



Bundeskartellamt



open markets | fair competition

# The Bundeskartellamt

Annual Report 2014



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# Welcome Note

## Sigmar Gabriel

### Federal Minister for Economic Affairs and Energy



The Bundeskartellamt is the guardian of the social market economy in Germany. The prosecution and punishment of restraints of competition was therefore once again the key focus of its work in 2014. For the first time ever it imposed fines totalling over a billion euros. The markets most affected were those for consumer products such as sugar, beer and sausage. This shows once more that the Bundeskartellamt protects not only companies in Germany but, above all, also the consumer in Germany.

A positive development in recent years has been the increase in private damages actions following cartel proceedings carried out by the Bundeskartellamt or the European Commission. The private enforcement of claims for damages is also an important means of enforcing competition law. With the implementation of a relevant European directive into German law by the end of next year we will be able to make private enforcement even more effective in Germany. Another aspect that will help to prevent restraints of competition more effectively is the fact that companies are increasingly working towards preventing their occurrence in the first place by ensuring that competition rules are observed (compliance).

It is important to me that companies cannot avoid paying fines simply by taking restructuring measures. Here there is still room for improvement. It is the task of politics to create the right framework for effective cartel prosecution. We will therefore push ahead with the necessary changes to the law in this area.

The digital age with its fast-moving technological developments also poses new challenges for competition policy. Effective merger control and protection against the abuse of market power must be ensured on the dynamic internet markets at both national and European level. Here too the Bundeskartellamt is playing a significant role.

The 2014 Annual Report shows that the protection of competition is in very good hands with the Bundeskartellamt. I thank all the authority's staff for their excellent work in merger control, cartel prosecution, abuse control, the market transparency unit and the review of public award procedures. I am counting on your high level of commitment in future and wish you much success for the challenges which await you.

A handwritten signature in black ink, reading 'Sigmar Gabriel' in a cursive script.

Sigmar Gabriel  
Federal Minister for Economic Affairs and Energy

# Foreword

## Andreas Mundt

### President of the Bundeskartellamt



At the moment the enforcement of competition law attracts great public attention. This is due to an increase in cartel prosecution as well as our merger control decisions, e.g. our recent prohibition of the planned merger between EDEKA and Kaiser's Tengelmann. The competition authorities also play an important role in the broad social debate on how to deal appropriately with the digital economy.

Last year the Bundeskartellamt imposed fines amounting to around 1.1 billion euros, more than ever before. Even if this was an exceptional year, it shows the great emphasis we place on cartel prosecution in our daily work. When we uncover and punish a cartel we do this primarily to ensure that consumers have the largest possible choice of products and services at fair prices and to strengthen the innovative power of the companies. Imposing fines is certainly not the primary objective of cartel prosecution, but sometimes they are necessary to deter companies from engaging in illegal agreements.

Merger projects are examined to establish whether they are likely to impede competition. This involves an in-depth analysis of the markets affected for which a large amount of data and facts has to be obtained from the market participants. Apart from the companies directly involved, we request information from suppliers, competitors and customers. The data can be analysed by using different economic methods. This enables us to keep up with and assess correctly real life developments and competitive conditions in the markets examined. Our decisions have far-reaching importance for the companies and their employees. We are aware of our responsibility and always take utmost care in making our decisions.

The digital economy also raises new questions in terms of competition law. At the same time, due to its rapidly increasing importance, the internet economy has long since become a feature of our daily case work. Last year the framework conditions of hotel booking platforms and the conditions established by brand manufacturers for the sale of their products over the internet played a prominent role in our work. Apart from these concrete cases the Bundeskartellamt is also active in national and international discussion fora to tackle new issues and find answers to them.

Our 2014 Annual Report is intended to provide you with a compact, easily understandable and, hopefully, interesting overview of our authority's scope of activities. I wish you pleasant reading!

A handwritten signature in black ink, appearing to be 'A. Mundt', written in a cursive style.

Andreas Mundt  
President of the Bundeskartellamt

# Tasks and organisation

The Bundeskartellamt is the most important competition authority in Germany. It is an independent higher federal authority which is assigned to the Federal Ministry for Economic Affairs and Energy. It is the Bundeskartellamt's responsibility to protect competition in Germany. Since 1958 the legal framework for this is the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*), which is applied and enforced by the Bundeskartellamt.



*“The Bundeskartellamt’s task is to protect free and fair competition in Germany.”*

## The tasks of the Bundeskartellamt include

### Enforcing the ban on cartels

Agreements between companies which prevent, restrict or distort competition are generally prohibited. Examples of these are agreements on prices, quantities, supply areas or customer groups (so-called hardcore cartels). The Bundeskartellamt prosecutes illegal cartels and can impose heavy fines on the persons and companies responsible.

### Merger control

Mergers are examined by the Bundeskartellamt if the turnover of the companies involved reach certain thresholds, one of the legally defined criteria of concentration is fulfilled and the project affects competition in Germany. The Bundeskartellamt assesses the effects a merger will

have on competition. If the negative effects on competition outweigh the positive effects, a merger project can be prohibited or cleared only subject to certain conditions.

### Control of abusive practices by dominant companies

Companies holding a dominant position are exposed to little, if any, competitive pressure. They thus possess a wide scope of action vis-a-vis their competitors, suppliers and customers. Having such a position of economic power is not prohibited per se but the abuse of such market power is forbidden. The control of abusive practices by the Bundeskartellamt therefore acts as a state regulatory tool in the absence of competition.





Review of procedures for the award of public contracts by the Federation

The provisions of public procurement law ensure that public contracts are awarded under competitive conditions and through transparent and non-discriminatory procedures. Two Federal Public Procurement Tribunals are located at the Bundeskartellamt which examine whether public procurement law was observed in the award of larger public contracts by the Federation.

#### Sector inquiries

The Bundeskartellamt conducts sector inquiries in order to gain a better insight into the competition situation in certain sectors if there are indications that competition in these markets is restricted or distorted. The aim of the inquiries is to gain extensive information about the markets concerned. Since this investigative tool was introduced in 2005 the authority has concluded a whole range of sector inquiries, for example in the fuel, waste management, district heating and milk sectors. In September 2014 it published the results of its sector inquiry into buyer power in the food retail sector. The Bundeskartellamt is currently analysing among other things competition conditions on the markets for ready-mixed concrete.

#### Bundeskartellamt Key Facts

- President: Andreas Mundt
- Vice-President: Dr Peter Klocker
- Budget 2014: 27.6 million euros
- around 355 employees
- of which approx. 150 are legal experts and economists
- 12 trainees
- female/male staff: 52/48 percent

#### Ban on cartels

- In 2014 the Bundeskartellamt imposed fines amounting to around 1.117 billion euros on 83 companies and 81 individuals in 9 cases.

#### Merger control

- In 2014 the Bundeskartellamt received 1,188 merger control notifications. 22 of these were closely examined in second phase proceedings.
- One merger was prohibited in 2014 and another was cleared only subject to conditions.

#### Control of abusive practices

- Number of proceedings initiated in 2014: 23
- Number of proceedings concluded in 2014: 29

#### Review of procedures for the award of public contracts by the Federation

- In 2014 the Bundeskartellamt received 124 applications for review.
- 28 applications were granted review and 39 were rejected.

#### Sector inquiries

- Since 2005 the Bundeskartellamt has concluded ten sector inquiries. In 2014 the results of the sector inquiry into buyer power in the food retail sector were published.
- Two sector inquiries are still in progress.



*“At the moment cases involving online platforms in particular raise complex competition law issues. We have therefore set up a task force to analyse the problems and find appropriate solutions for the developments taking place in these dynamic markets.”*

Dr Peter Klocker,  
Vice-President of the Bundeskartellamt

### Internal organisation

The Bundeskartellamt is headed by President Andreas Mundt and Vice-President Dr Peter Klocker. They are responsible for organising the internal processes and representing the authority to the public. Decisions on cartels, mergers and abusive practices are taken by a total of twelve decision divisions. Nine decision divisions are responsible for specific economic sectors. The 10th, 11th and 12th Decision Divisions deal exclusively with the cross-sector prosecution of cartels.

The General Policy Division advises the decision divisions in specific competition law and economic issues, represents the Bundeskartellamt in the EU's decision-making bodies, is involved in relevant competition law reforms at national and European level and coordinates cooperation between the Bundeskartellamt and foreign competition authorities as well as international organisations.

The Litigation and Legal Division advises the Bundeskartellamt on legal matters, prepares appeal proceedings before the Düsseldorf Higher Regional Court and represents the Bundeskartellamt before the Federal Court of Justice in Karlsruhe. The Litigation and Legal Division also includes the Special Unit for Combating Cartels (SKK).

The SKK assists the decision divisions in the preparation, execution and evaluation of dawn raids in cartel proceedings. It is the contact point for companies wishing to apply for leniency in cartel proceedings.



## Central Division

The Central Division is responsible for budget and human resources, organisation and information technology. The Information Technology Unit assists the authority in conducting online surveys in major proceedings and in seizing and evaluating IT data in cartel proceedings.



In 2014, with the assistance of a service provider, the Bundeskartellamt carried out an extensive review of its organisational structures and an evaluation of its personnel requirements. The examination confirmed that the authority functions efficiently and in a goal-oriented way. The Bundeskartellamt endeavours to even better structure the knowledge at its disposal and make it more readily available, also particularly in view of increasing digitalisation. Knowledge management will be concentrated into a special unit. The Bundeskartellamt is a family friendly employer. In 2014 the Central Division prepared the “work and family audit” developed by the Hertie Foundation with a view to obtaining the corresponding certification.

## The Bundeskartellamt in an international comparison

Every year the renowned antitrust journal Global Competition Review (GCR) analyses and evaluates the performance of leading competition authorities worldwide. In addition to the information submitted by the authorities themselves, the assessment also takes into account the opinions of experts, such as lawyers specialising in competition law, economists and academics as well as other special information which the journal derives from its own surveys and analyses. Again in 2013 the Bundeskartellamt ranked in the 5-star “elite” category.

## The Bundeskartellamt in the Internet:



Clear and informative: Internet presence of the Bundeskartellamt.  
[www.bundeskartellamt.de](http://www.bundeskartellamt.de)

## Rating of the international competition authorities

In 2013 the 5-star “elite” category was awarded to five competition authorities:

- Autorité de la concurrence (France)
- Bundeskartellamt (Germany)
- Department of Justice – Antitrust Division (USA)
- Directorate-General for Competition, European Commission
- Federal Trade Commission (USA)

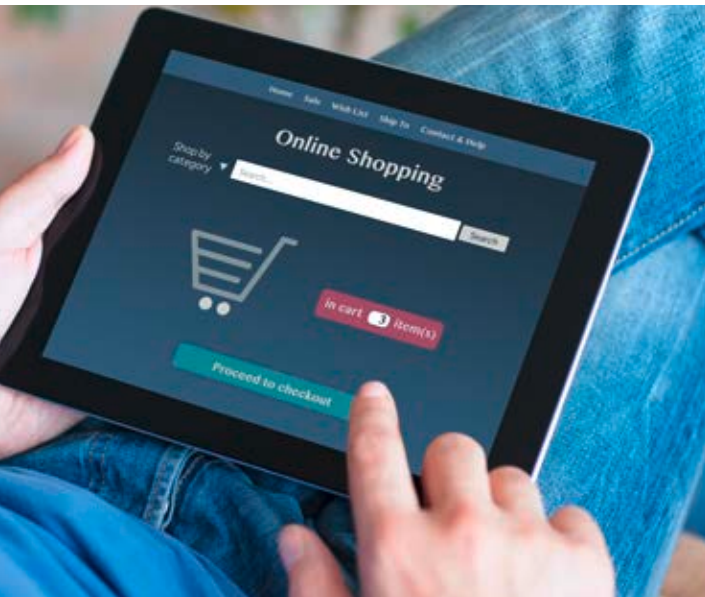
Source: GCR, Rating Enforcement 2014. The Annual Ranking of the World's Leading Competition Authorities. The authorities are assessed on a scale of one to five stars.

# General Policy Division

The General Policy Division advises the decision divisions on specific economic and antitrust issues and represents the Bundeskartellamt in the decision-making bodies of the European Union. It is involved in law reforms which have a bearing on competition and coordinates cooperation between the Bundeskartellamt and foreign competition authorities as well as international organisations. It is also responsible for the authority's press and public relations work and assists the President of the authority. The division is made up of seven units:

G1 – German and European Antitrust Law, G2 – Competition Law and Regulation, Public Procurement Law, G3 – Economic Issues in Competition Policy, G3A – Data Analysis, Survey Techniques and Econometrics, G4 – German and European Merger Control, G5 – International Competition Matters, PK – Press, Public Relations.

The Head of the General Policy Division is Dr Konrad Ost.



## Internet and competition

The internet has recently become the increasing focus of antitrust debate. One major issue in this context is the market position of large internet platforms such as Google, Amazon, Facebook or Apple and the business models they use. Their innovative success is increasingly underpinned by two phenomena which are typical for the digital economy. One is the fact that due to so-called network effects company growth in this field is a self-reinforcing process. The more users a platform has, the better its offer. This in turn attracts even more users. In addition, with the accumulation, analysis and use of user data, the platform providers gain a substantial competitive advantage. Keeping these markets open must be one of the top priorities of the competition authorities. The Bundeskartellamt is therefore paying great attention to the antitrust issues raised by internet platforms.

The other significant aspect is the fact that the internet is increasingly being used by a large part of the population to purchase goods on a regular basis. The internet offers access to a wide range of products and a large number of suppliers and makes it easy to compare offers and prices. Suppliers can greatly expand their reach and lower their distribution costs by selling online. The increasing importance of the internet trade is accompanied by a substantial change in distribution methods. In some cases the manufacturers themselves are starting to sell directly to end consumers. Many of them critically review their relationship with independent retailers. This relationship is defined by distribution contracts in which the manufacturers lay down the requirements they expect their distributors to meet. Even if they contain restrictions, such agreements can greatly help to make distribution more efficient – e.g. if they aim to achieve an adequate level of presentation and customer advice services. However, they also pose risks, in particular in sectors where competition between manufacturers is already restricted. A special focus needs to be placed, therefore, on restrictions that are directly targeted against the use of the internet. This is the case if, for example, dealers are prohibited from using platforms such as Amazon, eBay or price comparison sites, irrespective of the quality of their design.

