



Bundeskartellamt



open markets | fair competition

The Bundeskartellamt

Annual Report 2013



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Welcome note

Sigmar Gabriel

Federal Minister for Economic Affairs and Energy



Competition is a prerequisite for economic success and wide-spread participation in consumption because it provides an incentive to offer better products and services at more affordable prices. Markets need an authority that protects fair competition and prevents anti-competitive agreements. This requires clear rules that everyone adheres to. It is the task of the Bundeskartellamt to effectively enforce these rules.

The 2013 Annual Report shows: the protection of competition is in good hands with the Bundeskartellamt. With its activities in the areas of merger control, cartel prosecution, the control of abusive practices and the review of public award procedures, the authority vitally contributes to the advancement of our open and innovative economy.

The Bundeskartellamt rightly places a special focus on combating cartels. It is currently reaping the rewards of setting up several decision divisions that deal exclusively with cartel cases as well as its Special Unit for Combating Cartels. In 2013 alone the Bundeskartellamt imposed fines of more than 240 million euros on account of anti-competitive agreements. It uncovered cartels in several sectors, such as the rail sector, the confectionery industry and the milling industry. This proves that it is not only competitors and customers that benefit from the Bundeskartellamt's work; it is also of direct benefit to consumers.

The authority's tasks are constantly increasing. In particular the internet poses numerous new challenges. New sales channels and business models require new interpretations of the competition law provisions. In its fight against the abuse of market power the Bundeskartellamt has therefore rightly started to focus more heavily on the internet and the new media. The consolidation of market power in the internet sector is harmful to both competition and consumer interests, which is why we strive to prevent it.

Globalisation requires stronger international cooperation between competition authorities. As chair of the International Competition Network, President Mundt is making an important contribution to such cooperation.

The Public Procurement Tribunals also enjoy an excellent reputation on account of their work. I am counting on their expertise for the upcoming structural reform of the German public procurement law.

I'd like to thank the Bundeskartellamt's staff for their excellent and tireless work and wish them the best of success for their future tasks.

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

Sigmar Gabriel
Federal Minister for Economic Affairs and Energy

Interview

Andreas Mundt

President of the Bundeskartellamt



Mr Mundt, was 2013 a good year for competition in Germany?

“Yes, I think it was. By international comparison, the economy and the working and living conditions in Germany score very well at the moment. This high standard of welfare is a direct result of the competitiveness of the German economy.”

And your authority’s role in this?

“Competition is a cornerstone of our economic and social order. However, just as in sports, economic competition can only function if there are rules which everyone has to comply with. Imagine the World Cup in Brazil without referees. A similar situation would arise in the free market economy if there were no competition laws and no competition authorities.”

Did you have to intervene often in 2013 to show a “red card”?

“Yes, we punished many new violations of our competition act by uncovering illegal cartels and imposing substantial fines. These included the rail cartel and price agreements concluded by sugar manufacturers and beer brewers, to give but a few examples. Cartel prosecution is a vitally important part of our work. Our merger control activities and control of powerful companies also give considerable impetus to the economic process.”

What else would you consider to be a highlight in the Bundeskartellamt’s work in 2013?

“Here I would like to mention our Transparency Unit for Fuels. Since last year motorists have been able to use several Apps to gain information about the fuel prices charged at petrol stations in their vicinity and thus select the petrol station that offers the best price. We are fairly proud to be able to say that it took us only a few months to launch this tool and that it works smoothly and has met with great response.”

Talking about “Apps” – Is competition control by the Bundeskartellamt and other competition authorities still up-to-date in times of global internet giants?

“Our toolkit is generally well equipped to deal with all kinds of challenges, including those posed by the internet economy. I believe that the Bundeskartellamt’s proceedings against HRS and other hotel booking portals as well as our proceedings against Amazon are an impressive example of this. Competition law deals with economic power. In the current debate about Google and other internet platforms this issue is often mixed up with very different issues, e.g. problems relating to the protection of data and privacy. We can discuss the question of whether or not this ‘new type of market power’ requires new competition law tools. However, we also have to keep in mind that the internet economy is an extremely innovation-driven sector. In the relatively recent history of this medium there have been numerous examples of market leaders or even monopolists being replaced by new market leaders or monopolists. Our challenge as competition authorities is to use specific measures to keep the markets open without hampering any dynamic development.”

Tasks and organisation

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



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

The tasks of the Bundeskartellamt include

Enforcing the ban on cartels

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

Merger control

Mergers are examined by the Bundeskartellamt if the turnover of the companies involved exceeds certain thresholds, one or more of the legally defined elements of concentration is fulfilled and the project affects competition in Germany. In examining a merger project the

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

Control of abusive practices by dominant companies

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



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

The provisions of public procurement law ensure that public contracts are awarded under competitive conditions and through transparent and non-discriminatory procedures. The Federal Public Procurement Tribunals, which are located at the Bundeskartellamt, examine whether public procurement law was observed in the award of larger public contracts falling within the Federal Government's area of responsibility. In 2013 two of the previously three Public Procurement Tribunals were merged so that now two Public Procurement Tribunals review award procedures.

Sector inquiries

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

Bundeskartellamt Key Facts

- President: Andreas Mundt
- Vice-President: Dr Peter Klockner
- Budget 2013: 26.8 million euros
- around 345 employees
- of which approx. 150 are legal experts and economists
- 11 trainees
- female/male staff: 60/40 percent

Ban on cartels

- In 2013 the Bundeskartellamt imposed fines totalling approx. 240 million euros on 54 companies and 52 individuals in 11 cases.
- In 2014 the Bundeskartellamt has already imposed over 630 million euros in fines.

Merger control

- In 2013 the Bundeskartellamt received 1,091 merger control notifications.
- 18 of these were closely examined in second phase proceedings.
- One merger was prohibited in 2013 and two others were cleared only subject to conditions.

Control of abusive practices

- Number of proceedings initiated in 2013: 43
- Number of proceedings concluded in 2013: 50

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

- In 2013 the Bundeskartellamt received 127 applications for review.
- 17 applications were granted review and 42 were rejected.

Sector inquiries

- Since 2005 the Bundeskartellamt has concluded nine sector inquiries.
- Three sector inquiries are still in progress.



“The repeated achievements in cartel prosecution in 2013 are evidence of the authority’s targeted strategic reorientation in the last years. We have pooled our specialised knowledge, set up dedicated divisions and optimized our work processes.”

Dr Peter Klocker,
Vice-President of the Bundeskartellamt

Internal organisation

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

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

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

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

Central Division

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



Major projects of the division in 2013 included the development of an extensive educational and further training programme for internal staff and the conception of a new case database where documents relating to all the cases dealt with by the authority are centrally registered and are made more easily accessible via search functions. The IT forensics unit, which is of crucial importance for effective cartel prosecution, was upgraded and restructured. At the end of 2013 the Central Division introduced the European quality management system for the public sector (Common Assessment Framework).

The Bundeskartellamt in an international comparison

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

The Bundeskartellamt in the internet



Transparent and informative: In autumn 2013 the Bundeskartellamt launched its new internet presence. www.bundeskartellamt.de

Rating of the international competition authorities

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

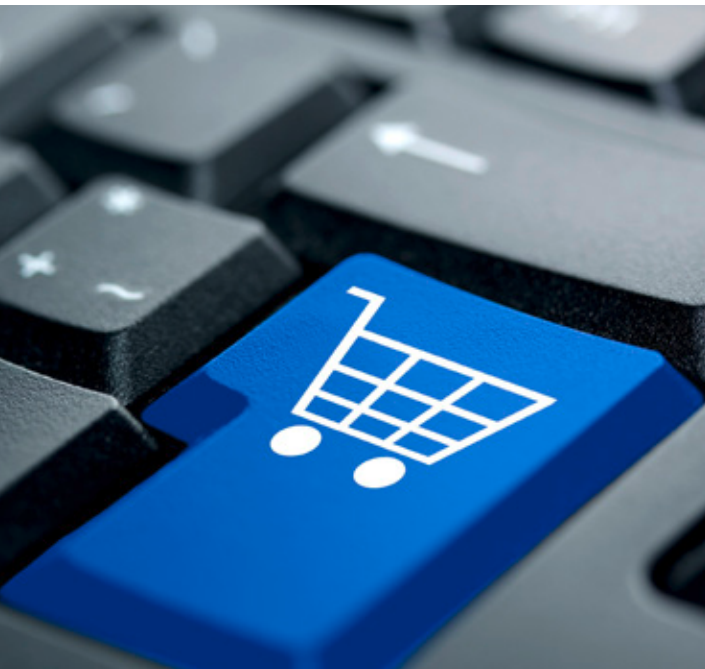
- Autorité de la concurrence (France)
- Bundeskartellamt (Germany)
- Department of Justice – Antitrust Division (USA)
- Directorate-General for Competition, European Commission
- Federal Trade Commission (USA)

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

General Policy Division

The General Policy Division advises the decision divisions in specific competition law and economic issues and represents the Bundeskartellamt in the decision-making bodies of the European Union. It is involved in law reforms which have a bearing on competition and coordinates cooperation between the Bundeskartellamt and foreign competition authorities as well as international organisations. It is also responsible for the authority's press and public relations work and assists the President of the authority. The division is made up of seven units: G1 – German and European Antitrust Law, G2 – Competition Law and Regulation, Public Procurement Law, G3 – Economic Issues in Competition Policy, G3A – Data Analysis, Survey Techniques and Econometrics, G4 – German and European Merger Control, G5 – International Competition Matters, PK – Press, Public Relations.

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



Internet and competition

Large sections of the public regularly buy online. The internet offers access to a wide range of products and a large number of suppliers and makes it easy to compare offers and prices. Suppliers can greatly expand their reach and lower their distribution costs by selling online.

Vertical agreements

The increasing importance of the internet trade is accompanied by a substantial change in distribution methods. In some cases the manufacturers themselves are starting to sell directly to end consumers. They often critically review their relationship with independent retailers. This relationship is defined by distribution contracts in which

the manufacturers lay down their requirements of their distributors. Even if they do contain restrictions, such agreements can greatly help to make distribution more efficient – e.g. if they aim to achieve an adequate level of presentation and customer advice services.

However, these so-called vertical agreements also pose risks, in particular if competition between manufacturers is already considerably restricted. Against this background the growing internet trade raises many new issues in the application of the law. In 2013, in addition to advising the decision divisions, the General Policy Division promoted the exchange of ideas on these aspects with its European sister authorities, academics and other professional stakeholders by organising specialist conferences and cooperating in international working groups.

Dual pricing systems

Dual pricing systems are price-related restrictions which specifically target online sales. They were the subject of several Bundeskartellamt proceedings in 2013. In a dual pricing system a retailer is granted different purchase prices depending on whether he sells the product online or over-the-counter. With the difference between the two prices a manufacturer can influence sales via the different distribution channels of a retailer and considerably restrict online distribution.

Conditions set by manufacturers on how online distribution should be conducted can also considerably hinder online sales. One example of this is if dealers are prohibited from using platforms such as Amazon, eBay or price comparison sites.

Platforms and best price clauses

With the help of certain sales practices platforms like Amazon or the hotel portal HRS aim at expanding or securing their market position, which can hinder competition.



