



Bundeskartellamt



open markets | fair competition



# The Bundeskartellamt

Organisation, Tasks and Activities



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# Foreword



## *Dear Reader,*

*Since its foundation more than 60 years ago it has been the responsibility of the Bundeskartellamt to protect competition in Germany to the benefit of consumers. Competition is a cornerstone of our economic order. Ludwig Erhard, former German economics minister and federal chancellor, once described the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) as the “basic law of the social market economy.”*

*Effective competition encourages businesses to push forward. They must make an effort to win customers. Consumers directly benefit from this as competition produces lower prices, better quality and constantly brings about new ideas, products and services.*

*Businesses may find competing with rivals troublesome and so they are tempted to find ways of foreclosing or bypassing competition. The Bundeskartellamt acts as a kind of economic referee to prevent excessive market power and punish illegal restrictions of competition. We are determined to prosecute illegal price-fixing agreements and other cartels that harm consumers. We prevent mergers that would concentrate market power in the hands of one or a few companies, and we intervene where businesses abuse their positions of power.*

*For some years now we have all have been experiencing truly radical economic and social change brought about by the digital transformation. The economy is reinventing itself at a very fast pace. As one of the leading international competition authorities we have started at an early stage to adapt the implementation of competition law to the digital age. So far we have already successfully conducted numerous proceedings dealing with the digital economy. Cases involving online platforms and data have become an integral part of our everyday work at the Bundeskartellamt. In early 2021, the lawmaker made important changes to competition law to ensure an even more effective monitoring of large digital companies. We immediately initiated new proceedings against Google, Amazon, Facebook and Apple.*

*Only effective competition ensures that consumers can choose between different suppliers and thus remind companies that the products and services they offer must continue to be innovative and consumer friendly. So protecting competition is also an effective way to protect consumers.*

*For some years now the Bundeskartellamt has also had direct competence in the sphere of consumer protection so it can address possible shortcomings in the enforcement of consumer rights, especially in the digital economy. Our sector inquiries have shown shortcomings with regard to data and consumer protection in key sectors such as messenger services, online user reviews, comparison websites, smart TVs and mobile apps. However, we have so far only been able to conduct inquiries and propose solutions. I think it would make sense if we were given competences to actually intervene in this area, which would enable us to effectively protect consumers.*

*This brochure is designed to provide a transparent overview of our work and answers to the questions you might have about the Bundeskartellamt. The most important message I would like to convey to you is that effective competition is of key importance for our social market economy. Our work to protect competition will be all the more successful if our society and all political and economic stakeholders strongly support the principle of competition. I would therefore be delighted if this brochure could inspire you to take a closer look at competition issues. This also applies to the Kids Corner our youngest future competition experts can find in the centre pages.*

*I hope you will find our brochure informative and entertaining.*

A white handwritten signature on a dark blue background. The signature is stylized and appears to be 'A. Mundt'.

*Andreas Mundt, President of the Bundeskartellamt*



# The Bundeskartellamt

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 Climate Action. The Bundeskartellamt's task is to protect competition in Germany. Since 1958 the legal framework for this has been the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB), which is applied and enforced by the Bundeskartellamt.

The Bundeskartellamt's tasks include enforcing the ban on cartels, merger control, the control of abusive practices of dominant companies, the review of federal award procedures for public contracts and sector inquiries. In addition to that, the Bundeskartellamt also carries out special consumer protection tasks and has been keeping a competition register for public procurement since 2021. The authority employs approximately 400 staff.

**>> The Bundeskartellamt's task is to protect free and fair competition in Germany. <<**



Andreas Mundt, President



Prof. Dr. Konrad Ost, Vice President

## Organisation

Altogether **13 decision divisions** investigate cartels, control mergers and abusive practices and conduct sector inquiries. Decisions are made by the chair of the respective decision division and two senior case handlers in accordance with the collegial principle.

Nine of the 13 divisions are responsible for specific economic sectors. Three decision divisions deal exclusively with the cross-sector prosecution of cartels. A further decision division deals with consumer protection and other issues.

**Two federal tribunals** are responsible for reviewing tender procedures which are carried out by the Federation or public contracting entities which can be attributed to the Federation.

The **Competition Register for Public Procurement** is a central federal register providing public contracting authorities with information helping them to assess whether a company must or can be excluded from an award procedure in Germany for having committed serious economic offences.

The **Market Transparency Unit for Fuels** at the Bundeskartellamt enables consumers to obtain information about current fuel prices at all petrol stations in Germany via apps and websites.

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 legislative reforms which have a bearing on competition and coordinates cooperation between the Bundeskartellamt and foreign



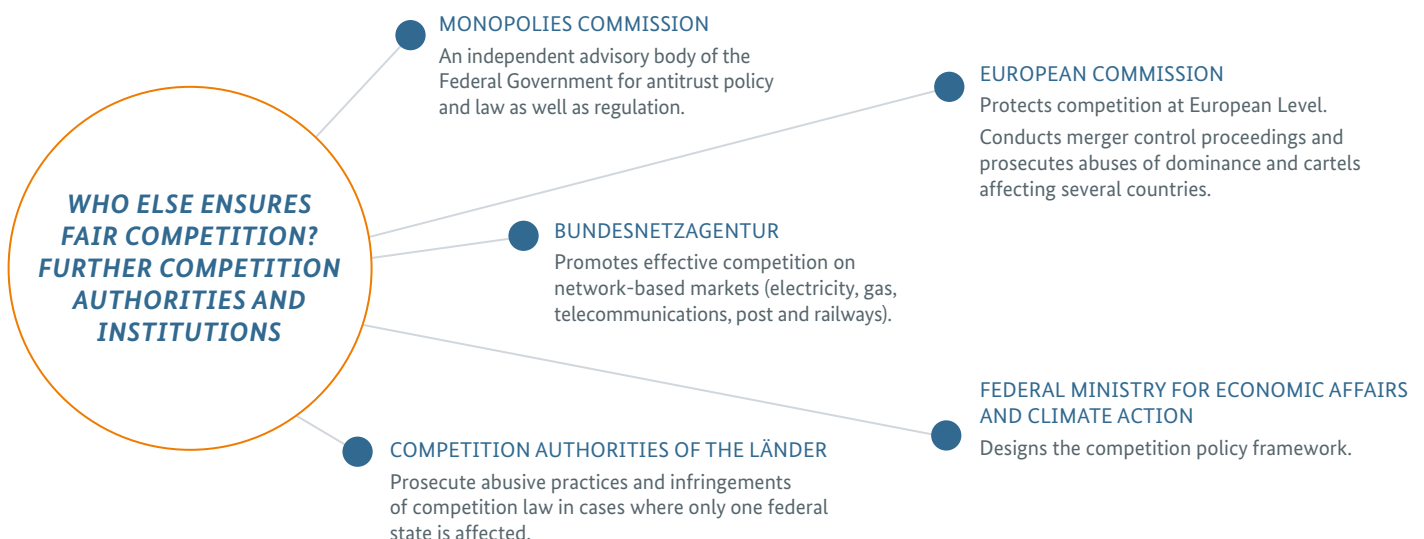
### THE BUNDESKARTELLAMT'S INDEPENDENCE

The Bundeskartellamt bases its decisions solely on competitive criteria. The decision divisions are independent in their decisions and not bound by any instructions from the directorate of the Bundeskartellamt. The Economic Affairs Ministry cannot influence the Bundeskartellamt's decisions either.

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 **Litigation and Legal Division** represents the authority in court. It also acts as amicus curiae to the Federal Court of Justice on a regular basis. The Litigation and Legal Division also assists the decision divisions in administrative and antitrust proceedings and advises them on special legal matters. The Special Unit for Combating Cartels (SKK) is also part of the Litigation and Legal Division.

The **Central Division** is responsible for budget and procurement, building management, IT and IT security, HR, organisation and general legal matters.





# Protection of competition

## >> **Why is competition important?**

*Competition ensures that companies have to try to win customers by offering cheaper prices, better quality or more innovative products than their competitors. Competition therefore benefits consumers.*

## >> **Does competition simply occur by itself?**

*No, not necessarily. Companies could try to eliminate competition by agreeing on prices with their competitors or acquiring a competitor.*

## >> **How is competition protected?**

*The Bundeskartellamt acts as a kind of referee in the social market economy. It protects free and fair competition with various tools, in particular cartel prosecution, merger control and abuse control.*



## >> *Competition is the best and most ingenious instrument of disempowerment in history.* <<

Franz Böhm (1895-1977), a lawyer and one of the founding fathers of German competition law

Competition in the economic sector can be compared with competition in sport – it spurs on maximum performance. It is the pressure created by competition which induces suppliers to drop (or only moderately raise) the prices of their products or services, improve quality and further develop their products technically. Competition encourages companies to be innovative and to develop completely new products and services to tap into new markets.

Not only customers but also suppliers benefit from competition because they also have a wider range of companies with which they can conclude contracts.



### HOW DO WE DEFINE COMPETITION?

Competition means that several companies compete with one another for customers. Customers can switch to another company offering comparable services at a better price or at better conditions.

## Benefits of competition

Apart from its direct economic benefits, effective competition performs another important function in that it limits not only the economic but also social and political power of individual companies. This is evident, for example, from discussions about large internet companies and not only their economic power but also their power over data and opinion. Competition also ensures that companies have to actively try to win customers.

## Telecommunications and energy: Consumers benefit from liberalised markets

After the termination of the former state telecommunications monopoly in the 1990s, a large number of new telephone companies entered the market. As a result, customers gained a much larger choice of products and services. Due to innovations such as online video telephony or short messaging systems, supply and demand in this market have changed rapidly in the last 20 years.



The energy markets are another example. Since the liberalisation of energy supply in the late 1990s, there has been a continuous surge of competitive activity in the electricity markets. Whereas customers were originally tied to a specific supplier depending on the region, consumers now have a choice. Suppliers compete with one another and try to acquire customers by offering cheaper prices or special offers, like green electricity.

### MARKET ECONOMY AND COMPETITION GO HAND IN HAND

*In a competitively organised market consumers can choose from a wide range of offers the goods and services which best match their expectations.*

*Companies which, in comparison to others, offer their customers good services at reasonable prices, can achieve higher turnover and profits. Poor service or excessive prices, on the other hand, are “punished” in a competitive environment by losses or even elimination from the market.*

*Competition can therefore rightly be described as “the driving force of the market economy”. An economic system which is based on the competition principle and the resulting incentive mechanisms is the best for achieving economic goals, i.e. prosperity and technical advancement.*



## Competition needs a strong referee

For the individual business which has to compete with other companies in its market, competition is often inconvenient. It is therefore tempting for companies to hinder or eliminate competition. This can be achieved, for instance, by colluding with competitors, engaging in abusive practices or acquiring other companies, which can in the extreme case completely eliminate competition.

As in sport, a referee is required to ensure that the “rules of play” are observed in order to prevent such restrictions of competition and to safeguard the benefits of competition. These rules of play are contained in the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) and European competition law. It is the Bundeskartellamt’s responsibility to enforce these laws in order to protect competition in Germany.





**>> The State must not decide who should be victorious in the market, nor should an industrial organisation such as a cartel; it must be the consumer alone. <<**

Ludwig Erhard: Prosperity for all.

## Legal framework

With cartel prosecution (see p. 12), merger control (see p. 18) and abuse control (see p. 24) as its tools, the German Competition Act provides the legal framework for maintaining competitive structures and preventing anti-competitive practices. Due to the key importance of competition, it is also referred to as the “Basic Law of the Market Economy”.

The GWB came into force on 1 January 1958. It has been amended ten times since then. Merger control was introduced with the 2nd amendment in 1973 and since 1999 the GWB has also protected bidders in the award of public contracts (see p. 36). With the 9th amendment in 2017 the Bundeskartellamt gained certain competences in the area of consumer protection (see p. 34).

It was also decided that the Bundeskartellamt set up a competition register for public procurement which would list serious infringements of law committed by companies (see p. 42).

With the 10th amendment in 2021 abuse control was modernised to enable the authority to proceed more effectively against large digital corporations.

## Legal recourse

Companies may appeal decisions of the Bundeskartellamt to the Düsseldorf Higher Regional Court. Appeals on points of law against decisions of the Düsseldorf Higher Regional Court can be lodged with the Federal Court of Justice in Karlsruhe.