## Cartel law

Cartel prosecution is a key area of activity of the Bundeskartellamt. In recent years the authority has intensified its cartel prosecution activities. The success of these measures is reflected in the increased number of cartel cases that have been concluded and the great amount of information on possible cartels received, in particular via the Bundeskartellamt's leniency programme.

The increased level of activity in this area has, however, also revealed deficits in the current legal framework. One such deficit is the fact that, despite a recent amendment to the competition law, cartel members are still able to avoid



being fined simply by modifying their corporate structures. This compromises the effective sanctioning of large companies with a group structure in particular. The Bundeskartellamt therefore advocates aligning the provisions on corporate liability with European law, which better reflects the economic realities. It also favours amending the current procedural law. The length and cost of cartel fine proceedings before the courts have reached a level which places a considerable burden on the parties to the proceedings and runs counter to effective cartel prosecution. The time seems to have come to consider sanction proceedings which allow for faster and more efficient procedures while still observing the rights of the defence.

### Growing focus on economics in competition law

Competition law practice is increasingly influenced by a growing focus on economics. This has led to a more refined analysis of relevant market and competition conditions on the one hand, and the increased use of data-based methods for investigation and analysis on the other. This is particularly true for merger control. In recent cases customer switching behaviour and bidding patterns were analysed (“switching/bidding analysis”) in order to assess the competitive pressure exerted by suppliers on one another.

In the recently concluded examination and prohibition of the takeover of Kaiser’s Tengelmann by EDEKA, in addition to other data-based analyses (such as an analysis of customer till receipts) an empirical “event analysis” was carried out which measured how the turnover quantities generated by the different supermarket formats (full range and discount) changed with the opening or closure of other outlets. This analysis helped to answer more precisely questions relating to market definitions, the competitive closeness

of the parties to the merger and the level of competitive pressure between the different distribution channels in the food retail sector.

Also in areas other than merger control economic aspects have gained in importance. As part of the sector inquiry “Buyer power in the food retail sector”, which was published in September 2014, an extensive econometric analysis was carried out in which all the relevant economic theories were considered. The complex empirical econometric analysis included data from around 3,000 purchasing negotiations. All in all approx. 65,000 data sets were processed.

The stronger focus on economic aspects is also reflected in the growing number of expert economic opinions submitted by the parties in complex merger cases such as the EDEKA/Tengelmann case or in the context of sector inquiries such as the inquiry into the food retail sector. In the EDEKA/Tengelmann case, for example, three economic consultancies submitted analyses which differed greatly in terms of their quality. It is therefore vital that economic expert opinions meet certain minimum quality requirements such as published by the Bundeskartellamt in 2010. Otherwise the necessary balance between a more refined economic analysis and the objective of effectively protecting competition cannot be maintained.



## Energy and competition

### Debate on capacity markets

Currently, there is an intense debate on how the electricity market should be designed in the future. The debate centres around the question of whether capacity mechanisms should be introduced in order to ensure security of supply. From the beginning, the Bundeskartellamt has viewed the introduction of a capacity market critically. In the authority's view, a capacity market is not needed at this stage. The Bundeskartellamt also holds the view that, contrary to what is sometimes claimed, the control of abusive practices does not prevent the occurrence of price peaks caused by shortages of supply. The Bundeskartellamt has explained its position in a comment on a Discussion Paper (Green Paper) by the Federal Ministry for Economic Affairs and Energy on the future design of the electricity market. It is also a member of the Federal Ministry for Economic Affairs and Energy's "Electricity Market Platform", a forum for dialogue on how to best design the electricity market of the future.

### Remunicipalisation

Many cities and municipalities are setting up new companies or bringing previously privatised businesses back under their area of responsibility. From a competition perspective, in this process too little attention is being paid to the fact that the entrepreneurial activities of the municipalities may distort competition to the detriment of private companies. In addition, the double function of the municipalities as market participants and sovereign powers makes discrimination against private competitors more likely. The Bundeskartellamt's proceedings relating to the award of energy concessions are proof of this. In October 2014 competition law experts met in Bonn at the Bundeskartellamt's invitation to discuss the role of competition and competition law in state entrepreneurial activities.

## Reform of the European Merger Regulation

In July 2014 the European Commission published a White Paper with proposals on how to amend the EU Merger Regulation to make EU merger control more effective. Key elements of the reform proposal are an expansion of the Commission's powers to include non-controlling minority shareholdings and a simplification of referral procedures.

The Bundeskartellamt has closely followed the reform process. In a joint statement with the Federal Ministry for Economic Affairs and Energy it has urged that the protection standard for minority shareholdings should not be lowered. In its view, a mandatory ex-ante notification requirement and a standstill obligation, in particular, are indispensable.

### New information leaflet on domestic effects

Mergers between foreign companies are subject to German merger control if they have a sufficiently strong effect on a German market. The new information leaflet, published in September 2014, illustrates on the basis of which criteria the Bundeskartellamt assesses whether this is the case. This increases legal certainty for foreign mergers.







### 17th International Conference on Competition

From 25 to 27 March 2015 the Bundeskartellamt hosted its 17th International Conference on Competition in Berlin.

- With around 400 participants from more than 50 countries a new record was set.
- Keynote speakers included: Timotheus Höttges, Chief Executive Officer of Deutsche Telekom AG, Edith Ramirez, Chairwoman of the US Federal Trade Commission, and Dr Mathias Döpfner, Chairman and Chief Executive Officer of Axel Springer SE.
- Main topic: “Big Data, Media and Competition” addressing the question of whether the Internet economy requires a new regulatory framework.

## International cooperation

The Bundeskartellamt closely cooperates with competition authorities all over the world. This cooperation is either conducted on a bilateral basis or within international networks.

### ICN

At international level the national competition authorities work together within the International Competition Network (ICN). With almost 130 competition authorities from approx. 120 jurisdictions it is the most important association of competition authorities worldwide.

Since September 2013 the President of the Bundeskartellamt, Andreas Mundt, has been the Chair of the ICN's Steering Group. In 2014 the Bundeskartellamt also chaired the ICN Cartel Working Group together with the US Department of Justice (DOJ) and the Japan Fair Trade Commission (JFTC).

In 2014 a practical guide to international enforcement cooperation in merger cases was compiled. Although some of the member states' approaches differed significantly, a practical and helpful document was drafted, owing to the principle of consensus applied within the ICN.

### OECD/UNCTAD

In 2014 the Bundeskartellamt again cooperated intensively in the competition-related activities of, among others, the Organisation for Economic Cooperation and Development (OECD) – Andreas Mundt is a member of the Bureau of the OECD's Competition Committee – and the United Nations Conference on Trade and Development (UNCTAD).

A key focus of the OECD's work in 2014 was to improve the rules for international cooperation in antitrust enforcement, one example being the exchange of information across national borders.

### ECN

The national competition authorities in the EU work very closely together. Major fields of cooperation are the application of Art. 101 and 102 TFEU and merger control. To combat cross-border restrictions of competition, the national competition authorities have formed the European Competition Network (ECN). In 2014 they assisted one another, e.g. in dawn raids, and exchanged confidential information which could be used as evidence in proceedings.

### Cooperation within the ECN 2014

- Official assistance in ten cases (Art. 101/102 TFEU)
- Exchange of confidential information in 16 cases (Art. 101/102 TFEU)
- In 2014 around 160 mergers were examined by more than one national authority. In such cases the authorities inform one another about the date of notification and the contact data of their case handlers. The Bundeskartellamt was involved in just under 100 cases.
- Cooperation in the in-depth examination of mergers is often made difficult by the different dates of notification.
- A close cooperation with the Austrian national competition authority helped significantly to implement divestment commitments in the TV programme magazines case.



# The Litigation and Legal Division

The Litigation and Legal Division represents the Bundeskartellamt before the Higher Regional Courts (OLG), the Federal Court of Justice (BGH) and other courts. In proceedings brought before the court of first instance, the Düsseldorf Higher Regional Court, it represents the authority in co-operation with the decision division in charge of the case in question. The Litigation and Legal Division represents the Bundeskartellamt in civil actions relating to general competition law issues. Here the authority often acts as *amicus curiae* to the Federal Court of Justice. The division also advises the Bundeskartellamt on all legal matters and assists the decision divisions in their cartel and administrative fine proceedings. The Special Unit for Combating Cartels (SKK) is also part of the Litigation and Legal Division

The Litigation and Legal Division is chaired by Jörg Nothdurft.

## Federal Court of Justice confirms prohibition of a merger in the masonry units sector (file ref. KVZ 82/13)

Already in the last reporting period the Düsseldorf Higher Regional Court had confirmed the prohibition of a merger between Xella and H+H, two manufacturers of masonry units. The court had rejected the parties' appeal on points of law against the decision. In the autumn of 2014 the Federal Court of Justice rejected the parties' appeal against the denial of leave to appeal.

The Federal Court of Justice emphasized that the creation or strengthening of a dominant position is a standard example for a significant impediment of effective competition. According to the court, it was not necessary to clarify in an appeal proceeding the question of whether or not a significant impediment of effective competition could be construed from the creation or strengthening of a dominant position if, as in the Xella/H+H case, no circumstances had been established which could show that the merger would have pro-competitive effects.

In examining whether the merger creates a dominant position based on the findings of the judges many aspects have to be considered without establishing the importance of an individual criterion.

## Düsseldorf Higher Regional Court confirms prohibition of "best price" clauses (MFN clauses) (file ref VI-Kart 1/14 (V))

In January 2015 the Düsseldorf Higher Regional Court rejected the appeal of the hotel booking portal HRS against a decision of the Bundeskartellamt in which the latter had prohibited the portal from continuing to implement so-called "best price" clauses. Under the "best price" clauses the hotels are obliged to always offer the hotel portal their lowest room prices, maximum room capacity and most favourable booking and cancellation conditions available on the Internet. The decision of the Düsseldorf Higher Regional Court is final. The authority is conducting further proceedings against the hotel portals Booking and Expedia which have similar clauses in their contracts with hotels.

## The Düsseldorf Higher Regional Court and the Federal Court of Justice confirm the liability of the legal successor in cartel fine proceedings against coffee roasters (file ref. V-4 Kart 5/11 OWi and KRB 39/14)

In early 2014 the Düsseldorf Higher Regional Court imposed a fine of 55 million euros on Melitta Europa GmbH & Co. KG, confirming the Bundeskartellamt's fines decision of 2009.

The main focus of the proceedings was not so much the accusation itself as the question of whether Melitta Europa GmbH & Co. KG was liable to pay the fine because in the meantime restructuring measures had been carried out within the company group. Both the Düsseldorf Higher Regional Court and the Federal Court of Justice, which confirmed the higher regional court's decision in early 2015, have decided that Melitta Europa GmbH & Co. KG as the legal successor of Melitta Kaffee GmbH is liable to pay the fines imposed on the latter because from an economic perspective Melitta Kaffee GmbH and Melitta Europa GmbH & Co. KG can be assumed to be identical.

### 2014 statistics

- Seven new cartel fine proceedings
- Five new cartel administrative cases
- 170 new private antitrust cases
- Nine *amicus curiae* briefs





### **Düsseldorf Higher Regional Court confirms Bundeskartellamt's publicity practice (file ref. VI-Kart 5/14 (V) and VI-Kart 4/14 (V))**

In its decision of October 2014 the Düsseldorf Higher Regional Court confirmed the admissibility of the publication of press releases by the Bundeskartellamt. Two companies on which the authority had imposed fines for their involvement in the so-called sausage cartel had objected to the press release published by the authority on the matter, in which the companies were named.

The court emphasized that the Bundeskartellamt was generally authorized to report to the public occurrences in its area of activity which were interesting or could even affect the general public. It stated that in cases in which the Bundeskartellamt reported on its fines proceedings, this was usually of important interest for the general public. This was also and especially true if the subject of the fine proceedings were cartel law violations which were to the detriment of the final consumer. According to the court this also justified naming the companies involved in the cartel because for potentially harmed customers of a cartel to be able to assert their claims for compensation it was absolutely necessary that the public be informed about the fines imposed and the names of the companies involved. The court stated that providing this information was the primary task of the Bundeskartellamt as the guardian of free and undistorted competition.

In another decision of January 2015 concerning a planned merger which the Bundeskartellamt had prohibited, the Düsseldorf Higher Regional Court rejected an application for a prohibitory injunction brought by several parties to the proceeding as well as by their lawyers. The complainants had objected to the authority's intention to publish the prohibition decision in the Internet.



*“A cartel violation is not a business secret. If the authority discovers a violation, it must be able to inform the public and the damaged parties accordingly. The Higher Regional Court confirmed this practice last year.”*

# Federal Public Procurement Tribunals

The federal public procurement tribunals are responsible for reviewing tender procedures which are carried out by the Federation or public contracting entities. The review procedure is similar to a court proceeding and is carried out if a company that wishes to participate or has participated in an invitation to tender has found evidence of a violation of public procurement law and applies to the public procurement tribunals for a review of the award procedure.

The 1st Public Procurement Tribunal is chaired by Hans-Werner Behrens.

The Chairman of the 2nd Public Procurement Tribunal is Dr Gabriele Herlemann.

In 2014, the review procedures conducted by the federal public procurement tribunals involved a vast range of procurements. A great number of the procedures concerned procurements made by the statutory health funds, mostly in the area of discounted drugs and medical aids. Other procedures concerned tenders for the improvement of rail and waterway networks and the procurement of IT services by federal government authorities. There was an increase in review procedures in the military sector, which in 2014 accounted for 14 percent of all procedures.

The statutory right to have an order divided into lots can be enforced by a company before the public procurement tribunals, provided certain requirements are met. In 2014, the public procurement tribunals decided that the mere fact that a company is an SME does not entitle it to have the order split into trade-specific lots.

In the tribunals view, a distinction must be made between partial lots and trade-specific lots. While the obligation to split an order into partial lots directly protects the interest of SMEs, the situation in respect of trade-specific lots is different. Whether a company possesses the necessary expertise to meet the requirements of a trade-specific lot does not depend on its size – and therefore also not on its being an SME.

## Formation of bidding syndicates by group-affiliated companies

Several review procedures raised the question of under what circumstances companies can be allowed to submit a joint tender (thus forming a bidding syndicate). A bidding syndicate can restrain competition for an order put out to tender if the companies that are part of the syndicate would also have been able to submit individual tenders themselves.

