



Bundeskartellamt



open markets | fair competition

The Bundeskartellamt

Annual Report 2016



Publication data

Published by

Bundeskartellamt
Kaiser-Friedrich-Straße 16
53113 Bonn
www.bundeskartellamt.de

June 2017

Print

Warlich Druck Meckenheim GmbH, Meckenheim

Design and production

Fink & Fuchs AG, Wiesbaden

Photo credits

Fotolia – ChenPG (title), BMWi/Susie Knoll (p. 2), Bundeskartellamt/Gloger (p. 3), Bundeskartellamt (p. 4), Bundeskartellamt/Schuering (p. 6 top), Bundeskartellamt/Gloger (p. 6 bottom), Fotolia – ra2 studio (p. 8), Fotolia – ty (p. 9), Fotolia – Sinuswelle (p. 10), Fotolia – Ingo Bartussek (p. 12), photo-case.de – zettberlin (p. 13), Fotolia – Rawpixel.com (p. 14), Fotolia – Gina Sanders (p. 15), Fotolia – John Smith (p. 17 top), Fotolia – Gerhard Seybert (p. 17 bottom), Fotolia – smetz02 (p. 19 top), Fotolia – Countrypixel (p. 19 bottom), maxoidos – Fotolia (p. 20), chaya1 – Fotolia (p. 20), fischer-cg.de – Fotolia (p. 20), yulyla – Fotolia (p. 20), vschlichting – Fotolia (p. 20), Shutterstock – aerogondo2 (p. 23 top), Fotolia – Kzenon (p. 23 bottom), Shutterstock – Brian A Jackson (p. 24), Fotolia – fototheobald (p. 25), Shutterstock – Bukhta Yurii (p. 27), Fotolia – sdecorat (p. 28), Fotolia – victor217 (p. 29), Fotolia – Schlegelfotos (p. 31), Fotolia – Dmitry Naumov (p. 32), Fotolia – m.mphoto (p. 35), Fotolia – Korta (p. 36 top), Fotolia – fefufoto (p. 36 bottom), Fotolia – dvoinik (p. 37), Bundesregierung/Engelbert Reineke (p.39), Fotolia – Kalafoto (p. 40)

Text

Bundeskartellamt
Kaiser-Friedrich-Straße 16
53113 Bonn

This brochure is published as part of the public relations work of the Federal Government. It is distributed free of charge and is not intended for sale.

Contents

Message of greeting by Brigitte Zypries, Federal Minister for Economic Affairs and Energy	2
Foreword by Andreas Mundt, President of the Bundeskartellamt	3
Tasks and organisation	4
General Policy Division	8
Litigation and Legal Division	12
Federal Public Procurement Tribunals	14
1st Decision Division	16
2nd Decision Division	18
Facts and figures	20
3rd Decision Division	22
4th Decision Division	24
5th Decision Division	26
6th Decision Division	28
7th Decision Division	30
8th Decision Division	32
9th Decision Division	34
Cartel prosecution	36
Market Transparency Unit for Fuels	40
Organisation Chart of the Bundeskartellamt	

Message of greeting

Brigitte Zypries

Federal Minister for Economic Affairs and Energy



With the 9th Amendment to the German Competition Act (GWB), which has just entered into force, we have adapted the legal basis of the Bundeskartellamt's activities to the changes brought about by the digital age and the Internet. This is an integral part of the digital regulatory policy illustrated in the Ministry's "White Paper Digital Platforms". In future the Bundeskartellamt will be explicitly authorised in abuse control cases to examine special criteria which play a role in particular in multi-sided markets and networks. These include network effects and economies of scale, access to competitively relevant data, the possibility to use different services at the same time (so-called multi-homing) and the potential for innovation.

In merger control it will be possible in future to take the high market potential of young companies into account even if they have not yet generated any appreciable turnover.

This is based on the knowledge that in certain constellations a merger with low levels of turnover may well be relevant both in economic and competitive terms. With these new provisions the Bundeskartellamt will have the necessary authority to act more efficiently against competition restrictions in the digital age. Big data and the internet economy will continue to raise challenging issues for competition law in future.

The 9th Amendment also closes a loophole in the law, the so-called "sausage gap". This will prevent businesses in future from using corporate tricks to avoid fines. The introduction of the rules on corporate fines for companies which already exist in European law will ensure that antitrust violations can be pursued by the Bundeskartellamt just as effectively and consistently as in European Commission proceedings. The new rules on antitrust damages actions will also ensure that injured parties receive adequate compensation from members of a cartel as quickly as possible. This will also help to prevent antitrust violations in the first place. The Bundeskartellamt's excellent work always directly or indirectly benefits consumers. With the 9th Amendment to the GWB we have further strengthened the authority's position. In future the Bundeskartellamt will be able to use sector inquiries as a tool to examine any alleged systematic violation of consumer protection regulations in a sector. The Bundeskartellamt is the competent authority for uncovering widespread violations of consumer protection law. I see this as an effective supplement to the opportunities offered by the well-established private enforcement of consumer protection. This is a step towards dual, pro-active competition law, as illustrated in our "White Paper Digital Platforms".

In 2016 the Bundeskartellamt examined around 1,200 notified mergers. It again followed up many tip-offs about competition law violations. It imposed a total of 124.6 million euros in fines in seven cases of violation of the prohibition of cartels. The sectors involved were sanitary wholesale, the toy industry, TV studios and the food retail trade. Keeping markets open, punishing abusive practices, protecting consumers and making sure that public contracts awarded by the government conform with the law: all these tasks will continue to demand a high level of commitment from all the staff at the Bundeskartellamt.

I would like to thank you for your excellent work in 2016 and wish you much success for your future work.

A handwritten signature in black ink that reads "Brigitte Zypries". The signature is written in a cursive, flowing style.

Brigitte Zypries
Federal Minister for Economic Affairs and Energy

Foreword

Andreas Mundt

President of the Bundeskartellamt



There is widespread consensus not only in Germany but all over the world that an economic system which is competitively structured works best. In our long-standing experience with the social market economy we have made three important observations in Germany and Europe: Firstly, competition is the best form of consumer protection. Effective cartel prosecution, for example, benefits the consumer because it reduces prices and offers more choice. Secondly, sustainable economic development is only possible in a competitive environment. Competition itself drives innovation. Only companies which are able to compete can create and secure jobs on a permanent basis. Thirdly, the German and European provisions of competition law are flexibly designed to take account of special conditions and new economic developments. This applies in particular to the rapid developments brought about by the digital transformation of the economy.

The 9th Amendment to the German Competition Act, GWB, which has recently come into force, has made the enforcement of competition law more effective. The legislator has now ensured that companies participating in cartels can no longer escape fines by retroactively implementing restructuring measures and has tightened abuse control provisions in the food retail sector.

Important amendments were made to the law in the area of the digital economy. The growing importance of the major internet platforms raises new and different competition law and economic issues. We have been quick to react to these developments and have devoted more resources to address these issues. We have already concluded numerous proceedings in this sector and are intensively pursuing other cases, such as e.g. our investigations against Facebook. We are pleased that the legislator has taken up our proposals for specific modifications to the law with regard to the digital economy. This will enable us to act even more effectively in future.

The legislator has also granted the Bundeskartellamt new competences in the area of consumer protection. This step was taken especially in view of the digital economy where, due to new types of practices even a single breach of the law can harm a very high number of consumers within a short space of time. Here the established and well-functioning system of privately enforced consumer protection in Germany reaches its limits. We can now conduct sector inquiries into consumer protection issues and act as an *amicus curiae* in court proceedings. We can thus examine which areas require action and whether even further steps are necessary to equip the Bundeskartellamt with powers of intervention in consumer protection. This will be a topic of discussion for the next legislative period.

I hope that this report will give you an interesting overview of our wide range of activities.

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

Andreas Mundt
President of the Bundeskartellamt

Tasks and organisation

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



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

The tasks of the Bundeskartellamt include:

Enforcing the ban on cartels

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

Merger control

Mergers are examined by the Bundeskartellamt if the turnover of the companies involved exceeds certain thresholds, one or more of the legally defined elements of concentration are 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 but only subject to certain conditions.

Control of abuse of dominant positions

Companies holding a dominant position are exposed to little, if any, competitive pressure. They enjoy a large scope for action vis-a-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 two Federal Public Procurement Tribunals which are located at the Bundeskartellamt examine whether public procurement law was observed in the award of public contracts falling within the Federal Government's area of responsibility.

Competition register at the Bundeskartellamt

On 1 June 2017 the Bundestag passed the Act introducing a register for competition in public procurement. In future, serious offences of any kind which could lead to the exclusion of companies from the award of public contracts for several years will be recorded in a central federal register. However, companies listed in the register can be deleted prematurely from it if they take self-cleaning measures. The electronic register will be kept at the Bundeskartellamt.

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 or into buyer power in the food retail sector. In 2016 sector inquiries were launched into the hospital sector and to assess the competition situation in the household waste collection sector. In May 2017 a sector inquiry analysing competitive conditions in the sector for the metering and billing of heating and water costs, so-called 'submetering', was concluded.

Bundeskartellamt Key Facts

- President: Andreas Mundt
- Vice President: Prof Dr Konrad Ost
- Budget 2016: 29.3 million euros
- 345 employees
- of which approx. 150 are legal experts and economists
- six trainees
- 174 female/171 male staff

Ban on cartels

- In 2016 the Bundeskartellamt imposed fines amounting to around 124.6 million euros on 24 companies and five individuals in seven cases.

Merger control

- In 2016 the Bundeskartellamt received around 1,200 merger control notifications. Ten of these were closely examined in second phase proceedings.
- In four cases the parties to the merger withdrew their merger notification and one case was cleared only subject to conditions.

Control of abusive practices

- Number of proceedings initiated in 2016: 15
- Number of proceedings concluded in 2016: 42

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

- In 2016 the Bundeskartellamt received 145 applications for review.
- 27 applications were granted review and 55 were rejected.

Sector inquiries

- Since 2005 the Bundeskartellamt has concluded eleven sector inquiries. In 2016 sector inquiries were launched to examine competitive conditions in the hospital and household waste collection sectors. Four sector inquiries are still in progress.



New competences in consumer protection introduced with the 9th Amendment to the GWB

With the 9th Amendment to the GWB in June 2017 the legislator granted the Bundeskartellamt new competences to conduct sector inquiries into consumer protection issues. The competence to conduct sector inquiries is a first step towards enabling the authority to examine in which areas the private enforcement of consumer protection which is already well established in Germany has its shortcomings. The Bundeskartellamt has also been granted the right to act as “amicus curiae” in the courts, i.e. in certain proceedings concerning consumer protection it will be able to appear before court as a neutral party. This role will make it easier for the authority to gain an overview of which legal issues are raised in the courts and in which areas there are enforcement deficits.