### EUROPEAN COMPETITION LAW

Competition rules to combat cartels and abusive practices are incorporated in the Treaty on the Functioning of the European Union (Articles 101 and 102 TFEU) in order to prevent companies from using anti-competitive practices across borders and to create uniform conditions to this effect. These rules are complemented by various regulations, notices and recommendations of the European Council and the European Commission. The Bundeskartellamt applies these European rules in addition to the provisions of the GWB if the anti-competitive practices are likely to affect trade between the Member States.

The European Commission, the Bundeskartellamt and the other national competition authorities in the EU often cooperate closely in cartel and abuse proceedings. In addition, the European Merger Regulation (“EMR”) was introduced at European level in 1990 as a tool for examining concentrations. Accordingly, some mergers are examined exclusively by the European Commission (see p. 46).





# Cartel prosecution

## **>> What is a cartel?**

*Cartels are anti-competitive agreements between undertakings which restrict competition, for example agreements on prices, quantities, supply areas or customer groups.*

## **>> Why are cartels harmful?**

*Cartels generally lead to higher prices and fewer choices for consumers.*

## **>> How can the Bundeskartellamt intervene?**

*Cartels are highly damaging to society and prohibited by law. The Bundeskartellamt can impose heavy fines on companies and individuals responsible.*

Pursuant to Section 1 of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB), **cartels are generally prohibited** in Germany. The provision reads as follows: “Agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition are prohibited.” European law also provides for a general ban on cartels in Article 101 TFEU. The Bundeskartellamt applies this rule in addition to Section 1 GWB if the anti-competitive agreement is likely to affect trade between Member States of the European Union.

## Positive effects of cartel prosecution

The prosecution of illegal cartels has **immediate positive effects on the economy and consumers**. Cartels cause great harm to the overall economy because they lead to higher prices, lower product quality and less innovation. Scientific studies indicate that cartels result in average price increases of up to around 15 per cent. Uncovering a cartel often directly leads to lower prices. The companies need to make an effort to win customers again.



### HARDCORE CARTELS

Agreements on prices, quantities, supply areas or customer groups are particularly serious infringements. These are referred to as hardcore cartels. When they are uncovered such agreements can be punished by heavy fines as they can cause considerable damage.

## DIFFERENT TYPES OF CARTELS

### PRICE CARTEL

Companies agree on their future pricing strategy.

*Example:* Eleven breweries agreed to raise the prices of draught and bottled beers. Among other aspects, they agreed to raise the price of a case of beer by about one euro in early 2008.

### QUOTA CARTEL

Companies carve up a market between them based on specific quota and thus foreclose competition.

*Example:* For many years several rail manufacturers guaranteed each other relatively stable shares of Deutsche Bahn’s contract volume. The cartel members carved up projects between them and monitored compliance with the quota they had agreed.

### AGREEMENTS ON CUSTOMER ALLOCATION AND DIVISION OF SALES AREAS

Companies divide specific customer groups or market areas among themselves and thus foreclose competition.

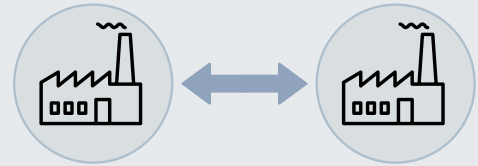
*Example:* The three major German sugar manufacturers agreed to generally limit their sales of sugar in Germany to specific sales areas and not to get in the way of the other cartel members in their respective areas. Even if customers requested to be supplied by a sugar manufacturer from a different region, this was not possible.

## HORIZONTAL AGREEMENTS / VERTICAL AGREEMENTS

### HORIZONTAL AGREEMENTS:

Agreements between actual or potential competitors operating at the same market level are referred to as horizontal agreements.

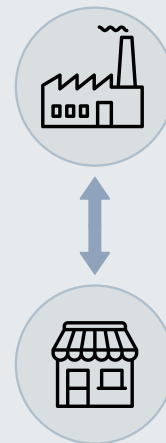
*Example: Several chocolate manufacturers agree on price increases for their products.*



### VERTICAL AGREEMENTS:

Companies operating at different market levels can also conclude binding anti-competitive agreements, for example with the aim to fix retail prices.

*Example: A manufacturer of outdoor jackets concludes an agreement with a retailer to ensure that the retailer will charge the manufacturer's recommended retail price (RRP). This is not the only type of agreement that is prohibited. Manufacturers must not pressurise retailers and, for example, threaten to stop supplies in order to ensure that certain retail prices are maintained. All retailers are free to set their own prices.*



## Exceptions

**Under certain conditions anti-competitive agreements are permissible, for example**

- >> if they serve to improve the production of goods or to promote technical progress while allowing consumers a fair share of the resulting benefit
- >> certain forms of cooperation between small and medium-sized companies
- >> due to special provisions for certain sectors of the economy such as the agricultural sector or books, newspaper and magazine publishers

## Possible sanctions

The Bundeskartellamt can impose heavy **fin**es. These can amount to up to 10 per cent of a company's turnover. The actual amount depends on the duration and gravity of the infringement. The size of the company concerned and the turnover it achieved with the products and services involved also play a role. The calculation of the fines also takes into account the economic viability of the companies involved as cartel fines should not force any company into insolvency. Company representatives, too, can have to face fines of up to one million euros.

The Bundeskartellamt's **Guidelines for the setting of fines** stipulate how the authority punishes antitrust infringements and the criteria on which this is based. If a settlement is agreed, the fine can be reduced. The fines collected are credited to the federal budget and thus indirectly benefit all consumers.

Where cartels are formed to target the public sector – referred to as **bid-rigging** in public tender procedures – the persons involved may even face imprisonment of up to five years. The company representatives involved will not be prosecuted by the Bundeskartellamt but by the public prosecution office. The Bundeskartellamt can, however, conduct parallel fine proceedings against the companies concerned.

While cartel prosecution aims at punishing cartels, it is also intended to achieve as much deterrence as possible to prevent businesses from engaging in cartel activity in the first place. If a cartel is uncovered, the businesses and persons involved will have to expect heavy fines. In many cases their public image is significantly harmed. In most cases the cartel members also have to face substantial claims for damages brought by cartel victims after the conclusion of the antitrust proceedings. More and more companies are thus seeking to adopt effective compliance measures to prevent infringements.

### Selected maximum fines\*

Year	Antitrust proceeding	Total fines imposed in euros	Highest single fine against a company
2020	Aluminium forging	174,841,500	145,000,000
2019	Quarto plates	646,405,000	370,000,000
2018	Special steel	291,700,000	118,000,000
2014	Beer	338,000,000	160,000,000
2014	Sausage	338,500,000	128,050,000
2014	Sugar	281,700,000	195,500,000
2009	Coffee	159,000,000	83,000,000
2008	Clay roof tiles	188,081,000	66,280,000
2007	Liquefied petroleum gas	249,000,000	67,200,000
2005	Industrial insurance companies	151,400,000	33,850,000
2003	Cement	**396,000,000	175,900,000

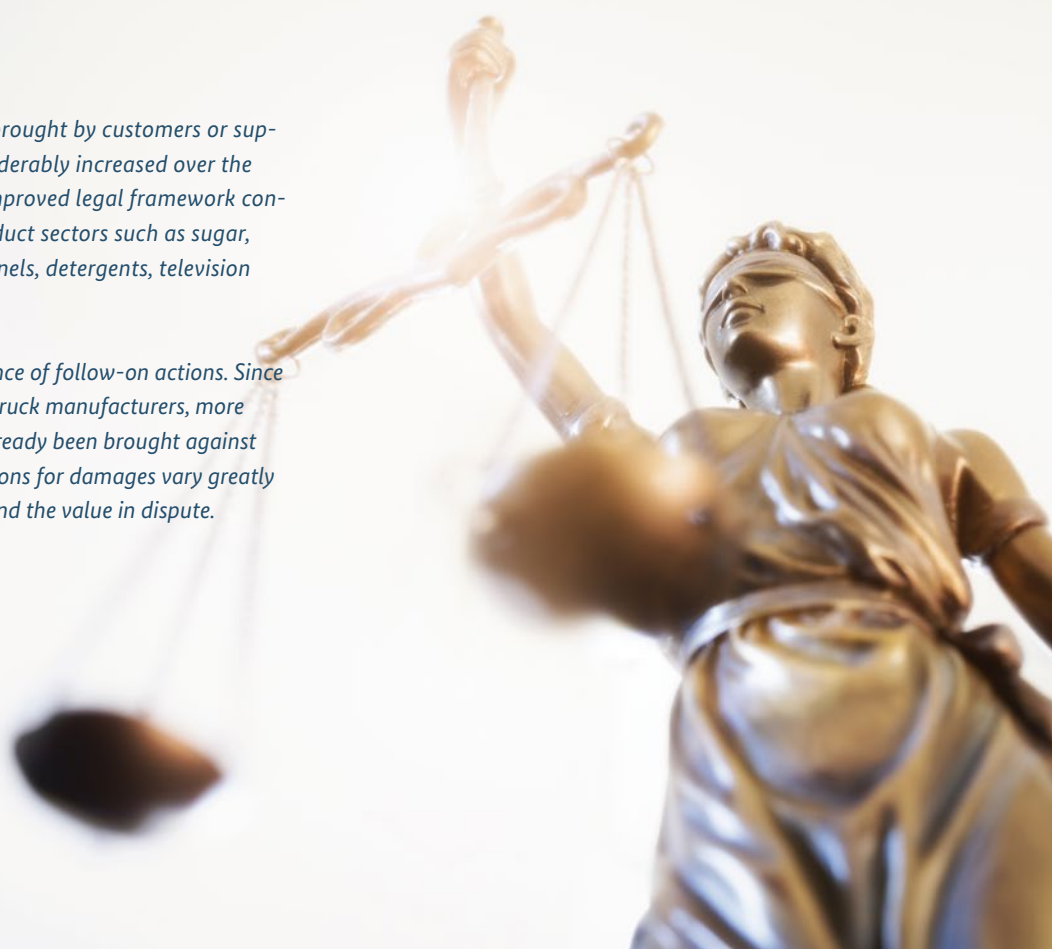
\* Figures are rounded. Since litigation is still pending in individual cases, not all the fines are final.

\*\* Total sum of final fines based on a judgment issued by the Federal Court of Justice in 2013.

### PRIVATE ACTIONS FOR DAMAGES

The number of private actions for damages brought by customers or suppliers that were harmed by a cartel has considerably increased over the last few years, due among other factors to improved legal framework conditions. This has affected many different product sectors such as sugar, trucks, rails, bathroom fittings, chipboard panels, detergents, television tubes, packaging or confectionery.

The truck cartel is an example of the significance of follow-on actions. Since the EU Commission imposed fines on several truck manufacturers, more than 450 private actions for damages have already been brought against the manufacturers in Germany alone. The actions for damages vary greatly in terms of the amount of damages claimed and the value in dispute.



## Increased effectiveness in cartel prosecution

The Bundeskartellamt has always given high priority to the prosecution of illegal agreements. With the introduction of several new measures over the last 20 years the Bundeskartellamt has been able to further improve the effectiveness of its cartel prosecution activities. The new measures include e.g. the leniency programme introduced in 2000 and the anonymous whistle-blowing system introduced in 2012. In 2002, the authority set up the Special Unit for Combating Cartels (SKK) and, since 2005, three separate divisions have been dedicated to the prosecution of hardcore cartels. In 2005, the lawmaker increased the possible amount of fines. A separate unit specialising in IT forensics was set up in 2009.

Two examples illustrated in detail:

### The leniency programme

In cartel cases, in contrast to most criminal or administrative offences, it is not only the offenders that are initially unknown, but the fact that an infringement has taken place is also concealed. The leniency programme, which was introduced in 2000, is a key tool to help uncover illegal agreements. It was enshrined into law by the 10th amendment to the German Competition Act (GWB) in 2021.

A company that participated in a cartel can avoid punishment if it discloses to the Bundeskartellamt its involvement in illegal agreements and thus helps to uncover and terminate a cartel. The fine can only be fully waived for the first informer (“first-come-first-served principle”). Fines can be substantially reduced for all other companies wishing to cooperate with the Bundeskartellamt in the proceedings. Just over half of all antitrust proceedings are initiated based on information provided by leniency recipients.