## No automatic entitlement for SMEs to have trade-specific lots

In order to create more competition there is a legal requirement under public procurement law to split larger orders into several lots. Public entities can fulfil this requirement either by creating so-called partial lots (the order is split into several parts) or so-called trade-specific lots (the order is split according to different trades). This is mainly to enable small and medium-sized companies to also participate in tender procedures.

In several cases which concerned the conclusion of rebate contracts for pharmaceuticals the question arose as to whether the formation of a bidding syndicate also led to a competition restraint if the members of the syndicate belonged to the same group of companies. The public procurement tribunal was of the opinion that this was not the case provided the individual members of the bidding syndicate were not free to autonomously determine their market behaviour. Such a lack of autonomy can be the result of, e.g., a 100 percent ownership or identical management boards. Companies that are thus affiliated form an economic unit and may also act as a unit in tender procedures.





## No-spy declaration

The disclosures by Edward Snowden about the foreign intelligence activities of the U.S. security authorities in Germany (and other states) indirectly led to a legal dispute in a review procedure concerning the procurement of IT services. The applicant in the review procedure stated that the company selected for the award of the contract was a subsidiary of a U.S. parent company and therefore obliged under U.S. law to submit data relating to the contract to the U.S. security authorities. In the applicant's view it was therefore an unsuitable contractor.

At the time of the review procedure the Federal Ministry of the Interior was preparing a decree on measures to prevent the leakage of information to foreign security authorities. The decree was not yet applicable at the time of the disputed procurement of IT services. The decree provides for a self-declaration by the bidder in which it declares that it is able to keep confidential all information received in the context of the contractual relationship and that it will in particular not transmit such information to any third party and is under no legal obligation to do so. In addition, the contractor is obliged to immediately inform the contracting entity if it is no longer able to meet this obligation. In the view of the applicant the company selected for the award would not have been able to truthfully make such a declaration.

The public procurement tribunals decided that despite the current debate on the foreign intelligence activities of the NSA, it was not possible to exclude the company from the

## The Federal Public Procurement Tribunals in figures

- In 2014, 124 applications were filed for the initiation of review proceedings.
- The monetary value of the awards on which the federal public procurement tribunals had to decide in 2014 amounted to over 1.6 billion euros.
- In 25 cases the tribunals' decisions were appealed to the Düsseldorf Higher Regional Court.

## Legal protection provided by the public procurement tribunals helps in developing the European internal market

- The public procurement tribunals are only competent for awards whose value exceeds a certain threshold: in the case of supplies and services this is 134,000 euros, in the case of construction works this is 5.186 million.
- These "award thresholds" were set in accordance with the EU Public Procurement Directives.
- The objective of the European Public Procurement Directives is to extend the cross-border, non-discriminatory European internal market to the field of public procurement.
- Prior to the adoption of the Directives, the internal market had not been fully implemented in this area because the Member States tended to promote their national economies by awarding public contracts to national companies.
- The effective legal protection which is provided by the public procurement tribunals in implementation of the European Public Procurement Directives contributes significantly to establishing an internal market also for public procurements.



award procedure. In the tribunal's view the confidentiality commitment did not constitute an eligibility requirement for the purposes of procurement law. The company could only have been excluded from the procedure if it had been proven that it had gravely failed to meet such confidentiality requirements in the past. This, however, had not been the case. In the tribunal's opinion a pre-judgement that the contractor might fail to meet a confidentiality requirement in the future was inadmissible and could not be accepted under procurement law as a ground for exclusion. The obligation to keep information confidential should be provided for in the award contract in the form of a special requirement.

# 1st Decision Division

The 1st Decision Division is competent for the following areas: extraction of ores and other non-metallic minerals, construction industry (building materials, glass, ceramics), real estate and related services and the wood industry, including furniture. Some relevant examples of the division's work in 2014 were a proceeding against the federal state of Baden-Württemberg on account of the joint marketing of round timber and a cartel proceeding against mattress manufacturers. In the area of merger control the division observed an increasing concentration in the furniture sector. In another case it prohibited so-called radius clauses in the lease contracts of factory outlet centers.

The 1st Decision Division is chaired by Franz Heistermann.



## Proceeding against the marketing of round timber by the federal state of Baden-Württemberg

In 2014 the division continued its proceeding against the system used by the federal state of Baden-Württemberg for the joint marketing of round timber. Via its state company Forst BW Baden-Württemberg markets wood not only from its own state forests but also from communal and private forests. Forst BW negotiates the prices for all the forest owners, determines the customers and sets the conditions for sales. According to the Bundeskartellamt's evaluation so far this type of cooperation between competitors is prohibited under competition law.

The Bundeskartellamt had already expressed its concerns to Baden-Württemberg in December 2013. Thereupon Baden-Württemberg offered commitments to the Decision Division to eliminate the competition concerns. However, it withdrew them again in January 2015. The Decision Division has continued the proceeding and intends to prohibit the state from carrying out the joint marketing of round timber for owners of more than 100 ha of forest. It plans to conclude the proceeding in the second half of 2015.

## Fines imposed for vertical resale price maintenance by mattress manufacturers

In February 2015 the division imposed a fine of 3.38 million euros on Metzeler Schaum GmbH in the mattress proceeding for enforcing resale price maintenance on retailers selling its products. From early 2007 to July 2011 representatives of Metzeler agreed on several occasions with its retailers that they should generally offer certain mattresses at the sales prices set by the manufacturer. The price agreements referred in particular to planned advertising measures.

The agreement of a specific final customer price between a manufacturer and a retailer is an illegal agreement which affects competition. Only non-binding price recommendations are permissible under competition law.

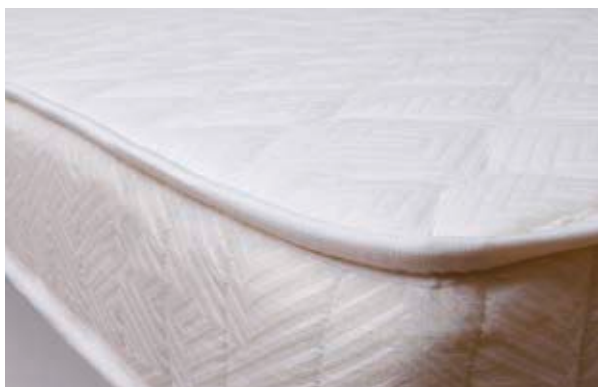
In August 2014 the Decision Division already imposed fines of 8.2 million euros on Recticel Schlafkomfort GmbH for enforcing resale price maintenance on retailers selling its products.

As both undertakings cooperated with the Decision Division in the proceeding, a settlement could be reached.

### Forests as an economic factor

- With a Germany-wide turnover of more than four billion euros the market for round timber is an important economic sector.
- According to the Bundeskartellamt's investigations, the federal state of Baden-Württemberg has a high share of 55 to 65 percent of the market for harvested round timber in this state.
- The sale of its own coniferous stem wood from the state forests accounts for a share of approx. 15 to 25 percent of the market. The remaining 35 to 45 percent share of the market is accounted for by the state's sales cooperations.





The mattress proceeding was initiated in response to complaints within the market. As a result the Bundeskartellamt conducted a dawn raid at several companies in the sector in August 2011.

After evaluating the evidence, the Division discontinued the proceeding against one mattress manufacturer, two purchasing cooperatives and one online retailer for reasons of expediency. The proceedings against two other manufacturers are still pending.

### Mergers of furniture stores

The furniture retail market in Germany has become even more concentrated. The Decision Division examined in great detail the launch of the joint furniture company Möbelzentrum Pforzheim by the XXXLutz group and EH Einrichtungs- und Beteiligungsgesellschaft mbH & Co. KG. Further acquisition projects of the XXXLutz group in respect of Möbel Kranz and Möbelstadt Rück GmbH & Co. KG as well as others by Möbel Kröger were also closely examined. Ultimately, however, these projects could be cleared as well as the acquisition of Möbel-Mahler Siebenlehn by the Krieger/Höffner group and the acquisition of the furniture store Möbelpark Sachsenwald by the Tessner group.

The Bundeskartellamt defines the furniture retail markets affected as regional markets, based on the actual customer flows according to postal code or postal code area. No indication could be found of a significant impediment of effective competition, especially not of the creation of a dominant position, on any of the regional markets affected.

### Geographic market definition

- When it examines a merger the Bundeskartellamt has to define the markets affected. The relevant market has to be defined in both product and geographic terms.
- In defining the relevant geographic market the Bundeskartellamt determines the territory in which the companies are exposed to effective competition from their competitors. The authority examines the possibilities of customers to switch to an alternative supplier in the geographic market.
- The relevant geographic markets can differ significantly in terms of size depending on the products and services that are affected in the individual case.
- Example: When an energy supply company purchases special technical components for a power plant, it invites tenders from suppliers within the various federal states or even worldwide. The geographic market definition is accordingly wide.
- When private consumers buy food, they are only willing to accept short distances. The geographic market definition used for the food retail sector is accordingly narrow. The distances which customers are willing to travel to purchase furniture are also limited. A definition of the geographic market as regional is therefore appropriate in this case.

### Radius clause of factory outlet center prohibited

The Decision Division has prohibited the operator of Wertheim Village Factory Outlet Center, VR Franconia GmbH, from using so-called radius clauses in its lease contracts with brand product manufacturers if these extend beyond a 50 km air radius and a term of five years. Up to now Franconia has forbidden most of the 100 brand product manufacturers in its factory outlet center in Wertheim from opening up shops in another factory outlet center or individual outlets within a radius of in most cases 150 kilometres of Wertheim.

Factory outlet centers are sales outlets in which manufacturers offer their branded goods at a reduced price. They are centrally planned, realized and administrated by one operator and usually consist of several thousand square metres of sales floor space with 40 to over 100 shops. The prohibited radius clauses restrict the tenants' freedom of action and so not only restrict competition between the existing factory outlet centers but in particular also hinder companies wishing to enter the market with a new factory outlet center.

## 2nd Decision Division

The 2nd Decision Division is responsible for agriculture, the food industry, leather and leather goods, shoes, cleaning agents and toiletries, and the wholesale and retail trade in food and beverages. A special focus of its work remains the food retail sector in Germany. Among other things the Decision Division prohibited the planned merger between the retail companies EDEKA and Kaiser's Tengelmann. It also took a decision of principle on the demand by powerful retailers for unjustified benefits from their suppliers (so-called "Anzapfverbot") and published the results of its sector inquiry into buyer power in the food retail sector. In a test case the Decision Division also dealt with the selective distribution system of the sportswear manufacturer ASICS.

The 2nd Decision Division is chaired by Birgit Krueger.



### Food retail sector

In 2014 the Decision Division published the results of its sector inquiry into structures and buying behaviour in the food retail sector in Germany. Key conclusion: The food retail sector in Germany is highly concentrated. The four large retailers EDEKA, REWE, ALDI and the Schwarz group (including Lidl) share between them more than 85 percent of the total market. The leading food retailers have a structural advantage over their competitors and in their relations with suppliers. They are able to use their strong market position to their advantage in negotiations with

their suppliers. In the evaluation of the inquiry the Decision Division analysed around 3,000 bilateral agreements between 180 manufacturers and 30 retail companies containing 33 million data.

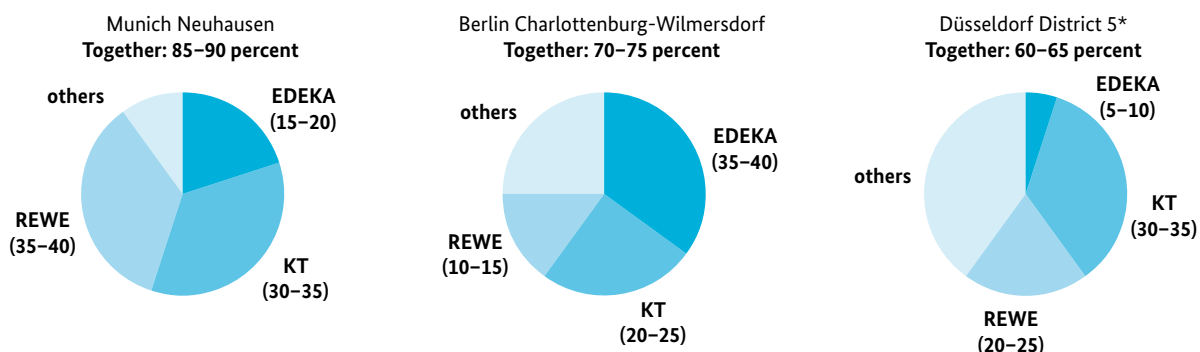
In various merger control proceedings in the past years the Decision Division has examined the local competitive situation for consumers to find out whether even after an acquisition of outlets by another competitor there were still sufficient shopping alternatives for consumers at the location. Another area of focus was the question whether the procurement practice of the retailer groups restricted competition in the sector.

#### Takeover of Kaiser's Tengelmann by EDEKA prohibited

In the spring of 2015 the Decision Division prohibited the acquisition of 451 Kaiser's Tengelmann outlets by the retailer EDEKA. The project would have considerably worsened competition conditions on a large number of highly concentrated regional markets and in municipal districts in greater Berlin, Munich, Upper Bavaria and North Rhine-Westphalia.

#### Food Retail Sector: Market shares in different municipal districts

Examples: Market shares (in percent) of EDEKA, REWE and Kaiser's Tengelmann (KT) in districts of Berlin, Munich and Düsseldorf.



\* Stockum, Lohausen, Kaiserswerth, Wittlaer, Kalkum, Angermund

It would have greatly limited choice for local consumers and the possibilities for them to switch to another retailer. The project would also have caused competition problems in the area of procurement because, among other reasons, the brand manufacturers would have lost an important independent buyer as a sales alternative.

In evaluating the merger project the Decision Division took all the distribution channels in the food retail sector into consideration, from full-range retailers such as REWE and EDEKA to hard discounters such as ALDI. It defined the markets as local or regional depending on the consumers' buying behaviour. In the large cities the actual competition situation was also examined in the city districts and neighbourhoods. The results of the investigations showed that with market shares of between ten and nearly 30 percent Kaiser's Tengelmann is an important competitor in nearly all the regional market areas affected.