In 2013 the Bundeskartellamt conducted several proceedings against so-called “best price” clauses. In such clauses the platform operators demand that the suppliers (hotels or retailers) always offer their most favourable prices and conditions on the platform. On first sight such measures appear to benefit consumers but in fact they restrict competition between the platforms and make the market entry of new, innovative suppliers more difficult.

Economic approach to competition law: the SIEC test as an example

The increasing “economisation” of competition law makes a refined effects analysis and the use of more complex data-based methods (“econometrics”) necessary. This can improve the accuracy of competition law practice. The aim of such measures is not to increase the administrative burden of the proceedings but to facilitate in-depth analysis on a case within case basis.

At the beginning of 2014, in order to improve the balance between refined analysis and effective competition protection, the Bundeskartellamt installed a unit within its General Policy Division which is specialised in data-based analysis. This measure is intended to make more effective use of the information potential offered by data-based analysis methods. The two economic units within the division are now coordinated within the newly created function of Chief Economist.

The Bundeskartellamt has taken this step in reaction to changes introduced by the 8th Amendment to the GWB. With the amendment the substantive test in merger control was brought into line with the European SIEC test. According to this, mergers are to be prohibited if they significantly impede effective competition. As in European law, the market dominance test is still maintained as a key standard example for determining a significant impediment of effective competition. Experience at EU level in 2004 suggests that the SIEC test is likely to increase the

Since early 2014 Christian Ewald has been the Bundeskartellamt’s Chief Economist. He is in charge of the units “Economic Issues in Competition Policy” and “Data Analysis, Survey Techniques and Econometrics”.

What are the advantages of an additional unit which is specialised in data analysis?

With this unit we can assist the decision divisions even better than before in making optimal use of the potential of data analysis for individual case assessment. It can also help to ensure more effectively the necessary balance between procedural economy and depth of analysis.

How does the trend towards a stronger focus on economics, e.g. in merger control following the introduction of the SIEC test, manifest itself and how should one react to this?

This trend manifests itself both in merger control as well as in other areas of competition law in the growing number of expert economic opinions submitted by the parties. In order to avoid that this merely results in an additional procedural burden, special focus should be placed on the quality of such expert opinions. In 2010 the Bundeskartellamt already published minimum quality requirements (Best Practices) for such economic opinions. Compliance with these is even more important now that the SIEC test has been introduced.

use of economic analysis in merger control practice in Germany as well.

The Guidance Document on Substantive Merger Control (March 2012), which describes the situation before the change to the SIEC test, already reflected this development. With the new test anti-competitive mergers in which the market leader is not a party to the merger can be more easily covered than before. These cases call for a particularly careful analysis of the effects of a merger on competition.

The first cases under the new test have shown that clearance decisions are also more complex when the SIEC test is applied. Although market definition is still a useful element of analysis under the SIEC test for estimating the effects of a merger, it is becoming less important than a detailed effects analysis.



Energy and competition

Liberalisation, assisted by proceedings conducted by the authority, has had a positive effect on competition in the energy sector. However, the transformation of Germany's energy system has also brought about some reverse developments. In the expansion of renewable energies, the emphasis up to now has been on state planning rather than on competition. An ever increasing proportion of electricity, now already around a quarter, is largely produced without a competition-based corrective. The result is massive cost increases, which burden private households and jeopardise the competitiveness of German industry.

The effects of the expansion of renewable energies can already also be felt in conventional electricity generation. There are calls for a comprehensive programme to promote power plants in the form of capacity markets.

The Bundeskartellamt advocates relying on competitive mechanisms wherever possible both in the expansion of renewable energies and in conventional electricity generation.

It also favours a fundamental reform of the Renewable Energy Sources Act (EEG) using every option to put the EEG on a competitive track. Market mechanisms should not be over-hastily abandoned in the debate on capacity markets. Such extensive intervention by the state in electricity generation, which has so far been competitively organised, brings with it new risks of mismanagement, regulatory failure and high costs. It is also not a foregone conclusion that such an intervention in the market will actually be necessary.

The Bundeskartellamt actively participates in discussions about the future design of the electricity market, comments on legislative projects and is represented in the power plant forum of the Federal Ministry for Economic Affairs and Energy. It also maintains a regular exchange

of ideas with other government agencies, companies and associations. The aim of these activities is to promote the competition principle. The transformation of the energy system can only become a success if this is carried out within a competitive process.

Simplification of fine procedures

The 8th Amendment to the GWB which came into force in 2013 also introduced changes to cartel fine procedures. However, the Bundeskartellamt's proposals were only partially implemented so that the General Policy Division is still striving for a more comprehensive reform. When the Bundeskartellamt imposes fines, the procedure is currently carried out in accordance with the provisions of the Administrative Offences Act (OWiG). Any appeal against a fine is dealt with in court proceedings, where essentially the Code of Criminal Procedure (StPO) applies.

In practice this system has proved unsuitable for the often complex and extensive cartel cases. The requirements of the StPO lead to a main hearing that is dominated by oral proceedings and which often lasts months, in which witnesses are again personally questioned, many motions and documents are read out and where it is very difficult to include electronic data in the proceedings.

At the end of 2012 a group of experts on cartel sanctioning law was formed to discuss alternative ways of making proceedings more efficient whilst at the same time maintaining standards of constitutional protection. Within this group professors from different legal disciplines and representatives of the Bundeskartellamt discuss topical issues of cartel sanctioning law and work on appropriate solutions.



International cooperation

The Bundeskartellamt regularly cooperates with competition authorities all over the world. This form of cooperation is either based on bilateral agreements or occurs within international networks.

ICN

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

In September 2013 the President of the Bundeskartellamt, Andreas Mundt, was elected as the new Steering Group Chair of the ICN. He heads the organisation together with the two Vice-Chairs, the presidents of the French and Brazilian competition authorities.

In 2013 the Bundeskartellamt also chaired the ICN Cartel Working Group together with the US Department of Justice (DOJ) and the Japan Fair Trade Commission (JFTC).

In 2013 a breakthrough was achieved in the drafting of recommended practices for dealing with the abuse of market power in the form of predatory pricing. In spite of the very different international approaches a groundbreaking result was achieved as a result of the principle of consensus applied within the ICN.

OECD/UNCTAD

In 2013 the Bundeskartellamt and the Federal Ministry for Economic Affairs and Energy cooperated intensively at international level in competition-related activities of, among others, the Organisation for Economic Cooperation and Development (OECD) – Andreas Mundt is one of the Vice-Chairs of the OECD Competition Committee – and the United Nations Conference on Trade and Development (UNCTAD).

European cooperation in 2013

The national competition authorities in the EU work very closely together. This applies both to the application of Art. 101 and 102 TFEU as well as merger control:

- Official assistance in 5 cases (Art. 101/102)
- Exchange of confidential information in 15 cases (Art. 101/102)
- In 2013 around 150 mergers were examined by several national authorities. The authorities informed one another about the date of notification and the contact data of the case handlers. The Bundeskartellamt was involved in around 90 cases.
- Cooperation in the in-depth examination of mergers is often made difficult by the different dates of notification. An example of this was the Akzo/Metlac case in 2012 where the deadline for decision by the Bundeskartellamt had expired before the UK Competition Commission started its in-depth examination.

A key focus of the work within the OECD in 2013 was the improvement of the rules for international cooperation in competition law enforcement, one example being the exchange of information across national borders.

ECN

At European level the national competition authorities and the European Commission work closely together to counter cross-border restrictions of competition more effectively. Together they form the European Competition Network (ECN). In 2013 they assisted one another e.g. in searches, and exchanged confidential information which could be used as evidence in proceedings.

The Litigation and Legal Issues Division

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

The division is chaired by Jörg Nothdurft.

Federal Court of Justice confirms constitutionality of cartel fine provisions (Ref. KRB 20/12)

Already in 2003 the Bundeskartellamt had imposed fines against the members of a cement cartel which was active throughout Germany. With the decision of the Federal Court of Justice of April 2013, the fines amounting to a total of around 380 million euros, the highest fine ever imposed in a Bundeskartellamt proceeding, became final.

The decision of the Federal Court of Justice confirmed the constitutionality of the key provision on the fining of competition law violations after the 2005 amendment of the GWB had brought the provision into line with European law.

The Federal Court of Justice held that fines are to be calculated on a statutory scale with 10 percent of the undertaking's turnover as the upper limit. This statement by the highest court also led to the adjustment of the Bundeskartellamt's guidelines on the setting of fines (see p. 36).

2013 statistics

- 5 new cartel fine cases
- 4 new cartel administrative cases
- 150 new private antitrust cases
- 8 *amicus curiae* briefs

of customer allocation agreements in the liquefied petroleum gas sector. The parties have appealed the decision.

Düsseldorf Higher Regional Court confirms Bundeskartellamt decision on reduction of Berlin water prices (Ref. VI-2 Kart 4/12 [V])

Early this year, after an oral hearing had been held in autumn 2013, the Düsseldorf Higher Regional Court rejected the appeal filed by Berliner Wasserbetriebe (BWB) against the Bundeskartellamt's decision from 2012. In its decision the authority had ordered a reduction of Berlin water prices by around 18 percent which BWB had refused to accept.

After the administrative courts had already dismissed complaints claiming the Bundeskartellamt was not the competent authority to deal with this case, BWB ultimately also lost in the civil proceedings. The Higher Regional Court confirmed that, as BWB charges its customers private water prices and not fees under public law, the company is subject to control by the Bundeskartellamt.

The court thus also confirmed the Bundeskartellamt's concept of investigating abusively high pricing. The authority had compared e.g. the revenue achieved by BWB with revenues in other large German cities. BWB has withdrawn its appeal to the Federal Court of Justice. The Bundeskartellamt's decision has therefore become final.

Liquefied Petroleum Gas: Complex proceedings at the court of first instance (Düsseldorf Higher Regional Court, Ref. VI-4 Kart 2-6/10 OWi)

In April 2013, after more than 100 days of court proceedings, hearing approx. 100 witnesses and reading 22 metres of files, the Düsseldorf Higher Regional Court imposed fines of around 244 million euros on five members of the liquefied gas cartel. The court even increased the sanctions the Bundeskartellamt had originally imposed on account



Federal Court of Justice: Local authority owned operators may not be unjustly privileged in the award of concessions (Ref. 65/12 and KZR 66/12)

Last year the Federal Court of Justice issued two decisions of principle on the award of concessions for electricity and gas networks as practised by the municipalities. The court clarified that the award must be carried out in a non-discriminatory and transparent procedure and under competitive criteria. It is not admissible for municipalities to give preference to their own municipal utilities without any objective justification. The consumer-friendly criteria under §1 of the Energy Industry Act must be observed.

The decisions issued by the Federal Court of Justice also confirmed the Bundeskartellamt's practice (see also p. 33). The authority had appeared as *amicus curiae* before the court.



Düsseldorf Higher Regional Court confirms prohibition of a merger in the masonry units sector (Ref. VI Kart 4/12 [V])

In the autumn of 2013 the Düsseldorf Higher Regional Court confirmed the prohibition of a merger between two manufacturers of masonry units, Xella and H+H. The court followed the Bundeskartellamt's view that aerated concrete blocks, calcium silicate bricks and clay bricks belong to a single product market. This case was also the first in which the new test under German merger control (revised in 2013) was applied which, however, did not affect this particular case. The parties have lodged an appeal to the Federal Court of Justice against the refusal of leave to appeal against this decision.