### The anonymous whistle-blowing system

In order to increase the ‘risk of detection’ even further, the Bundeskartellamt set up an electronic whistle-blowing system in 2012. Insiders who are reluctant to disclose their identity for fear of negative consequences or even reprisal can use the system to provide the authority with information about possible cartels anonymously.

### The Bundeskartellamt’s role in court proceedings

In 2021, the 10th amendment to the GWB strengthened the role of the Bundeskartellamt in judicial proceedings concerning administrative fines. Even after an objection has been filed against a fining decision, the Bundeskartellamt will remain the competent enforcement authority (not the General Prosecutor’s Office as has previously been the case). The authority thus has the same rights in these proceedings as the public prosecutor’s office.



### HOW TO REPORT CARTELS?

*The persons and companies involved in illegal agreements take care to observe the strictest secrecy. For this reason insider knowledge or knowledge about illegal agreements are of utmost importance for antitrust enforcers. If you know about such agreements, you can contact the Bundeskartellamt by phone (+49 228/9499 386) or by email ([info@bundeskartellamt.bund.de](mailto:info@bundeskartellamt.bund.de)). Information can also be submitted anonymously via the whistle-blowing system at [www.bundeskartellamt.de](http://www.bundeskartellamt.de). It is not possible, however, to submit leniency applications anonymously.*



## WHAT ARE THE STAGES OF AN ANTITRUST PROCEEDING? THE FIRE-FIGHTING VEHICLES CARTEL

For several years four manufacturers of fire-fighting vehicles carved up the market among themselves by guaranteeing each other certain shares of the total market referred to as “target quotas”. Whenever local authorities initiated award procedures for purchasing new fire-fighting vehicles, the manufacturers discussed which company should obtain the individual contracts. In secret meetings held at Zurich airport with the participation of an accountant based in Switzerland, the participants determined quotas and allocated contracts.

*How did the Bundeskartellamt uncover the case?*

### TIPP-OFFS

The Bundeskartellamt is usually made aware of possible infringements through tip-offs received e.g. from employees, customers or cooperative witnesses, or information gained from the authority’s own investigations in other cases. The tip-offs received are examined to establish whether they are plausible and relevant. The Bundeskartellamt became aware of the agreements concluded in the fire-fighting vehicles case after an anonymous report.

### DAWN RAIDS

If there are sufficient initial grounds to suspect a violation of competition law, the Bundeskartellamt can carry out dawn raids to secure evidence at businesses or private premises. In the case of the fire-fighting vehicles cartel the Bundeskartellamt carried out a total of four dawn raids in the period between May 2009 and July 2010. In two dawn raids carried out in Austria the authority was assisted by the Austrian competition authority.

### EVALUATION OF DOCUMENTS

The documents seized are then evaluated. Some companies might voluntarily submit further information and documents in order to have their fine reduced. In the fire-fighting vehicles case all four manufacturers cooperated with the Bundeskartellamt.

### HEARINGS

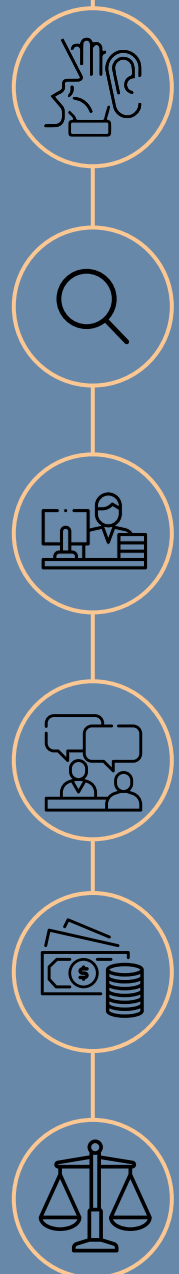
Apart from written evidence hearings also play an important role. The accused parties as well as witnesses are summoned to appear at the hearings. More than 20 persons were questioned regarding the fire-fighting vehicles cartel.

### IMPOSITION OF FINES

The Bundeskartellamt’s order imposing a fine describes the course of events that led to the infringement, provides a legal assessment of the conduct in question and sets a fine. In the fire-fighting cartel case the Bundeskartellamt imposed fines amounting to about 50 million euros in 2011/2012 against the four companies and the accountant involved.

### WHERE NECESSARY: LEGAL PROCEEDINGS

If the companies do not accept the fine, they can appeal against the administrative order imposing the fine. The competent court for such appeals is always the Düsseldorf Higher Regional Court. Appeals on points of law against decisions of the Düsseldorf Higher Regional Court can be lodged with the Federal Court of Justice in Karlsruhe. One of the companies involved in the fire-fighting vehicles case had initially filed an appeal which was later on withdrawn. The fine imposed on the company thus became final as well.





# Merger control

## **>> What is a merger?**

*A concentration between two or more companies.*

## **>> Why do we control mergers?**

*To prevent one company from obtaining too much power on a market and in this way impeding competition.*

## **>> What can the Bundeskartellamt decide?**

*A merger must be prohibited if it significantly impedes competition. In particular, this is the case if the merger creates or strengthens a dominant position. Otherwise, the merger is cleared with or without obligations.*

Company mergers are a common means for companies to reach strategic business goals. For example, a merger can help to gain access to new markets or customers, expand a company's own product portfolio, secure sales channels or supplies and develop synergies.

However, some mergers may restrict existing competition, for example when a company acquires a direct competitor. Such mergers may result in merely a few or even only one

supplier being left on the market. As a consequence, there are fewer incentives for companies to offer high-quality and innovative products at fair prices. Under certain circumstances, customers may thus not have enough alternatives to switch to other suppliers.

For this reason, the Bundeskartellamt examines mergers of a certain size which have an effect on the German market.

## Mergers examined by the Bundeskartellamt

Not every merger between companies has to be submitted to the authority for review. The merger project has to be a **concentration** as defined by law and the companies concerned must generally have reached certain **minimum turnover thresholds** in the year preceding the merger.

### CRITERIA OF A CONCENTRATION

- >> Acquisition of all or a substantial part of the assets of another undertaking
- OR
- >> Acquisition of direct or indirect control of (the whole or parts of) another undertaking
- OR
- >> Acquisition of shares in another undertaking (at least 25 per cent)
- OR
- >> Any other combination of undertakings enabling an undertaking to exercise a material competitive influence on another undertaking

### TURNOVER THRESHOLDS (generated in the year preceding the merger notification)

- >> The worldwide turnover of the undertakings concerned was > 500 million euros
- AND
- >> The domestic turnover of a participating undertaking was > 50 million euros
- AND
- >> The domestic turnover of another undertaking was > 17.5 million euros
- AND
- >> The domestic turnover of another undertaking was < 17.5 million euros but the consideration for the acquisition was > 400 million euros

Under certain conditions the Bundeskartellamt can request companies to notify mergers in certain sectors of the economy even if they do not meet the turnover thresholds. However, this requires indications that future mergers of this company could significantly restrict competition in these sectors of the economy. Prior to issuing such a request the Bundeskartellamt must have conducted a sector inquiry in one of the economic sectors affected.

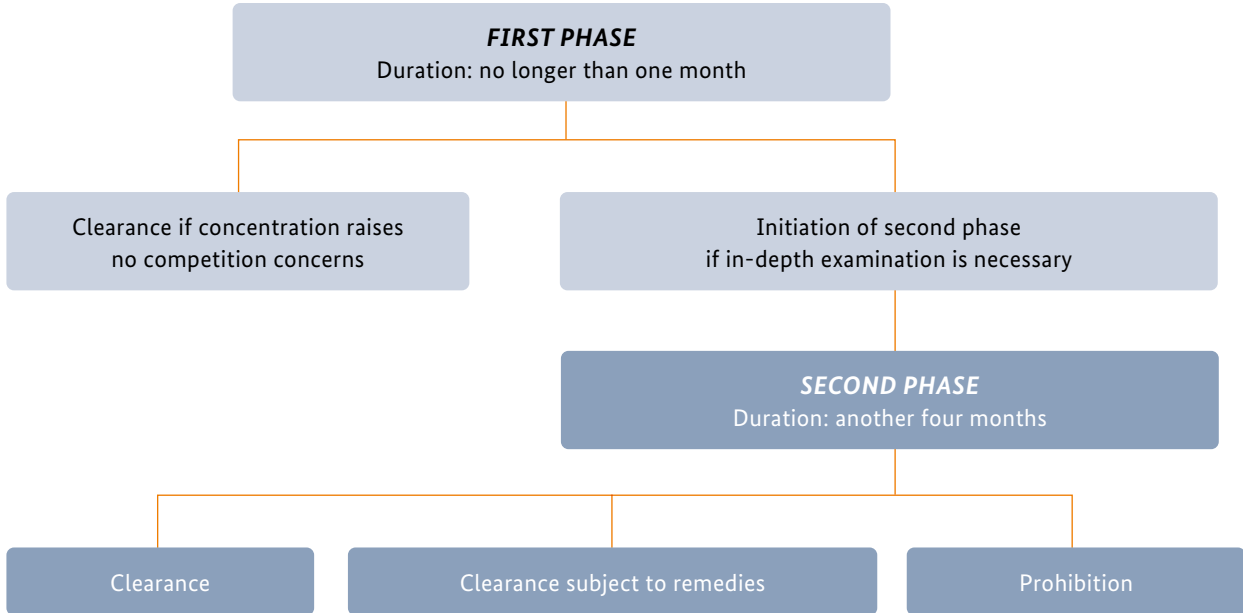
With regard to trade in goods, credit institutions, financial institutions or insurance companies, special rules apply to the turnover calculation to take adequate account of the businesses' competitive importance reflected in the turnover.

When assessing mergers involving publishers or broadcasting companies, four times the amount of the turno-

ver achieved or eight times the amount of the turnover achieved is to be taken into account, respectively. In this way, any tendency towards concentration can be effectively prevented in these markets which in terms of turnover are relatively small.



## Course of a merger control proceeding



Every year the Bundeskartellamt examines **around 1,000 notified mergers**. A large number of the proceedings can be concluded within the so-called first phase of merger control (one month), in many cases even after a few days. However, if the decision division examining the merger sees a need to conduct further investigations, it has altogether five months from receipt of the notification to assess the merger’s effects on competition in more detail.

This period may be extended in exceptional cases. Since the turnover thresholds were adjusted in the 10th amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) in 2021, the number of cases which are subject to notification has clearly fallen. This allows the Bundeskartellamt to focus its resources even more effectively on critical cases.

Mergers with a “Community dimension” are examined by the European Commission and not by the Bundeskartellamt. As a rule of thumb, concentrations are examined in Brussels if the combined turnover of all companies involved is higher than five billion euros. The exact thresholds are set out in the EC Merger Regulation.

Under European law it is also stipulated that individual cases may be referred by a Member State to the European Commission or by the European Commission to a Member State, irrespective of the turnover achieved by the companies involved. This depends on whether the merger mainly affects the territory of a Member State or is of cross-border significance.



### CRITERIA FOR ASSESSING THE MARKET POSITION (not exhaustive)

- >> Market share (market dominance is presumed to exist if a company's market share is more than 40 per cent)
- >> Presence and market position of competitors
- >> Financial strength
- >> Links with other companies
- >> Access to the markets – Are there potential competitors?

The following criteria also apply to platform markets in particular:

- >> Direct and indirect network effects
- >> Access to data relevant for competition
- >> Switching costs for users – Are multiple platforms typically used?
- >> The importance of a platform as a provider of intermediary services for supply and procurement markets

The Bundeskartellamt has to carry out a detailed assessment of the markets affected. For this purpose, the authority has to analyse a large number of data and facts collected from the companies concerned and also from their competitors, customers and suppliers. Many discussions are held with market players, surveys are conducted and information is obtained; internal corporate documents are evaluated, economic analyses are carried out, external studies are consulted and – where necessary – the companies' business premises are visited.



### PRE-EMPTIVE EFFECT OF MERGER CONTROL

Many corporate merger projects are not even notified or subsequently withdrawn if the companies reach the conclusion that the merger would probably not be cleared (so-called pre-emptive effect of merger control).

### BUZZWORD “RELEVANT MARKET”

Which markets are affected by a merger? What are the products and services competing with each other and constituting these markets? These key questions regarding the “relevant market” are part of every examination under merger control.