In February 2015 the Decision Division issued a statement of objections to the parties but made it clear that around 100 Kaiser's Tengelmann outlets could have been acquired. After the inclusion of amongst others organic supermarket chains in the market assessment EDEKA would have been able to acquire approx. a further 70 outlets and consequently in total around a third of Kaiser's outlets.

In two stages EDEKA and Tengelmann have only offered to give up a total of around 100 outlets in Berlin and Bavaria. However, the sale of these outlets would have hardly reduced EDEKA's critical market share increase. EDEKA could have easily acquired many of these outlets anyway because the merger posed no danger whatsoever to competition in the local markets affected.

After the prohibition decision the parties to the merger applied on 29 April 2015 for a ministerial authorisation.

#### Ministerial authorisation (Section 42 of the German Competition Act, GWB)

- The Federal Minister for Economic Affairs and Energy can, upon application, authorise a merger which has been prohibited by the Bundeskartellamt if ...
  - ... in a specific case the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration or
  - ... the concentration is justified by an overriding public interest.
- The Minister should decide on the application within four months.

#### Decision of principle on demand for unjustified benefits

In a test case in July 2014 the Decision Division took a decision of principle that several demands for special conditions made by EDEKA Zentrale AG & Co. KG on its suppliers after its takeover of the Plus markets in 2009 were abusive. These were generally referred to as "wedding rebates", the adjustment of purchase conditions to those previously granted to Plus. With these demands, some of which were general and some made with retroactive effect, EDEKA had in the Division's opinion violated the prohibition of inducing a supplier to grant benefits without any objective justification (so-called "Anzapfverbot"). EDEKA appealed against the decision.

#### Selective distribution: Test case against ASICS

Last year the case against ASICS Deutschland GmbH was continued. The proceedings had been initiated because ASICS had introduced a selective distribution system for its products, notably sports and running shoes. This system poses severe restrictions to online sales. The distribution system prohibits the advertisement or sale of ASICS products via third party platforms such as eBay or Amazon and the support of price search engines. The Decision Division is also examining possible restrictions of cross-supplies between authorised retailers.

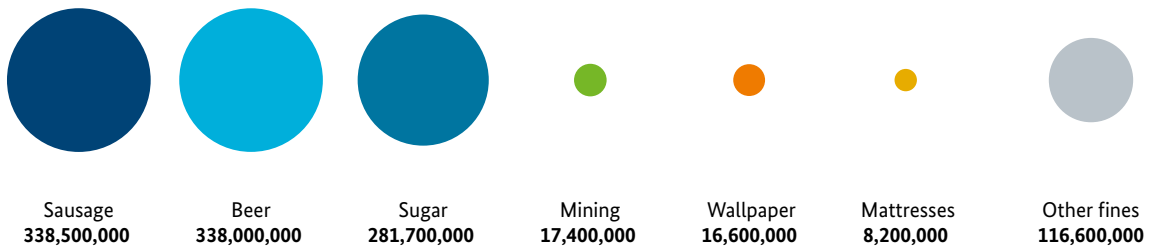
The proceeding against ASICS is considered as a test case. The Decision Division expects to conclude the proceeding within the course of the year.

#### Agricultural trade

The Decision Division closely examined several mergers in the agricultural trade. The trade is characterised by the strong market positions of large central cooperatives with areas of activity which are largely independent of one another. This can lead to problematic positions of power in particular in the case of acquisitions in the cooperatives' own key area of activity. For example, the Decision Division cleared plans by Agravis Raiffeisen AG and its Danish cooperation partner Danish Agro to acquire large parts of the agribusiness activities and the production of seeds and feedstuffs of Getreide AG. Due to competition concerns expressed by the Bundeskartellamt the parties to the merger had already previously withdrawn a total of nine locations from the takeover package. Otherwise the merger would have led to a significant impediment of competition in the northern half of eastern Germany.

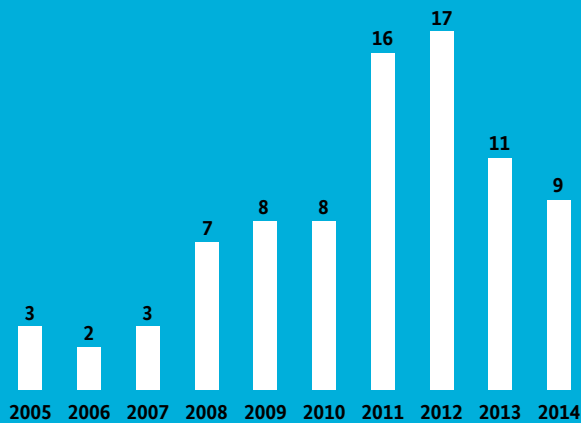
# Data and facts

## Fines imposed in 2014 in euros total of approx. 1,117,000,000\*



\* The figures are rounded values. A small amount of the fines were already imposed in 2013.

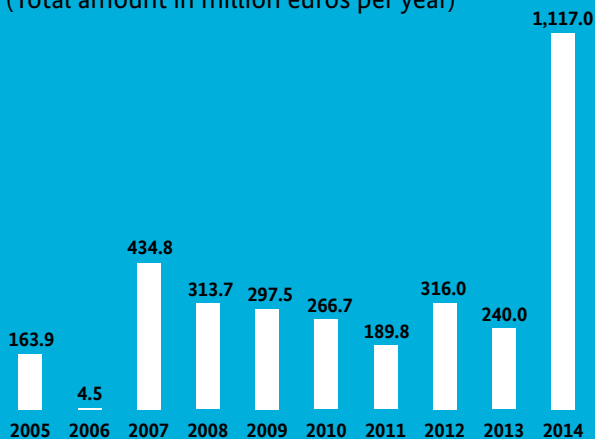
## Cartel proceedings concluded by the Bundeskartellamt between 2005 and 2014



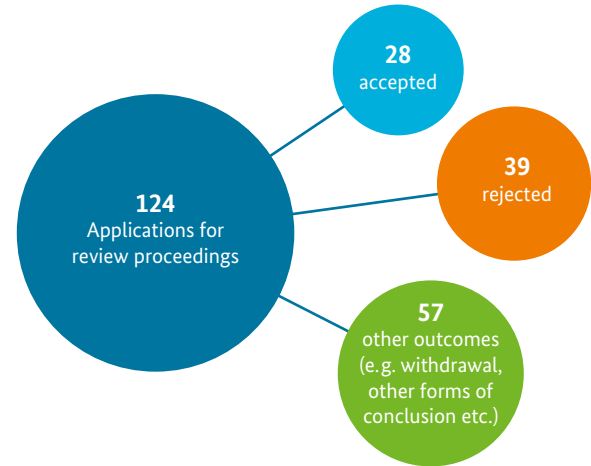
## Dawn raids and evidence seized in 2014



## Fines imposed by the Bundeskartellamt (Total amount in million euros per year)



## Practice of the Federal Public Procurement Tribunals in 2014

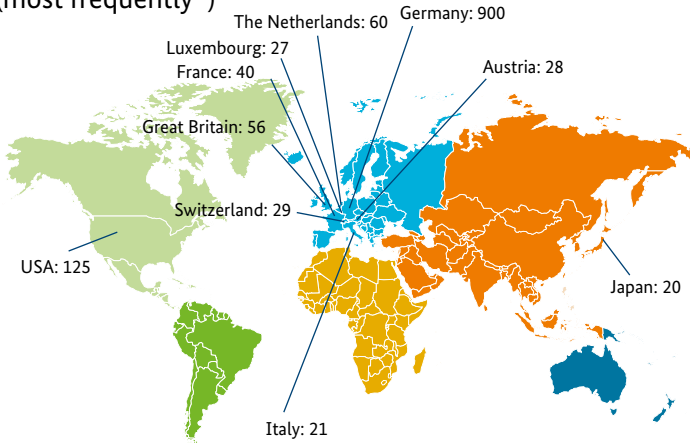


## Abuse of dominance proceedings in figures for 2014

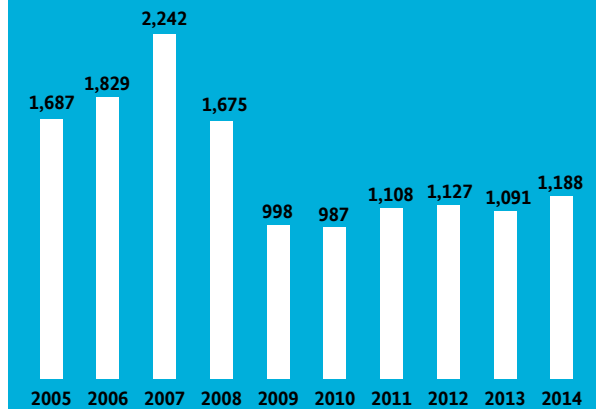


## Mergers notified to the Bundeskartellamt

Acquirers according to geographic origin 2014 (most frequently\*)

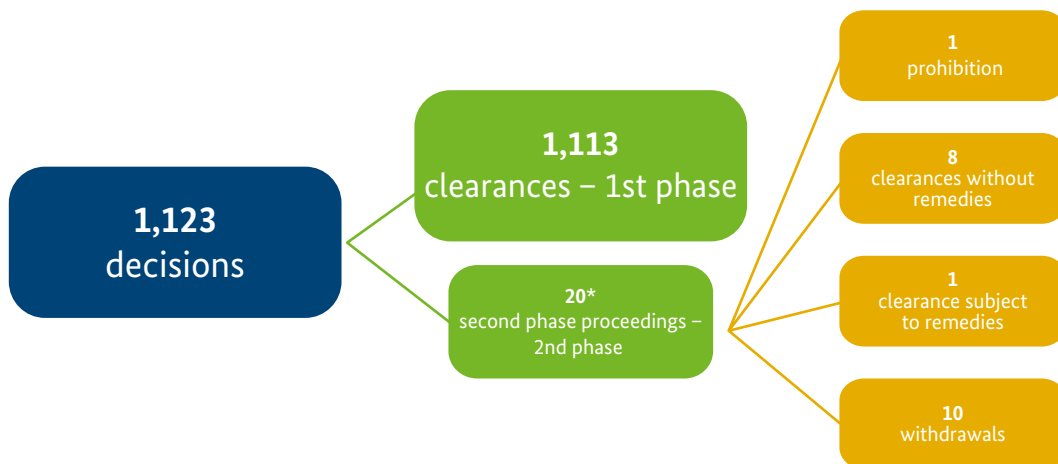


## Mergers notified to the Bundeskartellamt between 2005 and 2014



\* The ten countries from which most of the acquirers originated in 2014.

## Merger control: Bundeskartellamt decisions in 2014



\* in 2014 two more mergers were examined in second phase proceedings which had not been concluded by 31 December 2014.



# 3rd Decision Division

The activities of the 3rd Decision Division cover the health sector, including health insurance, hospitals, pharmacy and medical technology as well as the chemical and textile industries. Last year the Decision Division concluded an abuse proceeding against SodaStream GmbH and also carried out a test proceeding in e-commerce in connection with the selective distribution system of adidas AG. In merger control proceedings the Decision Division is continuously preoccupied with the consolidation of the hospital sector. In the health sector another proceeding involved maintaining competition in the supply of blood glucose strips in the Westphalia-Lippe region

The 3rd Decision Division is chaired by Eberhard Temme.

## adidas AG ends restriction of online sales

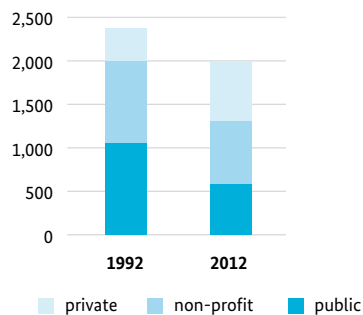
The possibilities offered by the Internet create new challenges for both manufacturers and retailers. The reaction of many brand manufacturers is to redesign their distribution systems. This often raises competition law issues.

In this dynamic market environment the aim of competition law is to keep markets open for the benefit of retailers and consumers. However, the overall elimination of an important distribution channel such as online sales is anticompetitive.

A proceeding against adidas as well as another against ASICS (which has not yet been concluded) serve as test cases in this area because currently many brand manufacturers are contemplating similar measures.

In 2014 the 3rd Decision Division was able to close its proceedings against adidas after the company had ceased restricting online sales. In a settlement proceeding adidas submitted an amended version of its conditions of sale for e-commerce, in which it completely abandoned its ban on sales via online market places. Also, all authorised retailers will be free in future to use adidas brand related terms as search words for search engine advertising such as Google AdWords.

Development – Proportion of hospital operators



Source: German Hospital Federation, DKG, hospital statistics 2014

## Merger control in the hospital sector

Irrespective of their operators (municipal authorities, churches, private operators) hospitals are active as entrepreneurs and compete with one another. Due to strict legal provisions there is almost no price competition in this area. It is therefore important first of all to maintain competition for the quality of healthcare for patients. It is crucial to ensure that after a merger patients can still choose between an adequate number of alternative providers.

In the case of a planned merger the Bundeskartellamt examines the competitive situation of hospitals whose services are comparable from the patient's point of view. There are, e.g. separate market definitions for the market for acute hospitals and for the market for rehabilitation centres or the market for retirement and nursing homes. In geographical terms, only those hospitals will be included in the examination that represent a health care alternative from the point of view of patients and that are, for example, not located too far away. Patient flows are analysed for this purpose.



### Hospital mergers

- During the last few years the financial situation of the municipal hospitals in particular has further worsened. This has led to an increasing consolidation process.
- From 2004 to 2014 the Bundeskartellamt examined a total of more than 210 hospital mergers.
- 182 mergers were cleared and seven prohibited.
- The remaining cases were either not subject to merger control or the proceedings have not yet been concluded.

An examination of current patient statistics and the current competition situation led in 2014 to the clearance of a hospital merger project which had been prohibited in 2012 (Klinikum Worms/Hochstift Worms). The merger could later be cleared due to a change in market conditions.

One example of the few prohibitions in 2014 was the planned merger of the Esslingen district clinics (Kreis-kliniken Esslingen) with the Esslingen clinical centre (Klinikum Esslingen) in Baden-Württemberg. As there are no other acute hospitals in the Esslingen and Kirchheim/Nürtingen districts, the merger of the two leading and closest competitors would have led to the emergence of a dominant hospital operator in the region. Other hospitals which are located further away, e.g. in Stuttgart or Tübingen, would have hardly qualified as an alternative for patients. The prohibition is final.