“Particularly in cartel fine cases which involve a large number of parties, the limits of traditional procedural law can be reached. As in other areas of economic crime, improvements could be made here without reducing legal protection.”

Federal Public Procurement Tribunals

The Federal Public Procurement Tribunals are responsible for reviewing tender procedures which are carried out by the Federation or public contracting entities. The review procedure is similar to a court proceeding and is carried out if a company that wishes to participate or has participated in an invitation to tender has found evidence of a violation of public procurement law and applies to the Public Procurement Tribunals for a review of the award procedure. Since 2013 review procedures have been carried out by two instead of previously three Public Procurement Tribunals.

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

The 2nd Public Procurement Tribunal is chaired by Dr Gabriele Herlemann.

The main areas of focus in review procedures in 2013 were the award of rebate contracts for pharmaceuticals or the procurement of medical aids by the statutory health insurance funds, tenders for the restoration of the rail and water transport networks and the procurement of IT services by the Federal authorities. Other procedures concerned construction projects of the Federal Government both in Germany and abroad as well as surveillance and cleaning services.



Defence and security procurements

Subject to an EU directive, the Public Procurement Tribunals have also been responsible since 2011 for reviewing defence and security procurements. In 2013 there was an increase in the number of review proceedings in this area. These concerned awards for e.g. the surveillance of military installations, the purchase of protective clothing and the hire of training helicopters through to the supply of spare parts for and the maintenance of armoured vehicles.

Participation of bidding syndicates in award procedures

In several review proceedings last year legal issues raised by the participation of bidding syndicates played a role. This applied in particular to the statutory health insurance sector. The formation of such syndicates can be problematic from a competition perspective.

On the one hand, combinations of bidders for the submission of a joint offer are positive for competition if they enable the companies to become more competitive and therefore allow them to offer lower prices to the public sector. On the other hand, the formation of bidding syndicates can have a negative effect on competition. This is the case if each member of a bidding syndicate could submit a competitive offer on its own and where the formation of a syndicate eliminates this competitive relationship.

In 2013, for the information of bidders and public contracting entities, the Federal Public Procurement Tribunals stipulated to what extent a public contracting entity may include provisions in the invitation to tender on the admissibility of the formation of bidding syndicates. This decision has meanwhile also been confirmed by the Düsseldorf Higher Regional Court. Other proceedings concerned the exclusion of bidding syndicates from the award procedure because the contracting entity considered the bidding syndicate to be anticompetitive. However, the Public Procurement Tribunals lifted these exclusions because the formation of the syndicates facilitated the submission of cheaper offers and well-functioning secret competition vis-à-vis the other competitors participating in the award procedure was still ensured.



Rebate contract for patented substance

Also of great competitive relevance in 2013 was a proceeding in which a statutory health insurance fund had directly concluded a rebate contract for a patented substance with the owner of a patented pharmaceutical for a period of two years.

Other companies were not included in the award proceedings. On the basis of market surveys, the health insurance fund had concluded that only the patent holder and not pharmaceutical importers was able to cover in full the predicted procurement requirement. In rejection of this a pharmaceutical importer had filed an application for review, which was granted by the Public Procurement Tribunal. In the tribunal's opinion the health insurance fund had de facto pre-empted the outcome of the aptitude test and deprived the importers of the possibility to prove themselves capable of supplying the product in the quantities required. The decision, which has meanwhile been confirmed by the Düsseldorf Higher Regional Court, improves the chances of parallel importers and re-importers to participate in the tenders for rebate contracts for patented pharmaceuticals.

“Stuttgart 21” award proceedings

In 2013 award procedures for the major Deutsche Bahn construction project “Stuttgart 21” were reviewed. This was necessary to clarify whether the services offered by the bidder envisaged for the award satisfied the requirements set by the public contracting entity. This applied both to the technical details of the bidder's offer as well as the legal practicability of its concept.

The review proceedings dealt with complex technical issues such as whether an alternative tender matches the original design plans of the contracting entity.

The Federal Public Procurement Tribunals in figures

- In 2013 127 applications were filed for the initiation of review proceedings.
- The monetary value of the awards on which the Public Procurement Tribunals had to decide in 2013 amounted to over 3 billion euros.
- In 23 cases the tribunals' decisions were appealed to the Düsseldorf Higher Regional Court.

5-week time limit

- The Public Procurement Tribunals have to decide on an application for review within a statutory time limit of five weeks.
- An extension of this time limit is only possible in exceptional cases.
- This ensures that if an application is rejected, public investments can still be carried out without any significant delays.
- If an application for review is granted, the public contracting entity can quickly correct the award procedure.

Such issues justify the reason why the Public Procurement Tribunals decide as a tripartite body, which includes one honorary associate member in addition to one full-time associate member and the chair: The role of the honorary associate member, in particular, is to complement the legal expertise of the two full-time associate members with the technical expertise necessary for the proceedings and with practical knowledge in the area at hand.

1st Decision Division

The 1st Decision Division is competent for the following areas: extraction of ores and other non-metallic minerals, construction industry (building materials, glass, ceramics), real estate and related services and the wood industry. Examples of the division's work in 2013 were a cartel proceeding against the Federal State of Baden-Württemberg on account of the joint marketing of round timber and a proceeding against radius clauses in the lease agreements of outlet centres. In a sector inquiry the Decision Division is also currently examining corporate links between suppliers of ready-mixed concrete. 2013 was also marked by various divestiture measures in the case of suppliers of rolled asphalt following the inquiry into this sector in 2012.

The 1st Decision Division is chaired by Franz Heistermann.



Under scrutiny: company interlocks

Rolled asphalt

In 2013 and 2014, following the sector inquiry, the Decision Division worked towards the break-up of 65 anti-competitive joint ventures between companies active on the rolled asphalt market (as at June 2014).

The sector inquiry had shown that there is a nationwide, closely-knit network of mutual company participations between the asphalt mixing plants in Germany. Such networks can generally lead to mutual dependencies and considerations which are problematic from a competition point of view.

Following the publication of its sector inquiry, the Decision Division had informed the companies concerned of its preliminary assessment as to which individual joint ventures and other interlocks were problematic under competition law. These included initially 104 of in all 133 joint ventures.

The companies were given three months to comment. The companies which were willing to divest had to present a divestiture plan for implementation within 15 months if possible. Around 10 further proceedings (in addition to the 65 already mentioned) could be concluded without divestiture. The Decision Division is continuing with proceedings in which the companies did not agree to divestiture meas-

ures. These will result within the near future in further break-ups initiated by the companies themselves or in the issue of formal orders to divest.

Sector inquiry into ready-mixed concrete

In 2013 the Decision Division launched a sector inquiry into the ready-mixed concrete sector in order to examine corporate interlocks between suppliers in this market and their effect on competition. The major suppliers of the pre-product "cement" are also active on the ready-mixed concrete markets and hold shares in joint ventures.

The aim of the inquiry is to establish the extent of these interlocks and to achieve where necessary improvements in the market structure by means of appropriate administrative proceedings.

Key figures for 2012

Ready-mixed concrete

- Number of plants: 1,905
- Turnover: around 3 billion euros
- Production: 46 million cubic metres of ready-mixed concrete
- Number of employees: 9,000

Source: Federal Association of the German Ready-Mixed Concrete Industry (Bundesverband der Deutschen Transportbetonindustrie e.V.).

Rolled asphalt

- Number of plants: 541
- Turnover: 1,912 million euros
- Sales within Germany: 47.9 million tonnes
- In more than 90 percent of the cases rolled asphalt is the material used for road surfacing in Germany
- Largest buyer: Public sector with about 85 percent of the rolled asphalt produced

Source: Bundeskartellamt, 2012 Sector Inquiry into rolled asphalt industry.



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

The Decision Division is examining the system used by the State of Baden-Württemberg for marketing timber. Baden-Württemberg markets wood via its state company Forst BW not only from its own state forest but also from municipal and private forests. Forst BW negotiates the prices for all forest owners, determines the customers and sets the conditions for sale. Bundling distribution, sales and marketing among competitors in this way is prohibited under the GWB.

The proceeding also covers services in preparation for timber sales, invoicing and accounting. Via these services the State of Baden-Württemberg gains competition relevant information about the timber sales of its competitors, e.g. their respective customers, the categories and qualities of timber sold or their sales conditions and prices.

According to the Decision Division's assessment to date, owners of forest areas of less than 100 hectares will still be able to conduct their sales via Forst BW. Marketing co-operations of municipalities or other public law corporations among themselves or with private forest owners without the participation of the State of Baden-Württemberg will also remain exempted to a relatively large extent from the ban on cartels.

The parties to the proceeding were given an opportunity to comment on the Decision Division's preliminary legal opinion of the situation. The State of Baden-Württemberg has submitted several concrete proposals for a consensual solution which the division is now examining in closer detail.



Factory outlet centres

- Collection of shops at one common site
- Centrally planned, realised and administrated by one operator
- Manufacturers offer their branded goods at a reduced price
- Currently nine factory outlet centres in Germany, some of them with a sales area of over 20,000 square metres and more than 100 shops

Radius clause of factory outlet centres

The Decision Division has initiated an injunctive proceeding against the operator of the factory outlet center Wertheim Village, VR Franconia GmbH. Via a radius clause in its lease agreements the operator of the outlet centre prohibits its tenants from opening shops in another factory outlet centre within a radius of 150 kilometres of Wertheim. The operators of a fashion outlet centre which is 147 kilometres away from Wertheim have met with considerable problems in acquiring tenants because of this clause.

The Decision Division holds the preliminary view that radius clauses generally violate competition law. Following the comments made by VR Franconia GmbH the Decision Division has conducted a comprehensive market survey and is currently evaluating the results of this survey. This proceeding is expected to be concluded in the summer of 2014.

2nd Decision Division

The 2nd Decision Division is responsible for agriculture, the food industry, leather and leather goods, shoes, cleaning agents and toiletries, and the wholesale and retail trade in food and beverages. In the past year, one of the major cases on which the Decision Division worked was a cartel proceeding against three large German sugar manufacturers. Other important proceedings, such as the proceeding against the natural cosmetics manufacturer WALA and a test case against the sportswear manufacturer ASICS, concerned agreements between manufacturers and their dealers. A recurring issue in the Decision Division's work is the food retail trade in Germany. Last year the Decision Division also continued its sector inquiry into the food retail sector and examined the competition conditions on the food retail procurement markets.

The 2nd Decision Division is chaired by Birgit Krueger.



Fine proceedings against sugar manufacturers

In 2013 the Decision Division conducted cartel proceedings against the three major German sugar manufacturers Pfeifer & Langen GmbH & Co.KG, Südzucker AG Mannheim/Ochsenfurt and Nordzucker AG. In early 2014 it imposed fines amounting to around 280 million euros on the companies and seven individuals personally involved for concluding anti-competitive agreements on sales areas, quotas and prices.

The sugar manufacturers had formed a "territorial cartel" and for many years had agreed to generally limit their sales of sugar in Germany to their respective sales areas. The territorial agreement was protected by measures to guarantee prices and quantities in Germany and to control imports and exports.

In the proceedings Nordzucker AG fully cooperated with the Bundeskartellamt under the authority's Leniency Programme. All the companies concerned agreed to have the proceedings terminated by settlement.