Internal organisation

The Bundeskartellamt is headed by President Andreas Mundt and Vice President Prof Dr Konrad Ost. 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. In the middle of 2017 another decision division will be established in which the new competences allowing the authority to carry out sector inquiries into consumer protection issues will be pooled.

The General Policy Division advises the decision divisions in specific competition law and economic issues, represents the Bundeskartellamt in the European Union’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 digital economy is also a key area of focus of the General Policy Division’s work. Here it advises the decision divisions on digitalisation issues, helps to develop competition law and economic policy tools and also represents the authority at conferences on digitalisation.

The Litigation and Legal Division advises the Bundeskartellamt on legal matters, prepares appeal proceedings



“The 9th Amendment to the GWB is a first step towards bringing competition protection and consumer protection under one roof at the

Bundeskartellamt. Our new Consumer Protection Division has commenced its work and will soon be an important pillar in the system for ensuring consumer protection.”

Prof Dr Konrad Ost,
Vice President of the Bundeskartellamt

before the Düsseldorf Higher Regional Court and represents the Bundeskartellamt before the Federal Court of Justice in Karlsruhe. The Litigation and Legal Division also includes the Special Unit for Combating Cartels (SKK). The SKK assists the decision divisions in the preparation, execution and evaluation of dawn raids in cartel proceedings. It is also the contact point for companies wishing to apply for leniency in cartel proceedings.

Administration Division

The Administration Division is responsible for budget and human resources, organisation and internal services and the IT operations of the Bundeskartellamt. The IT Unit assists the different divisions of the authority in conducting online surveys in major proceedings and seizing and evaluating IT data in cartel proceedings.

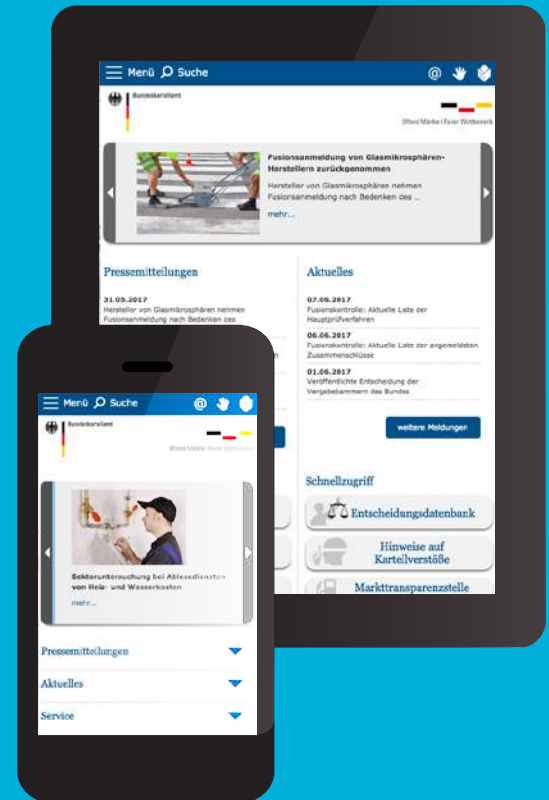
In 2016 the Bundeskartellamt was again awarded the certificate of the Hertie Foundation for the various measures it takes to reconcile work and family life. The authority offers a large number of placements for practical training and internships for qualified lawyers and economists. Apart from staff recruitment, another important area of its work is personnel development. The authority organises further training events for its staff with in-house and external experts.

In 2016 the Bundeskartellamt introduced a new system to record all its internal work processes and to improve knowledge management. In 2017 the authority will continue to further develop the digitisation and optimisation of its administrative processes, including the collection and analysis of data in cartel proceedings.

The Bundeskartellamt in an international comparison

Every year the renowned antitrust journal Global Competition Review (GCR) analyses and evaluates the performance of leading competition authorities worldwide. In addition to the information submitted by the authorities themselves, the assessment also takes into account the opinions of experts, such as lawyers specialising in competition law, economists and academics as well as other special information which the journal derives from its own surveys and analyses. Again in 2016 the Bundeskartellamt ranked in the 5-star “elite” category.

The Bundeskartellamt in the Internet



Since 2016 the Bundeskartellamt’s website also has a mobile layout for mobile devices.

Rating of international competition authorities

In 2016 the 5 star “elite” category was awarded to five competition authorities:

- Autorité de la concurrence (France)
- Bundeskartellamt (Germany)
- Korea Fair Trade Commission
- Department of Justice – Antitrust Division (USA)
- Federal Trade Commission (USA)

Source: GCR, Rating Enforcement 2016. The Annual Ranking of the World’s Top Antitrust Authorities. The authorities are assessed on a scale of one to five stars.

General Policy Division

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



Reform of the German Competition Act

On 9 March 2017 the German Bundestag passed an extensive reform of the German Competition Act (GWB), the so-called 9th Amendment. The amendment, which came into force in June 2017, introduces some substantial changes to German competition law.

It has closed legal loopholes in the liability for fines for competition law violations. In several cases in the past these loopholes enabled companies involved in cartels to escape fines by carrying out restructuring measures. This will be prevented in future by widening, in line with European law, the group of those liable for fines to controlling group companies and legal and economic successors.

The amendment contributes significantly to adapting the legal framework to developments in the digital economy. It clarifies that even non-monetary exchange transactions constitute a market and can fall within the scope of competition law. Moreover, criteria which play a special role in the assessment of the market power of platforms and networks (in particular network effects and access to data) have been explicitly included in the amendment.

Finally, merger control thresholds will be supplemented by a purchase price criterion. This is in reaction to the fact that the thresholds which up to now have been based on turnover are insufficient to cover all the mergers in the digital economy which are relevant to competition. As the merger between Facebook and WhatsApp has clearly shown, high purchase prices are sometimes paid for companies which up to now have achieved little or no turnover.

An important element and one of the main reasons for amending the GWB was to implement the EU directive 2014/104/EU on antitrust damages actions into German law. This will further strengthen the position of injured parties claiming compensation.

Consumer protection

The coalition agreement of December 2013 already contained a provision for consumer protection to become a target of the supervisory activities of the Bundeskartellamt, among others. In the parliamentary debate on the 9th Amendment concrete proposals were made to strengthen the public enforcement of economic consumer protection and grant the Bundeskartellamt powers in this area. Selective additions to the well-proved system of private enforcement were discussed, in particular in view of the digital economy where, due to new practices, even a single breach of law can harm a very large number of consumers within a short space of time. However, no parliamentary majority was established to grant the Bundeskartellamt wider powers in the current legislative period to end and eliminate such violations. The main reason given was the lack of sufficiently sound knowledge about the deficits of the current enforcement system. Nevertheless as a first step the legislator decided to grant the Bundeskartellamt competences to conduct sector inquiries into consumer law issues and to act as an amicus curiae in court proceedings. Sector inquiries are a tool which have proved useful in competition law and can help to strengthen private enforcement and further clarify possible enforcement deficits.



Internet and competition

New digital products and business models as well as the special characteristics of digital markets have created new challenges for competition policy and enforcement. For some time now the Bundeskartellamt has therefore dedicated more resources to digital economy issues. In June 2016 it published a high profile working paper on “Market Power of Platforms and Networks” which deals with the specifics of antitrust enforcement in the digital economy. In a joint project with the French competition authority it examined the consequences and challenges which the collection and use of data in the digital economy and other industrial sectors pose for competition authorities.

The Bundeskartellamt is also intensely engaged in a discussion process about a regulatory framework for digital markets which was set in motion by the “Green Paper Digital Platforms” of the Federal Ministry for Economic Affairs and Energy.

The focus of the Bundeskartellamt’s case work on the one hand is to keep markets open to promote innovation and the growth of smaller or new competitors and on the other hand to effectively address the abuse of market power of large companies. The abuse proceedings themselves are complex and difficult, especially in a market environment where business models and practices are constantly changing. It is therefore necessary to add to the existing toolbox. The GWB in its current form already allows for the elimination of competition problems by means of flexibly designed and time-limited commitments. Whether the competition authorities need new procedural tools to be able to react flexibly to developments in the dynamic

internet markets and quickly and effectively solve competition problems is under further consideration. Preliminary injunctions in particular can be a suitable tool to (provisionally) prevent anti-competitive effects in highly concentrated markets.

Economics and data analysis in the application of competition law

Conceptual economic considerations and data-based analyses are of essential importance for the Bundeskartellamt’s work. The economic units of the General Policy Division are intensively involved in our case work and maintain a lively exchange with academics and competition authorities of other countries.

The introduction of the prohibition criterion of a significant impediment to effective competition with the 8th Amendment to the GWB has led to more refined economic analysis in the authority’s merger control practice. The so-called SIEC test focuses on the specific competitive pressure which is eliminated by a merger and the likely effects of this. Economically sound theories of harm are thus gaining importance. Empirical analyses are also increasingly being carried out to assess the actual degree of competition in a market.

Moreover, with its proceedings on online vertical restraints (especially price parity clauses and restrictions of online sales) the Bundeskartellamt has assumed the role of an international pioneer in the development of relevant theories of harm and triggered intensive discussions at international level. Competition authorities abroad are now also taking up more such cases.



Overall the importance of data-based analyses increased again in 2016. Where necessary, technically sophisticated econometric analyses are carried out on a case by case basis. Standard methods such as e.g. overlap analysis and random sampling are also applied and, in selective cases, consumer surveys. A trend towards the increased use of data can also be observed in the economic expert opinions commissioned by parties to proceedings.

Packaging Act

In May 2017 the legislator passed the Packaging Act. In the debate about the future design of packaging disposal the Bundeskartellamt has strongly advocated the maintenance of competitive structures. It took a critical view of calls to assign the organisation of the collection of packaging to the municipalities. The authority therefore welcomes the fact that the organisation of waste management will, in principle, remain in the hands of private sector companies. The development of this sector since the monopoly of the “Der Grüne Punkt - Duales System Deutschland GmbH” was opened up has shown that competition can increase efficiency in this sector, too, without endangering environmental goals.

Guidance document on merger remedies

In May 2017 the Bundeskartellamt published a Guidance Document on Merger Remedies. Commitments taken by parties to a merger can dispel competition concerns

about a merger which might otherwise lead to its prohibition. The guidance document explains the most important types of remedies to companies and their representatives and sets out the requirements they have to fulfil. It also describes the procedure for the acceptance and implementation of remedies.

18th International Conference on Competition (IKK)

- From 15 to 17 March 2017 the Bundeskartellamt hosted its 18th International Conference on Competition in Berlin.
- With around 400 participants from more than 50 countries the event once again confirmed its international appeal. The conference speakers included Brigitte Zypries, the Federal Minister for Economic Affairs and Energy, Margrethe Vestager, the European Commissioner for Competition and Dr Frank Appel, the Chief Executive Officer of Deutsche Post AG.
- The application of competition law at international level in the digital age was the main theme of the conference.