### Increased competition in the sale of blood glucose strips in the Westphalia-Lippe region.

The Decision Division has concluded a cartel proceeding against the pharmacists association in the Westphalia-Lippe region (Apothekerverband Westphalia-Lippe e.V.). The association had agreed with the major health insurance funds that patients be supplied with blood glucose strips preferably via pharmacies in the Westphalia-Lippe region. To this effect it had concluded a clause prohibiting the health insurance funds from controlling and influencing the procurement of these strips.

According to the agreement the health insurance funds had to refrain in particular from influencing doctors and health insurance patients to purchase blood glucose strips directly from certain other providers. This restricted the sales possibilities of competitors such as direct mailing companies or medical supplies shops. As a consequence of the proceeding the association has forgone its rights under its prohibitive control and influence clause.

### Abuse proceeding against SodaStream

In early January 2015 the Decision Division imposed a fine of 225,000 euros on SodaStream GmbH. As early as 2006 the Decision Division had decided that it is against competition law for SodaStream (formerly Soda Club) as a dominant company to reserve the exclusive right to refill the CO<sub>2</sub> cartridges for the soda makers it sells. In 2008 the Federal Court of Justice confirmed the decision.

Following this decision SodaStream modified its distribution concept. However, the company's warning and safety instructions as well as disclaimers of warranties still gave the impression that it was exclusively entitled to refill the cartridges. The company made it explicitly clear that e.g. empty cylinders were to be returned to SodaStream or authorised distributors. Another note stated that unauthorised filling could be illegal.

As a result the Decision Division initiated a new proceeding in 2012. In setting the fine account was taken of the fact that SodaStream had cooperated with the Bundeskartellamt and a settlement could be reached. At the same time the company promised to correct the texts objected to and to attach a label to its CO<sub>2</sub> cartridges for a further three years stating that they can also be refilled by other companies.



# 4th Decision Division

The activities of the 4th Decision Division cover the waste management industry, financial services and other services. An area of focus in the waste management industry last year was planned mergers on the markets for the collection of domestic and commercial waste. The Decision Division also helped to find a pro-competitive solution to a conflict between operators of compliance systems over the collection of packaging waste. In the financial services sector, payment systems continued to play a major role.

The 4th Decision Division is chaired by Eva-Maria Schulze.



## Electronic cash: Banking associations implement commitments

In 2014 the Decision Division monitored compliance by the leading banking associations with their commitments to open up the electronic cash system to competition. In the past retailers in Germany had to pay a fee of 0.3 percent of the value of each electronic cash card payment transaction to the bank issuing the card. The level of the fee was jointly set by the leading associations of the German banking sector. A proceeding initiated by the Bundeskartellamt against this practice ended in April 2014 with a commitment by the leading banking associations to abandon the standard retailer fees and to introduce negotiated fees.

The negotiations on fees conducted for the first time for all participants in the electronic cash system led to a significant reduction of the costs for the retail companies. The EHI Retail Institute estimates that in 2015 companies in the retail sector (department stores (with or without a food department), supermarkets but not petrol stations) will be able to save approx. 20 percent of or more than 60 million euros in retailer fees compared to being billed at the previous standard fees. The Decision Division con-

cluded from the result of its examinations that the associations have in fact kept their commitments. Consequently, the proceedings could be discontinued.

The Bundeskartellamt is committed to ensuring that the leeway created by competition is not restricted again by an over-stringent regulation of the card payment systems at European level.

## Online transfers

In proceedings against the German Banking Industry Committee (Deutsche Kreditwirtschaft), the Decision Division is examining to what extent the general terms and conditions of the banks and savings banks constitute an inadmissible restraint of competition vis-a-vis independent online payment services such as Sofortüberweisung.de.

The general terms and conditions stipulate that bank customers may only enter their personalised security data (PIN and TAN) on websites authorised by the banks. The banks substantiated this with security requirements. It remains to be assessed whether the protection of customer data can also be ensured by measures that allow third parties to compete with the banks in the market for online payment services.

### Payment behaviour in Germany

- Germans use cash for 53 percent of their expenditure on goods and services.
- The girocard (formerly EC card) is used for 29 percent of total expenditure.
- Credit cards are used for 4 percent of total expenditure.
- The remaining payments are made mainly via bank transfer and online payment schemes.

Source: Survey of Deutsche Bundesbank, "Payment behaviour in Germany in 2014"



## Competition in the waste management industry

Following a wave of privatisation in the nineties, it has become evident that many municipalities have begun again to carry out services of general public interest themselves. These also include waste management. For example, in the discussion on a law on material recycling, it has been suggested that the compliance schemes be abolished and responsibility for the waste management of recyclable material be transferred to a “central body” or the municipalities. The Bundeskartellamt is committed to maintaining competitive structures and strives to counter a monopolisation of waste management services by the municipalities.

### Mergers in the waste management industry

In 2014 the Decision Division had to closely examine several acquisitions by the Rethmann group, to which the two waste management companies REMONDIS and Rhenus also belong. The proceedings concerned in particular domestic and commercial waste and document destruction services.

The Decision Division cleared for example the acquisition by REMONDIS of waste management sites of the Sita group in Radolfzell, Talheim, Trossingen and Pfullingen. REMONDIS originally intended to acquire seven sites from Sita. However, in the Decision Division’s view this would have significantly impeded competition in the market for the collection and transport of residual and bio-waste in southern Baden-Württemberg. After the Decision Division had expressed its concerns to the parties in May 2014 REMONDIS abandoned its plans to acquire three sites. The merger could be cleared as a result.

In July 2014, in another proceeding the division cleared the acquisition by REMONDIS of companies of Saar Umwelt-Gruppe in second phase proceedings. The transaction affected several markets for the collection of domestic and commercial waste in the Saarland and Rhineland-Palatinate as well as several processing markets.

### Waste management industry in Germany

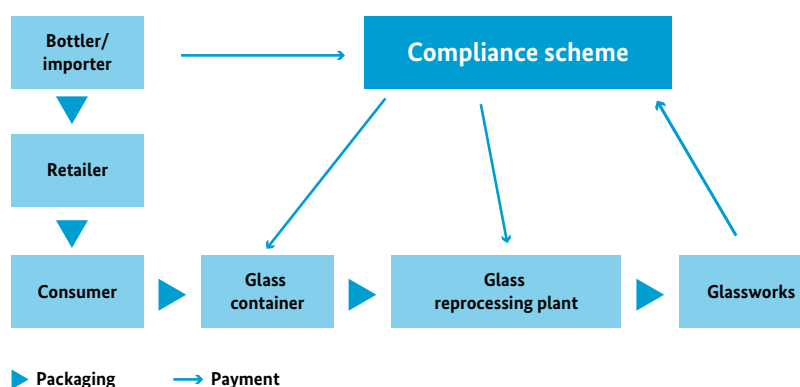
- Total turnover of the waste management industry in Germany: **approx. 50 billion euros**
- **250,000** workforce

Source: Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB) (“Development of Waste Policy in Germany”)

### Volume clearing of the compliance schemes

In the spring of 2014 the cooperation between the compliance scheme operators in the collection of packaging waste ran into difficulties. Several scheme operators terminated their existing clearing contracts because they were no longer prepared to accept the market shares attributed to them under their contracts and to pay their according share of the costs of package waste collection. This jeopardised the clearing system as such and resulted in a financing shortfall for the current year, which the operators themselves estimated at almost 53 million euros.

### Typical contract structure of a compliance scheme using recycled glass as an example



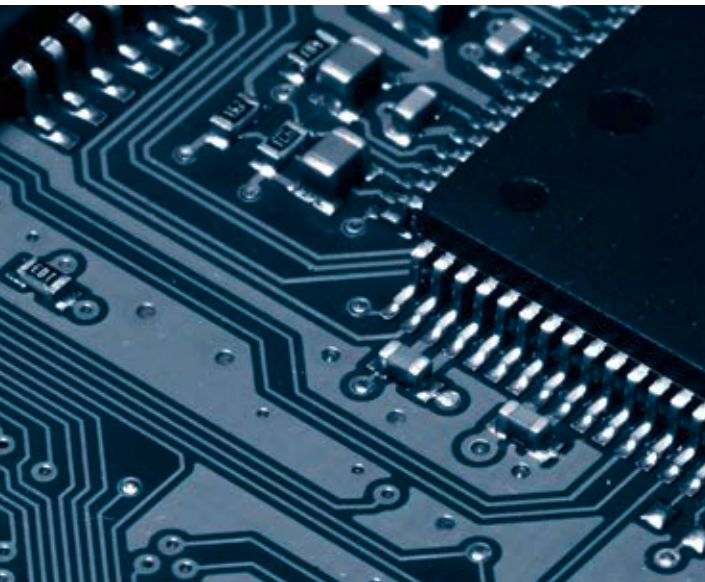
The scheme operators constantly kept the Decision Division informed of their endeavours to find a solution to the clearing problem for the current year 2014, to closing the financial gap and to signing new clearing contracts from 2015. The Decision Division commented on several occasions on aspects of competition law which had to be considered.



# 5th Decision Division

The 5th Decision Division is responsible for the areas of mechanical and plant engineering, the metal industry, iron and steel, measurement and control technology, patents and licences, and paper. Last year one of the main focuses of the Decision Division was the examination of an international merger project concerning semiconductor manufacturing equipment. It also examined a merger in the armaments industry. Another sector the Decision Division dealt with last year was the sanitary, heating and air conditioning sector.

The 5th Decision Division is chaired by Dr Ralph Langhoff.



## International merger in the sector of semiconductor manufacturing equipment

In November 2014 the Decision Division cleared the merger between Tokyo Electron Ltd. (Japan) and Applied Materials, Inc. (USA).

This merger project of international importance was examined by the Bundeskartellamt and seven other national competition authorities (among them authorities in Asia and the USA). The Decision Division cooperated closely with the other authorities within the context of the proceedings.

### Effects doctrine under Section 130(2) GWB

“This Act shall apply to all restraints of competition having an effect within the scope of application of this Act, even if they were caused outside the scope of application of this Act.”

### De minimis markets:

- Markets which have existed for at least five years and which had a sales volume in Germany of less than 15 million euros in the last calendar year (Section 36(1) sentence 2 no. 2 GWB).
- If the merger raises competition issues only in de minimis markets the law provides that this is not sufficient to justify a prohibition of the merger.
- The threshold linked to the national sales volume also applies if the markets concerned are considered in economic terms as worldwide markets, as in the Tokyo Electron/ Applied Materials merger.

The companies involved develop and produce equipment for the manufacture of semiconductors (chips). This includes many different and very sophisticated types of equipment, each of which covers a specific stage in the manufacturing process. If all the types of equipment produced are taken together, Applied Materials is the number one manufacturer in this sector and Tokyo Electron the number four.

In an intensive one-year investigation the Bundeskartellamt examined whether the proposed merger would have anticompetitive effects and carried out an in-depth examination of almost 40 individual markets.

The investigations showed that the companies already had a strong market position in many individual markets. Nevertheless the project could be cleared as the two companies only overlap in a few of these markets. Furthermore, many of the markets affected in Germany are so-called de minimis markets (see box). In spring 2015, Tokyo Electron and Applied Materials ultimately abandoned the project after the commitments offered by the parties to the merger had not been sufficient to overcome significant concerns expressed by competition authorities in other countries.





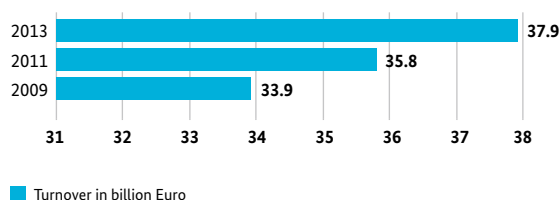
### Merger in the armaments industry

In March 2015 the Decision Division cleared the planned acquisition of a part of Diehl Defence Land Systems GmbH, Freisen, by Krauss-Maffei Wegmann GmbH & Co. KG, Munich. The business to be acquired was the track production and repair business for Diehl armoured vehicles, which was transferred to DST Defence Service Tracks GmbH, Freisen.

With DST, Krauss-Maffei Wegmann acquires the only German track manufacturer for military vehicles. However, its integration into the armaments company Krauss-Maffei Wegmann is unlikely to disadvantage other market players in terms of potential market foreclosure. Although Krauss-Maffei Wegmann's market position in the maintenance business will be strengthened, the merger will not significantly impede effective competition in the market. There are a large number of competitors in this sector which, although mostly smaller suppliers, can successfully compete for the orders put out to tender.

In its investigations the Bundeskartellamt carried out extensive surveys with national and international competitors and the procurement services of the Federal Armed Forces as the principle customer.

**Development: Turnover in the sanitary, heating and air conditioning sector**



Source: Zentralverband Sanitär Heizung Klima (German Sanitation, Heating and Air Conditioning Association)/Business Registry data evaluated by the German Federal Statistical Office, 2010

### Sanitary, heating and air conditioning sector 2013

- Total turnover: 37.9 billion euros
- Number of persons employed in the sanitary, heating and air conditioning sector: 346,000.
- Number of companies in the sanitary, heating and air conditioning sector: 53,998
- 62.6 percent of the turnover is achieved in the private sector.
- 74 percent of the total turnover is accounted for by the renovation of heating systems and bathrooms.
- In 2013 the companies organised in the sanitary, heating and air conditioning sector's craft associations renovated a total of 579,000 heating systems and 492,000 bathrooms.

Source: Zentralverband Sanitär Heizung Klima (German Sanitation, Heating and Air Conditioning Association), March 2014

### Focus on the sanitary, heating and air conditioning sector

Attempts by the manufacturers to maintain the three-tier distribution channel from the manufacturer to the installer via a wholesaler as an exclusive distribution channel are still evident in this sector. Initially, the three-tier distribution channel is merely a possible and, as such, admissible type of distribution. Nonetheless, measures taken to secure this distribution channel which in turn exclude other channels, such as distribution via DIY stores or online retailers, can raise competition law concerns.

The Decision Division is also currently conducting proceedings against wholesalers in this sector. In March 2013 it carried out a search operation. The Decision Division is investigating suspicions that sanitary wholesalers operate a system of price coordination which aims at reaching price agreements to the detriment of installers and other customers.