It is necessary to define the market both in terms of the products or services offered and in terms of the territory covered. For this purpose, it has to be asked what alternatives are available to customers or suppliers to substitute the products or services in question with other products or services (so-called demand-side substitutability).

*Example: Examination of the merger between the department store chains Kaufhof and Karstadt in 2018*



#### Product market from the consumers' point of view:

There is no single department store market, but various groups of goods (toys, sports/outdoors, home textiles, office supplies and stationery, etc.) have to be taken into account. The competitive conditions relating to these groups of goods differ considerably. There are different local shopping alternatives available for the various groups of goods. In addition, online sales also have to be taken into account.

#### Geographic market from the consumers' point of view:

With regard to offline sales, the market is not defined as national in scope. Instead, there are a number of individual regional markets, depending on the catchment areas of the department stores. Online sales, however, are to be considered as nationwide.

## Conclusion of a proceeding

**Clearance** – The vast majority of notified mergers do not raise any competition concerns and can be cleared.

**Prohibition** – A merger which would significantly impede effective competition, in particular a merger which is expected to create or strengthen a company's dominant position, is to be prohibited. Not every company that is large or economically strong is also dominant within the meaning of competition law. A company is dominant if it has no competitors on a market or is not exposed to any substantial competition or has a paramount market position in relation to its competitors.

It is not possible to prohibit a merger based on the assumption that it would impede competition on a so-called minor market. A market is minor if the total sales volume in the relevant market was less than 20 million euros in the year preceding the merger. If competition is impeded on several minor markets at the same time, then the minor market clause applies to all of these minor markets as a whole. This means that the turnover threshold is applied to all of these markets combined and their sales volumes are added together.

**Clearance subject to remedies** – The Bundeskartellamt may clear a merger subject to conditions or obligations. The companies involved are then required to take certain measures to prevent an impediment to competition, which would otherwise be likely to occur. Examples of such conditions include the obligation to sell certain parts of the business or stores to an independent third party or to grant third parties certain access rights, frequency usage rights or patents to safeguard competition.

**Legal remedies** – If companies do not agree with the Bundeskartellamt's decision, they can file an appeal with the Düsseldorf Higher Regional Court. The final decision rests with the German Federal Court of Justice.



## Ministerial authorisation

German competition law provides for the possibility to apply for ministerial authorisation. The Federal Minister for Economic Affairs and Climate Action may authorise a merger prohibited by the Bundeskartellamt if in a specific case the negative effects on competition are outweighed by advantages to the economy as a whole or by overriding public interest. This possibility of a political review of the Bundeskartellamt's decisions which are purely based on competition-related criteria has proved successful in practice.

Since the introduction of merger control in 1973, a ministerial authorisation has been granted in only ten cases (in seven cases subject to conditions). The decisions were based on various grounds such as, for example, ensuring energy supply, securing jobs or retaining valuable technical expertise.

## Breaking up mergers

Neither German nor European competition law provides for the possibility to break up companies on the sole grounds of their size or market dominance. Where applicable, such companies may be subject to abuse control by the competition authorities.

However, if a merger is implemented without seeking the necessary clearance from the Bundeskartellamt beforehand, the Bundeskartellamt may break up the merger retroactively if the conditions for prohibition are fulfilled. This may also lead to severe fines (prohibition to implement a concentration).



### EDEKA/KAISER'S TENGELMANN MERGER CASE

*In spring 2015 the Bundeskartellamt prohibited EDEKA's plans to acquire 451 Kaiser's Tengelmann stores. The authority held that the acquisition would significantly worsen the conditions of competition on the food retail markets. In the Bundeskartellamt's view, consumers' options to select and switch to other local food retailers would be substantially limited in some regions in Germany. Conditions for suppliers were also likely to worsen significantly since after the acquisition of Kaiser's Tengelmann an important independent buyer would no longer remain as a sales alternative to the large retail chains. The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision.*

*In parallel to the judicial appeal the parties had also filed an application for ministerial authorisation. In March 2016 Sigmar Gabriel, the Federal Minister for Economic Affairs at the time, granted the authorisation subject to conditions in order to protect approx. 16,000 jobs at Kaiser's Tengelmann.*

### MERGERS BETWEEN INTERNET PLATFORMS

*In 2015 the Bundeskartellamt did not object to the merger between two of the largest German online dating platforms, elitepartner.de and parship.de. Despite the platforms' high market shares it could be expected that consumers would still have sufficient alternatives to choose from even after the merger.*

*The authority's assessment had shown that users often switched between the various platforms available, new market entries were relatively easy in this market and newer mobile apps, such as Tinder or Lovoo, exerted significant competitive pressure.*

*The merger between the second largest and the third largest real estate platform (immowelt.de and immonet.de) could also be cleared. The Bundeskartellamt acknowledged that after the merger only two instead of previously three large platforms would compete with one another on the relevant market. However, the decision was mainly based on the assessment that competition was more likely to intensify between two large platforms. Otherwise, there would have been a risk that due to so-called network effects (see p. 40) the market leader immobilienscout24.de could have grown much faster than its competitors, ultimately squeezing the two smaller platforms out of the market.*





# Control of abusive practices

## **>> What is the purpose of abuse control?**

*The purpose of abuse control is to prevent large, powerful companies from exploiting their economic power to the detriment of others.*

## **>> Which companies are subject to abuse control?**

*Dominant companies which are not exposed to any substantial competition or have a paramount market position. Powerful companies on which other companies are dependent.*

## **>> What kind of conduct is prohibited?**

*Having a powerful market position is not prohibited per se. However, dominant companies are prohibited from discriminating against, impeding or exploiting other companies.*

## **>> What can the Bundeskartellamt do?**

- >> prohibit the abusive conduct;*
- >> force the companies to adopt competitive practices;*
- >> order the reimbursement of prices if these were abusively excessive.*
- >> impose fines*



## Regulatory tool in the absence of competition

The economic power of a company is usually limited by comparable offers of rival companies. As long as customers and suppliers have sufficient possibilities to switch to alternative market players, the scope of action of companies is effectively limited. Some companies, however, are not exposed to effective competitive pressure. It is not forbidden for a company to gain or hold such a position of economic power. In fact, this often results from great innovative power, special expertise and the readiness to take risks. However, it is the purpose of competition law and the task of competition authorities to prevent the abuse of such market power. The control of abusive practices therefore acts as a regulatory tool of the state in the absence of competition.



DO APPLES AND BANANAS FORM A MARKET?  
ARE TRUCKS AN ALTERNATIVE  
TO SMALL CARS?

In the control of abusive practices, a company's position on one or several clearly defined markets has to be assessed. The relevant market is defined in both product terms (which products or services are interchangeable?) and geographic terms (in which territory are the companies exposed to competition from their competitors?) (also see p. 21).

## Market dominance

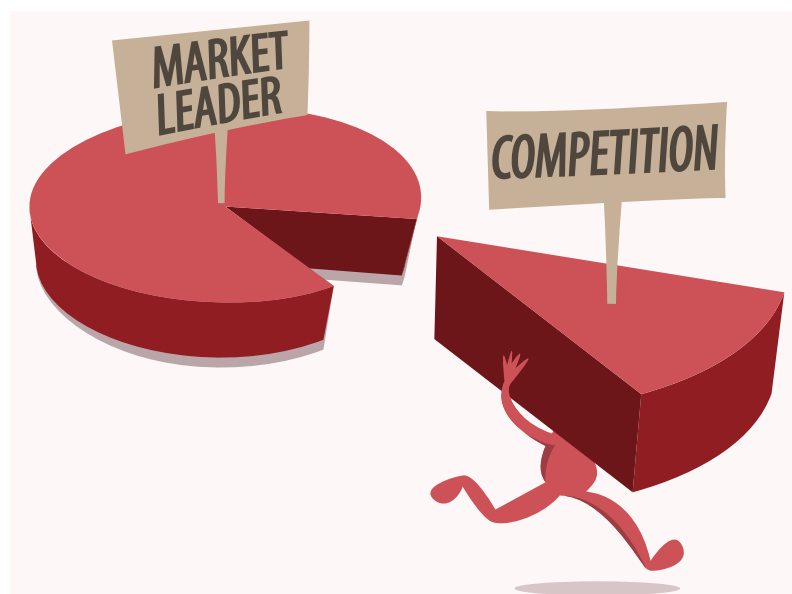
A company is dominant if it has no competitors on a market or is not exposed to any substantial competition or has a paramount market position in relation to its competitors.

Whether a company holds such a paramount position on the market affected is assessed in an **appraisal of all criteria relevant for competition**, such as e.g.:

- >> the company's market share (market dominance is presumed to exist if this is more than 40 per cent);
- >> the number and size of its competitors;
- >> its access to resources (e.g. patents, production sites, distribution networks);
- >> or opportunities for newcomers to enter the market.

In addition, there are other criteria, which may be relevant in particular for multi-sided markets and networks and for assessing market power in the digital economy, e.g.

- >> direct and indirect network effects;
- >> parallel use of several services or high switching costs for users?
- >> access to data relevant for competition;
- >> competitive pressure driven by innovation.



## Abusive practices

It is not prohibited for a company to have a strong position in a market. The fact that companies strive to attain such a position is an integral element of competition. However, the abuse of such market power is prohibited under competition law.

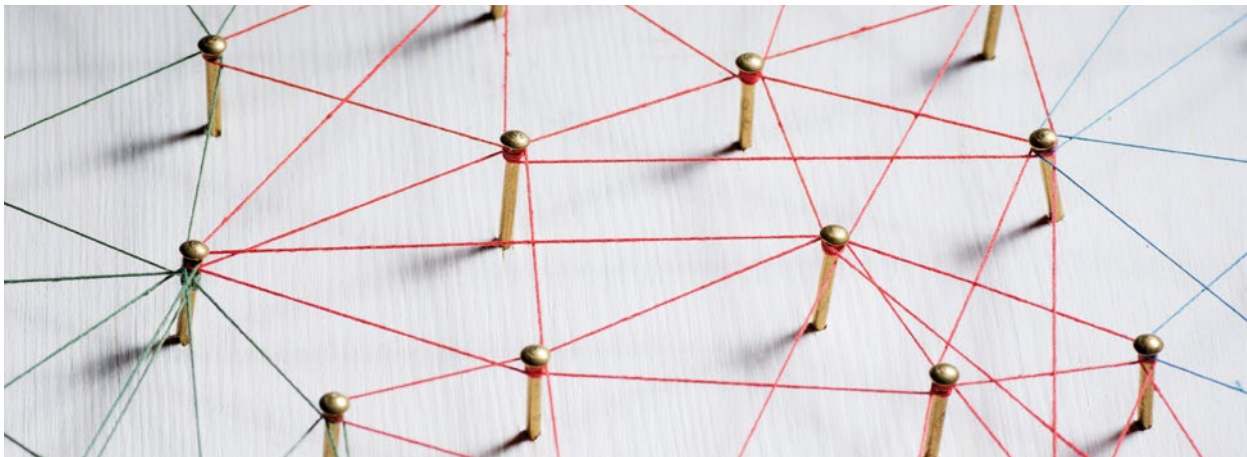
Various practices can constitute a prohibited abuse of market power and typical examples of such practices are set out in the law. However, it is not always easy to draw the line between what conduct is allowed and what is prohibited.

## Relative market power and powerful companies

Special requirements also apply to companies which are not dominant but ...

- >> on which other companies depend. There are no sufficient and reasonable possibilities for switching to third companies.
- >> act as intermediaries on multi-sided markets (e.g. as an internet platform) and other companies are dependent on their intermediary services.

Dependence may also arise from the fact that a company controls data and another company is dependent on accessing these data for carrying out its own activities.



### ABUSIVE CONDUCT – TYPICAL EXAMPLES:

>> **Prohibition of unfair impediment:** Any unfair impediment which adversely affects the competitive position of other companies without any objective justification is prohibited.

*Examples: Long-term discount contracts with customers in order to squeeze competitors out of the market or tying agreements which tie the purchase of one product to the purchase of another product.*

>> **Prohibition of discrimination:** Prohibition of discrimination against individual companies or their preferential treatment over others without any objective justification.

*Examples: Significantly different payment for similar services or the refusal to supply or enter into a business relationship with certain companies.*

>> **Exploitative abuse:** Unreasonable prices or conditions are demanded from customers or suppliers. Whether such demands are abusive is assessed (where possible) according to whether they are clearly excessive or less favourable than on a comparable market with effective competition.