International Cooperation

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

ICN

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

Since September 2013 the President of the Bundeskartellamt, Andreas Mundt, has been the Chair of the ICN's Steering Group. In 2016 the ICN published various work products, including a guidance document on merger remedies, a catalogue of agency investigative powers, a framework for sharing non-confidential information, an update of the ICN's market studies good practice handbook and work products on agency assessment and performance measurement.

OECD/UNCTAD

In 2016 the Bundeskartellamt again cooperated in the competition-related activities of the Organisation for Economic Cooperation and Development (OECD) – Andreas Mundt is a member of the Bureau of the OECD's Competition Committee – and the United Nations Conference on Trade and Development (UNCTAD).

Every year the OECD hosts two conferences of the Competition Committee and a Global Forum on Competition in Paris. The Bundeskartellamt takes an active part in all these events.

ECN

The national competition authorities in the European Union work very closely together in the areas of cartel prosecution, abuse control and merger control. In order to more effectively combat cross-border restrictions of competition they have formed the European Competition Network (ECN). They assist one another e.g. in dawn raids or other investigative measures and can cooperate in case work e.g. by exchanging confidential information.

ECNplus

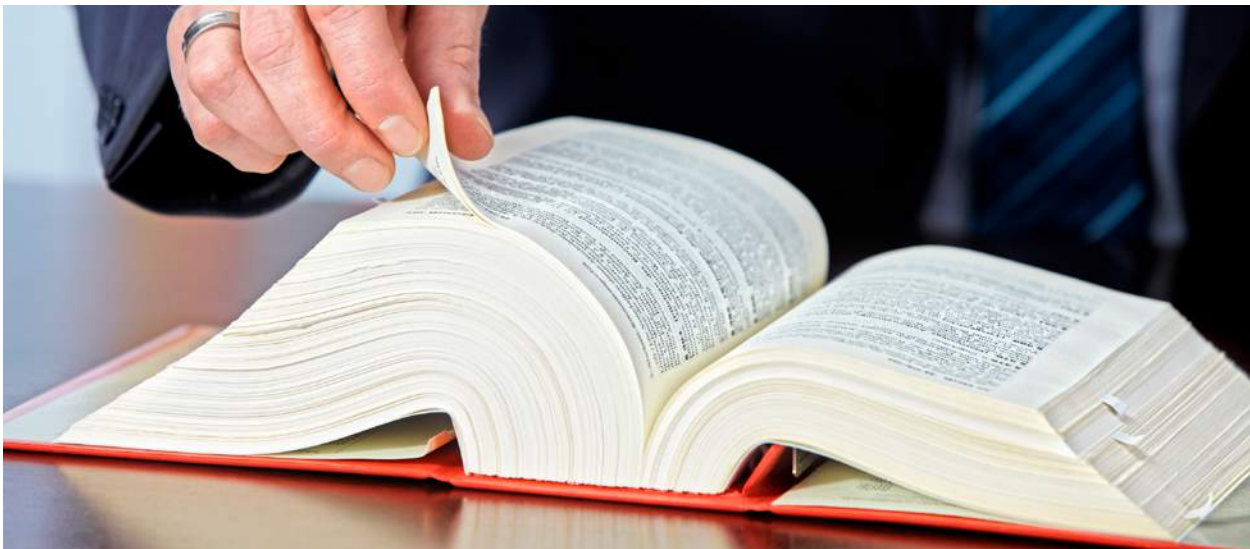
The Commission has set itself the target of improving the institutional framework conditions of the national authorities represented in the ECN in order to more effectively enforce competition law (ECN Plus Initiative). As a first step it carried out a public consultation from November 2015 to February 2016 on how to strengthen the national authorities in the areas of (i) independence and resource endowment, (ii) investigative and decision-making powers, (iii) setting of fines and (iv) leniency programmes. In March 2017, at the end of the consultation period, the Commission presented a proposed directive for new rules in these areas.

European cooperation in 2016

- Official assistance in four cases (Articles 101/102 TFEU)
- Exchange of confidential information in eight cases (Articles 101/102 TFEU)
- In 2016 around 180 mergers were examined in parallel 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 110 of these cases.
- The Bundeskartellamt cooperates closely with other national authorities and the European Commission. In 2016, for example, the Working Arrangements for Cooperation in Advisory Committees on EU merger cases were revised. The Bundeskartellamt played an important role in the revision of the arrangements and cooperated closely with several European competition authorities and the European Commission during the revision phase.

Litigation and Legal Division

The Litigation and Legal Division represents the Bundeskartellamt before the Higher Regional Courts (OLG), the Federal Court of Justice (BGH) and other courts. In the court of first instance, the Düsseldorf Higher Regional Court, the Division fulfils this task in co-operation 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 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 also part of the Litigation and Legal Division. The Litigation and Legal Division is chaired by Jörg Nothdurft.



Federal Court of Justice allows Bundeskartellamt's appeal on points of law in case prohibiting retailers' demands for unjustified benefits from a supplier, the so-called "Anzapfverbot" case (file ref. KVZ 1/16)

At the Bundeskartellamt's request the Federal Court of Justice allowed its appeal on points of law against a decision of the Düsseldorf Higher Regional Court in which the court reversed the authority's decision of principle in the "Anzapfverbot" case. This provision limits the exercise of buyer power, e.g. by major food retailers against manufacturers. The subject of the proceeding were EDEK's demands for special conditions after its acquisition of the Tengelmann discounts chain Plus in 2008.

Confirmation of prohibition of use of price comparison engines in e-commerce sector (file ref. VI Kart 13/15 (V))

The Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision of principle against the

running shoes manufacturer Asics. According to the decision the general prohibition of the use of price comparison engines by retailers implemented through a (selective) distribution system violates competition law and is illegal. The court shared the view of the Bundeskartellamt that the general prohibition of the use of price comparison engines is a restriction of competition by object. It stated that the case law of the European Court of Justice was clear on this matter. The prohibition deprived the retailers of an advertising and sales opportunity. The court further stated that the prohibition could also not be justified on the grounds of protecting the company's brand image and pre-sale services because consumers of running shoes did not necessarily need or want such services or if so, could

2016 statistics

- 1 new cartel fine proceeding
- 4 new cartel administrative cases
- 142 new private antitrust cases
- 12 amicus curiae briefs



“It is good that the Federal Court of Justice has stressed the importance of the competition authority’s decisions for subsequent damages actions. Public and private antitrust enforcement are two pillars of one system and complement each other.”

inform themselves via the Internet. The court left open whether Asics’s earlier distribution system was also anti-competitive because of its ban on the use of Google AdWords and on sales via online marketplaces.

Authority’s press release no indicator of bias (file ref VI Kart 1/16 (V))

The Düsseldorf Higher Regional Court has clarified that there is no reason to doubt the impartiality of an examination by the Bundeskartellamt’s decision divisions if the authority reports about the issue of a statement of objections in a press release. It stated that certain abridgments were unavoidable. In the court’s opinion the informed reader would be well aware that the legal position reported in the press release was only provisional and objections by the parties concerned would lead to a review of the factual and legal position.

No legal obligation for convergence within the ECN (file ref VI Kart 1/16 (V))

Differing views of the authorities represented in the network of European competition authorities (ECN) do not hinder a national authority from issuing a decision. This view was confirmed by the Düsseldorf Higher Regional Court in a case concerning the use of best price clauses on hotel booking platforms. The complainant had claimed that the majority of the European competition authorities held a different view than the Bundeskartellamt. The Düsseldorf Higher Regional Court pointed out, however, that the correct application of law was the sole decisive factor in enforcing European competition law effectively. It was clearly inadequate to simply count the number of advocates for one or another interpretation of the law.

Business secrets are also protected in court (file ref. VI Kart 6/14 (V), VI-Kart 4/15 (V))

In two cartel administrative proceedings the Düsseldorf Higher Regional Court has made use of its possibility to exclude the public from its proceedings in order to protect business secrets. The relevant provisions of Sections 169ff of the Courts Constitution Act reasonably complement the possibilities to protect business secrets laid down in Section 72 (2) GWB and make the hearing of witnesses possible. The lawyers of the third parties summoned to the proceedings were allowed to remain in the courtroom once they had been sworn to secrecy.

Federal Court of Justice on binding effect of authority decisions for damages actions (file ref. KZR 25/14)

In a civil proceeding in which the Bundeskartellamt had acted as amicus curiae, the Federal Court of Justice clarified the extent of the statutory binding effect of authority decisions on antitrust violations for subsequent damages actions filed by injured parties. The court also clarified that the binding effect not only applies to the operative part of the authority’s decision but also to the main grounds of the decision. In the court’s opinion the binding effect extended to all the actual findings on the facts of the case made in the course of the proceedings, based on which the authority affirmed a violation of competition law. In the case of coordinated market behaviour, it was also to be presumed in a civil proceeding that such coordination had actually determined market behaviour.

Federal Public Procurement Tribunals

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

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

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

In 2016 the review procedures conducted by the federal public procurement tribunals again involved a vast range of public procurements. One area of focus were procurements by the statutory health insurance funds, in particular last year the procurement of discounted contrast agents for radiology doctor's practices (so-called medical supplies) and discount contracts for parenteral preparations for cancer therapy which are prepared in pharmacies (so-called cytostatic drugs). Further areas of focus were review procedures for procurements in the areas of security and defence as well as hydraulic engineering.

Car pool services for members of the German Bundestag

The review procedure examined whether the procurement of car pool services for members of the German Bundestag to assist them in exercising their public duties, i.e. chauffeur-driven journeys within the Berlin city may be awarded to a government-owned company without a public tender procedure. The company concerned had been responsible up to that point for the mobility and fleet management of the Federal Ministry of Defence.

The direct award of a public contract as a so-called in-house award is only admissible under very strict conditions. The company which is to be given the contract must

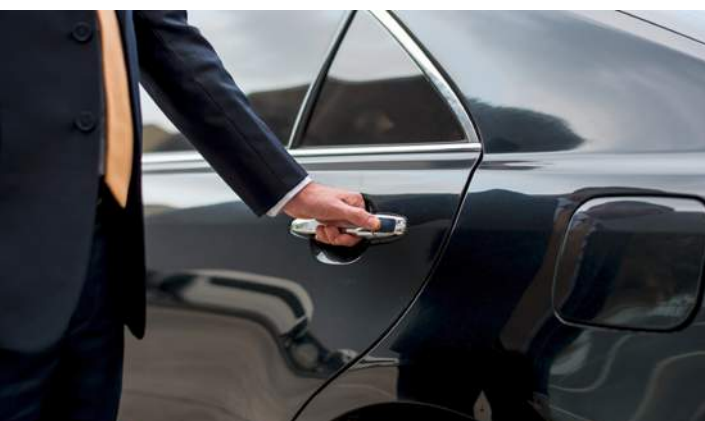
be supervised by the contracting entity, in this case the Federal Republic of Germany. The major share of the company's revenue must be achieved with this contracting entity and there should be no private capital participation in the company. These strict preconditions were established by case law with the aim of opening up public procurement to competition as far as possible. Since April 2016 these requirements have also been laid down in the latest amendment to the German Competition Act, GWB.