# 6th Decision Division

The 6th Decision Division is responsible for the areas of media and press, culture, sports and entertainment, the advertising industry and trade fairs. Last year a main focus of the work of the Decision Division was on mergers in the media sector. In addition, following the launch of a dedicated task force, the Decision Division is now increasingly preoccupied with the evaluation of online platforms under competition law.

The 6th Decision Division is chaired by Julia Topel.

## Online platforms

In the recent past the Bundeskartellamt has already concluded several cases involving online platforms which have raised new competition issues. It intends to further expand its competencies in this area. To this effect the Bundeskartellamt has set up a task force within the Decision Division which is to examine more closely the competitive conditions on online platforms.



multi-sided markets. Real estate portals bring together those offering real estate on the one hand and those looking for real estate on the other with the aim of establishing a direct transaction. For this they are regarded as a classical platforms. In these kind of platform markets the presence of a large number of smaller competitors tends to result above all in the market leader being chosen. With the merger, participants in this market will now have another large portal to choose from.

### Proceedings against CTS Eventim

In November 2014 the Decision Division also initiated administrative proceedings against the ticket retailer CTS Eventim AG & Co. KGaA. In these proceedings it is examining the admissibility under competition law of various business practices of CTS.

Another example of the Bundeskartellamt's work in the area of online platforms are the proceedings against the

### Merger between real estate portals

The Decision Division has cleared plans by Axel Springer SE to acquire sole control of Immowelt AG and the launch of a joint venture between Immowelt AG and Immonet GmbH. The joint venture brings together the second and third largest real estate portals in Germany. The real estate portal Immobilienscout24.de will remain the market leader even after the merger.

Although the merger reduces the number of large real estate portals in Germany, it may also increase competitive pressure on the market leader. A platform in competition law terms is one that provides services which enable direct interaction between two or more separately identifiable groups between which there are indirect network effects. Therefore platforms are often termed as two-sided or

### Network effect

- The term is used to determine the effect that one user of a good or service has on the value of that product to other people.
- This can be an indirect or direct network effect, depending on whether a platform or a network is concerned.
- The network effect is considered indirect if another user group benefits from an increase in the number of users. Such effects occur in the case of online portals in particular, e.g. real estate portals.
- A direct network effect occurs if there is an increase in value with a simultaneous increase in the number of users in one and the same group. Such effects occur, in particular in social networks.
- If the value decreases with an increasing number of users, e.g. because of overload, this can be termed as a negative network effect.

“best price” clauses (MFN clauses) of hotel booking platforms (see 9th Decision Division).

## Press mergers

Last year the Decision Division examined several mergers in which the companies concerned claimed to be suffering economic difficulties and where it had to be determined whether the circumstances of the mergers fulfilled the requirements of a failing firm defence.

### WAZ/Westfälische Rundschau and Ruhr-Nachrichten

The media group Funke Mediengruppe planned to sell seven local editions of the daily newspaper Westfälische Rundschau (and some editions of the daily newspaper WAZ) in Dortmund, Lünen, Schwerte and Castrop-Rauxel to the media company Medienhaus Lensing (which publishes the daily newspaper Ruhr Nachrichten). In July 2014, on receipt of a statement of objections issued by the Decision Division, Medienhaus Lensing withdrew its notification of the planned acquisition.

Ruhr-Nachrichten is the only competitor of the seven local editions of Westfälische Rundschau in the Dortmund area which has a high circulation of newspapers. In their notification Lensing and Funke had invoked the failing firm principle. However, the planned acquisition did not fulfil the requirements for this because the assets which were to be sold did not represent an independent business unit in either economic or organisational terms. The editions are part of a profitable newspaper chain and fully integrated in the company group.

### Westfälische Nachrichten and Münstersche Zeitung

By contrast, in September 2014 the Decision Division cleared plans by the Münster-based publishing house Aschendorff Verlag (which publishes the daily newspaper Westfälische Nachrichten) to acquire the publishing business of the regional daily Münstersche Zeitung from Medienhaus Lensing. This project fulfilled the requirements for a failing firm defence. Münstersche Zeitung as a business area can be sufficiently distinguished in economic and organisational terms from Medienhaus Lensing.

### Münchner Abendzeitung (AZ)

Even before the Munich daily newspaper Münchner Abendzeitung (AZ) filed for insolvency, a number of publishing

## Failing firm defence

- A merger can be cleared although it is likely to create or strengthen a dominant position if...
  - ... the target company is a failing firm which has to be proved by adequate documentation.
  - ... in case of the target's market exit, the acquiring company would largely gain the target company's market position.
  - ... there is no alternative to the merger project that would be less harmful to competition, in particular no alternative buyer.
- With the 8th amendment to the German Competition Act (GWB) in 2013 a special provision was introduced for the acquisition of small and medium-sized newspaper and magazine publishers. The new provision sets lower requirements for the clearance of a merger under the failing firm defence principle in this sector.

houses, some of which were direct competitors of AZ, had explored in talks with the Decision Division whether they could acquire AZ under the failing firm defence principle. However, at that point in time there was no evidence that there were no alternative acquirers which could have ensured the continuation of this newspaper in a way which was less problematic in competition terms.

In the course of the insolvency proceedings the newspaper group Straubinger Tagblatt/Landshuter Zeitung also decided to make a takeover offer. The merger project was unproblematic in competition terms due to the absence of overlaps in the circulation areas and could be cleared.

## Springer/Funke merger project: Cooperations

In 2013, as part of the merger project between Funke Mediengruppe and Axel Springer SE, the Decision Division had already cleared the acquisition of the Springer women's magazines BILD der Frau and Frau von Heute by Funke. This was the largest merger project in the print media sector in a long time. Last year the Decision Division cleared the acquisition by Funke of Axel Springer's TV programme magazines Hörzu, TV Digital, Funk Uhr, Bildwoche and TV Neu only subject to conditions and obligations. Several TV programme magazines had to be sold to a competitor.

The Decision Division recently examined the launch of the joint marketing venture “Media Impact”. “Media Impact” is to carry out the nationwide marketing of advertising space for the media products of Funke and Axel Springer in the newspaper sector and the marketing of advertising for their magazines and online media. As it did not raise any serious competition concerns, the project was cleared.



# 7th Decision Division

The 7th Decision Division is responsible for telecommunications and broadcast engineering, EDP, household equipment, electro-technology and the press sector. In 2014 the Decision Division examined, inter alia, the admissibility under competition law of a marketing platform for DVB-T2 broadcast standards and a cooperation between telecommunications companies in the supply of broadband connections. The Decision Division also fined a manufacturer of navigation devices for resale price maintenance.

The 7th Decision Division is chaired by Dr Markus Wagemann.

## Resale price maintenance for mobile navigation systems

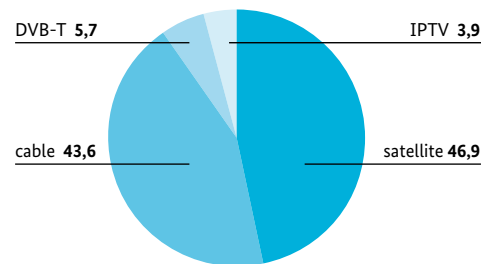
The company United Navigation has been fined 300,000 euros for having engaged in a vertical restraint of competition. The company tried to influence the retail prices of its portable navigation systems by exerting pressure on retailers to raise their sales prices. This is prohibited under competition law. Manufacturers are prohibited from obliging their retailers to demand certain prices or minimum sales prices for a specific product. Only non-binding price recommendations are permitted.

### Resale price maintenance

- Resale price maintenance means that a manufacturer obliges its customers to resell its products at a certain price pre-determined by him (or at least not below a pre-determined price).
- The German Competition Act prohibits such fixed or minimum resale price maintenance.
- The Act allows for a case-by-case assessment of certain restraints imposed by manufacturers on their retailers.

In the first half of 2014, the Austrian competition authority (BWB) conducted – with the assistance of the Bundeskartellamt – a dawn raid at the premises of United Navigation. The BWB had received information which suggested that the company had engaged in illegal resale price maintenance. United Navigation cooperated extensively in the investigation of the case and agreed to have the proceeding terminated by settlement. Both factors led to a reduction of its fine.

**Market shares of TV distribution channels**  
initial reception, in percent



Source: Association of Private Broadcasters and Telemedia (Verband Privater Rundfunk und Telemedien e.V.); 2014

## DVB-T2 marketing platform in line with competition law

In the past year the Decision Division dealt with the marketing model of a paid access programme platform by the Bonn company Media Broadcast GmbH. The platform is intended to market content in DVB-T2 format. Under the marketing model the HD content of the two large German private broadcasting groups ProSiebenSat.1 and RTL as well as the HD and SD content of other private broadcasters in DVB-T2 format will be encrypted and only broadcast in pay-TV.

In the past, under the so-called “transport model” of Media Broadcast GmbH, the private broadcasters had paid themselves for the costs of transmission. After RTL decided to no longer use its distribution channel, Media Broadcast GmbH developed this new marketing model. The reception of content from public service broadcasters will remain free of charge.

The investigations mainly focused on whether the business relations between the platform operator and the



### Broadband internet access

- Term is often misused. Correct meaning: access to the internet with a high data transmission rate.
- According to a definition by the International Telecommunication Unit (ITU) a service or system is broadband if it has a data transmission rate of more than 256 kbit/s.

broadcasting groups were in line with competition law. The Decision Division did not see any cause for concern in this regard. Media Broadcast GmbH has concluded individual and independent agreements with the broadcasting groups. The transmission of broadcast content against payment was simply the more attractive entrepreneurial alternative for the broadcasters.

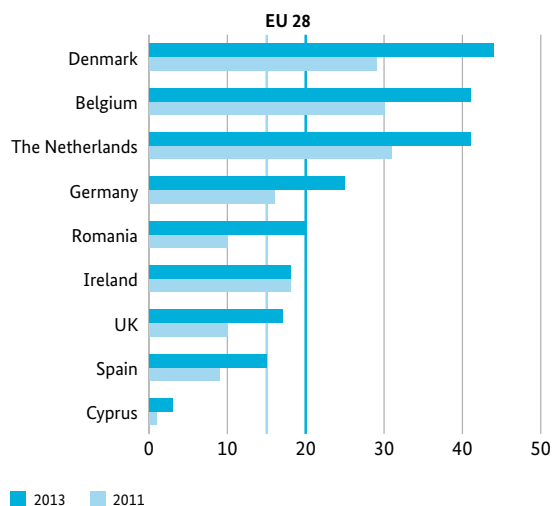
### No objections to cooperation in the supply of broadband services

The Decision Division had no objections to a cooperation between Telekom Deutschland GmbH and Telefónica O2 Germany GmbH & Co. OHG.

Like Telekom, Telefónica offers its customers broadband connections and sells wholesale products for broadband access to providers without their own infrastructure. In the future the companies intend to cooperate more closely in the provision of fast broadband connections. Both hope to benefit from this cooperation.

The Bundeskartellamt has decided not to take any action against the cooperation. Without this cooperation

**High-speed internet of 30 Mbit/s or more**  
in companies with at least ten employees, in percent



Source: Eurostat; German Federal Statistical Office, Wiesbaden 2014



Telefónica would soon no longer have been able to offer its customers high-speed broadband access. For economic reasons the company would not have been able to expand its own high-speed network which is why it is dependent on the cooperation with Telekom. Telekom expects from its cooperation with Telefónica that it will be able to expand its provision of faster broadband services in areas which are already connected within a shorter period of time. The cooperation is therefore not expected to impede infrastructure competition between the companies or with third parties.

### Joint venture for production of foreign identity documents

One of the Decision Division's merger cases in 2014 concerned the creation of a joint venture for the production of foreign identity documents. The parties to the joint venture were Devrient GmbH and Bundesdruckerei GmbH. Following an in-depth examination, the Decision Division cleared the project despite the strong market position of Bundesdruckerei in Germany.

In Germany all contracts relating to passports, identity cards and electronic residence permits are awarded by the Federal Ministry of the Interior to Bundesdruckerei without a tender procedure. This is done for security reasons. This practice is not likely to change in the short and medium term which is why the creation of the joint venture was not expected to significantly impede effective competition in Germany.

As regards the joint venture's foreign business activities, the Bundeskartellamt's investigations showed that irrespective of whether the market is defined as worldwide or Europe-wide, the joint venture would not achieve a critical size. A large number of companies in Europe and worldwide compete for contracts for the production of identity documents.

# 8th Decision Division

The 8th Decision Division is responsible for mineral oil, gas, electricity, district heating and water. In 2014 the Decision Division conducted abuse proceedings against several municipalities on account of their practices in the awarding of concessions for gas and electricity networks. The Division also continued to take action against excessive water prices. An in-depth merger investigation in the gas sector led the Decision Division to revise its definition of the gas markets.

The 8th Decision Division is chaired by Dr Felix Engelsing.

## Energy monitoring

In December 2014 the Federal Network Agency and the Bundeskartellamt published their joint annual Monitoring Report on developments in the German electricity and gas markets. According to the report, competitive conditions in the electricity markets have further improved and competition in the gas markets has also increased.

### Competition in the energy sector

#### Results of the energy monitoring

##### Electricity

- In 2013 the market shares of the four largest suppliers of conventional electricity fell to around 67 percent (six percentage points less than in 2010).
- Currently there are more electricity generation capacities than are required to cover demand.
- Wholesale markets continue to have a high level of liquidity.
- All customer groups are increasingly making use of the possibility to freely choose their electricity supplier.
- With the amendment to the Renewable Energy Sources Act the course has been set for more competition in the renewable energy sector.

##### Gas

- The number of gas household customers who have changed supplier has increased in 2013 and now amounts to just under ten percent.
- The number of industrial and commercial customers changing supplier has reached the same level as in the electricity sector and now amounts to around 13 percent.
- At the reference date of 1 April 2014 the gas prices for household customers were stable compared to the previous year, while the gas prices for industrial customers had fallen.

## EWE/VNG merger

After an in-depth investigation, the Decision Division cleared plans by the energy supplier EWE to increase its participation in the gas company VNG. In the course of the proceedings the Bundeskartellamt fundamentally revised its previous gas market definitions. The merger project could be cleared due to the positive development of competition in the gas sector. On account of recent developments in the gas sector, the markets at the wholesale level have merged and can be defined as national markets. Only the market for the basic supply of household customers must still be defined as a local or regional market. The market for the supply of special contract customers, in contrast, is now also defined as a national market. Due to the revised market definition the merger project did not raise any competition concerns. It could therefore be cleared unconditionally.