WALA: vertical resale price maintenance for natural cosmetics

The Decision Division has imposed fines amounting to a total of 6.5 million euros on WALA Heilmittel GmbH and representatives of the company. WALA had put pressure on retailers for years, obliging them to comply with its recommended prices for its natural cosmetics products sold under the brand name "Dr. Hauschka".

In summer 2007 WALA introduced a selective distribution system with the help of so-called "depot contracts". The conclusion and duration of these contracts were also made subject to the retailers' adherence to the recommended prices. The contracts also contained clauses restricting internet sales which further helped to enforce the vertical price fixing measures.

A settlement agreement was reached with WALA and its representatives involved. WALA has amended its distribution agreements and revised the problematic clauses which in the Decision Division's view were aimed at vertical resale price maintenance and restricting internet sales. Consequently, the proceedings could be discontinued.

Selective distribution: test case against ASICS

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

Selective distribution

- Distribution exclusively via selected retailers
- Selection of dealers is based on predetermined criteria
- Selection criteria must be objectively plausible and non-discriminatory
- Selective distribution systems can contain anti-competitive terms and conditions which harm retailers and consumers

The Bundeskartellamt has received several more complaints from retailers about the selective distribution systems of other brand manufacturers which also prohibit sales via third party platforms. The proceedings against ASICS are considered a test case. On preliminary examination, the Decision Division holds the view that the distribution system contains a number of serious restrictions of competition. The proceedings are expected to be concluded within the course of the year.

Food retail trade

The food retail market in Germany is highly concentrated. The four major food retailers EDEKA, REWE, Aldi and the Schwarz group (to which Lidl belongs) together share more than 85 percent of the market. In various merger control proceedings in the past years, the Bundeskartellamt has examined the local competitive situation for consumers to find out whether even after a takeover there were still a sufficient number of shopping alternatives for consumers at the location.

In the more recent past the Decision Division has also increasingly examined the procurement markets, in particular the question of whether there are competition restraints in the relationship between retail groups and their suppliers and manufacturers.

Abuse proceedings against EDEKA - "wedding rebates"

After its takeover of the Plus stores, EDEKA had demanded special conditions from its suppliers in different product areas. In the Decision Division's view this constituted an abusive practice because EDEKA demanded benefits from its suppliers without an objective justification. The proceeding is in the final stages of conclusion.



Participation of REWE in Wasgau AG

REWE and Wasgau had planned a purchasing cooperation which in the view of the Decision Division raised serious competition concerns. The two companies therefore decided to merge instead. The merger was cleared by the Decision Division because it did not lead to market dominance either on the procurement or sales markets.

Sector inquiry on buyer power

The sector inquiry aims to establish a solid data base for the demand market and shed more light on the significance of buyer power. In a first investigative phase, the Decision Division has already conducted a survey on company and market structures in the food procurement sector.

In the second phase the Bundeskartellamt is investigating whether and to what extent the leading food retailers enjoy purchasing advantages over their competitors, and what effects such advantages have on competition in the sales markets. The authority plans to publish the results of the sector inquiry this summer.

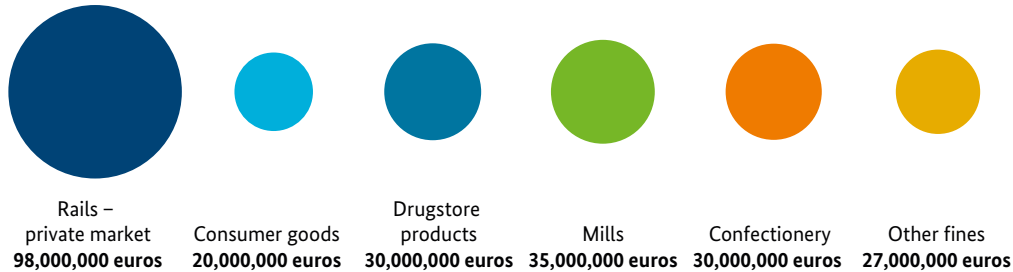
Sector inquiry 2013

- The inquiry analyses around 3,100 bilateral agreements with 33 millionen data provided by 180 manufacturers and 30 retail companies.
- The Decision Division is analysing quantities, turnover, list prices and conditions for a representative sample of 250 products.

Data and facts

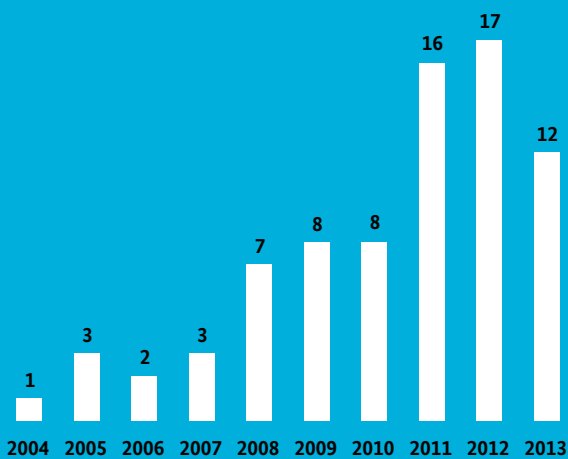
Fines imposed in 2013

total of approx. 240,000,000 euros*

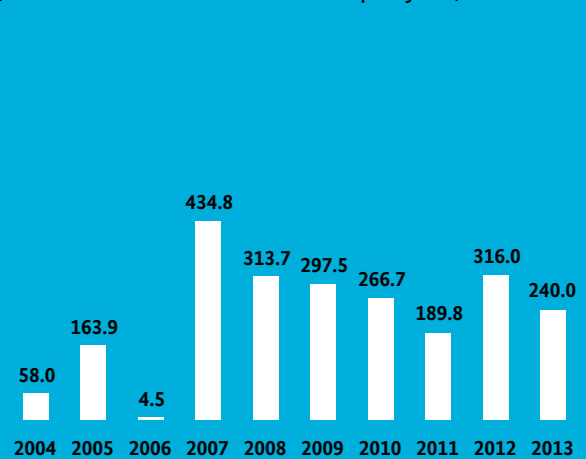


* The figures are rounded values.

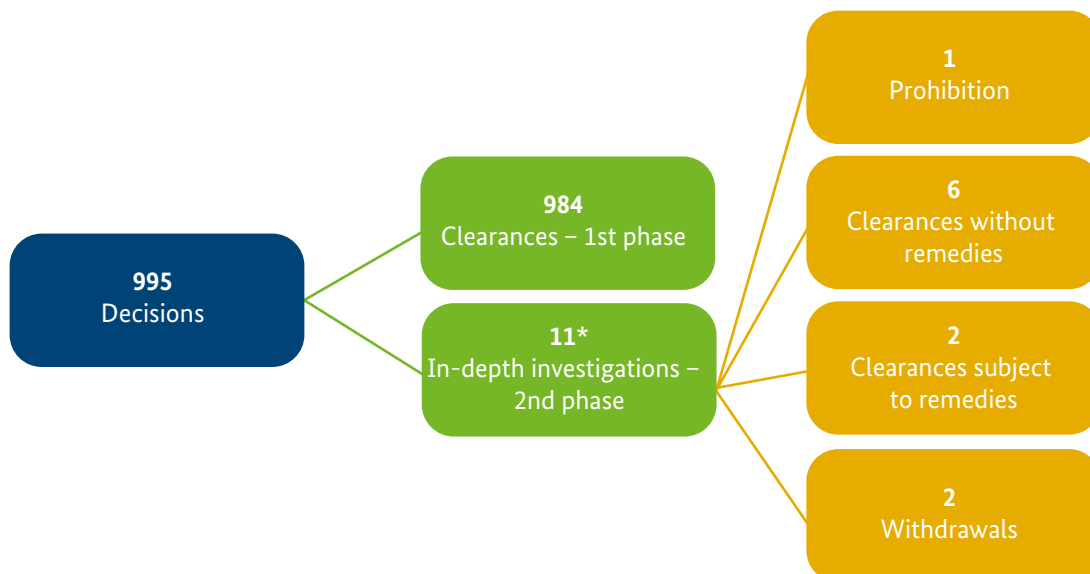
Cartel proceedings concluded by the Bundeskartellamt from 2004 to 2013



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

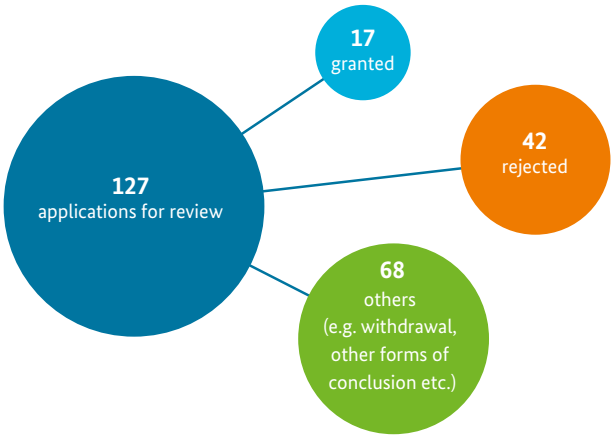


Merger control: Bundeskartellamt's decisions in 2013

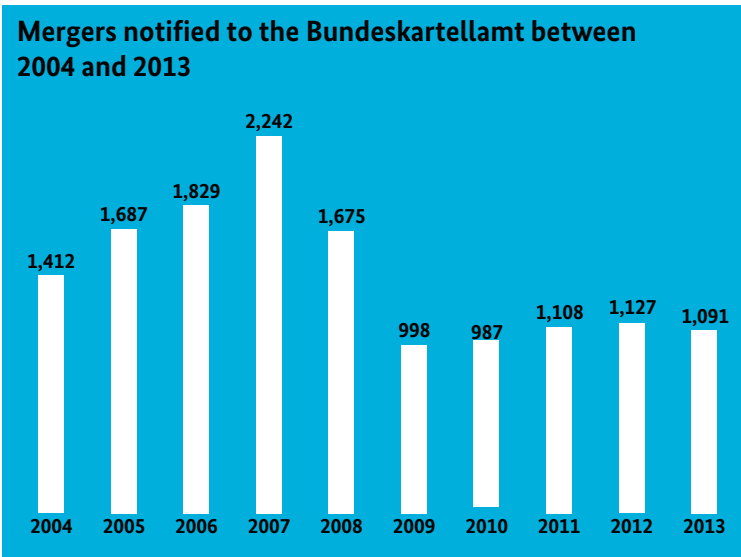


* In 2013 seven more mergers were examined in second phase proceedings which were not yet concluded on 31.12.2013.

Practice of the Federal Public Procurement Tribunals in 2013



Abuse of dominance proceedings in figures



3rd Decision Division

The activities of the 3rd Decision Division cover the health sector, including health insurance, hospitals, pharmacy and medical technology as well as the chemical and textile industries. In the last year a particular area of focus was on the health sector with some major consolidations in the hospital market and proceedings regarding competition between ophthalmologists. The Decision Division also carried out investigations on the online marketing of sportswear.

The 3rd Decision Division is chaired by Eberhard Temme.

adidas AG: Examination of the selective distribution system

The increasing importance of e-commerce has caused many brand manufacturers to restructure their distribution systems. This involves changes in the requirements to be met by their retailers, which also often raises competition law issues. Internet-specific issues have increasingly become the focus of the Bundeskartellamt's proceedings.