In the case in question the public procurement tribunals were able to confirm that all these conditions had been fulfilled. Firstly, the Federation had a majority on the supervisory board as well as at the shareholders' meeting of the car pool company and therefore extensive controlling rights and the right to issue instructions. Secondly, in recent years the company has worked exclusively for the Federation and its institutions. Its activities in the private sector accounted for less than ten percent of its total operations. Finally, the capital participation of a third party in the company did not stand in the way of an in-house award because the shareholder was a publicly owned company.

The tribunal's decision was finally confirmed on appeal by the Düsseldorf Higher Regional Court.

Expansion of toll system for heavy goods vehicles

One of the fundamental principles of the award of public contracts is that these are awarded by competitive tender. However, there may be constellations in which the award of a public contract is not possible in an open procedure or only under the condition that assets already created in the past will not be used again. This is the case, e.g. if a contractor produces software and holds the copyrights to this software. If the software is to be developed further, only the previous contractor is usually considered as the service provider because it is under no obligation to make its copyrighted source code available to another service





provider which is at the same time its competitor. Otherwise a new invitation to tender would have to be issued for the production of the entire software, which would be uneconomical. In such a situation public procurement law allows for the previous contractor to be commissioned with the further development of the software. Competition then takes second place to the protection of economic assets.

Against this background the 2nd Public Procurement Tribunal rejected an application for a review in connection with the extension of the toll system for heavy goods vehicles to all trunk roads. The previous toll system provider, Toll Collect GmbH, was to be directly commissioned with the technical extension of the existing toll system to further trunk roads. This extension was only possible with the use of information technology copyrights to which at that time Toll Collect held the rights. The applicant in the review proceeding, an Austrian toll system provider, claimed that it could dock onto the existing motorway toll system of the previous provider and therefore also offer the required services for extending the system to trunk roads. In its decision the public procurement tribunal confirmed the view of the contracting entity that it did not want to replace the existing system for motorways with a new one for cost efficiency reasons but wished to continue using it. In view of the copyright situation only Toll Collect could be considered as the provider of the toll extension services. The later operation of the complete toll system, on the other hand, will be opened up to competition in a Europe-wide award procedure. The decision is final.

The Federal Public Procurement Tribunals in figures

- In 2016, 145 applications were filed for the initiation of review proceedings.
- 82 of these were decided in substance. 27 applications were granted, 55 were rejected.
- Almost three quarters of the cases concerned the award of contracts for public supplies and services, followed by construction contracts. These were followed in roughly equal amounts by contracts awarded by sector contracting entities (such as Deutsche Bahn AG) and contracts for defence and security services. The award of independent professional services played only a marginal role.
- In 31 cases the decisions of the public procurement tribunals were immediately appealed to the Düsseldorf Higher Regional Court.

Prospects for 2017:

- The legal basis for national public procurement law for contracts with values exceeding the relevant thresholds on a Europe-wide basis are EU directives which are to be implemented into national law. The new directives were implemented into national law with the reform of public procurement law which came into force on 18 April 2016.
- In 2017 the EU Commission plans to review the public procurement directive from 2007 and if necessary to further optimize legal protection. To achieve this purpose a network of review institutions from all the Member States of the EU will be formed for the first time.
- The aim of this network will be to exchange experience and identify practical problems in the application of law and in cooperation with the EU Commission to further optimize the system of legal protection.

1st Decision Division

The 1st Decision Division is competent for the following areas: extraction of ores and other non-metallic minerals, building materials and the construction industry, real estate and related services, the wood industry including furniture, as well as electrical household appliances and consumer electronics. Some relevant examples of the division's work in 2016 were a cartel proceeding against furniture manufacturers and the assessment under competition law of the joint marketing of round timber in Baden-Württemberg. A merger between titanium dioxide companies was extensively examined. Another area of focus of the division's work were bidding syndicates and supply associations on the building materials markets.

Until June 2017 the 1st Decision Division was chaired by Christian Ewald.

He was succeeded by the former chair of the 7th Decision Division, Dr Markus Wagemann.

Cartel proceeding against furniture manufacturers

In early 2017 the decision division imposed fines totaling 4.43 million euros on five furniture manufacturers and four managers involved for enforcing resale price maintenance on retailers. The companies involved were aeris GmbH, hülsta-werke Hüls GmbH & Co. KG, Kettler GmbH, Rolf Benz AG & Co. KG and Zebra Nord GmbH.

The manufacturers had applied inadmissible pressure on lower-price retailers in order to influence shop prices, in particular by threatening to refuse to supply to them and in some cases by carrying out those threats. To some degree competing retailers had also helped to monitor compliance with the minimum sales prices set by reporting those retailers that had deviated from the set price. The Bundeskartellamt decided not to impose fines on these retailers for discretionary reasons. All the orders imposing the fines are now final.

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

The decision division continued to deal with the case concerning the joint marketing of round timber by the federal state of Baden-Württemberg. Via its state company Forst BW, Baden-Württemberg markets wood not only from its own state forests but also from communal and private forests. In summer 2015 the Bundeskartellamt had prohibited Baden-Württemberg from selling timber on behalf of these other forest owners and from performing services such as e.g. forest ranger services and technical forestry management. The federal state of Baden-Württemberg appealed against the decision to the Düsseldorf Higher Regional Court.

In early 2017, during the court proceeding, an amendment of the Federal Forests Act (BWaldG) came into effect, the object of which was to create an exemption from competition law. Nonetheless, in March 2017, the

Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's prohibition decision. The court stated that the amendment to the Forests Act only meant that the federal state's activity no longer violated German competition law. However, according to the court the Federal Republic of Germany did not have any regulatory competence in respect of the European ban on cartels. In the court's view any wording in the Forests Act aimed at creating an exemption under European competition law therefore violated European law and was to be regarded as void. The federal state of Baden-Württemberg has appealed the decision of the Düsseldorf Higher Regional Court to the Federal Court of Justice on points of law.

Merger between titanium dioxide companies

At the end of 2016, after extensive examination, the Bundeskartellamt cleared the acquisition of Sierra Rutile Limited by Iluka Resources Limited. Both companies are active in opencast mining in Australia and Sierra Leone and sell the extracted raw materials, including the minerals ilmenite and rutile, worldwide. These contain titanium dioxide, from which pigments for paints and dyes are manufactured.

Forests as an economic factor

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



The decision division examined in particular the extent to which customers are able to use titanium dioxide raw materials other than natural rutile for further processing. The findings of the investigations showed that although the merger significantly strengthened the market position of the parties, it was comparatively easy for customers to substitute natural rutile with other titanium dioxide raw materials. The pigment manufacturers, some of which are themselves active in the extraction of raw materials, will thus continue to have sufficient procurement alternatives.

Special areas of focus: Bidding syndicates/supply associations in the building materials sector

As a consequence of the authority's dissolution in recent years of joint ventures which posed problems under competition law, there are again significantly more independent suppliers active in the markets for building materials such as e.g. asphalt and ready-mix concrete. The decision division has given increasing consideration to the assessment of bidding syndicates and supply associations under competition law. Companies sometimes cooperate in individual invitations to tender in order to submit a joint bid. This is permissible under competition law under certain conditions. The assessment of the cooperation

between competitors in so-called public private partnerships was an area of focus in the construction sector, particularly in the construction of motorways and federal trunk roads.

Sector inquiry into the cement and ready-mix concrete sector

The assessment of bidding syndicates and supply associations is also an area of focus in the examination of cases in the cement and ready-mix concrete sector. Further aims of the inquiry are also to analyse the general market and competitive conditions and to identify and assess possible practices and conduct which could negatively affect well-functioning competition in the building material markets which are important for the economy as a whole. Conclusions can and should be drawn from this inquiry for setting priorities in competition law enforcement practice in future. The conclusion of the sector inquiry and the publication of its findings are expected in mid 2017.



German ready-mix concrete sector 2015

- Number of companies/works: 530/1890
- Production volume: 47.2 million cubic metres
- Turnover: 3.21 billion euros
- Number of employees: 9,230

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

German cement industry 2015

- Number of companies/cement works 22/55
- Cement production in 1,000 tonnes: 31,160
- Total turnover in million euros: 2,488
- Number of employees: 7,810

Source: Zementindustrie im Überblick 2016/2017,
German Cement Works Association (Verein Deutscher
Zementwerke e.V. (VDZ))

2nd Decision Division

The 2nd Decision Division is competent for agriculture, textiles/shoes, bags, cosmetics/drugstore products as well as the manufacture of and the wholesale and retail trade in food. Areas of focus in the division's work last year included the examination of conditions of supply in the milk sector and the food retail sector.

The assessment of restrictions of online sales under competition law remains an important topic.

The 2nd Decision Division is chaired by Dr Felix Engelsing.

Food retail sector

The food retail sector in Germany is highly concentrated. The four major food retailers EDEKA, REWE, ALDI and the Schwarz group (including Lidl and others) share more than 85 per cent of the market. This market structure can be detrimental not only to local consumers but also to suppliers of the retailers.

Ministerial authorisation in EDEKA/Kaiser's Tengelmann merger case

In March 2016 the Federal Minister for Economic Affairs and Energy granted a ministerial authorisation for the merger between EDEKA and Kaiser's Tengelmann which the Bundeskartellamt had previously prohibited.

REWE withdrew its appeal against this decision after EDEKA was obliged in the course of a conciliation process to sell 67 outlets (mainly in Berlin) to REWE after its acquisition of Kaiser's Tengelmann. This divestment was examined and cleared by the decision division. Based on the legally binding ministerial authorisation allowing the transfer of all Kaiser's Tengelmann outlets to EDEKA,

the divestment of some of these outlets to REWE led to a relative improvement in competition.

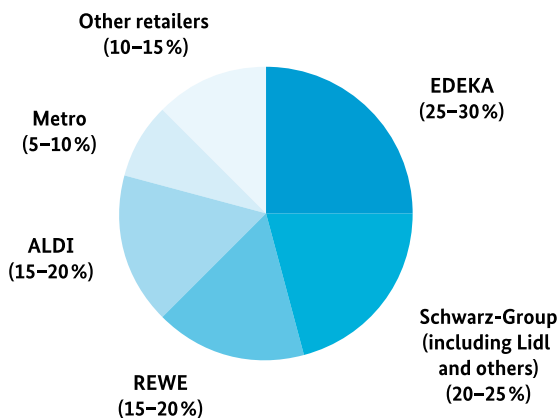
Clearance of REWE-coop merger subject to conditions

In October 2016 the decision division cleared the acquisition of the northern German food retailer Coop eG by REWE subject to conditions. In order to address competition problems in regional sales markets, REWE and Coop sold eleven outlets to the Bartels Langness group, a competitively independent SME.