*Examples: Excessive gas or water prices for household customers or unfair terms of contract.*

>> **Demanding unjustified benefits** (so-called **Anzapfverbot**): A dominant company demands unjustified unequal treatment from its suppliers to its advantage.

*Example: Demands for better purchase conditions than given to other customers, without anything being provided in return.*

## Proceedings and sanctions

The Bundeskartellamt can conclude a proceeding by ordering that

- >> the abusive conduct be ended;
- >> the company alter its conduct in future or implement certain measures;
- >> customers be reimbursed for the abusively excessive prices;
- >> other companies be granted access to data relevant for competition or to other essential facilities.
- >> In exceptional cases the Bundeskartellamt can also impose fines for abusive conduct.

In its abuse proceedings the Bundeskartellamt's key objective is to restore competitive conditions as soon as possible and not to impose fines. The Bundeskartellamt may, however, decide to initiate a fine proceeding especially in cases of recurrent abusive behaviour or in cases with a high potential for significant harm.

### “RELEVANT MARKET”: EXAMPLE AMAZON

Amazon is undoubtedly a large and important enterprise. However, to find out whether it is a dominant company, it has to be established on which different markets it is active and the position it has on these markets. The online sale of books constitutes a separate market from the company's online video platform. From the customers' perspective the offer of server capacity has little to do with the supply of food products. The Bundeskartellamt has dealt with several cases involving Amazon Marketplace, the largest internet platform for smaller sellers selling their goods online and since early 2021 has also conducted a proceeding against Amazon under Section 19a of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) (see p. 41).



### ABUSE CONTROL OF WATER SUPPLIERS

There are more than 6,000 water suppliers in Germany. They have a supply monopoly in their regional water pipe network and are hence not exposed to any competition. In the past few years the Bundeskartellamt and also several competition authorities of the Länder have successfully concluded proceedings against individual suppliers for charging abusively high prices. The prices in other municipalities and regions with comparable supply conditions were taken as a standard for comparison. The Bundeskartellamt obliged individual suppliers to substantially reduce their prices and reimburse consumers.

### ABUSE PROCEEDINGS AGAINST FACEBOOK

In early 2019 the Bundeskartellamt imposed far-reaching restrictions on Facebook's processing of user data. The company was prohibited from combining its user data collected from different sources. The Bundeskartellamt assumes that Facebook has a dominant position on the German market for social networks. In the authority's view, Facebook violated the prohibition to abuse its dominant position by making the use of its social network conditional on the unlimited collection of any kind of user data from third-party sources and their combination with the users' Facebook accounts. The Facebook group appealed against the Bundeskartellamt's decision. The court proceeding is still ongoing. The European Court of Justice is to decide on key data protection issues before a final decision is taken.

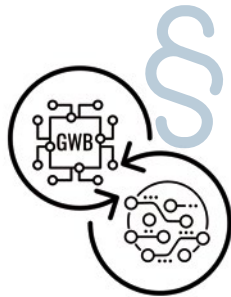
### READJUSTED PURCHASE CONDITIONS

After acquiring the Plus discount markets in 2009, EDEKA made various special demands for readjusted purchase conditions (so-called "wedding rebates") on suppliers which were dependent on EDEKA as a customer.

The Bundeskartellamt saw these demands for special conditions, some of which were general without any service provided in return and some with retroactive effect, as a violation of the prohibition to demand benefits from a supplier without any objective justification ("Anzapfverbot"). The Federal Court of Justice confirmed the Bundeskartellamt's decision.

## Modernisation of abuse control – Section 19a GWB: More effective control of large internet companies

With the 10th amendment to the GWB in 2021 (GWB Digitalisation Act), a new tool was added to the authority's toolbox for enforcing abuse control. The new provision set forth in Section 19a GWB is targeted in particular at large digital companies and enables the Bundeskartellamt to act earlier and more effectively against abusive practices.



### What are undertakings of paramount significance for competition across markets?

This rule is especially aimed at very large companies which are predominantly active in the digital and internet sector. Companies are considered to be “of paramount significance for competition across markets” if they pose a particular risk to competition. Such a situation can emerge if companies operate a digital ecosystem which extends across markets and are in a position to expand their position of power across different markets or to protect their incontestability. Various factors can be taken into consideration when assessing the significance of a company, e.g.

- >> its market position;
- >> its financial strength or its access to other resources;
- >> whether it is active on several markets or in several areas and how these are related;

- >> its access to data relevant for competition;
- >> the relevance of its activities for third-party access to the market and its related influence on the business activities of third parties.

### What type of conduct can the Bundeskartellamt prohibit?

The Bundeskartellamt can prohibit companies which are of paramount significance for competition across markets from engaging in certain practices that could be particularly damaging to competition. Notably, this can also apply to markets on which the company is not (yet) dominant. This is a significant difference to previous abuse control and enables the Bundeskartellamt to also intervene at an early stage in order to keep markets open, promote innovation and protect consumer choice.

Examples of abusive practices which can be prohibited are:

- >> Self-preferencing. When a company gives preference to its own offers over competitors' offers.
- >> “Penetration” of new markets. Hindering competitors by trying to rapidly expand its own market position on new markets using tying or bundling strategies.
- >> Exploiting the power of data. Creating or raising barriers to market entry by processing data relevant for competition that have been collected by the company.
- >> Refusing the interoperability of products or services or data portability or making this more difficult.

Reversal of the burden of proof: Prohibiting a certain behaviour is only possible if the practice in question is not objectively justified. However, the respective company has to prove in each individual case whether the practice is objectively justified.

#### SHORTER LEGAL PROCESS

The legal process has been shortened to save time in the conduct of legal proceedings. Company appeals against decisions issued by the Bundeskartellamt on the basis of Section 19a GWB are brought directly before the Federal Court of Justice and not, as is usually the case, before the Düsseldorf Higher Regional Court as the court of first instance. In a case of dispute this can mean that a final court decision could be available possibly many months or even years earlier.



# Kids Corner with Kartell Man



## ***Do you know why competition is important?***

*Competition is important because it pushes us, and companies, to achieve top performance.*

*Companies, such as ice-cream parlours, are always competing with one another and want to attract as many customers as possible.*

*However, they must bear in mind that customers may switch to a competitor because they prefer the competitor's product or it is cheaper there.*



## ***Owners of ice-cream parlours may sell their ice cream to more customers if, for example, they offer...***

- *cheaper ice cream;*
- *more delicious ice cream;*
- *new flavours nobody has tried before.*

## ***Have you ever heard of the Bundeskartellamt?***

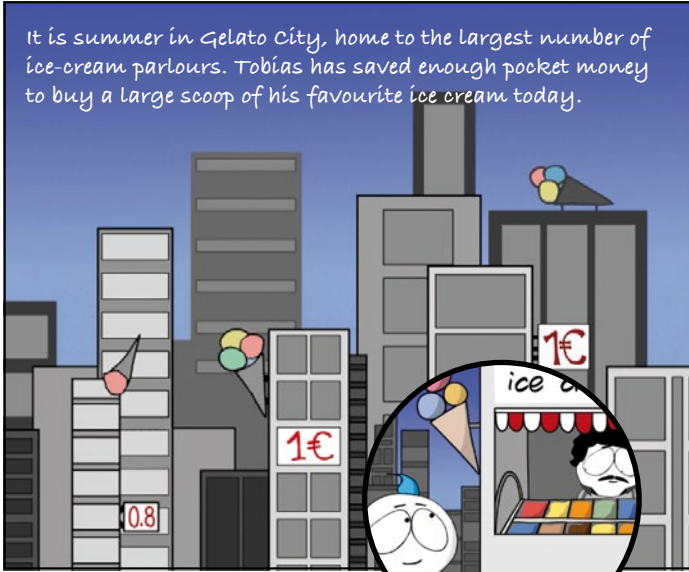
*The Bundeskartellamt makes sure that all companies, including all ice-cream parlours, follow competition rules, and in this way it ensures that there is always enough competition in the markets.*



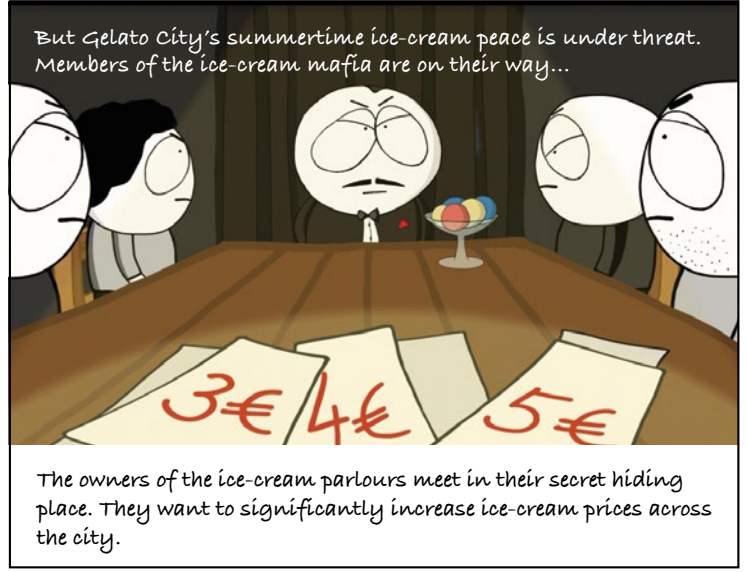
Watch the Kartell Man film here:



# The ice cream cartel

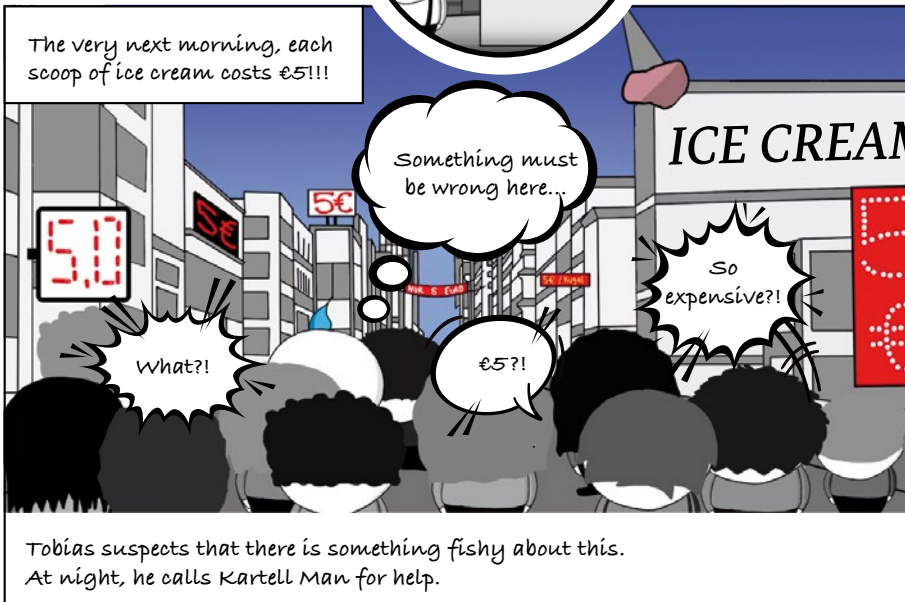


It is summer in Gelato City, home to the largest number of ice-cream parlours. Tobias has saved enough pocket money to buy a large scoop of his favourite ice cream today.



But Gelato City's summertime ice-cream peace is under threat. Members of the ice-cream mafia are on their way...

The owners of the ice-cream parlours meet in their secret hiding place. They want to significantly increase ice-cream prices across the city.



The very next morning, each scoop of ice cream costs €5!!!

Something must be wrong here...

So expensive?!

What?!

€5?!

Tobias suspects that there is something fishy about this. At night, he calls Kartell Man for help.

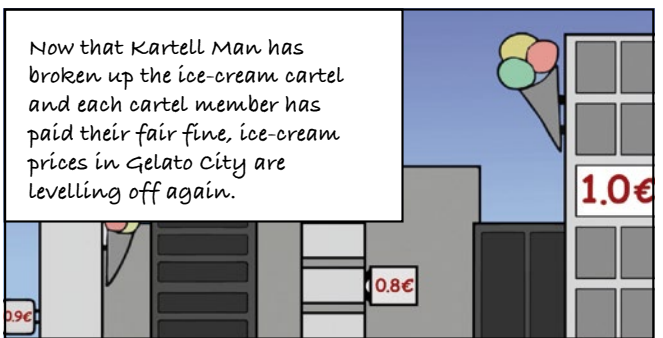


How is this possible? Why are all the prices so high and identical?