In proceedings against adidas AG, the 3rd Decision Division is currently examining the effects of e-commerce distribution requirements imposed by this sports equipment manufacturer and their possible restriction of online trade. The examination focuses inter alia on the prohibition by adidas of the sale of its products via open third-party platforms such as eBay and Amazon.

Last year the Decision Division carried out an online survey of approx. 3,000 retailers which offer products manufactured by adidas AG in brick-and-mortar and online outlets as well as more than 90 manufacturers of sports equipment. The Decision Division plans to conclude the proceedings in 2014.



Competition among ophthalmologists from different federal states in Germany

The Bundeskartellamt has increased competition between ophthalmologists in the federal state of Brandenburg. The Brandenburg ophthalmologists' cooperative and the health insurance fund AOK Nordost had only allowed those ophthalmologists who were accredited in Brandenburg to provide health care services within the statutory health insurance scheme, to participate in specific selective contracts and become members of the cooperative. Competition from ophthalmologists accredited in other federal states was consequently appreciably restricted. By means of commitments undertaken by the Brandenburg ophthalmologists cooperative and AOK Nordost, the Bundeskartellamt succeeded in having these restrictions removed.

Mergers of health insurance funds

With the entry into force of the 8th Amendment to the GWB in 2013 the Bundeskartellamt has also become responsible for examining mergers between health insurance funds. In the light of the strong consolidation in this sector, this was an appropriate decision.

Trends in e-commerce

Nine out of ten internet users shop online.

40 percent of them regularly use the internet for their purchases, i.e. more than ten times a year

Products which are most frequently purchased online: Books (64 percent), followed by shoes, clothing and accessories (60 percent)

Source: BITCOM, Trends in e-commerce.



The Decision Division cleared all mergers between health insurance funds that were notified in 2013 in the first phase of merger control. These include e.g. the merger of the company health insurance funds Betriebskrankenkasse Mobil Oil in Celle and Hypo Vereinsbank Betriebskrankenkasse in Munich.

Merger control in the hospital sector

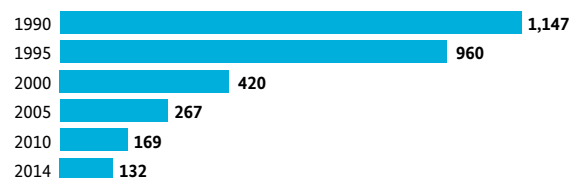
Irrespective of their operators (municipal authorities, churches, private operators) hospitals are active as entrepreneurs and compete with one another. Due to strict legal provisions there is almost no price competition in this area. It is therefore important first of all to maintain competition on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

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

Fresenius/Rhön: Largest German hospital merger project

In February 2014 the Decision Division cleared what has so far been the largest merger project of hospital operators in Germany. The health care group Fresenius SE & Co. KGaA, which owns, inter alia, the Helios clinics, acquires 40 clinics and 13 medical care centres operated by Rhön-Klinikum AG.

Development of the number of health insurance funds:
Concentration through mergers



Source: GKV-Spitzenverband (German National Association of Statutory Health Insurance Funds).

The project originally included four further locations. This part of the project was abandoned due to competition concerns expressed by the Decision Division. Apart from the regional overlaps in in-patient care, the examination also focused on the demand side and the vertical relationship between Fresenius as a manufacturer of medical products and Rhön as its customer. In contrast to the analysis of the markets from the patients' perspective, no regional market definition was applicable in this case because the hospital operators buy medical products at least on a nationwide basis. The hospital groups concerned still have relatively low market shares on these markets in spite of increasing consolidation in the sector. For this reason the acquisition did not raise any substantial concerns.

Asklepios/Rhön: Subsequent prohibition

In June 2013 the Decision Division retroactively prohibited plans by Asklepios Kliniken Verwaltungsgesellschaft to acquire a stake in its competitor Rhön-Klinikum AG.

The project had initially been cleared subject to the condition that a clinic and a medical care centre in the Goslar region be sold to a third party. This was to prevent the merger from strengthening Asklepios' dominant position in the Goslar region. As Asklepios no longer intended to comply with this condition the whole project was retroactively prohibited.

Hospital mergers

- From 2003 to 2013 the Bundeskartellamt examined a total of more than 200 hospital mergers.
- 166 mergers were cleared and 6 prohibited.
- The remaining cases were either not subject to merger control or the proceedings have not yet been concluded.

4th Decision Division

The activities of the 4th Decision Division cover the sectors of waste management, banks, insurance, financial and other services. A particular area of focus last year was on payment systems. The Decision Division investigated inter alia large mergers of companies offering cash handling services (CIT). It is also committed to maintaining competitive structures in the waste management sector.

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



electronic cash: Standard charges for retailers abandoned

Proceedings against standard charges for retailers for the use of the electronic cash card payment system have been concluded with commitments by the leading banking associations. The banking associations have undertaken to abandon the standard charge for retailers which the Decision Division viewed as a restriction of competition.

Up to now retailers in Germany have paid a standard charge jointly set by the banking associations for each payment transaction with girocard (formerly ec card) of 0.3 percent of the respective sales volume, at least 0.08 euros.

The Decision Division initiated the proceedings after some retail chains had abandoned the system and were able to negotiate discounts with the banks. This will now become possible for all retailers. Even smaller retailers can conduct such negotiations jointly, through so-called concentrators.

electronic cash is by far the leading card payment system on the German market, with an annual transaction volume of 128 billion euros. The revenue earned by the financial institutions from the charges for retailers amounts to well above 300 million euros per year.

The most important competitive product and an alternative for retailers is the electronic direct debit system (ELV) which uses the girocard to process a direct debit.

Online transfers

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

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

In this matter the Bundeskartellamt is maintaining close contact with the European Commission. In 2012 the European Commission presented its Green Paper on card, internet and mobile payments in Europe.

Payment behaviour in Germany

- Germans use cash for 53 percent of their expenditure on goods and services.
- The girocard (formerly ec card) is used for 28 percent of total expenditure.
- The credit card is used for 7 percent of total expenditure.
- The remaining payments are made mainly via bank transfers and online e-payment schemes.

Source: Survey of Deutsche Bundesbank
"Payment behaviour in Germany in 2011".



Mergers of cash handling (CIT) companies

In July 2013 the Decision Division cleared the acquisition of Brink's Deutschland GmbH and Brink's Transport und Service GmbH by the Madrid-based company Prosegur Compania de Seguridad SA subject to conditions. The companies undertook to sell a substantial share of their business in the Greater Berlin area to competitors prior to the acquisition. The parties have meanwhile fulfilled the conditions.

The acquisition of Brink's by Prosegur would have led to the creation of a dominant position in Berlin. Brink's is the leading provider in Berlin, followed by Prosegur. All the other providers that are active in Berlin are mainly medium-sized and small companies, and some of them do not offer the complete range of cash handling services. Larger competitors are either not represented in Berlin or, if at all, only with minimal market shares.

A further merger project, the acquisition of Unicorn Geld- und Wertdienstleistungen GmbH by Ziemann Sicherheit Holding GmbH, could be cleared without any conditions or obligations. The investigations showed that the merger was not expected to create or strengthen a dominant position or pose any other significant impediment to effective competition in any of the regional markets affected.

Competition in the waste management sector

From a competition perspective waste management markets are often regional or local markets. In many of these markets there is a small number of companies with high market shares. An ongoing consolidation can be observed with the tendency of large market participants to increasingly realign their market areas. This increases the risk of mergers leading to considerable restrictions of competition. The Decision Division also critically examines co-operations between waste management companies for their conformity with competition law requirements.



Sector inquiry into waste management compliance schemes ("dual systems") 2012 Results

- Opening up of the sector to competition in 2004: The number of suppliers has since risen from one to nine
- Wave of innovation in waste collection and sorting – higher quality recycling
- Savings in waste management costs throughout Germany of approx. 1 billion euros
- Saving of 50 euros per year for a family of four

A special focus is placed on the competition between operators of compliance schemes in packaging disposal.

In the legislative process the Bundeskartellamt has always advocated protecting competitive structures and striven to counter a monopolisation of waste management by the local public authorities. The Federal Government is currently working on an amendment of the Packaging Ordinance. Further discussions are taking place on whether a law on material recycling is needed to enable the collection of other recyclable household waste apart from packaging waste in the 'yellow bin'.

In 2013 the topics dealt with by the Decision Division included:

- the suspicion of agreements relating to invitations to tender issued by municipal authorities for waste management services in southern Germany,
- several mergers proposed by waste management companies,
- the acquisition of several business operations of the company SITA by its competitor REMONDIS in Baden-Württemberg.

5th Decision Division

The 5th Decision Division is responsible for the areas of mechanical and plant engineering, the metal industry, iron and steel, measurement and control technology, and patents and licences. Last year the Decision Division's activities focussed on the sanitary, heating and air conditioning sector and the restriction of online trading.

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

Abandonment of dual pricing system by garden product manufacturer

In 2013 the Decision Division conducted proceedings against the garden product manufacturer GARDENA. In granting retailer discounts the company had differentiated between the forms of distribution. Its sales price to the retailer depended on whether the product was sold online or in the retailer's store.

The Decision Division viewed this form of discount-setting as an illegal dual pricing system. The staggered discounts were structured in such a way that only brick-and-mortar retailers were able to benefit from the full discount.

It is generally recognised under German and European competition law that where brick and mortar retailing involves higher costs for retailers than online sales, the manufacturer can make allowances for such costs, for example, in the form of a contribution towards fixed costs. However, it is inadmissible to generally discriminate against online distribution.

Dual pricing systems

- Manufacturers offer worse conditions for products sold over the internet
- Less incentive for retailers to sell over the internet
- Problematic competition restraint under German and European law



The proceedings could be discontinued after GARDENA agreed not to differentiate between the form of distribution in future when granting retailer discounts.

The Decision Division is currently examining the discount structures for online distribution of other companies.

Consolidation of scrap trade

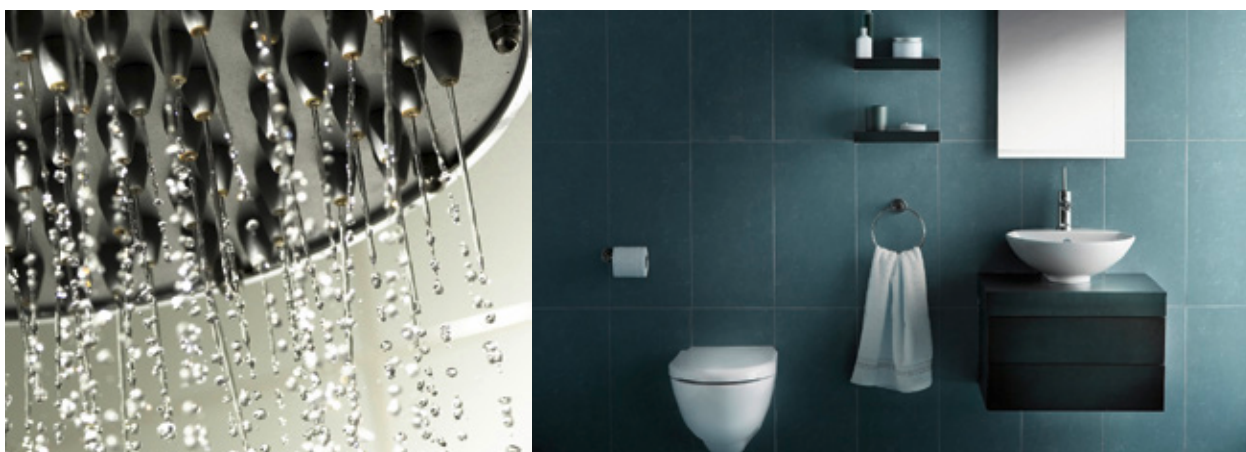
Changes in the market usually spark waves of consolidation in different sectors. The fall in scrap prices increased the economic pressure for restructuring measures in the scrap trade.