"Retail Trade Group": New cooperation in the food retail sector

In April 2017 the food retailers Bartels-Langness, Bunting, Georg Jos. Kaes, Klaas & Kock, Netto ApS (Netto Nord) and real, established a joint venture which is to perform joint services for the parties in the areas of purchasing, e-commerce, logistics and administration. The decision division did not object to this project because the cooperation helps to ensure the competitiveness and hence the independence of the smaller retailers, also as a sales alternative for the suppliers.

Retailers' share of total national turnover in the food retail sector



* Source: Sector inquiry "Buyer power in the food retail sector" (September 2014)

Guidance note on the prohibition of vertical price fixing

In early 2017 the Bundeskartellamt published a draft guidance note on vertical price fixing in the brick-and-mortar food retail sector. In recent years the Bundeskartellamt has conducted a number of proceedings in which it intensely examined the business relations between retailers and manufacturers in the food sector and imposed fines on a large number of companies on both sides of the market on account of vertical price fixing. By giving them specific case examples the publication provides companies with guidance to enable them to walk the thin line between necessary communication processes on the one hand and illegal behaviour on the other.

Conditions of supply to dairies

In April 2016 the decision division initiated an administrative proceeding to examine the conditions which the dairies have set farmers for the supply of raw milk. The first case in the proceeding was initiated as a test case against Germany's largest dairy, DMK Deutsches Milchkontor. The authority is following up the suspicion that the farmers' scope of competitive action is being restricted by such conditions of supply.

In March 2017 the decision division published a progress report presenting the key findings of its investigations so far. The decision division has identified restrictions of competition in the form of long contract periods and terms of notice, exclusivity agreements and terms of payment which are to the detriment of the farmers. In the report the authority offers initial proposals for alternative and more pro-competitive means of structuring supply relations between milk producers and dairies. The report is to serve as a basis for a discussion with market participants and policy makers.

Restrictions in online sales

Many retailers wishing to sell their products online are restricted by manufacturers' requirements. In 2015 the decision division took a decision of principle on this issue



in a case against the sports equipment manufacturer ASICS. In the past ASICS had prohibited its dealers from using price comparison engines for their online presence. In the decision division's view this prohibition primarily served to control price competition. In April 2017 the Düsseldorf Higher Regional Court confirmed the division's decision to prohibit this ban.

The European Court of Justice is currently dealing with the important issue of whether platform bans are admissible. In the case concerning the distribution rules of the cosmetics manufacturer Coty the court is examining whether Coty can prohibit its authorised dealers from selling its products via platforms such as Amazon or eBay. Both the Federal Government and the Bundeskartellamt consider such a prohibition as inadmissible.

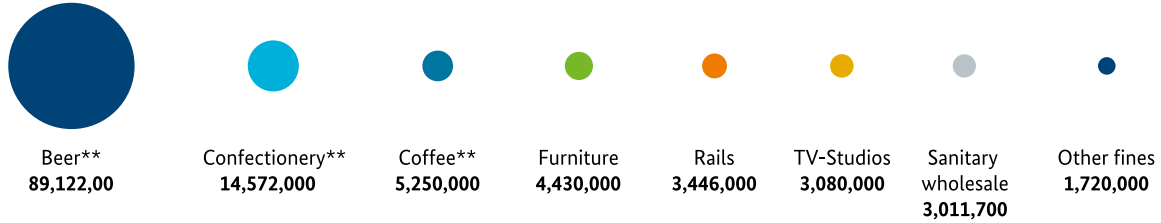


Selective distribution

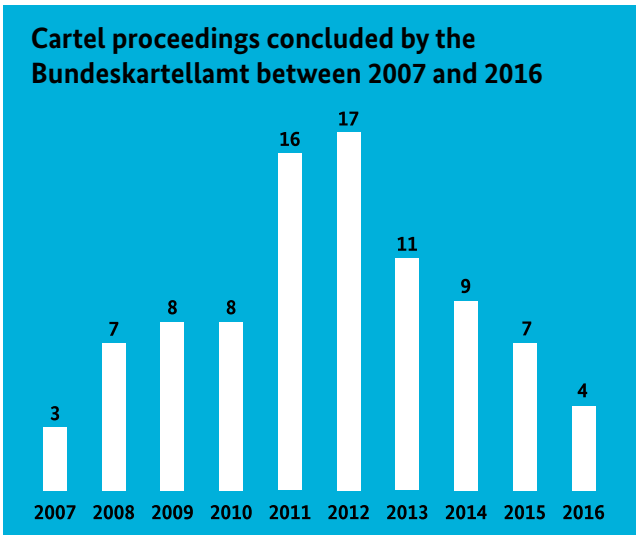
- Distribution exclusively through selected dealers
- Dealers are selected on the basis of set criteria
- Selection criteria must be objective, transparent and non-discriminatory
- Selective distribution systems can contain anti-competitive terms and conditions which harm retailers and consumers

Facts and figures

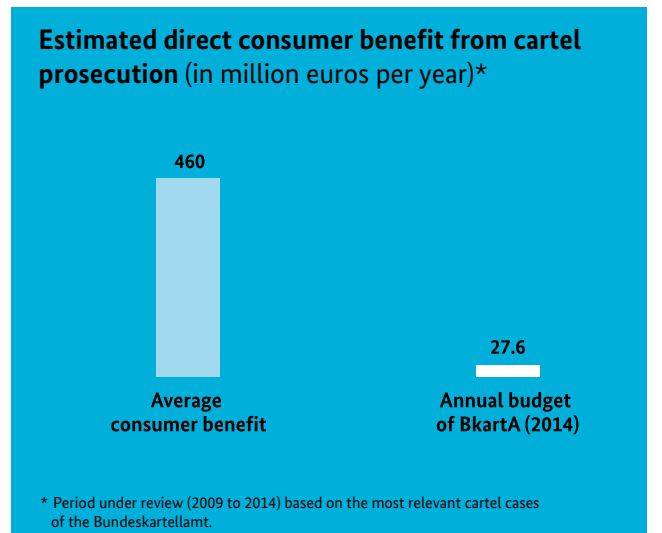
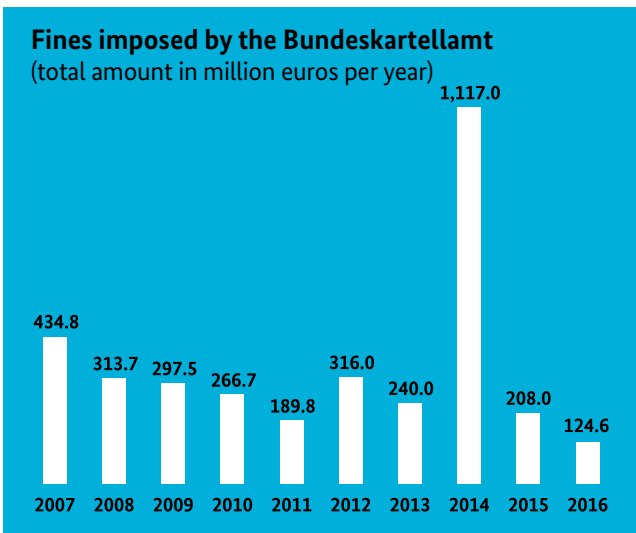
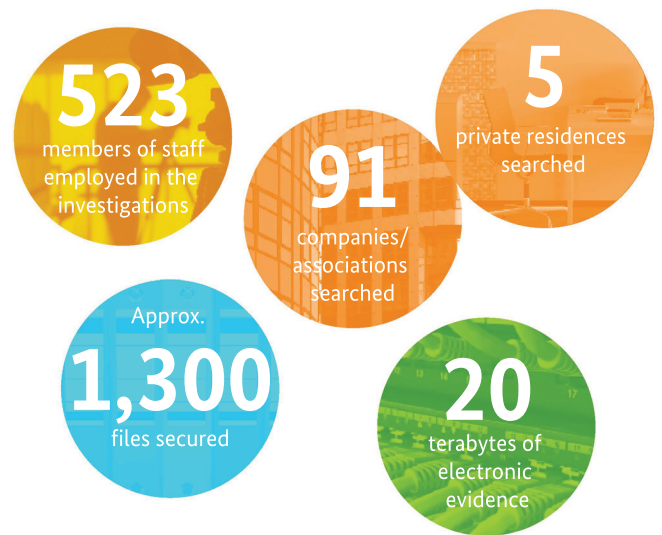
Fines imposed in 2016 in euros Total of 124,600,000*



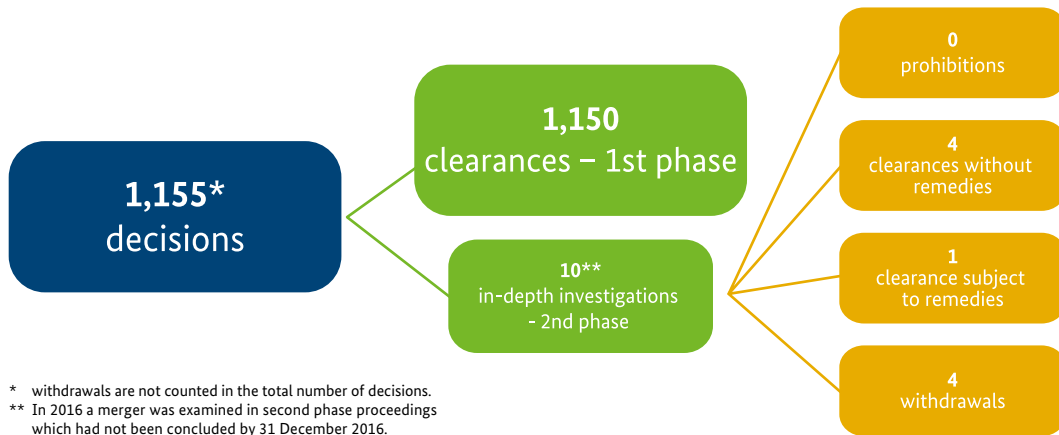
* The figures are rounded values.
** part of a major proceeding in the food retail sector (so-called "Vertikalfall")