This sets Kartell Man's alarm bells ringing and he sets off immediately.



Hey! You are not allowed to reach price agreements! This is prohibited!



Now that Kartell Man has broken up the ice-cream cartel and each cartel member has paid their fair fine, ice-cream prices in Gelato City are levelling off again.



Kartell Man is the city's celebrated hero.

While searching for the reason behind these high prices, Kartell Man finds the ice-cream mafia's secret hiding place and catches them trying to collude on prices again!



# Sector inquiries

- >> *The Bundeskartellamt conducts sector inquiries to get an idea of the competitive situation in certain sectors of the economy.*
- >> *Sector inquiries can be initiated if there are indications suggesting that competition in these sectors is limited or distorted.*

## What can a sector inquiry lead to?

- >> *The findings from a sector inquiry can be of importance, for example, in examining future mergers in this market.*
- >> *If a sector inquiry finds indications of a cartel agreement or abuse of market power, the Bundeskartellamt can initiate proceedings.*
- >> *Sector inquiries can also serve as a basis for recommending legal measures to the legislator to remove obstacles to competition.*



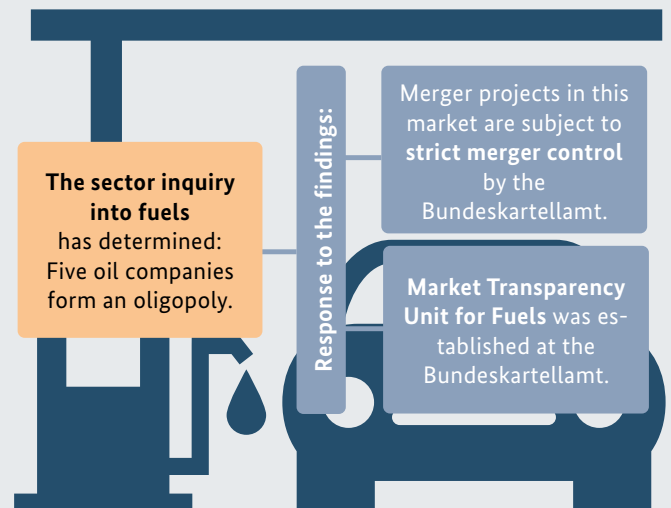
- Sector inquiries are not directed against individual companies
- They follow up on a concrete suspicion of a competition law infringement
- Aim: Obtain knowledge of a market



## SECTOR INQUIRY INTO FUELS

In May 2011 the Bundeskartellamt determined in its sector inquiry into fuels that the five large oil companies in the petrol station sector jointly control the market (oligopoly). Based on these findings, merger projects in this market have since been subject to strict merger control.

In the sector inquiry it was also possible to determine for the first time to what extent the oil companies are able to change their fuel prices at petrol stations almost simultaneously by monitoring their respective pricing. In response to this, the German Federal Government decided to establish the Market Transparency Unit for Fuels (MTS-K) at the Bundeskartellamt in 2013. Consumers can now compare the current fuel prices at petrol stations online or via an app and refuel at the cheapest petrol station (see also p. 44).



## SECTOR INQUIRY INTO DISTRICT HEATING

*This sector inquiry identified competition deficits in the district heating markets. The incumbent suppliers operated without competition in their respective supply areas and customers had no possibilities to switch suppliers. In some cases, the price differences amounted to more than 100 per cent. Based on this result, the Bundeskartellamt initiated proceedings against seven district heating suppliers on the suspicion of excessive prices. The proceedings were concluded in 2017. Investigations were carried out in 30 different supply areas across almost all federal Länder. The result: Numerous customers benefited from reimbursements or price reductions amounting to approx. 55 million euros in total.*

## SECTOR INQUIRY INTO BUYER POWER IN THE FOOD RETAIL SECTOR

*The sector inquiry examined the structures in the German food retail sector. The food retail sector in Germany is highly concentrated. Four large retailers share more than 85 per cent of the total market between them. This strong market position can be exploited in negotiations with suppliers, for example. These findings were used in important proceedings in this area, e.g. in an abuse proceeding conducted against EDEKA in 2013. After acquiring the Plus stores, EDEKA had demanded large special payments and retroactive benefits, so-called wedding rebates, from its suppliers.*



# Consumer protection

In the **9th amendment to the German Competition Act** (Gesetz gegen Wettbewerbsbeschränkungen – GWB), which entered into force in early June 2017, the Bundeskartellamt was for the first time given powers in the area of consumer protection.

Since then, a newly established decision division has conducted **sector inquiries into consumer law issues** and has been acting as “**amicus curiae**” (“friend of the court”) in civil consumer law actions.

Sector inquiries focus on issues relating to consumers’ everyday digital activities.

With these new competences the Bundeskartellamt can identify problems and provide recommendations for action. However, the legislator has so far not granted the Bundeskartellamt powers to intervene in such matters, e.g. by issuing cease and desist orders or reimbursement orders.

**AMENDMENT  
TO THE GERMAN  
COMPETITION  
ACT IN 2017:  
CONSUMER  
PROTECTION**

**Sector  
inquiries**

**“amicus curiae”  
briefs**

## SECTOR INQUIRIES IN THE AREA OF CONSUMER PROTECTION

### COMPARISON WEBSITES

A large number of website operators were surveyed on topics such as rankings, financing, corporate links, reviews and market coverage for the Bundeskartellamt's examination concluded in October 2017. The inquiry uncovered consumer unfriendly tricks practised by some of the websites and gives advice on how best to use comparison websites.



### SMART TVs

The inquiry particularly examined how smart TV manufacturers use user data from the stage of collection up to their commercial use.



### ONLINE USER REVIEWS

In many cases online user reviews are an important guide for consumers in making their buying decision. However, such reviews are often fake or manipulated. The sector inquiry pointed out the way in which review systems work. In the final report the problems identified are outlined, background information and solutions are presented and important tips on how best to deal with user reviews are included.



### MOBILE APPS

The Bundeskartellamt identified considerable data protection shortcomings in the use of mobile apps on devices with Android or iOS operating systems and presented possible solutions.



### MESSENGER AND VIDEO SERVICES

Since November 2020 the authority has been examining whether the way in which established messenger and video services use the personal data of their users in some cases violates applicable data protection law. The Bundeskartellamt is especially also examining the question as to which consequences improved interoperability between the different services would have.



## Public consumer protection

Traditionally, consumer protection in Germany is organised under civil law. Qualified bodies, associations and chambers, such as consumer advice centres, provide advice to consumers that may have been harmed and can serve warnings on companies in the event the law has been violated. In a second step, they can also bring legal actions, where necessary. Unlike in many other countries (e.g. in the Netherlands, France, the

United Kingdom and Australia), economic consumer protection is not enforced by public bodies in Germany.

By additionally establishing public consumer protection at the Bundeskartellamt, possible shortcomings in the existing consumer protection system, especially in the digital economy, could be addressed.

Watch a video on how to properly use comparison websites:

### *“amicus curiae” briefs*

In certain consumer law proceedings, the Bundeskartellamt can now access court files and provide a statement from an objective point of view (as is already the case under competition law).





# Federal Public Procurement Tribunals

- >> *The Federal Public Procurement Tribunals are located at the Bundeskartellamt.*
- >> *They are responsible for reviewing award procedures relating to contracts above certain values carried out by the Federation or public contracting entities that can be attributed to the Federation.*
- >> *Companies which consider their rights violated in an award procedure or feel that the provisions governing the award of public contracts have not been complied with can file an application for review with the public procurement tribunals.*



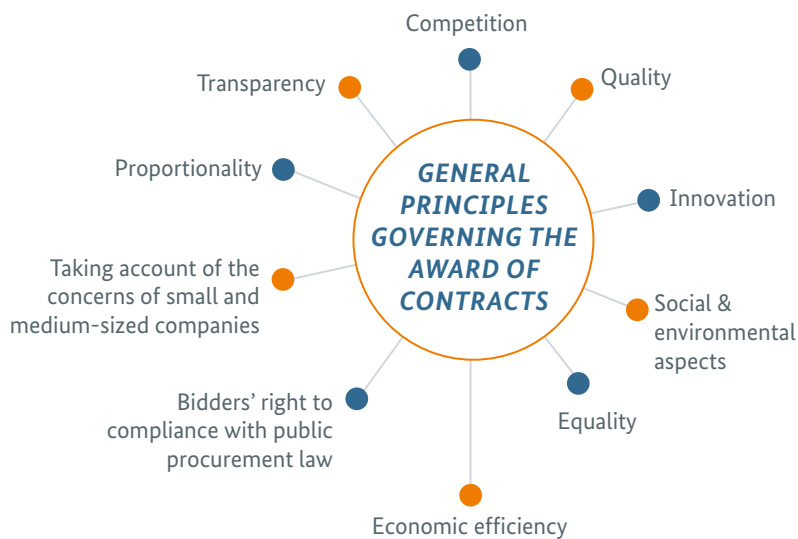
Each year the public sector awards contracts worth hundreds of billions to private companies, making it a significant economic factor. Public contracts have to be awarded under competitive conditions.

## Public procurement law

Public procurement law defines the rules which have to be observed by public contracting authorities in procurement procedures and the possibilities suppliers have to defend themselves against any violations of public procurement law. The aim of public procurement law is to ensure the efficient use of budgetary resources whilst at the same time protecting fair competition between the companies and guaranteeing free market access to the European Single Market.

## Procurement Procedure

Certain conditions have to be fulfilled in an award procedure. The procedure must be transparent and all participants must be treated equally. The most relevant types of procedure are open procedures, restricted procedures (restricted group of participants) and negotiated procedures.



Pursuant to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB), in order to be awarded a public contract companies have to demonstrate their expertise and capability to fulfil the task at hand and there must be no legal reason to exclude them for reliability issues. A contract is awarded to the company which submitted **the most economically advantageous tender**. The most economically advantageous tender is determined according to the best price-quality ratio.

## Review Procedures

Bidding companies are legally entitled to expect the public contracting entities to comply with the rules governing award procedures.

A company which wants to participate or has participated in an award procedure and which is of the opinion that its bid was wrongly rejected can file for review proceedings with the federal public procurement tribunals. The case is then reviewed before the public procurement tribunals in a procedure similar to a court proceeding. The public procurement tribunals are independent and not accountable to another authority in their decision-making. The decision of a public procurement tribunal can be immediately appealed before the Düsseldorf Higher Regional Court.

### AWARD OF CONTRACT FOR THE CONSTRUCTION OF FIVE ADDITIONAL CORVETTES TO PREVIOUS CONTRACTOR VIOLATES PUBLIC PROCUREMENT LAW

*The Bundeswehr had planned to award the contract for the construction of five additional corvettes type K130 to the previous contractor. The first federal public procurement tribunal granted the application to review the award procedure filed by a company from Kiel (Germany).*

*The company based in Kiel complained to the public procurement tribunal that no other companies had been invited to participate in the negotiated procedure. The opposing party argued that this procedure was necessary because only the bidding consortium which had already supplied the same type of ship to the Bundeswehr in the past was able to supply the ships within a specifically defined period because of its special knowledge and experience. The timeframe was based on international alliance commitments of the Federal Republic of Germany.*

*However, in the tribunal's opinion insufficient proof was provided during the review proceedings that only the previous contractor had been able to reproduce the ships within the required period.*





# Digitalisation

- >> The digital transformation has an impact on all sectors of the economy, making it a real cross-cutting issue. Innovative business models have created challenges for competition policy and competition law enforcement.*
- >> The Bundeskartellamt has already concluded numerous landmark proceedings relating to the digital economy, which makes it one of the internationally leading competition authorities.*
- >> In addition to enforcing competition law, the Bundeskartellamt also provides its expertise in the discussion of conceptual and pressing competition policy issues raised by the digital economy.*

## Digitalisation

Innovation Market power

Online advertising Internet of things

Big data Blockchain

Online sales Algorithms

Network effects Killer acquisitions

Social media Start-up

Fintech Data protection Industry 4.0

Cloud Platforms

## How do digital markets work?

Many digital markets have a tendency towards concentration or are already dominated by a few big players. This is due to phenomena which are typically less prominent in traditional markets, such as strong network effects, data processing and feedback loop effects resulting from such processing activities.