Last year the Decision Division examined and cleared four major mergers in the markets for iron scrap and non-ferrous metal scrap (e.g. copper, aluminium, zinc).

The three largest scrap traders in Germany, TSR Recycling GmbH & Co. KG, the Interseroh group and Scholz AG participated in the merger projects.

In the past the scrap markets were primarily regional markets. Meanwhile the collection radiuses have widened. The procurement markets for iron scrap, and in particular for the distinctly more valuable non-ferrous metal scrap can now be assumed to be large supra-regional markets.





From a demand-side perspective, however, the scrap trade is at least national. Non-ferrous metal scrap is also regularly sold to other European countries.

Focus on sanitary, heating and air conditioning sector

Proceedings in the sanitary, heating and air conditioning wholesale trade

The Decision Division is currently conducting proceedings against wholesalers in this sector. It is examining pricing strategies and whether the wholesalers have coordinated or agreed on prices.

The EU Commission has also conducted investigations in this sector and in 2013 imposed heavy fines on 17 manufacturers of sanitary products. Attempts by the manufacturers to maintain the three-tier distribution channel from the manufacturer to the installer via a wholesaler as an exclusive distribution channel are still evident.

This is accompanied by a high degree of price intransparency which can hinder competition from internet dealers and building supply stores.

Merger between wholesalers of sanitary, heating and air conditioning installations

After intensive examination a merger between wholesalers in this sector was cleared. At the end of 2013 the Decision Division examined the acquisition of a business unit of Praetner GmbH & Co. Handels KG by Cordes & Graefe KG.

Cordes & Graefe is by far the number one wholesaler of sanitary, heating and air conditioning installations in Germany and is pursuing an expansion strategy. The company holds a strong market position both in the national procurement markets as well as in many regional sales markets.

In its investigations the Decision Division extensively asked manufacturers, wholesalers and installers of sanitary, heating and air conditioning installations as well as building supply stores and internet dealers for their comments on the intended merger. Many market participants expressed concern not so much about the merger project as Cordes & Graefe's general growth strategy.

The project could ultimately be cleared. There is still sufficient competition from other companies in the regional markets affected by the project. The acquisition only results in a marginal improvement of Cordes & Graefe's market position vis-à-vis manufacturers and suppliers and so is unlikely to create or strengthen a dominant position on the procurement markets either.

6th Decision Division

The 6th Decision Division is responsible for the areas of media, culture, sports and entertainment, the advertising industry, the paper industry and trade fairs. Last year, the Decision Division was largely preoccupied with mergers in the media sector. Other relevant proceedings concerned the examination under competition law of the online platform “Germany’s Gold” of the two public broadcasting groups ARD and ZDF and the competitive relevance of the price parity clause used by the online retailer Amazon.

The 6th Decision Division is chaired by Julia Topel.

Springer/Funke merger project

The Decision Division is currently examining one of the largest merger projects in recent times in the print media sector. The media group Funke Mediengruppe intends to buy several titles of Axel Springer SE. It also plans to create two joint ventures in the areas of distribution and marketing of advertisements. The complex merger project has been divided into four different packages that will be examined separately. In a first step the Bundeskartellamt has already cleared the takeover of the local newspapers Hamburger Abendblatt and Berliner Morgenpost, as well as several advertising newspapers and women’s magazines by Funke Mediengruppe.

The second part of the proceeding concerned the planned takeover of several TV programme magazines by Funke. In the Bundeskartellamt’s assessment, the takeover of the magazines would have further strengthened the existing dominant oligopoly on the reader and advertising markets for TV programme magazines. The parties to the merger therefore proposed the sale of several of their TV programme magazines to an independent third party.

In the Decision Division’s assessment, this enabled the media group Klambt Mediengruppe to enter the market which helped to prevent anticompetitive effects of the merger. As a result, the second part of the merger project could also be cleared subject to conditions and obligations. The decision was not appealed.

The Decision Division is currently examining possible forms of cooperation (in particular the creation of one or more joint ventures) between Funke and Springer in the areas of distribution and marketing.



The failing firm defence

A merger can be cleared although it will create or strengthen a dominant position if ...

- the target company is a failing company, which has to be proved by adequate documentation.
- in case of the target’s market exit, the acquiring company would largely gain the target company’s market position.
- there is no alternative to the merger project that would be less harmful to competition, in particular there is no alternative buyer.

In 2013 the 8th Amendment to the GWB introduced a special provision for takeovers of small and medium-sized newspaper and magazine publishing houses. The new provision stipulates lower requirements for the clearance of a merger under the failing firm defence in this sector.

FAZ/FR: clearance under the failing firm defence

In February 2013, the Bundeskartellamt cleared plans by Frankfurter Allgemeine Zeitung GmbH, or rather its printing house, to acquire the publishing business of the daily paper Frankfurter Rundschau from the insolvent Druck- und Verlagshaus Frankfurt am Main, although this created a monopoly. One of the objectives of the merger proceedings was to examine whether the failing firm defence applied and the market position of Frankfurter Rundschau would accrue to FAZ anyway should the Frankfurter Rundschau disappear from the market or whether there were any alternative buyers.

Funding through advertising in the media sector

In the media sector, advertising plays a significant role in the generation of turnover. Most private German radio and TV programmes are offered free of charge to the audience and are financed through advertising breaks. Many media objects are 50 percent funded by advertising and 50 percent by sales revenue. Therefore, both the viewer/reader/listener markets on the one hand and the advertising markets on the other usually have to be considered in the examination of mergers or other projects in the media sector.

Net advertising revenue 2013 per advertising medium (Selection)

- TV advertising around 4.1 billion euros
- Dailies just under 3 billion euros
- Popular magazines just under 1.3 billion euros
- Online offers around 1.15 billion euros

Source: Federation of German Advertising Industry (ZAW)/
Federation of German Newspaper Publishers (BDZV).

The project gave no cause for concern under merger control aspects with regard to its effects on the national reader and advertising markets, on which the publications of the parties to the merger are represented. The examination therefore focused on the regional markets in the Frankfurt Rhein-Main area. There was no doubt that the merger would strengthen the dominant position of FAZ on the regional reader and advertising markets. However, as the failing firm defence applied, this was to be expected even without the merger.

“Germany’s Gold”: joint online platform of ARD and ZDF under examination

In September 2013 the public service broadcasters ARD and ZDF gave up their joint online platform for the distribution of TV content, which they had set up via commercial subsidiaries together with eleven other production and licensing companies.

The Bundeskartellamt had expressed competition concerns about the business model of Germany’s Gold. The joint online marketing of videos against payment whose production was mainly financed by user fees would not only have led to a coordination of prices and availability of the videos; it was also likely that alternative platforms would have no or only limited access to the videos.

The Bundeskartellamt had therefore called on the companies to design the business model of their platform in such a way that it complied with competition law and to grant alternative platforms non-discriminatory access to productions financed by user fees. Ultimately, the companies were not willing to make such amendments.



Already in 2011 the Bundeskartellamt had prohibited a proposed joint venture by RTL interactive GmbH and Pro7Sat.1 Media AG for the launch and operation of an online video platform (“Amazonas”). The joint venture in its planned form would have further strengthened the dominant duopoly held by the two broadcasting groups on the German TV advertising market. Also in this case the parties were not willing to amend their business model in such a way that it complied with competition law.

Proceeding against Amazon: online retailer drops price parity clause

In 2013 the Decision Division initiated proceedings against the online retailer Amazon because of its business model for the Amazon Marketplace, in particular the obligation of Marketplace sellers to observe Amazon’s price parity clause. The proceedings could be terminated that same year after Amazon had removed the price parity clause from all of its contracts with sellers.

The price parity clause prohibited sellers from selling products they offered on Amazon Marketplace cheaper anywhere else on the internet. The prohibition applied to other internet market places, such as eBay, as well as on-line shops owned by the sellers themselves. Since 2012, Amazon had monitored and enforced compliance with its price parity demands. Amongst other things, Amazon threatened to withdraw its permission to sell via amazon.de.

During the proceedings the Bundeskartellamt conducted a web survey of 2,400 sellers who offer their products on Amazon Marketplace. The survey provided detailed information on the effects of the price parity clause and the relevance of Amazon Marketplace as a distribution channel.

7th Decision Division

The activities of the 7th Decision Division focus on the area of telecommunications and broadcast engineering, EDP, household equipment and electro-technology. An area of particular attention last year were merger cases involving large cable network operators and telecommunications companies. Other proceedings dealt with restraints of competition in online trading.

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

Kabel Deutschland prohibited from taking over Tele Columbus

In 2013 the Decision Division prohibited the merger between Kabel Deutschland Holding AG and the cable network operator Tele Columbus.

The merger would have further strengthened the oligopoly of Kabel Deutschland and Unitymedia KabelBW on the German retail TV services market. On this market the cable network operators compete for the delivery of TV signals to residential premises with multiple housing units via a broadband cable network.

Competition in the feed-in market, i.e. the relationship between cable network operators and TV channels, as well as in the market for the delivery of TV signals would have been restricted due to the extended range of operation which Kabel Deutschland would have gained from the acquisition.

Although the planned merger would have improved to some extent the offer of telephony and internet access in competition with Deutsche Telekom, these improvements would not have outweighed a substantial worsening of structural and competitive conditions in the supply of TV services.

The major cable networks in Germany

- With about 8.5 million customers, Kabel Deutschland is the largest cable network operator in Germany.
- Unitymedia KabelBW has around 7 million customers, most of which are in North Rhine-Westphalia, Hesse and Baden-Württemberg.
- Tele Columbus provides approx. 1.6 million households with cable connections.



Kabel Deutschland was not prepared to sell the urban network areas operated by Tele Columbus, which in the Decision Division's view raised the most competition concerns, to a third party in order to eliminate the negative effects on competition. Kabel Deutschland's offer to sell networks in Berlin, Dresden and Cottbus corresponded to less than half of the volume that would have been required.

Liberty Global/Kabel Baden-Württemberg – judicial repercussions

At the end of 2011 the Decision Division had already cleared the acquisition of Kabel Baden-Württemberg by Unitymedia (subsidiary of Liberty Global) under strict conditions. The competitors Deutsche Telekom and NetCologne objected to this decision. Last year the Düsseldorf Higher Regional Court reversed the decision. The court considered the obligations insufficient. If this decision were to become final the Decision Division would have to review the merger case. The Federal Court of Justice is currently examining whether to grant an appeal against the decision.

Merger control: Brussels or Bonn?