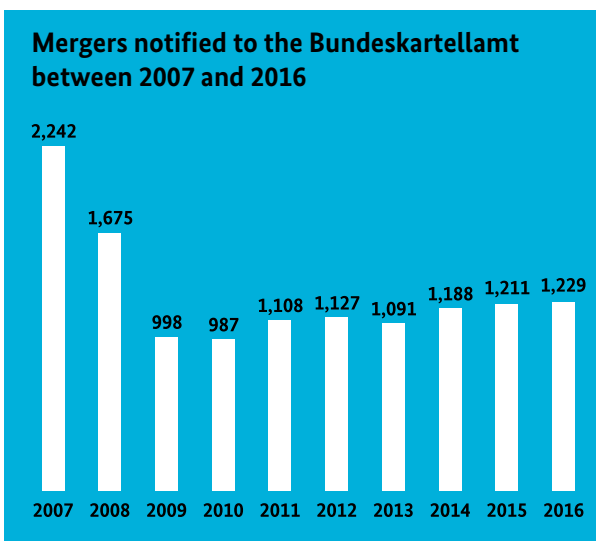
Dawn raids and evidence seized in 2016



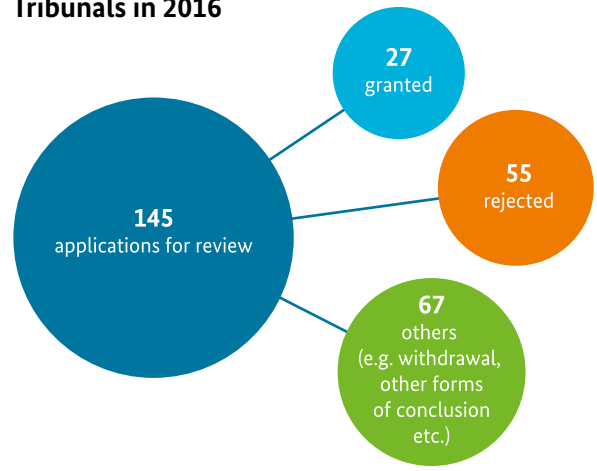
Merger control: Bundeskartellamt decisions in 2016



Mergers notified to the Bundeskartellamt between 2007 and 2016



Practice of the Federal Public Procurement Tribunals in 2016



Abuse of dominance proceedings in figures for 2016



3rd Decision Division

The activities of the 3rd Decision Division cover the healthcare sector, including health insurance, hospitals, pharmacy and medical technology as well as the chemical and plastics industries. In its merger control proceedings the decision division has been constantly preoccupied with the consolidation in the hospital market and in 2016 also launched a sector inquiry into this market. It also examined mergers in the hearing aids market, the pharmaceutical wholesale and blood donation services sectors.

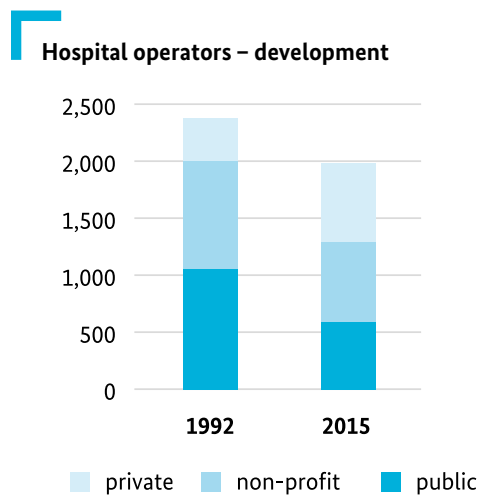
The 3rd Decision Division is chaired by Eberhard Temme.

Merger control in the hospital sector

Irrespective of their operators (municipal authorities, churches, private operators) hospitals are independently 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 thus crucial to ensure that patients have sufficient local options to choose from.

In the case of a merger project the decision division examines the competitive situation of hospitals whose services are comparable from the patients' 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 division's analysis will also include a survey of patient flows.

The competitive conditions in the hospital sector were also the focus of a sector inquiry launched by the division at the end of May 2016. The aim of the sector inquiry is to obtain information about the current market situation



Source: German Hospital Federation, Hospital Statistics (10/2016); Federal Statistical Office, basic hospital data 2014 and 2015

and intensity of competition in acute inpatient hospital treatment and to further develop assessment criteria for merger control proceedings. Another aim of the sector inquiry is to determine what factors influence patients in their choice of hospital and how hospitals try to set themselves apart from their competitors in terms of the services and areas of specialisation or quality management they offer. The inquiry will also look into the role of various stakeholders such as medical staff, remuneration structures and the financial situation of the hospitals.

Consolidation process in the hospital sector

- In recent years the financial situation of the hospitals has stabilized and the number of notified merger projects has decreased.
- From 2004 to 2016 the Bundeskartellamt examined a total of more than 250 hospital mergers.
- 210 mergers were cleared and seven prohibited.
- The remaining cases were either not subject to merger control or the proceedings have not yet been concluded.

Merger of pharmaceutical wholesalers

The division has cleared the acquisition of the regionally active pharmaceutical wholesaler Ebert+Jacobi GmbH & Co. KG by the cooperative Noweda, which is active as a pharmaceutical wholesaler throughout Germany. The merger affects in particular southern Germany and Hesse.

The pharmaceutical wholesalers Phoenix and/or Alliance Healthcare will remain the market leaders in all the regional



markets, but with the acquisition Noweda has moved into second or third place. Also in a national context Noweda is still the second largest wholesaler after Phoenix. Pharmacies will still have several pharmaceutical wholesalers as alternative suppliers after the merger, both at a regional and national level.

At the same time cooperation was reduced between the target company and other companies in the sector at the instigation of the decision division. With the acquisition Ebert+Jacobi is no longer part of the Pharma Privat group, a purchasing association of small and medium-sized pharmaceutical wholesalers in Germany. An existing IT service contract with a company belonging to the Pharma Privat group was also terminated to dispel concerns expressed by the Bundeskartellamt.

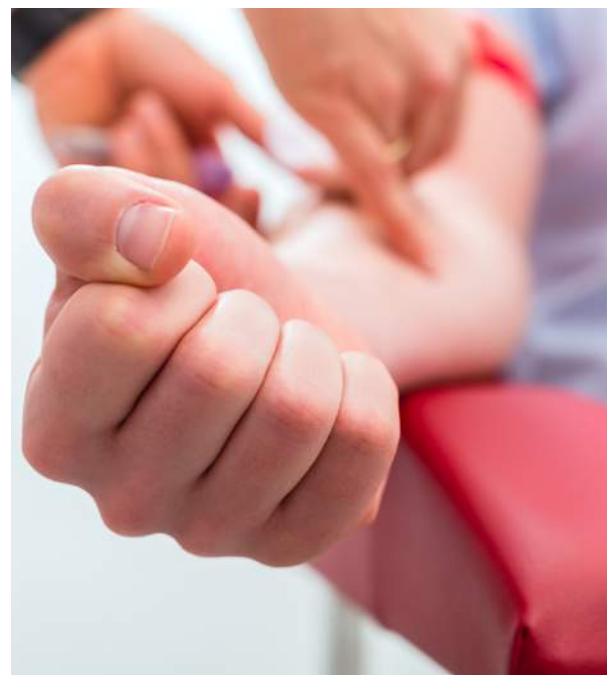
Merger in the hearing aid sector

The decision division cleared the acquisition of AudioNova International B.V., Rotterdam, the Netherlands, by Sonova AG, Stäfa, Switzerland. With the retail chains Geers and HörGut the AudioNova group operates over 550 hearing aid retail outlets across Germany. The Sonova group is the leading hearing aid manufacturer in Germany and sells hearing aids to hearing aid retail outlets. With the hearing aid retail chains Fiebing and Vitakustik the company is also active in Germany on the market for the sale and fitting of hearing aids to final customers. With the acquisition the

Sonova group will become one of the largest hearing aid retail chains in Germany. An examination of the markets affected has shown that even after the merger there will still be sufficient competitive pressure from other market participants.

Blood donation services

Hospitals and doctors have a high demand for blood products which are supplied in particular by the blood donation services of the German Red Cross but also by state and municipal services and private companies. Blood donation services in Germany are currently in a phase of transition and consolidation. For example, joint ventures are increasingly being established between university institutions with the participation of various German Red Cross blood donation services. The decision division closely monitors such projects and assesses them from a competitive perspective. In 2016 the decision division examined the planned merger between the blood donation services of the Bavarian Red Cross and the last municipal blood donation service based in Bavaria, i.e. the blood donation services of the municipal clinic Städtisches Klinikum München GmbH. It objected to the project due to competition concerns. However, it became evident during the proceedings that there was no longer a notification requirement among other reasons because the turnover of the blood donation services of the municipal clinic had fallen below the threshold beyond which mergers have to be notified.



4th Decision Division

The activities of the 4th Decision Division cover the waste management industry, financial services and other services. In the area of financial services the competitive conditions of different payment methods - electronic cash and online payment systems - remained an area of focus of the division's work. The division also examined a merger between cooperative central banks, launched a sector inquiry into the waste management sector and decided on a number of merger projects.

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

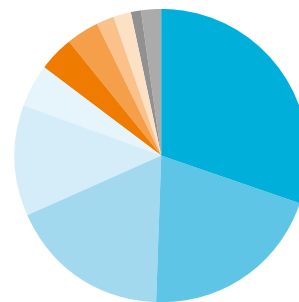
Online banking conditions of German Banking Industry Committee illegal

In the summer of 2016 the decision division declared illegal certain rules in the online banking conditions of the German Banking Industry Committee (Deutsche Kreditwirtschaft).

The German Banking Industry Committee and its banking associations have for many years used jointly agreed general terms and conditions which also include the "Special Conditions for Online Banking". These oblige online banking customers to observe certain rules for the use of the personal security features PIN (personal identification number) and TAN (transaction authentication number). According to these rules, online banking customers may not use their PIN and TAN as authentication credentials for access to non-bank payment systems.

In the decision division's view these rules violate German and European competition law because they significantly impede the use of alternative innovative non-bank payment systems for the purchase of goods or services in the Internet. The parties involved have appealed the decision to the Düsseldorf Higher Regional Court.

Online-Payment 2016
Share of payment methods in turnover achieved in German e-commerce sector in percent



- Purchase against invoice (30.5 %)
- Direct debit (20.2%)
- Paypal (17.9%)
- Credit card (12.2%)
- Hire purchase/ instalment financing (4.5%)
- Advance payment (4.0%)
- Payment on collection (3.6%)
- Immediate transfer (2.0%)
- Cash on delivery (1.9%)
- Pay with Amazon (1.1%)
- Others (2.1%)

* Source: EHI-Study on Online-Payment 2017



Joint online offers of banks

In 2016 the decision division also examined the online banking apps offered by German banks. Several savings banks have developed a joint app under the project name "Yomo" which allows a customer to open and operate an account via a mobile telephone. The decision division had no competition concerns about this project. As the project also enables smaller banks in particular to offer their own app-based current account, it is likely to stimulate competition in the current account market. The decision division also had no objection under competition law aspects to the planned addition of a new payment function to the online payment system

'paydirekt'. This will allow customers in future to transfer small amounts of money from one mobile phone to another (so-called "P2P payment function"). paydirekt is a joint venture of leading private banks, cooperative banks and undertakings from the savings bank sector. The banks participating in the joint venture have jointly developed this payment system but compete with one another in other areas.

In the decision division's view the cooperation is likely to improve competitive conditions on the market for online payment systems. paydirekt can now add a mobile function to its online payment system which the market leader PayPal has already offered for some time. Other providers of similar payment systems include FinTechs such as Lendstar, Cringle or Tabbt and also the savings bank group ("Kwitt") and the cooperative banks ("Geld senden und empfangen"/"send and receive money"). The decision division had no objections to the cooperations in the last two examples either.