## Market Transparency Unit for Electricity and Gas Wholesale Trading

The Decision Division is involved in the creation and launch of a Market Transparency Unit for Electricity and Gas Wholesale Trading which is based at the Federal Network Agency. The tasks assigned to this unit are carried out by the Federal Network Agency and the Bundeskartellamt by mutual consent. The principal task of the Market Transparency Unit is to monitor electricity and gas wholesale trading in order to detect any irregularities in price developments at the wholesale level which could be attributed to abusive practices. In 2014, the main focus of the Unit's work lay on the conception and procurement of an IT infrastructure and the implementation of the REMIT Implementing Regulation. Since the beginning of 2015 the Market Transparency Unit for Electricity and Gas Wholesale Trading has its own website as required by law. It can be found under: [www.markttransparenzstelle.de](http://www.markttransparenzstelle.de).

## Remunicipalisation of gas and electricity networks

Concession contracts which were concluded in the 1990s are expiring or about to expire which is why several thousand concessions for the operation of electricity and gas networks throughout Germany will have to be newly awarded in the next few years. In the awarding of the concessions there is a noticeable trend towards remunicipalisation. In some cases municipalities have tried to give municipal bidders (municipal utilities, undertakings or holding companies) preference in the award decision.

The legal criteria which have to be complied with in the award of new concessions forbid such preferential treatment. Under the Energy Industry Act and the GWB the bidder with the best offer for the operation of the network should receive the award.

### Municipality of Titisee-Neustadt

The Decision Division has found that the municipality of Titisee-Neustadt acted abusively in awarding rights of way for electricity and gas networks by giving a certain bidder preference without objective justification and applying illegal award criteria. The Decision Division ordered the municipality in January 2015 to carry out a new non-discriminatory award procedure. The municipality has appealed this order to the Düsseldorf Higher Regional Court and has applied for interim court relief. It has also filed a municipal constitutional complaint to the Federal Constitutional Court.

### Federal State of Berlin

Upon complaints by an unsuccessful bidder, the Decision Division initiated a proceeding against the Federal State of Berlin in July 2014 on the suspicion that it had abused its dominant position in the award of rights of way for gas pipelines. In the same case a legal dispute between another unsuccessful bidder and the State of Berlin is pending at the civil courts. The Decision Division has therefore suspended the proceeding for the time being. In December 2014 the Berlin Regional Court granted a subsidiary motion by the unsuccessful bidder and held that the award decision of the State of Berlin was for several reasons anti-competitive.

## Abuse proceedings in the water supply sector

Recently the Decision Division has conducted a number of abuse proceedings against water suppliers, which led to a considerable reduction in the price of water. With its proceedings against Berliner Wasserbetriebe (BWB), its order to cut water prices which has meanwhile become final and the conclusion of a settlement agreement in May 2014, the



Decision Division ensured that water customers in Berlin will be spared a total of around 440 million euros from 2012 to 2018. In February 2014 the Düsseldorf Higher Regional Court unreservedly upheld the Bundeskartellamt's order to cut the water prices.

With the 8th amendment to the GWB, which came into force in the summer of 2013, the Bundeskartellamt may still examine water prices charged by private water suppliers but may no longer examine public water supply charges. As a consequence more and more municipalities seek refuge in the public water supply system to avoid an examination of their charges by the Bundeskartellamt. This has become a serious issue. One prominent example is the city of Wuppertal.

The Decision Division has been conducting investigations against the Wuppertal municipal utility (Wuppertaler Stadtwerke GmbH, WSW) since 2012 on suspicion of it having charged excessive prices for drinking water. In reaction to the proceedings the city of Wuppertal has reorganised its water supply and placed it in the hands of a municipal company operating under public law with the aim of having current and future water charges exempted from control under competition law. The Decision Division is nevertheless continuing the proceedings on account of the price setting activities of the past. Currently the Decision Division is in talks with the municipal company.

In late September 2014 the Decision Division also initiated abuse proceedings against swb AG in the city of Bremen for having charged excessive water prices. Swb AG had significantly raised its water prices as of 1 August 2014.

In addition, the Decision Division is working on a report on water supply in large cities.

# 9th Decision Division

The focal areas of activity of the 9th Decision Division are the tourism, hotel, restaurant and catering sector, transport, postal services and the automotive industry including rail, air and water vehicles. A major focus of the Decision Division's work in 2014 were the proceedings against Deutsche Bahn and Deutsche Post AG. Another area of focus were restraints of competition caused by the "best price" clauses (MFN clauses) of hotel booking portals. Another example of the work of the Decision Division is the examination of a major merger of suppliers in the automotive industry and a cooperation between the largest container shipping companies in the world.

The 9th Decision Division is chaired by Silke Hossenfelder.

## Deutsche Bahn: Abuse control proceedings concerning ticket sales

Since January 2014 the Decision Division has been conducting abuse control proceedings against Deutsche Bahn on suspicion of its having restricted competition in ticket sales. Several competitors of the company had complained that they had only limited access to Deutsche Bahn's sales channels.

The investigation focuses inter alia on why Deutsche Bahn's competitors cannot sell their tickets at railway stations. Also under examination are ticket sales undertaken by Deutsche Bahn on behalf of some of its competitors. Different rates of commission charged by Deutsche Bahn could raise a problem in this respect. The same is true of Deutsche Bahn's refusal to allow competitors to sell long-distance tickets although these competitors have to accept Deutsche Bahn's long-distance tickets in their trains.



## Proceedings against Deutsche Post: Price squeeze in respect of orders placed by large-volume mailers

In November 2013, following complaints by independent postal service providers, the Decision Division initiated abuse control proceedings against Deutsche Post AG.

### *What are the indications examined in the proceedings against Deutsche Post AG?*

The Bundeskartellamt is following up the accusation that Deutsche Post offers large-volume mailers individual services at lower prices than those charged to its competitors. In this way the company could possibly be unfairly hindering other postal service providers.

### *What exactly is the problem?*

Independent postal service providers often only provide part of the mail services themselves and have to use Deutsche Post for all other logistics services. If they have to pay higher prices for these services than Deutsche Post's own major customers, their competitiveness in this sector will decrease.

### *What are the competition concerns?*

By applying a price squeeze Deutsche Post AG could effectively prevent competition for orders from large-volume mailers, even if some competitors can offer their partial services cheaper than Deutsche Post AG.

### Competition in the rail transport market in 2013\*

- Long distance passenger rail services  
37 billion passenger kilometres, 99 percent with Deutsche Bahn AG  
< 1 percent with competitors
- Local passenger rail services  
53 billion passenger kilometres, 81 percent with Deutsche Bahn AG  
19 percent with competitors

\* Share of transport service

Source: Federal Network Agency (Bundesnetzagentur), Annual Report 2013 – Rail







### Hotel booking portals – restraint of competition caused by “best price” clauses

In December 2013 the Decision Division prohibited the hotel booking portal HRS from including so-called “best price” clauses in the contracts concluded with its hotel partners. These clauses obliged the hotel operators to always offer their lowest room rates, maximum room capacity and most favourable booking and cancellation conditions via the HRS portal. Since March 2012 the hotels had even been prohibited from offering travellers better conditions if they wanted to book directly at the hotel’s reception desk. In the meantime the Düsseldorf Higher Regional Court has confirmed the prohibition decision and rejected HRS’ appeal against the Bundeskartellamt’s decision.

After this clarification by the court the Decision Division also issued a letter of objections to the booking portal booking.com which had used comparable “best price” clauses. The “best price” clauses of Expedia are also the subject of a further proceeding.

*“‘Best price’ clauses are only beneficial to the consumer at first glance because ultimately they restrict competition between the hotel booking platforms. Due to this kind of clauses benefits from competition, such as lower commission payments, cannot be passed on to customers in the form of better prices.”*

### Mergers in the automotive industry

In 2014 the Decision Division dealt with a number of mergers in the automotive industry. 78 of the Decision Division’s 196 merger cases concerned the automobile industry.

One example was the planned acquisition of the US company Veyance Inc. by Continental AG. Both companies are component suppliers to the automobile industry. The Decision Division carried out an intensive examination of the planned merger because it led to a high joint market share of the companies, in particular on the EEA-wide market for airsprings for heavy-duty utility vehicles, and reduces the number of the currently relevant suppliers from four to three.

Ultimately the merger could be cleared. The investigations showed that Veyance only plays a minor role in the European market. The company manufactures its airsprings from natural rubber and as a result currently does not come into consideration as a supplier for many utility vehicle manufacturers. In addition, the Decision Division saw the possibility of new entries to the market.

### Cooperation between the largest container shipping companies worldwide

The Decision Division had already been consulted at an early stage by the companies about the planned cooperation between the three largest container shipping companies worldwide, Maersk, MSC and CMA-CGM. The three shipping companies planned, inter alia, to set up a joint venture in order to coordinate their worldwide cooperation in the sea transport of freight containers. The Bundeskartellamt was the competent authority to examine this merger project. With the approval of the companies concerned the Decision Division had already conducted market investigations before formally opening the proceeding. In terms of standard containers (TEU) the joint capacities of the three shipping companies exceeded those of all other suppliers, especially on the routes from northern Europe to Asia. Before the Bundeskartellamt could complete its assessment, Maersk, MSC and CMA-CGM abandoned their plans due to opposition from the Chinese competition authority. Subsequently, the targeted cooperation agreements between the three large shipping companies no longer contained any elements which would have been relevant for examination under merger control.

# Cartel prosecution

The 10th, 11th and 12th Decision Divisions are responsible for the cross-sector prosecution of illegal cartels. They are assisted in the planning, execution and evaluation of investigative measures such as e.g. dawn raids by the Special Unit for Combating Cartels (SKK). In 2014 the Bundeskartellamt imposed fines amounting to around 1,117 billion euros on 83 companies and 81 individuals in nine cases. This was by far the highest total fine in the Bundeskartellamt's history. This extraordinarily high amount is attributable above all to the conclusion of three extensive proceedings (sugar, beer, sausage).

The 10th Decision Division is chaired by Prof Dr Carsten Becker.

The 11th Decision Division is chaired by Ulrich Hawerkamp.

The 12th Decision Division is chaired by Michael Teschner.



## Fine proceedings against sugar manufacturers

In early 2014 the 2nd Decision Division concluded a cartel proceeding against the three major German sugar manufacturers Pfeifer & Langen, Südzucker and Nordzucker. Total fines amounting to around 280 million euros were imposed on the companies and their representatives (see also the 2013 Annual Report).

## Price-fixing agreements between breweries

Also in the first few months of 2014 the Bundeskartellamt imposed fines totalling around 338 million euros on eleven breweries, a trade association and 14 individuals involved for concluding illegal price-fixing agreements (see 2013 Annual Report for further details). Six breweries and a trade association appealed against the decision.

## Price-fixing agreements between sausage manufacturers

In July 2014 the Bundeskartellamt imposed fines totalling approx. 338.5 million euros on 21 sausage manufacturers as well as 33 company representatives for concluding illegal price-fixing agreements. The individual fines imposed range from a few hundred thousand euros to three digit million amounts. In addition to the seriousness and duration of the infringement this spread of fines is due to the difference in size of the companies participating in the cartel. Many sausage manufacturers are medium-sized companies; however there are also large individual manufacturers which belong to company groups.

The investigations showed that at least since the early 1980s a general consensus had been reached between a large number of manufacturers at regular meetings within the sector to find a common position ahead of forthcoming

### Fines are calculated...

- ... according to the duration and seriousness of the infringement.
- The statutory upper limit of a fine is ten percent of the total turnover of a company.
- Calculations to determine the total turnover of a company are based on the turnover achieved by the so-called "economic unit", i.e. the company group to which an individual company belongs.
- Individual fines calculated within the statutory framework of fines.
- Turnover related to the infringement as key factor for the calculation. This is the turnover which was achieved during the infringement period with products and services which were the subject of the agreement.
- Account is taken of the economic viability of the individual company.



ing price negotiations with the major food retail chains. Since 2003 actual agreements had been reached between several sausage manufacturers to jointly implement price increases for the sale of sausage products to the retail trade. Most of the agreements were made by telephone either by reciprocal calls or organised ring round calls.

Due to the heterogeneity of the products (different types of sausage, different package sizes, etc.) the cartel members were unable to set specific prices for the individual products, which was why price ranges were agreed for product groups (raw, boiled and cooked sausage and ham). The manufacturers were able to demand higher prices for their products from the retail trade as a result of the cartel agreement.

The Bundeskartellamt obtained first indications of the cartel from an anonymous tip-off. During the proceedings a large number of the manufacturers involved cooperated with the Bundeskartellamt and made confessions. Ten companies or company groups have appealed against the Bundeskartellamt's fines decision.

#### Bundeskartellamt's Guidelines for the Setting of Fines of 25 June 2013

- New ruling of the Federal Court of Justice (decision of 26 February 2013, file KRB 20/12) made an adjustment to the guidelines for setting fines necessary. Upper fine limit: maximum of ten percent of the turnover achieved by the company in the previous year.
- Individual calculation within the statutory framework of fines according to the duration and seriousness of the infringement.
- Cartel-related turnover as key factor for calculation. This is the turnover which was achieved during the infringement period with products and services which were the subject of the agreement.
- The size of the company and its financial situation are taken into account.



#### Price-fixing agreements and bid rigging in the case of contracts for specialist underground mining services

In August 2014 the Bundeskartellamt imposed fines totaling 17.4 million euros on five providers of specialist underground mining services on account of price-fixing agreements and bid rigging. The proceedings were initiated in April 2013 with a dawn raid following a leniency application by another company. The anti-competitive agreements concerned two different issues: As part of the conversion of "Schacht Konrad", a former iron ore mine near Salzgitter, into a final storage site for radioactive waste, which already began in 2007, it was intended to award contracts for specialist underground mining services for this project in several lots. The total value of the contracts amounted to around 110 million euros. The six companies involved formed several bidding syndicates to bid for the awards. The Bundeskartellamt's investigations have shown that during the bidding phase the companies or bidding syndicates agreed not only to divide specific lots among themselves but also coordinated the price levels of their bids (and bogus quotes).