- **Competence according to volume of turnover**
Rule of thumb: The EU Commission is the competent authority if the combined turnover of all the companies involved is greater than 5 billion euros.
- **Referral possible**
 - Commission to Member State:
Threat of restriction of competition, affects a separate market in the Member State
 - Member State to Commission:
The project would otherwise have to be examined in at least three Member States



Telefónica Deutschland/E-Plus – Cooperation with the European Commission

In July 2013 plans to merge the number 3 and 4 providers on the German mobile phone markets were made public. The merger project had to be notified to the European Commission because the combined turnover of the companies was more than 5 billion euros.

The Bundeskartellamt sought to have the proceedings referred for examination in Germany because the effects of the project on competition are limited to Germany.

The Commission refuses to refer the case and has been examining the project since October 2013. The European competition authority is closely cooperating with the Bundeskartellamt in the examination of the case.

Restriction of online trading

Sennheiser lifts its ban on sales via Amazon Marketplace

In the autumn of 2013 the Decision Division examined certain clauses of the new selective distribution contracts of Sennheiser Vertriebs- und Service GmbH under competition law.

The clauses contained a ban on marketing via third party platforms: This excluded the sale of Sennheiser products on electronic market places such as eBay or Amazon Marketplace and hence substantially restricted online distribution. The Decision Division came to the conclusion that Sennheiser GmbH, which has generally authorised the Amazon platform as a dealer in its selective distribution system, cannot prohibit its other dealers from selling goods via Amazon Marketplace.

In order to dispel concerns about competition in the market, Sennheiser has lifted its ban on the sale of goods via its dealers on Amazon Marketplace.

Bosch und Siemens Hausgeräte stops dual pricing system

In 2013 Bosch und Siemens Hausgeräte GmbH introduced a new discount system for its dealers. The Decision Division criticised that the system put so-called hybrid dealers at a disadvantage who sold household appliances in both their brick-and-mortar stores and online shops.

On account of the discount system, the more turnover hybrid dealers generated via their online shops, the lower the discount they received. The discount system thus created incentives for the dealers to limit their online sales.

This restricted competition in online trading. Bosch und Siemens Hausgeräte GmbH has informed all its dealers affected in writing that it has discontinued its previous discount system. As a consequence, in future the same discount can be obtained for brick-and-mortar and online sales.



8th Decision Division

The 8th Decision Division is active in the areas of mineral oil, water and mining. It also covers the gas, electricity and district heating sectors. In 2013 one of the division's main areas of focus were abuse control proceedings relating to excessive water prices. In the same year the Market Transparency Body for the gas and electricity wholesale markets was set up, the competencies for which are jointly shared by the Bundeskartellamt and the Bundesnetzagentur (Federal Network Agency). Another joint project is the annual Monitoring Report on developments in the German electricity and gas markets. The Decision Division has monitored a number of municipal procedures for the reallocation of concessions for the operation of gas and electricity networks. In the mineral oil sector the focus lay with the launch of the Market Transparency Unit for Fuels.

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



Abuse control proceedings in respect of water prices

There are more than 6,000 water suppliers in Germany. They have a supply monopoly in their water pipe network and are hence not exposed to any competition. This makes an effective abuse control of water prices necessary.

Recently the Decision Division has conducted a number of abuse control proceedings against water suppliers, which led to a considerable reduction in the price of water. Proceedings against the public utility Stadtwerke Mainz were concluded after the utility submitted an undertaking to the Bundeskartellamt to reduce its water prices by around 15 percent as from 1st January 2013. In early 2014 the Düsseldorf Higher Regional Court rejected an appeal by the Berlin water supplier Berliner Wasserbetriebe (BWB) against the Decision Division's order in 2012 for it to lower its water prices. For customers in Berlin this means that they will be spared a total of approx. 255 million euros for the period from 2012 to 2015. In addition, as part of a settlement, the Decision Division has obtained a commitment from BWB that the price reduction will continue to apply for three more years from 2016 to 2018, meaning that customers in Berlin will be spared approx. 185 million euros more, i.e. in total approx. 440 million euros.

Since the 8th Amendment to the GWB came into force in the summer of 2013 the Bundeskartellamt can still examine water prices charged under private law but not public water charges. The "switch to charges" has become a real problem. Water suppliers can quite easily restructure themselves.

"Switch to charges": Proceedings against Wuppertal water supplier

The Decision Division is currently investigating the Wuppertal water supplier, WSE Energie & Wasser AG, on suspicion of its charging abusively excessive prices for drinking water.

From 2008 to 2010 the Wuppertal water supplier earned the highest revenue in Germany from the supply of drinking water. However, the amount invested in improving the water supply network was only below average.

As a reaction to the proceedings the city of Wuppertal has reorganised its water supply network and placed it in the hands of a local authority-owned operator with the aim to have current and future water charges exempted from control under competition law. The Decision Division is now continuing the proceedings on account of pricing in the past.

Water supply in Germany

- In 2013 an average household paid approx. 206 euros for 80 cubic meters of drinking water.
- Over 6,000 water suppliers in Germany
- Price differences of up to 100 percent
- Competition authorities are only responsible for monitoring water prices.
- Under public law charges for water are not subject to control under competition law.



Remunicipalisation of electricity and gas networks

As contracts from the 90s will expire in the next few years, several thousand concessions for the operation of electricity and gas networks will be newly awarded nationwide in Berlin, Hamburg, Stuttgart, Bremen and Leipzig, among other cities. A trend towards remunicipalisation is apparent. In individual cases municipalities try to give their own utilities preference in the award decision.

The legal criteria which have to be complied with in the award of new contracts rule out such preferential treatment. Under the Energy Industry Act and the GWB the bidder with the best offer should receive the award. The network should operate in a secure, affordable, consumer-friendly, efficient and environmentally friendly way. The bidders which are best suited to ensure these objectives must be selected in a non-discriminatory manner.

In 2010 the Bundeskartellamt, together with the Federal Network Agency, had already published guidelines on the award of electricity and gas concessions.

At the wish of the municipalities, the Decision Division is providing assistance with a number of current award proceedings.

There were also a number of contentious issues which were either brought before the civil courts by rival bidders or addressed to the Bundeskartellamt.

In December 2013 the Decision Division's decision-making practice on the award of concessions for the operation of electricity and gas networks was confirmed by the Federal Court of Justice in two decisions of principle (see also p. 13).

Market Transparency Body for Electricity and Gas Wholesale Trading

In 2013 the Decision Division was involved in the creation and launch of a market transparency body for electricity and gas wholesale trading which is based at the Federal Network Agency. The tasks assigned to this body are jointly carried out by the Federal Network Agency and the Bundeskartellamt. The chief task of the market transparency body is to monitor electricity and gas wholesale trading in order to detect any irregularities in price developments at the wholesale level which could be attributed to abusive practices.

Energy monitoring

In December 2013 the Federal Network Agency and the Working Group on Energy Monitoring at the Bundeskartellamt published the second of their joint annual monitoring reports on developments in the German electricity and gas markets. The aim of the report is to observe and analyse the network-based energy markets.

District heating: Proceedings against seven suppliers

Last year, following an extensive sector inquiry, the Decision Division initiated proceedings against seven district heating suppliers on suspicion of their charging abusively excessive prices. The investigations focus on around 40 different supply areas in almost all the federal states.

9th Decision Division

The focal areas of activity of the 9th Decision Division are the tourism, hotel, restaurant and catering sector, transport, postal services and automotive industry including rail, air and water vehicles. A major focus of the Decision Division's work in 2013 was devoted to the proceedings concerning the 'best price' clauses of the hotel booking portal HRS. Furthermore, the Decision Division's workload included the control of a major merger of suppliers to the aerospace industry as well as the ongoing abuse control proceedings against Deutsche Bahn AG and Deutsche Post AG.

The 9th Decision Division is chaired by Silke Hossenfelder.

Deutsche Bahn: Abuse control proceedings concerning ticket sales

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

The investigation currently focuses on why Deutsche Bahn's competitors cannot sell their tickets at railway stations. Also under examinations are ticket sales by Deutsche Bahn on behalf of some of its competitors. Different rates of commission charged by Deutsche Bahn could represent a problem in this respect.

The Decision Division is also examining whether Deutsche Bahn is abusing its obligation by law to set joint tariffs to oblige its competitors to use its ticket sales services.

Competition in the rail transport market in 2012*

- Long distance passenger rail services
 - 99 percent Deutsche Bahn AG
 - < 1 percent competitors
- Local passenger rail services
 - 85 percent Deutsche Bahn AG
 - 15 percent competitors

*Share of transport service

Source: Federal Network Agency (Bundesnetzagentur), Activity Report Railway Sector (Tätigkeitsbericht Eisenbahnen) 2012 (July 2013).



Market for letter mail in 2012

Deutsche Post AG:
88.7 percent turnover-based market share
88.9 percent volume-based market share

The remaining market shares are accounted for by a total of approx. 650 licensees.

Source: Federal Network Agency
(Bundesnetzagentur),
Activity Report Postal Services
(Tätigkeitsbericht Post)
2012/2013.

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

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

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

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

What exactly is the problem?

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

What are the competition concerns?

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



HRS: Best price clauses prohibited

In December 2013 the Decision Division prohibited the HRS hotel reservation portal from including so-called best price clauses in the contracts concluded with its hotel partners. These MFN clauses oblige the hotel operators to always offer their lowest room price, maximum room capacity and most favourable booking and cancellation conditions via the HRS portal. Since March 2012 the hotels had even been prohibited from offering travellers better conditions if they wanted to book directly at the hotel's reception desk.

The Decision Division criticised that such clauses hinder competition between the online booking platforms and restrict market entry. HRS was ordered to delete the clauses from its contracts and general terms and conditions by 1 March 2014 as far as the clauses affect hotels in Germany. Further proceedings were initiated in 2013 against the online platforms Booking and Expedia because the contracts they concluded with hotel partners contained similar clauses.

Best price (MFN) clauses ...

- oblige companies to at least grant their contract partner the best conditions available.
- risk hindering competition between different platforms.
- can impede market entry.
- prevent more favourable conditions.



Merger in the aerospace industry

In October 2013 the Bundeskartellamt cleared the acquisition of the French Permaswage Holding SAS by the US Precision Castparts Corporation in second phase proceedings. Both companies are component suppliers to the aerospace industry. The merger project concerns the manufacture and sale of so-called fluid fittings used to secure tube and piping systems in aircraft.

The merger was also examined and cleared by the US competition authority. As the companies also supply a considerable volume of these products to customers in Germany, the project was also subject to merger control by the Bundeskartellamt. With the merger Precision Castparts became the market leader on the worldwide market for fluid fittings. The Decision Division's in-depth market analysis showed that competitors will still be able to compete with the company. Buyers of fluid fittings, in particular aircraft manufacturers and their suppliers, will still be able to switch supplier and support new manufacturers without any problems.

Cartel prosecution

The 10th, 11th and 12th Decision Divisions are responsible for the cross-sector prosecution of illegal cartels. They are assisted in the planning, execution and evaluation of investigative measures such as e.g. dawn raids by the Special Unit for Combating Cartels (SKK). In 2013 the Bundeskartellamt imposed fines amounting to around 240 million euros on 54 companies and 52 individuals in 11 cartel cases. These include the rail cartel case, investigations against companies in the milling industry and fines imposed on the manufacturers of confectionery products, household porcelain and drugstore products. In early 2014 the Bundeskartellamt also concluded a cartel case against several breweries.

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

The 11th Decision Division is chaired by Ulrich Hawerkamp.

The 12th Decision Division is chaired by Michael Teschner.