Merger between DZ BANK and WGZ BANK

The Bundeskartellamt cleared the merger between DZ BANK AG and WGZ BANK AG. The two banks are the central banks in the German cooperative banking sector and primarily offer central bank services. The cooperative banks largely obtain these services either from DZ BANK or WGZ BANK. The decision division's investigations showed that once affiliated to one of the two banks, the cooperative banks did not switch to the other nor did they contemplate such a switch. The above services can also be obtained from a provider outside the cooperative banking sector. Competition conditions are therefore not expected to significantly deteriorate on account of the merger.

Competition in the waste management sector

Sector inquiry into household waste collection

In 2016 a sector inquiry was launched into the household waste collection sector, which focuses on the competition conditions in the regional markets for the collection and transport of household waste. The sector inquiry was launched because of the increased concentration on the waste management markets and a declining participation in tenders for waste collection and disposal contracts in many regions. Small and medium-sized enterprises in particular seem to be more and more reluctant to participate in such tenders. The sector inquiry will in particular investigate the competition conditions in tenders issued by compliance schemes and municipalities and follow up indications that competition is being restricted on the regional waste disposal markets.



Acquisition of Bördner group by REMONDIS

On account of the ongoing consolidation process in the waste disposal sector, the decision division again examined a large number of mergers in 2016. One case which required particularly intensive investigation was the acquisition by REMONDIS of the Bördner waste disposal group. The division cleared the merger in June 2016.

The Bördner group is active in Limburg and the Hochsauerland district. With this merger REMONDIS, Germany's largest waste management company, will further extend its network of locations in north-west Hesse and strengthen its leading position in the collection of household and commercial waste in the greater Rhine-Main region. However, the decision division's investigations have shown that even after the merger there will be sufficient competitive pressure from other market participants.

Waste management industry in Germany

- Turnover of waste management industry in Germany in 2016: around **40 billion euros**
- Nearly 200,000 employees in approx. 6,000 companies
- Volume of domestic waste in Germany in 2014: approx. **50 million tonnes**

Source: Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, "Abfallwirtschaft in Deutschland 2016"; Federal Environment Agency

5th Decision Division

The 5th Decision Division is competent for the following areas: mechanical and plant engineering, the metal industry, iron and steel, measurement and control technology, patents and licences, the paper industry and the gambling industry. Again in 2016 a key area of the division's activities was the sanitary, heating and air conditioning sector. The decision division concluded a cartel proceeding in this sector and cleared a merger involving the market leader Cordes & Graefe KG only after changes were made to the original project. It also prohibited the toy manufacturer LEGO from discriminating against online retailers in future. The decision division also examined in depth a merger between two producers of equipment for the manufacture of semiconductors.

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

Key focus: Sanitary, heating and air conditioning sector

Cartel proceeding against wholesalers of sanitary, heating and air conditioning installations

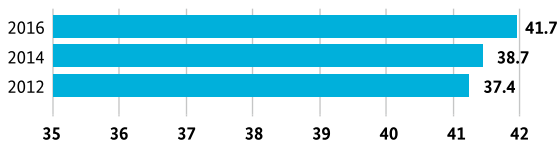
In March 2016 the Bundeskartellamt imposed fines totaling around 21.3 million euros on nine wholesalers and an individual involved in the sanitary, heating and air conditioning sector for having coordinated the calculation of so-called gross prices. The proceeding against another company is still ongoing.

The companies had jointly set calculation factors to determine so-called gross prices for sales to the specialist installation trade. The subject matter of the coordinated calculation, which was also of significant relevance as a calculation guide for the sector nationwide, were at least 250,000 products from the sanitary sector. This joint calculation among competitors led to an anti-competitive price alignment of the reference prices and hence significantly reduced the intensity of competition.

Clearance of merger between wholesalers

In March 2017 the decision division cleared the acquisition by Cordes & Graefe KG of the business operations of Wilhelm Gienger GmbH. The planned merger was initially notified in autumn 2016 and was extensively examined

Development of turnover in the sanitary, heating and air conditioning sector



■ Turnover in billion euros

Source: German Sanitation, Heating and Air Conditioning Association

Three-tier distribution channel in the sanitary, heating and air conditioning sector



by the decision division. After the decision division had informed the companies of its preliminary assessment, the parties withdrew their application in order to renotify the merger project in a modified form which would be less problematic under merger control.

The merger affects the wholesale markets for sanitary, heating and air-conditioning products. Cordes & Graefe is the German market leader in this market segment. Whereas Wilhelm Gienger is mainly active in the Baden-Württemberg area, Cordes & Graefe only has a few locations in this region. However, in the Ulm region, where their sales areas overlap, the companies would together have reached high market shares. Nonetheless the merger could be cleared after the companies divested a subsidiary in this region.

LEGO changes its conditions for online sales

In June 2016 the decision division terminated its proceeding against the toy manufacturer LEGO. The latter had undertaken to operate its discount system in future in such a way that online retailers will be able to obtain the same level of discount as brick-and-mortar retailers. The decision division had initiated the proceeding in reaction to complaints by retailers. According to LEGO's previous discount system, retailers could only obtain the highest number of discount points through sales in brick-and-mortar stores. This meant that irrespective of the quality of their online presence, online retailers in many cases obtained lower discounts than those retailers which were exclusively active in offline sales.

Vertical price fixing

- Vertical price fixing denotes a process where a manufacturer obliges its customers to resell its products at a certain price (or at least not below a certain price).
- The German Competition Act generally prohibits such fixed or minimum resale price maintenance.
- The Act allows for a case-by-case assessment of certain restraints imposed by manufacturers on their retailers.

In January 2016 the decision division had imposed a fine of 130,000 euros on LEGO in another proceeding for enforcing vertical resale price maintenance in the sale of its so-called “highlight articles”. Those affected were retailers in northern and eastern Germany who in 2012 and 2013 were forced by sales representatives of LEGO to raise their retail prices. In some cases the retailers were threatened with either a reduction in supply or even the refusal to supply.

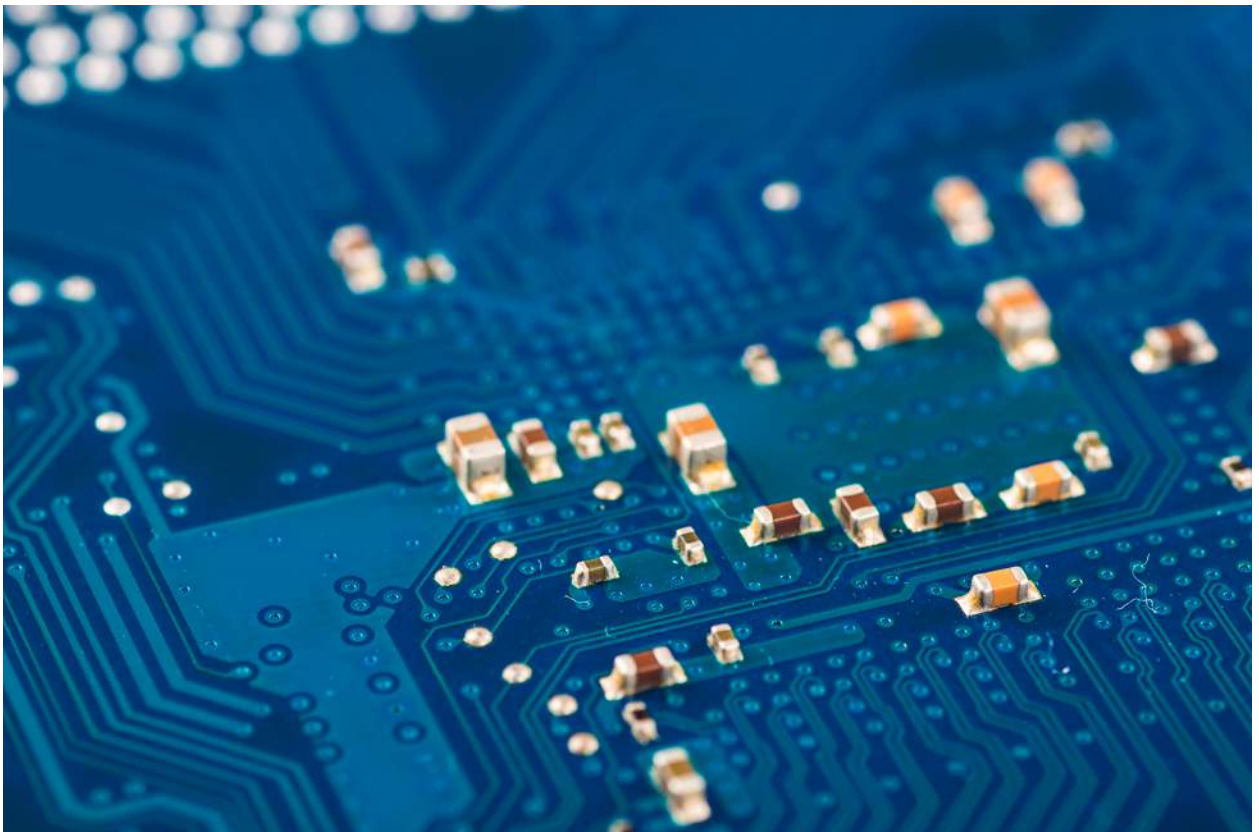
After the proceeding was opened LEGO carried out extensive in-house investigations and from the onset significantly contributed to clarifying the facts of the case and of its own accord drew the necessary organisational and personnel consequences. In setting the fine the Bundeskartellamt took into account that the company had cooperated extensively with the authority and that a settlement could be reached.

Merger of producers of equipment for the manufacture of semiconductors

At the beginning of 2017 the division cleared the planned minority holding of ASML Holding N.V., the Netherlands, in Carl Zeiss SMT Holding GmbH & Co. KG, Germany. Both companies are internationally active producers of equipment for the manufacture of semiconductors (chips).

ASML produces very sophisticated types of equipment, which play a key role in the manufacture of microchips. Carl Zeiss SMT is especially active in the manufacture of high performance optics. The two companies are not direct competitors and already cooperated with one another before the merger. Due to the strong pressure to innovate, there are many different forms of cooperation in the sector, particularly in the area of research and development. Furthermore, the companies’ customers include several large international companies with significant buyer power which will continue to limit the scope of action of the parties after the merger.

In 2013/2014 the decision division had already conducted extensive market surveys in the sector to examine the planned merger between Applied Materials and Tokyo Electron and again in 2016 in the merger proceedings involving KLA-Tencor Corporation and Lam Research Corporation.



6th Decision Division

The 6th Decision Division is responsible for the media sector, the digital economy, culture, sports and entertainment, the advertising industry and trade fairs. The decision division also includes a think tank which is tasked with assessing online platforms under competition law. A key area of the division's activities is an ongoing abuse of dominance proceeding against Facebook. It also closely examined a merger between concert organisers and conducted proceedings in the area of football broadcasting rights as well as in the digital audiobook sector.