## What does the Bundeskartellamt do with regard to the digital economy?

The Bundeskartellamt not only conducts proceedings in the online economy but also carries out important policy work in order to find answers to the numerous newly emerging legal and economic questions. The Think Tank Internet was established as early as 2015. The separate unit “Digital Economy” is currently working on conceptual projects and provides support to the decision divisions in their proceedings relating to the digital economy. In addition, the authority plays an active part in conferences worldwide and is in close communication with other authorities and universities both at national and international level. The Bundeskartellamt has published nationally and internationally acclaimed texts and papers, some of which in cooperation with other competition authorities.

One of the numerous proceedings conducted in the digital economy is the abuse control proceeding against Facebook based on which the authority prohibited Facebook from combining user data collected from various sources.

Further proceedings were also conducted against Amazon and online hotel platforms. In addition, the authority took action against impediments to online distribution and assessed mergers between various online platforms, e.g. in the area of real estate or dating platforms. In terms of consumer protection, the Bundeskartellamt carefully examined comparison websites, smart TVs and online user reviews in the context of sector inquiries. In early 2021, the Bundeskartellamt received new powers under the 10th amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB). Since then, it has initiated new proceedings against Amazon, Apple, Facebook and Google based on Section 19a GWB (see also pp. 40 f.).



**PLATFORMS AND NETWORKS**

One of the main characteristics of platforms and networks are their so-called network effects. Users prefer services which are already used by many other people. The more users connect with one another, the more each one of them benefits from the service. This is called a direct network effect. Establishing a connection between different market sides (such as sellers and buyers) is of great importance on online platforms. Buyers profit from a larger number of sellers and vice versa. This is referred to as indirect network effects.

**PROCESSING OF DATA**

Collecting data is the central building block of many digital business models (big data). Companies process large data volumes, e.g. in order to offer digital services or in the context of presenting adverts. At the same time, data are a factor of market power: The companies that have access to large volumes of data can provide better services and often enjoy a competitive advantage. The power a company has based on data may depend, for example, on how many of its data are relevant for competition, how well the data can be processed and what conclusions can be drawn from these data.

**SERVICES OFFERED FREE OF CHARGE**

In the digital economy online services are often provided to users free of charge. This is possible because many companies use user data for advertising purposes. User data can also be further processed in order to improve products or services. Platforms are aimed at several market sides, each of which is subject to a different pricing model: Retailers or hotels, for example, that want to be found on and transact their business via a platform often have to pay a fee or commission even if other users can use this service free of charge.

## The legislator is keeping pace with the digital transformation

## §19a GWB

In the 9th amendment to the GWB in 2017 and in the 10th amendment to the GWB in 2021, the legislator adjusted German competition law to the particularities of digital business models. Factors such as network effects or the significance of data, which are important in the digital economy, were explicitly enshrined in law. In addition, the GWB now also includes further clarifications which, in particular, may be important in legal proceedings. For example, it is now expressly set out that markets on which services are provided free of charge can be defined as markets within the meaning of competition law.

The 2021 amendment particularly **modernised abuse control**. Based on a newly introduced instrument (**Section 19a GWB**) the Bundeskartellamt is given the possibility to act more effectively and especially more quickly against large digital companies. The Bundeskartellamt can prohibit companies which are of “paramount significance for competition across markets” from engaging in certain practices that are particularly damaging to competition. One innovation in particular is that this also applies to markets on which the company in question is not (yet) dominant (on abuse control see p. 25).

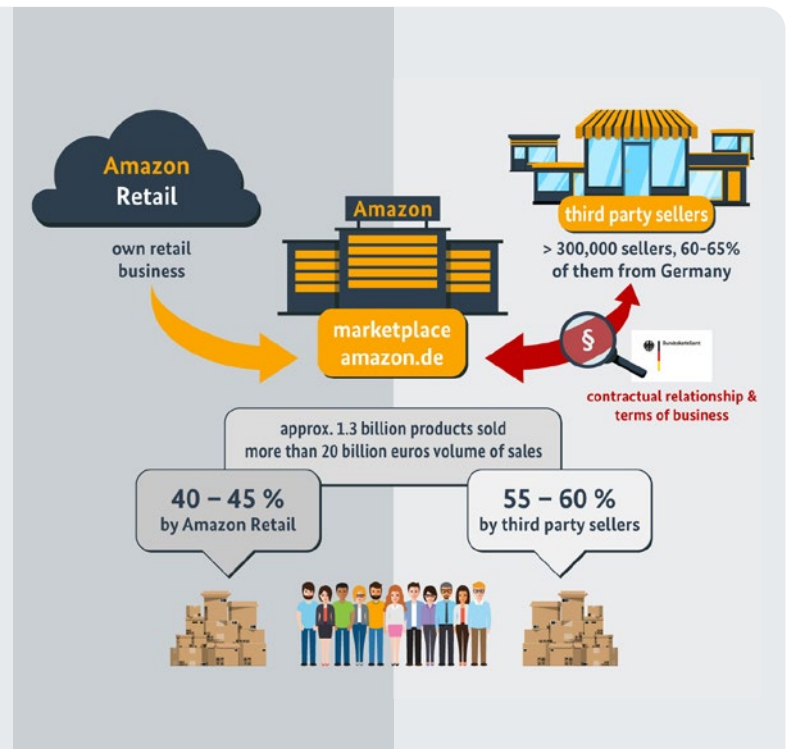




## AMAZON PROCEEDING

Amazon's double role as the largest retailer and the largest marketplace potentially impedes others. Many retailers depend on the reach of Amazon's marketplace. Following several complaints lodged by retailers against Amazon's business practices, the Bundeskartellamt conducted an abuse proceeding.

In this context, the Bundeskartellamt examined Amazon's terms and conditions and its practices towards sellers. As a result of the proceeding, far-reaching changes were effected in 2019: These included provisions on liability, the termination and blocking of seller accounts and the jurisdiction of courts outside Germany in the event of legal disputes.

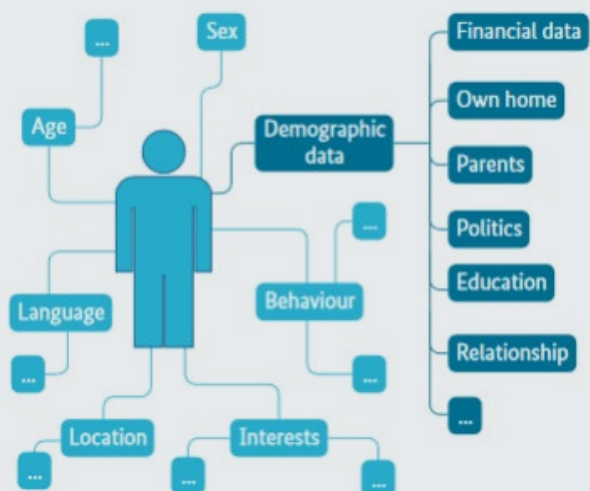


## FACEBOOK

In early 2019 the Bundeskartellamt conducted an abuse proceeding against Facebook and imposed far-reaching restrictions on the company's processing of user data. The company was prohibited from combining its user data collected from different sources. The Bundeskartellamt assumes that Facebook has a dominant position on the German market for social networks. In the Bundeskartellamt's view, Facebook violated the prohibition to abuse its dominant position by making the use of its social network conditional on the unlimited collection of any kind of user data from third-party sources and their combination with the users' Facebook accounts.

The Facebook group lodged an appeal against the Bundeskartellamt's decision. While the Bundeskartellamt's decision has meanwhile been confirmed by the German Federal Court of Justice in a summary proceeding, the main proceeding is still ongoing. Prior to concluding the main proceeding, the European Court of Justice (ECJ) will decide on key issues relating to data protection (information from December 2021).

### Facebook tracks users in every detail of their lives





# Competition Register for Public Procurement

## **>> What is the Competition Register?**

*The Competition Register is an electronic database for registering certain economic offences which can be attributed to companies.*

## **>> What is the Competition Register for?**

*It provides contracting authorities with information helping them to assess whether a company must be excluded from an award procedure. Authorities are obliged to consult the Competition Register before awarding a contract worth 30,000 euros or more.*

## **>> What kind of information does it contain?**

*The register contains information on offences which are particularly relevant for award procedures. The list of offences to be entered in the Competition Register comprises for instance forming criminal organisations, bribery, money laundering, fraud or violations of the ban on cartels.*

## Tasks of the Competition Register

Companies which have committed serious economic offences are to be entered in the Competition Register. Under public procurement law such companies should not be able to benefit from public contracts and concessions. The register was made available in stages in 2021. In a first step, the authorities and contracting entities providing information were registered, before the obligation to provide information became applicable and the search function was activated.

### LEGAL BASIS:

The operation of the Competition Register is based on the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) and the Competition Register Act (Wettbewerbsregistergesetz – WRegG). The GWB defines the types of offences for which a company can or must be excluded from award procedures and the preconditions for self-cleaning. The WRegG specifies, among other things, the public authorities' obligations to provide information and consult the register and the legal process.

**>> The Competition Register is to contribute to fighting economic crime and antitrust violations. This new transparency will strengthen the preventive effect of criminal and competition law. <<**

Andreas Mundt, President of the Bundeskartellamt

## Registration and consultation

The offences entered in the Competition Register must be attributable to a company. These include in particular bribery, forming criminal associations, financing of terrorism, money laundering, fraud to the detriment of the public budget, tax evasion, violations of labour law provisions and cartel agreements. Such offences will be entered in the register if the decisions are final (criminal verdicts, penal orders or decisions imposing fines). The competition authority's decision is sufficient in cases of cartel agreements. In some cases the sanction imposed must be above a certain de minimis threshold. The competent public prosecution offices and administrative bodies communicate the decisions to the Competition Register electronically. Prior to awarding contracts worth 30,000 euros net or more public contracting entities are obliged to consult the Competition Register on whether the company which has made the best offer is entered in the register. It is also possible to consult the register on a voluntary basis if the contract values are less than this amount. If the company concerned is listed in the register, it is for the contracting authority to decide whether the company should be excluded from the procurement procedure based on the reasons for exclusion specified in public procurement law.

## Deletion and self-cleaning

Entries in the register will be deleted after expiry of certain periods. The expiry period depends on the gravity of the misconduct. It can be either 3 or 5 years. Companies can apply for premature deletion if they review their misconduct and implement preventive measures for the future. This process is referred to as self-cleaning. The Bundeskartellamt will review the company's self-cleaning measures and assess whether they are sufficient. If an entry has been deleted from the Competition Register, the misconduct it was based on must not be considered in an award procedure to the disadvantage of the company concerned.

## Legal process

The Bundeskartellamt's decisions relating to the Competition Register can be appealed to the Düsseldorf Higher Regional Court. Companies and natural persons have a right to obtain information on the data saved about them. Concerned companies will have an opportunity to comment prior to each entry.



# Market Transparency Unit for Fuels

## What is the Market Transparency Unit for Fuels?

Since 31 August 2013 companies which operate public petrol stations or have the power to set their prices are legally required to report price changes for the most commonly used types of fuel, Super E5, Super E10 and Diesel, “in real time” to the Market Transparency Unit for Fuels. The unit then shares the price data with consumer information services which in turn inform consumers via an app, the navigation system or online about the current petrol and diesel prices. The Market Transparency Unit for Fuels analyses the price developments at petrol stations and publishes a detailed account in its annual report. In this way, the unit improves transparency and competition in the fuel sector.