Bundeskartellamt conducted hearings of 25 brewery representatives, some of whom were questioned several times. In the course of the proceeding not only Anheuser-Busch InBev but also Bitburger, Krombacher, Veltins and Warsteiner cooperated with the Bundeskartellamt.

On the basis of confessions a settlement could be reached with five breweries and nine individuals involved. Six breweries and a trade association have appealed against the decision.

Price agreements between breweries

At the beginning of 2014 the Bundeskartellamt imposed fines totalling around 338 million euros on 11 breweries, a trade association and 14 individuals involved. The breweries, including well-known manufacturers such as Bitburger, Krombacher, Veltins, Warsteiner, Radeberger and Carlsberg, are accused of agreeing prices for their draught and bottled beer.

In 2006 and 2008 price increases of five to seven euros per hectolitre were agreed for draught beer. In 2008 a price increase was agreed for bottled beer with the aim of raising the price of a 20 bottle crate by one euro. Following the price agreements of the breweries at national level, several of these breweries also agreed the same price increases with some of the regional breweries in North Rhine-Westphalia.

The hearing of witnesses was a decisive factor in this proceeding because most of the agreements were based on personal contacts between the owners and managing directors of the breweries. The investigations were triggered in September 2011 by the leniency application of the company Anheuser-Busch InBev. In the ensuing period the

Bundeskartellamt's guidelines for the setting of fines of 25 June 2013

- A new ruling of the Federal Court of Justice (decision of 26 February 2013, file KRB 20/12) made an adjustment to the guidelines for calculating fines necessary. Upper fine limit: Maximum of 10 percent of the turnover achieved by the company in the previous year
- Individual calculation within the statutory framework of fines proportional to the duration and gravity of the infringement
- Cartel-related turnover as key factor for calculation. This is the turnover which was achieved during the infringement period with products and services which were the subject of the agreement
- The size of the company and its financial situation are also taken into account



Rail cartel

After already fining the rail manufacturers a total of around 135 million euros in 2012 for colluding in the submission of bids for calls for tender by Deutsche Bahn, the Bundeskartellamt again imposed fines on this sector in 2013, this time amounting to 97.6 million euros. This was on account of agreements concluded to the detriment of local public transport companies, private, regional and industrial railway companies and construction companies. The rail manufacturers agreed among themselves which company was to be awarded the contract. Calls for tender and projects were divided among them. The cartel existed from 2001 to 2011 and covered the supply of rails, switches and sleepers.

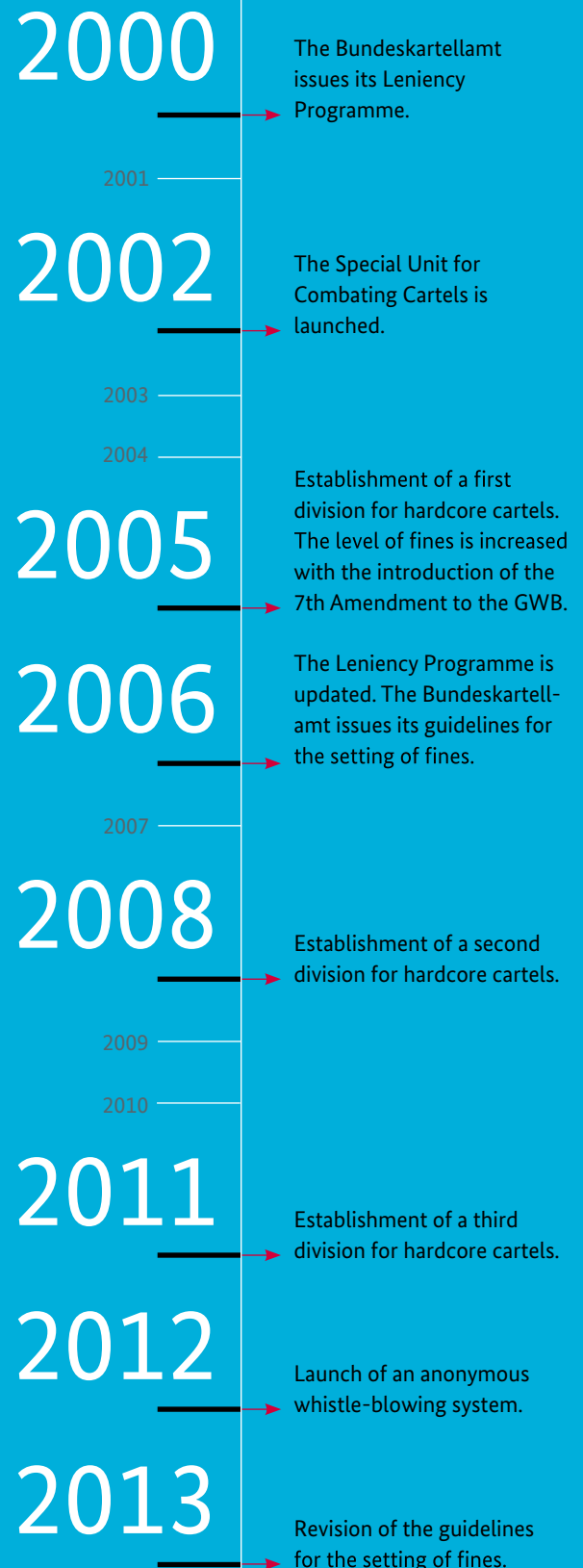
In these proceedings the Bundeskartellamt worked closely together with the public prosecutor's office and criminal investigation department in Bochum since the cartels involved publicly tendered products and services. The public prosecutor's office is currently investigating the individuals involved on suspicion of bid-rigging.

Mills case

In February 2013 the Bundeskartellamt concluded its mills cartel proceeding. After an initial fine of approx. 24 million euros had been imposed on a milling company in October 2011, fines totalling around 41 million euros were imposed on altogether 22 companies, a trade association and individuals involved.

Over a number of years the milling companies involved had agreed on prices, customer allocation and supply volumes in numerous rounds of regular talks. The agreements applied to all forms of flour distribution, i.e. to industrial customers and bakeries and the sale of flour in small packages to food retailers. The companies had also agreed on targeted shutdowns or the non-operation of certain mills in order to control capacities in the market.

Measures to increase the effectiveness of cartel prosecution





In the proceeding the Bundeskartellamt closely cooperated within the European Network (ECN) with colleagues from France and the Netherlands as some of the companies were also involved in similar agreements in these countries. Five companies have appealed against the Bundeskartellamt's fines decision.

Over 60 million euros in fines imposed on confectionery manufacturers

Early last year the Bundeskartellamt concluded its cartel proceedings against several manufacturers of branded confectionery. The proceedings were triggered by a leniency application filed by Mars GmbH. The Bundeskartellamt imposed fines amounting to around 60 million euros on 11 companies. The following infringements were detected:

- In 2007 Kraft (Milka) and Ritter had informed one another about planned price increases for their 100g chocolate blocks. This was proved with the help of a leniency application filed by Ritter.

- At regular meetings representatives of the companies Mars, Nestlé, Ritter and Haribo exchanged information on the state of negotiations with the opposite side of the market. Agreements were also concluded between Ritter, Mars and Nestlé on price increases for their chocolate products.
- In addition, fines were also imposed on ten members of a working group of the association of the German confectionery industry (Arbeitskreis der Konditionenvereinigung der Deutschen Süßwarenindustrie e.V.). Also within this working group confectionery manufacturers regularly informed one another on the state of negotiations with the food retail trade.

Five companies have appealed against their fines.

Cartel prosecution in 2013 in figures

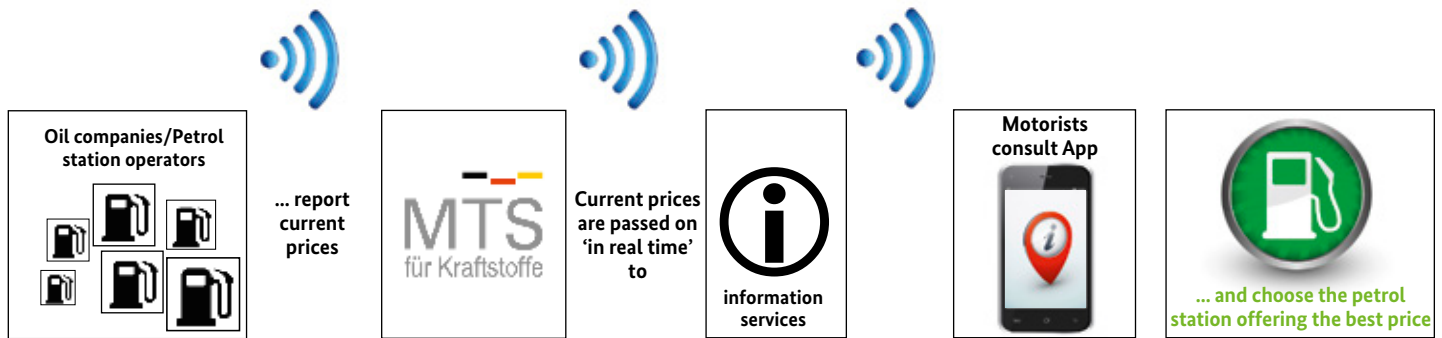
- Fines imposed: approx. 240,000,000 euros
- Leniency applications: 64 in 41 cases
 - filed by companies: 58
 - filed by individuals involved: 6
- Dawn raids: 17
- sites searched: 73 companies/associations, 11 private residences
- Number of staff employed: 386
 - Bundeskartellamt staff: 191
 - Police officers: 117
 - IT personnel: 69
 - Public prosecution officials: 9
- Items of evidence seized
 - approx. 1,330 files
 - approx. 18 terabytes of electronic evidence

Items of evidence seized at dawn raids in 2013



Market Transparency Unit for Fuels

After a development period of only a few months, the Market Transparency Unit for Fuels, a Bundeskartellamt project, commenced regular operations on 1 December 2013. It enables consumers to inform themselves on current fuel prices.



Further information is available at www.bundeskartellamt.de.

Oil companies and petrol station operators report the 'real time' prices for the fuel types Super E5, Super E10 and diesel to the Market Transparency Unit for Fuels. The Unit passes these price data on to private consumer information service providers, who in turn inform the consumers. Via the internet, a smartphone or navigation system, motorists are thus able to gain information on the current fuel prices and find the cheapest petrol station in their vicinity or along a specific route. The information service enables them to compare prices between petrol stations in Germany and choose the cheapest offer.

Market Transparency Unit for Fuels

- More than 14,000 petrol stations in Germany report their price changes to the Market Transparency Unit. This corresponds to an almost complete coverage of the market.
- More than 80 consumer information services have been admitted to the system (as at June 2014).
- More than 20 consumer information services have commenced live operation (as at June 2014).
- Strong response: Since its introduction in September 2013, around one out of four German motorists have already used the offer and compared fuel prices.
- Acceptance is particularly strong among men and younger age groups. 30 percent of the men and 18 percent of the women have already compared prices at least once. Among motorists aged 16 to 29, this figure amounts to 39 percent.

Source: Bundeskartellamt; Allensbacher Archive, IfD survey 11017, December 2013.

"The more motorists use this new tool to select the petrol station offering the best price, the greater the pressure will be on the oil companies to set competitive prices."

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Organisation Chart

Responsibilities of the decision divisions:

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

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