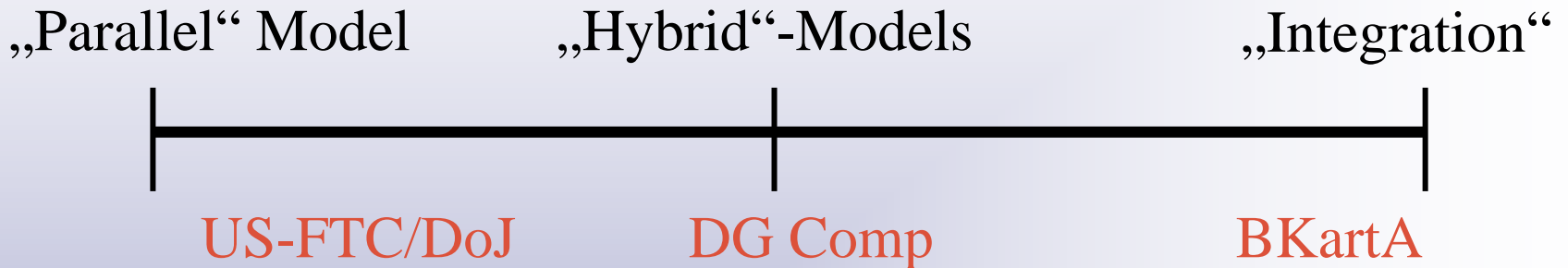


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Models of integrating economists in law enforcement



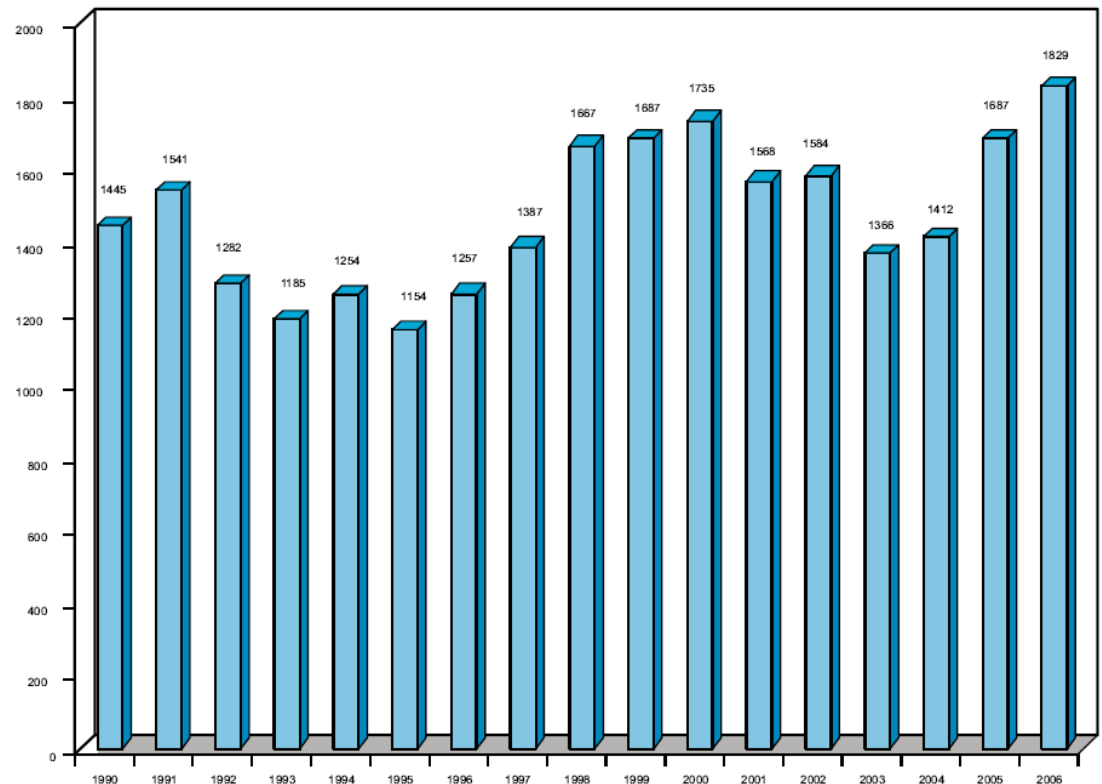
- Main functions:
 - „Bundling“ function (i.e. knowledge management in competition economics)
 - Support for independent Decision Divisions
 - „Bridgehead“ (e.g. to academics, other CCE)

Mergers: Facts and Figures

Update 2007

- Trend continues (> 1.800 notifications expected)
- < 2% Phase-II (11/2007: 31)
- ~45% of Phase-II cases finally raised competition concerns
 - 7 clearances with remedies
 - 7 prohibitions

Mergers notified to the Bundeskartellamt between 1990 and 2006



Substantive Issues I: Collective dominance

- The conceptual framework: Prohibition „Phonak / ReSound“ (hearing aids)
 - Concentration levels as a starting point (legal presumptions)
 - Transparency – retaliation – mavericks („inside“ and „outside competition“)
 - Core issues
 - Transparency: On the role of market information systems of trade associations
 - Retaliation: How does competition on innovation work with „patent thickets“, patent pooling and cross-licensing?
 - Mavericks: Effects of acquiring a valuable patent portfolio and recently price aggressive competitor with a significant market share
- What means „strengthening“ of collective dominance?
 - The energy sector: „E.ON / Stadtwerke Eschwege“
 - The media sector: „Springer / P7S1“

Substantive Issues II: „A dose of competition“

- „Merger wave“ in German hospital markets
 - > 40 mergers since 2005
 - 4 prohibitions
 - „Leading prohibition case“ upheld in 2007 by Higher Regional Court of Düsseldorf but still under review of FCJ
 - 1 „ministerial allowance“ rejected
- Core issues:
 - Product market definition: „acute hospitals“ or several areas of specialisation?
 - Geographic market definition: On the role of „patient flows“ (and the problem of the „silent majority fallacy“)
 - How does competition look like in the „hospital market“?

- Scope of German Merger Control:
 - § 35 II (2) ARC – „de-minimis market“ (offers for at least 5 years, less than EUR 15 million p.a.)
 - FCJ judgement in „Sulzer / Kelmix“: only market volume in Germany relevant – even if geographic scope of relevant market should be wider (e.g. EU-wide)
- Scope of legal review by the courts:
 - So far: legal review almost excluded for deals which were abandoned post prohibition
 - FCJ judgement in „Springer / S1P7“: under certain circumstances „continuing interest“ of parties in review by the courts