At the end of January 2008 three of the companies agreed to avoid a price war for future contracts for specialist mining services awarded by RAG Deutsche Steinkohle AG. Subsequently, the companies divided 30 projects amounting to an order volume of approx. 80 million euros among themselves.

During the course of the proceedings all the companies cooperated with the Bundeskartellamt under its leniency programme. In addition, a settlement could be reached with the five companies fined, which also reduced the level of the fines.

In the proceedings the Bundeskartellamt worked together with the public prosecutor's office in Bochum since the cartels concerned the provision of public services.

## Measures to increase the effectiveness of cartel prosecution

# 2000

The Bundeskartellamt issues its Leniency Programme.

2001

# 2002

The Special Unit for Combating Cartels is set up.

2003

2004

# 2005

Launch of a first division for hardcore cartels. The 7th Amendment to the GWB increases the level of fines.

# 2006

The Leniency Programme is revised. The Bundeskartellamt issues guidelines for the setting of fines.

2007

# 2008

Launch of a second division for hardcore cartels.

2009

2010

# 2011

Launch of a third division for hardcore cartels.

# 2012

Introduction of an anonymous whistle-blowing system.

# 2013

The guidelines for the setting of fines are revised.

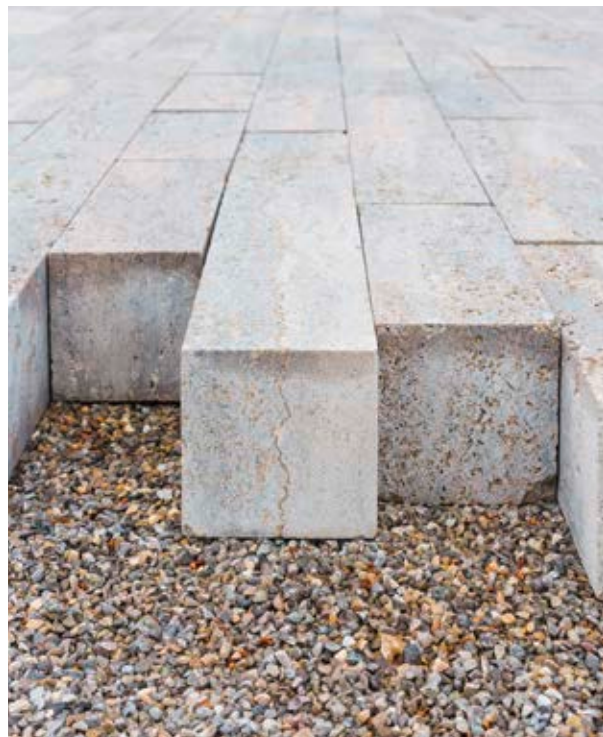
## Fines imposed on manufacturers of concrete paving stones

In the middle of 2014 the Bundeskartellamt concluded a proceeding against manufacturers of concrete paving stones. It imposed fines amounting to around 6.2 million euros on 14 companies and 17 individuals involved for concluding price-fixing agreements for the market region North Rhine-Westphalia and the bordering districts. In 2012 the Bundeskartellamt had already imposed fines amounting to around 2.3 million euros for concluding price-fixing agreements for other market regions. These were imposed on another six companies and individuals involved.

The companies had agreed that there was to be no (aggressive) price competition between them in the sale of standard concrete paving stones for road, garden and landscape construction. On the basis of this general agreement they defined certain ranges into which any price increases should fall. The companies always used the high-turnover standard „8 cm grey paver” as a reference product.

Five of the companies which were fined cooperated with the Bundeskartellamt. One company which had applied for leniency was consequently exempted from a fine. A settlement was agreed with most of the companies concerned.

Six companies and several individuals involved have appealed against their fine. In all the other cases the fines have become final.





#### Selected maximum fines\*

Cartel proceeding	Total fines imposed in euros	Year
Cement	400,000,000**	2003
Sausage	338,500,000	2014
Beer	338,000,000	2014
Sugar	281,700,000	2014
Liquefied Petroleum Gas	249,000,000	2007
Rails	232,100,000	2013
Clay Roof Tiles	188,100,000	2008
Coffee	159,000,000	2009
Industrial insurance	151,400,000	2005
Ophthalmic lenses	115,000,000	2010

\* Rounded values. Since litigation is still pending in individual cases, not all the fines are final.

\*\* Amount which has become final with a decision by the Federal Court of Justice in 2013.

## Wallpaper cartel

Last year the Bundeskartellamt imposed fines totalling around 17 million euros on four wallpaper manufacturers, their representatives and their trade association for coordinating price increases. At trade association board meetings in 2005 representatives of the four wallpaper manufacturers had agreed to introduce a price increase of around five to six percent for wallpaper in Germany with effect from 1 March 2006. The association's managing director at the time helped to implement the price agreement by forwarding information about the forthcoming announcement of the price increase to all association members.

The next round of price increases of around five percent in early 2008 also followed an anti-competitive agreement which was reached at a general meeting of the association. Five wallpaper manufacturers participated in this agreement.

In calculating the fines account was taken of the fact that two of the companies cooperated with the authority. The proceedings against two manufacturers could be concluded by settlement, which was also considered in the calculation of the fines.

Two companies and the association have appealed against their fines to the Düsseldorf Higher Regional Court.

## Customer allocation agreement concerning services provided for heat exchangers used in power plants

In July 2014 the Bundeskartellamt imposed a fine of 1.89 million euros on a company on account of an anti-competitive customer allocation agreement concerning



services provided for the heating surfaces of regenerative heat exchangers used in power plants. The proceeding had been initiated following a leniency application filed by another company.

The two companies had agreed not to compete with one another for orders for service and maintenance work. The company which had originally installed the heat exchanger was also to receive the orders for this work. To this purpose the companies submitted excessive bogus quotes to the customers of the other company.

As public tenders may have been affected by the cartel, the proceedings against the individual persons involved were referred to the Mannheim Public Prosecutor's Office on suspicion of bid rigging. The public prosecutor's office and the Bundeskartellamt cooperated closely during the proceedings. In setting the fine the Bundeskartellamt took into account that the company fined had fully cooperated with the authority and that a settlement could be reached.

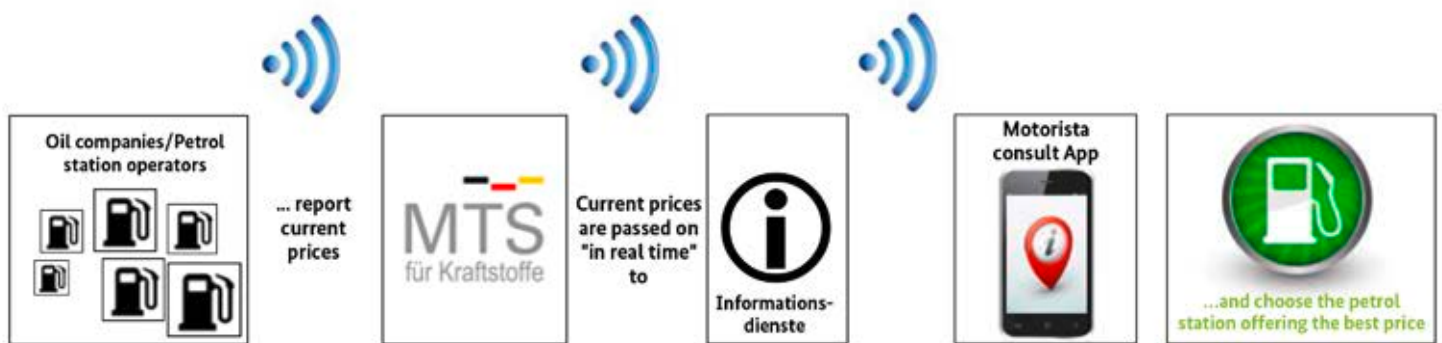
#### Cartel prosecution in 2014 in figures

- Fines imposed: approx. 1,117 billion euros
- Leniency applications: 72 in 41 cases
  - filed by companies: 68
  - filed by individuals involved: 4
- Dawn raids: 15
- Sites searched: 84 companies/associations  
14 private residences
- Number of staff employed in the searches: 486
  - Number of Bundeskartellamt staff: 227
  - Police officers: 172
  - IT staff: 87
- Items of evidence seized:
  - approx. 817 files
  - approx. 19 terabytes of electronic evidence

# Market Transparency Unit for Fuels

The Market Transparency Unit for Fuels (MTU Fuels) enables consumers to inform themselves on current fuel prices. The normal operation of this unit started on 1 December 2013 following a successful three-month trial period.

The operators of public petrol stations or companies which have the power to set prices at them (e.g. oil companies) are required to report every change in price for the fuel categories Super E5, Super E10 and diesel "in real time" to the MTU Fuels. The unit then passes these price data on to consumer information service providers, which in turn inform the consumers. This enables motorists to find out the latest fuel prices via the Internet, their smartphone or navigation device and to drive to the cheapest petrol station in the area or along a specific route.



Further information is available at [www.bundeskartellamt.de](http://www.bundeskartellamt.de)

## Positive Interim Results

In November 2014, one year after the MTU Fuels started operating, the Bundeskartellamt reported a first positive balance:

- In a town a motorist can save on average up to 15 – 20 cent per litre if he drives to the cheapest petrol station in town and at the cheapest time of the day.
- If a motorist fills up his tank at the same petrol station in town at the cheapest time of the day, he can still save on average 7 – 10 cent per litre.
- The cheapest time to tank: Between 18 and 20 hours. From 20 h onwards prices tend to rise significantly. Some petrol stations are known to keep their prices cheap until around 23 h.
- On average a petrol station significantly increases its prices at one point in the evening and carries out three to four reductions in smaller stages during the course of the following day.

The pattern of price rises in the evenings and gradual price drops during the day can be witnessed to the same extent every day of the week. There is no distinct difference between the different days of the week.

### Market Transparency Unit for Fuels

- More than 14,500 petrol stations in Germany report their price changes to the MTU. This corresponds to an almost complete coverage of the market.
- More than 120 consumer information services have been admitted to the system. (Information as of May 2015)
- More than 40 consumer information services have commenced live operation. (Information as of May 2015)

*“The more motorists use this tool to drive to the petrol station offering the cheapest price, the greater the pressure will be on the oil companies to keep their prices competitive.”*

# Organisation Chart

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## Responsibilities of the decision divisions:

All decisions in administrative and fine proceedings;  
participation in proceedings of the supreme *Land* authorities

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53113 Bonn

## Federal Public Procurement Tribunals

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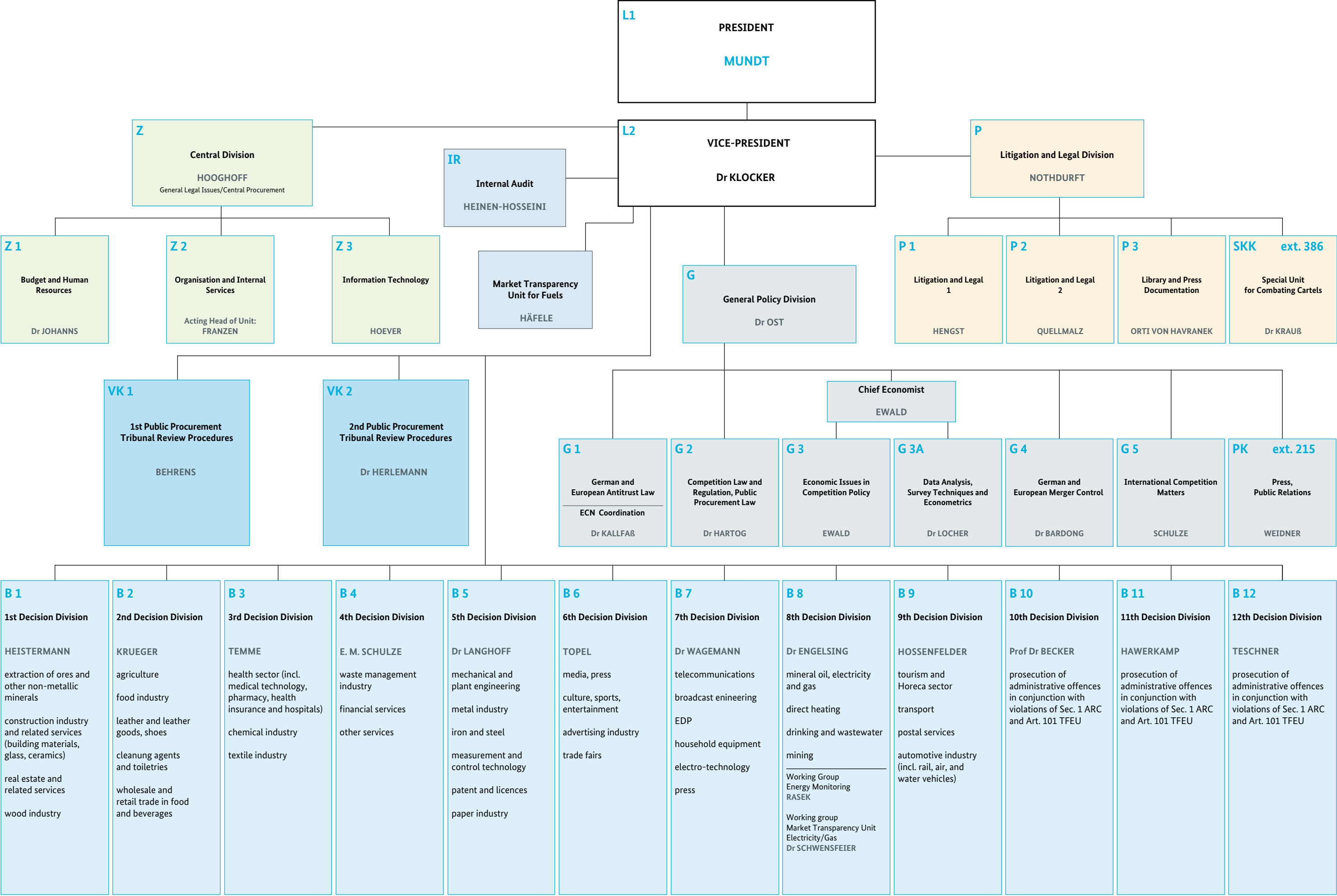
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'legal notice' on our website [www.bundeskartellamt.de](http://www.bundeskartellamt.de)

May 2015





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