Oil companies/  
petrol station operators



Market Transparency Unit  
for Fuels



Information services



Motorists



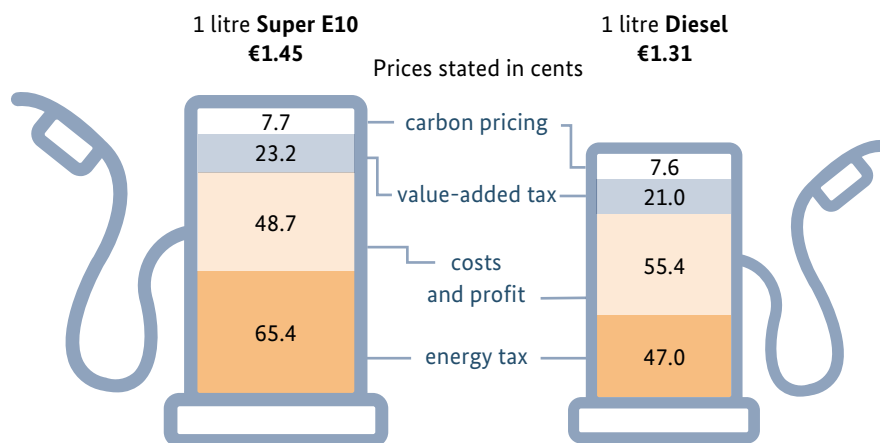
Cheapest petrol station

## Did you know...

Identical prices are in themselves no proof of anti-competitive agreements.

Petrol stations are in principle free to set their own prices for petrol and diesel.

### TAXES ON DIESEL AND PETROL



Fuel prices currently tend to be highest in the morning and lowest in the evening.

There is no limit to how often petrol stations in Germany can change their prices in the course of a day.

Price changes at a petrol station are displayed in the refuelling apps in a very timely manner.

Taxes make up well more than half of the petrol and diesel price.

### CONSUMER INFORMATION SERVICES

A list of authorised and active consumer information services is available at: [www.bundeskartellamt.de](http://www.bundeskartellamt.de)

### MARKET TRANSPARENCY UNIT FOR ELECTRICITY & GAS

The Bundeskartellamt is currently setting up the Market Transparency Unit for Electricity and Gas Wholesale Trading based at the Bundesnetzagentur. The tasks assigned to this unit will be jointly carried out by the Bundesnetzagentur and the Bundeskartellamt.

The task of this new unit will be to monitor electricity and gas wholesale trading in order to detect any irregularities in wholesale pricing which could be attributed to abusive practices.



# International cooperation

Globalisation is pushing markets closer together and businesses are becoming more international. Many corporate mergers now have a national or international dimension and the integration of the national economic systems allows companies to organise cartels or other anti-competitive practices on an international or even global scale.

For this reason, the Bundeskartellamt regularly cooperates with competition authorities all over the world. This cooperation is either conducted on a bilateral basis or within international networks.

## European Commission

Competition in Europe is supervised by the European Commission's Directorate-General for Competition. Its task is to enforce the competition rules under the Treaty on the Functioning of the European Union. Like the Bundeskartellamt it prosecutes cartels (just at European level), intervenes where individual companies abuse their dominant position and examines mergers between companies whose turnover is above certain threshold values. In addition, the Directorate-General for Competition also ensures that state aids do not violate European rules. For this purpose, it works together closely with the competent competition authorities of the EU Member States.



### WHO IS COMPETENT?

**Merger control:** The European Commission examines cases with a Community dimension (rule of thumb: if the combined turnover of all the companies involved is higher than five billion euros). Cases can be referred between Brussels and the Bundeskartellamt in Bonn on application.

**Cartel prosecution and control of abusive practices:** Cases in which European law is (also) applicable are notified within the European Competition Network (ECN) and handled by the best placed authority. The European Commission is competent if an infringement affects competition in more than three Member States.

## European and international organisations

**European Competition Network (ECN):** The European competition authorities work together closely in a joint network, the European Competition Network (ECN). They use the network to exchange information on cases and decisions, for example. They also provide mutual official assistance in investigations, e.g. by conducting dawn raids at business locations under their jurisdiction on behalf of other competition authorities or by exchanging evidence.

**International Competition Network (ICN):** Outside Europe the Bundeskartellamt is active in the International Competition Network (ICN). The network of competition authorities currently has 140 members. In working groups competition law issues are discussed and the results are presented at the annual ICN conference. Since September 2013, Andreas Mundt, President of the Bundeskartellamt, has chaired the ICN's Steering Group.

**OECD:** The Organisation for Economic Co-operation and Development (OECD) is a platform for discussing competition policy issues. The Bundeskartellamt and the Federal Ministry for Economic Affairs and Climate Action take an active part in the OECD Competition Committee. Andreas Mundt, President of the Bundeskartellamt, is also a member of the Bureau of the OECD Competition Committee.

**UNCTAD:** The United Nations Conference on Trade and Development (UNCTAD) helps developing countries to integrate into the world trade system. The Bundeskartellamt actively joins the annual meetings of the Competition Committee on a regular basis.

### EXAMPLES OF INTERNATIONAL COOPERATION

- >> In the area of cartel prosecution European competition authorities can work together very closely. For example, in 2012, 2014 and 2015 the Bundeskartellamt carried out dawn raids at various electronic goods manufacturers on behalf of the Austrian competition authority. The initial processing and inspection of electronic evidence and the questioning e.g. of the managers involved are also among the tasks in which the Bundeskartellamt assists the competition authority handling the case.
- >> Through the ICN chairmanship the Bundeskartellamt drives the creation of worldwide standards in the enforcement of competition law. Practical relevance is central in this regard, be it in merger control by providing statement templates for the parties involved, which facilitate the exchange of information between the competition authorities reviewing the case, or in cartel prosecution by preparing principles for leniency programmes.



# The Bundeskartellamt – then and now

## 1958

>> On 1 January 1958 the **German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB)** enters into force. The Bundeskartellamt commences its work in Berlin with 53 members of staff.

>> Dr Eberhard Günther is appointed the Bundeskartellamt's **first president**. Tasks of the Bundeskartellamt: Cartel prosecution and control of abusive practices.



The first President of the Bundeskartellamt, Dr Eberhard Günther, at the opening ceremony.



Ludwig Erhard on the way to the ceremony.

## 1999

>> The Bundeskartellamt is given competences in the area of **public procurement law**. It can now review federal award procedures.

>> As the German Federal Government is relocated to Berlin, the Bundeskartellamt moves **from Berlin to Bonn**. The Bundeskartellamt's new official seat is in the buildings that formerly housed the offices of the Federal President.



General-Anzeiger Bonn, November 24, 1998

## 1992

>> European legislation brings about **liberalisation**: Network-based sectors (post, telecommunications, electricity, gas and water) are opened up to competition.

## 1973

>> **Merger control** is introduced. Prior to this, businesses were merely required to inform the Bundeskartellamt about corporate mergers.

>> Under the **2nd amendment to the GWB** resale price maintenance imposed on retailers by manufacturers is prohibited.

## 1990

>> Reunification: Privatisation of East German businesses causes a **wave of mergers**.

>> **European merger control** enters into force.

## 2000

The Bundeskartellamt launches its **leniency programme**.

## 2001

The International Competition Network (**ICN**) is founded.

## 2003

The European Competition Network (**ECN**) is founded; decentralised application of European competition law.

## 2006

The Bundeskartellamt issues its **guidelines for the setting of fines**.

## 2005

>> The Bundeskartellamt may conduct **sector inquiries**.

>> **The notification and authorisation procedure** for cartels is **abolished**. Under certain conditions anti-competitive agreements can be exempted under competition law.

## 2017

9th amendment to the GWB

>> Developments in the **digital economy** are taken into account in the GWB.

>> The Bundeskartellamt is given powers in the area of **consumer protection**.

>> The act introducing a **competition register for public procurement** is passed. The aim is to help public contracting entities verify whether a company has committed relevant violations of the law.

## 2021

The 10th amendment to the GWB modernises abuse control. The aim is to more effectively control large digital companies.

## 2013

The **Market Transparency Unit for Fuels** takes up its work.



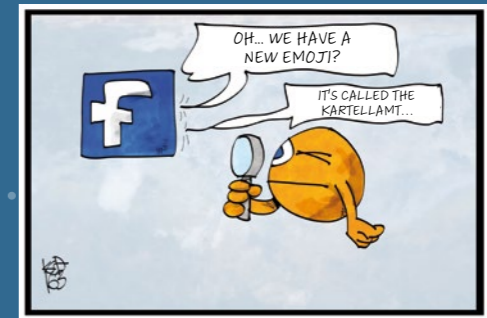
## 2009

Andreas Mundt becomes the **new president** of the Bundeskartellamt.



## 2019

The Bundeskartellamt prohibits Facebook from combining user data from different sources.



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# Organisation Chart

**L1**  
**PRESIDENT**  
Mundt



**L2**  
**VICE PRESIDENT**  
Prof. Dr Ost

Chair of Staff Council:  
Dr Plath-Bomberg  
Equal Opportunities Officer:  
Dr Immel  
Representative for Severely  
Disabled Employees:  
Hensel

**IR**  
**Internal Audit**  
Heinen-Hosseini

**W** **Competition Register Division**  
**Hooghoff**

W1 Thiele <b>Entry in Register and Information</b>	W2 Dr Wiesner <b>Self-Cleaning</b>	W3 Sonnenfroh <b>Consultation of Register and Service</b>
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**P** **Litigation and Legal Division**  
**Nothdurft**

P1 Quellmatz <b>Litigation and Legal 1</b>	P2 Rauber <b>Litigation and Legal 2</b>	P3 Dr Breuer <b>Litigation and Legal 3</b>	SKK Dr Roesen <b>Special Unit for Combating Cartels</b>	PB N.N. <b>Library</b>
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**Z** **Central Division**  
**H.-H. Schneider**

Z1 Scholl-Bäcker <b>Budget and Procurement</b>	Z2 Franzen <b>Internal Services</b>	Z3 Hoever <b>Information Technology</b>	Z4 Zeise <b>Human Resources</b>	Z5 Lange <b>Organisation</b>
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General Legal Matters • Information Security • Agile Administration Management

**G** **General Policy Division**  
**Hossenfelder**

G1 Dr Stempel <b>German and European Antitrust Law</b> ECN-Coordination	G2 Dr Wacker <b>Regulation and Competition, Procurement Law</b>	G3 Balz Chief Economist <b>Economic Issues in Competition Policy</b>	G4 Dr Pape <b>German and European Merger Control</b>	G5 B. Schulze <b>International Competition Matters</b>	G6 Dr Wismer <b>Digital Economy</b>	PK Weidner <b>Press, Public Relations</b>
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**Decision Divisions** | **Procurement Tribunals**

<b>B1</b> Dr Wagemann • extraction of ores and other non-metallic minerals • building materials, construction industry and related services • real estate and related services • wood industry and furniture • wholesale and retail trade in food • agricultural trade	<b>B2</b> Dr Engelsing • e-commerce • agriculture, food, food industry • clothing, shoes • cosmetics and drugstore products • household appliances, consumer electronics	<b>B3</b> Bangard • health sector (incl. medical technology, pharmacy, health insurance and hospitals) • chemical industry	<b>B4</b> Temme • waste management industry • other services • automotive industry (incl. rail, air and water vehicles)	<b>B5</b> E. M. Schulze • mechanical and plant engineering • metal industry • iron and steel • measurement and control technology • paper industry • gambling industry • patents and licences	<b>B6</b> Topel • media • Internet economy • advertising industry	<b>B7</b> Dr Krauß • telecommunications • broadcast engineering • EDP	<b>B8</b> Ewald • electricity, gas, district heating, drinking and wastewater • mineral oil, mining • electrical engineering <b>WORKING GROUPS:</b> Energy Monitoring Dr Meyer-Flamme Market Transparency Unit: Electricity/Gas Dr Schwensfeier <b>TRANSPARENCY UNIT FUELS</b> MTS Kraftstoffe Bayer Dr Güttes	<b>B9</b> Krueger • tourism and Horeca sector • transport • postal services • financial services • insurance	<b>V</b> Prof. Dr Becker Competition Protection and Consumer Protection • press and press-related advertising industry • book publishing and retail • radio • culture, sport, entertainment • outdoor advertising • trade fairs	<b>B10</b> Hengst prosecution of administrative offences in conjunction with violations of Sec. 1 GWB and Art. 101 TFEU	<b>B11</b> Hawerkamp prosecution of administrative offences in conjunction with violations of Sec. 1 GWB and Art. 101 TFEU	<b>B12</b> Teschner prosecution of administrative offences in conjunction with violations of Sec. 1 GWB and Art. 101 TFEU	<b>VK1</b> Behrens 1st Public Procurement Tribunal Review Procedures	<b>VK2</b> Dr Herlemann 2nd Public Procurement Tribunal Review Procedures
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