The 6th Decision Division is chaired by Julia Topel.

Online platforms

The digital economy raises many new issues in terms of competition law. The conduct and strategies of large Internet companies are provoking intense discussion about whether they are legal, the competitive harm they cause and to what extent they should be subject to special control. Much concern has been expressed about the alleged paramount market position of firms active in digital markets. At the same time many digital markets are very dynamic and innovative. In this context the division's "Internet Think Tank" has examined the competitive conditions on online platforms in particular. The Think Tank's work is reflected in the decision division's case decisions and work results.

Working papers on "Market Power of Platforms and Networks" and "Big Data"

The working paper published by the Bundeskartellamt in summer 2016 on the "Market Power of Platforms and



Networks" deals with the economic specifics of platforms and networks and their effects on market definition and the criteria used to assess market power or dominance. The working paper is complemented by another paper which was jointly prepared by the Bundeskartellamt and the French competition authority on "Competition Law and Data" which deals with the increasing importance of data in the economy and the ensuing impact on competition law. The key issues addressed by the paper are why, how and to what extent data can become an instrument of market power.

The principles presented in the working papers are applied in the decision division's various proceedings.

Proceeding against Facebook

The decision division has conducted a proceeding against Facebook since March 2016. The authority is investigating suspicions that with its specific terms of service regarding the use of user data, Facebook is abusing its possibly dominant position in the market for social networks. There is an initial suspicion that Facebook's terms of use

Network effect

- A network effect occurs if the value of a service generally increases with a simultaneous increase in the number of its users (positive network effect). Such effects occur in online platforms in particular.
- If the value decreases with an increasing number of users, e.g. because of overload, this can be termed as a negative network effect.
- A direct network effect occurs if there is an increase in value with a simultaneous increase in the number of users in one and the same group. Such effects occur in social networks in particular.
- The network effect between different sides of a market is considered to be indirect if another user group benefits from an increase in the number of users. Such effects occur especially in the case of transaction platforms, e.g. real estate platforms.

are in violation of data protection provisions. Not every law infringement on the part of a dominant company is also relevant under competition law. However, for advertising-financed Internet services such as Facebook, user data are hugely important. The decision division is examining inter alia whether the consumers are sufficiently informed about the type and extent of data collected. The use of unlawful terms and conditions could represent an imposition of unfair conditions on users.

Facebook's market position

- By its own account Facebook has around 1.86 billion active users per month worldwide (Information as of December 2016).
- In 2016 Facebook claimed to have achieved a worldwide turnover of 27.6 billion US Dollars.

Source: Facebook

Exclusivity between Amazon subsidiary Audible and Apple prohibited

In reaction to a complaint by the German Publishers and Booksellers Association (Börsenverein des Deutschen Buchhandels) the Bundeskartellamt and the European Commission examined a long-term agreement between Audible and Apple for the sale of audiobooks. The decision division's examination focused on contract clauses on the exclusive purchase of digital audiobooks by Apple from Audible for sale in Apple's download shop iTunes Store as well as on the obligation of Audible not to supply digital music platforms other than iTunes. In reaction to the proceeding the companies finally abandoned the agreement.

Proceeding against CTS Eventim

In 2016 the decision division examined the acquisition of the concert and festival organiser FKP Scorpio Konzertproduktionen GmbH by CTS Eventim AG & Co. KGaA.

CTS Eventim operates the ticket online shop "Eventim.de", provides ticketing services for event organisers via an electronic platform and also organises events itself, especially rock/pop tours and festivals such as Rock am Ring. FKP Scorpio is a concert organiser specialising in festivals such as the well-known Hurricane and Southside festivals. In spite of CTS's powerful market position in ticketing services, which according to the concept for assessing the market power of online platforms could be indicative of a dominant position, the merger could be cleared. The reasons for this were that there are only a few areas of overlap between the activities of the two companies on the tour promoter markets and that CTS already had a stake in FKP Scorpio.

The decision division is also conducting an abuse proceed-

ing against CTS Eventim on account of the conditions it sets for its ticketing services for event organisers and advance booking offices. The main focus of its investigations are exclusivity agreements. The proceeding is still ongoing.

Football broadcasting rights: DFL undertakes for the first time to observe "no single buyer" rule

The decision division has examined the marketing model of the German Football League (Deutsche Fußball Liga, DFL) for the award of media rights for the games of the German football league from the 2017/18 season onwards. In order to dispel concerns expressed by the Bundeskartellamt the German League Association and DFL have undertaken to observe comprehensive criteria when awarding media rights for the games of the 1st and 2nd football leagues from the 2017/18 season onwards.

DFL had contacted the Bundeskartellamt to ensure that the structure of the media rights packages and award procedure take account of the authority's possible competition concerns. In principle the joint selling of the media rights of the clubs of the 1st and 2nd Bundesliga by DFL constitutes an anti-competitive agreement. Such agreements can only be exempted from the prohibition of cartels if the joint selling results in product improvements which benefit the consumer and for which the restraints of competition are indispensable.

With its decision the division aims to ensure that as in other European countries more than one single bidder gains live rights to the Bundesliga games. As long as there is only one holder of live rights in the market, there is the danger that innovation competition, especially from Internet-based offers, will be restricted.



7th Decision Division

The activities of the 7th Decision Division focus on the areas of telecommunications and broadcast engineering, EDP, electrical engineering, press and radio, press-related advertising and outdoor advertising. Last year the decision division examined mergers relating to newspaper publishers, magazines and providers of press distribution services. The decision division also conducted an administrative proceeding against Deutsche Funkturm GmbH on account of its prices for the lease of surface area for FM antennas. In another proceeding it examined the participation of Intel and NavInfo in the HERE mapping service.

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

Merger between newspaper publishers

In April 2016 the decision division cleared the merger between the publishing groups NOZ Mediengruppe and medien:holding:nord-Gruppe (mhn). NOZ Mediengruppe publishes among others the daily Neue Osnabrücker Zeitung. Two dailies which belong to the mhn group are the Flensburger Tageblatt and Schweriner Zeitung.

The decision division's investigations showed that there are no overlaps between the activities of the two publishing groups. Whilst the activities of NOZ Mediengruppe are limited to Lower Saxony, the mhn group is active in Schleswig-Holstein and Mecklenburg-West Pomerania. With a daily circulation of all its newspapers amounting to over 450,000 copies, NOZ Mediengruppe is now one of the ten largest newspaper publishers in Germany.

Daily newspaper market in 2016

	Rang 2016*
Axel Springer SE	1
Verlagsgruppe Stuttgarter Zeitung/Die Rheinpfalz/ Südwest Presse, Ulm	2
Funke Mediengruppe (formerly WAZ publishing group), Essen	3
Verlagsgruppe DuMont, Cologne	4
Verlagsgruppe Madsack, Hanover	5
Verlagsgruppe Ippen, Munich	6
Verlagsgruppe Augsburgener Allgemeine	7
ddvg, Hamburg	8
Rheinisch-Bergische Verlagsgesellschaft/ Rheinische Post	9
Verlagsgruppe Neue Osnabrücker Zeitung	10

*based on number of copies circulated

Source: Formatt-Institut, Dortmund

Mergers in the national distribution of media products

The decision division cleared the acquisition of Axel Springer Vertriebservice (ASVS) by Gruner + Jahr, and the acquisition of the international sales business of Gruner + Jahr by IPS Pressevertrieb. The national distribution of media products includes the services which specialised providers perform for newspaper and magazine publishers in the retail of media products, including sales in railway station bookshops. Such services cover e.g. quantity planning and the organisation of dispatch and logistics.

After its acquisition of ASVS the market share of Gruner + Jahr, up to then already active in the national distribution sector via Deutsche Pressevertrieb (DPV), would only have exceeded the threshold above which dominance is presumed in the international sales segment. However, as substantial parts of DPV's international sales business were simultaneously divested to IPS, the merger project did not significantly strengthen DPV's international business. IPS's stronger position in the international business segment as a result of the second acquisition was also not expected to significantly impede effective competition because the providers of other large publishers will continue to exert sufficient competitive pressure.

Joint venture between Gruner + Jahr and Landwirtschaftsverlag Münster

In June 2016 the decision division cleared the launch of a joint venture between Gruner + Jahr and the agricultural publishing house Landwirtschaftsverlag Münster. The two publishing houses are pooling six magazine titles from the segments home, food and rural life in the joint venture. These are "Landlust" and "Einfach Hausgemacht" published by Landwirtschaftsverlag Münster and the magazines "Essen & Trinken", "Essen & Trinken für jeden Tag", "Living at home" and "Flow" which are published by Gruner + Jahr.



Although the merger affects different reader and advertising markets in the popular magazines sector, according to the decision division’s investigations it is unlikely to significantly impede effective competition in the markets affected because several important competitors will continue to exert sufficient competitive pressure.

Deutsche Funkturm adjusts pricing structure

In December 2016 the decision division terminated an administrative proceeding against Deutsche Funkturm GmbH, Münster. Deutsche Funkturm was suspected of abusive conduct in its lease of high altitude mounting surfaces for the installation of FM antennas on antenna masts and telecommunication towers.

Its planned pricing structure for the lease of surface area for FM antennas could have discriminated against smaller broadcasting network operators, in particular. The division terminated the proceeding after Deutsche Funkturm adjusted its pricing structure in reaction to the division’s objections.

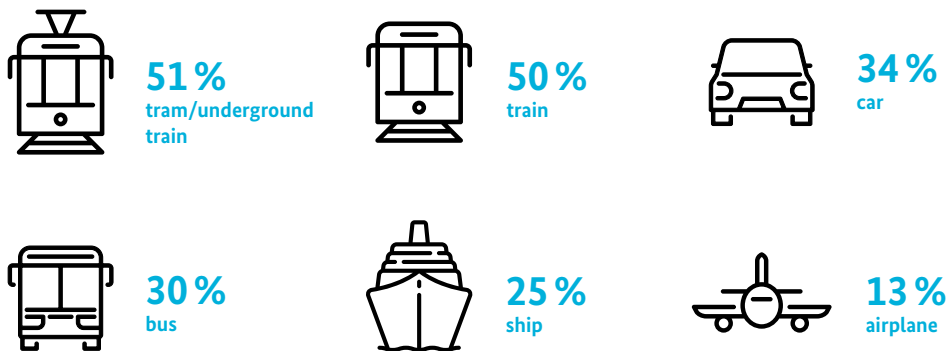
Since the beginning of 2016 the amendment to the Telecommunications Act (TKG) and market regulation measures undertaken by the Federal Network Agency have opened up opportunities for competition between broadcasting network operators. The upstream market for the lease of surface area for FM antennas is not subject to regulation under the TKG. The Bundeskartellamt’s proceeding was initiated to protect emerging competition on this new market.

Participation of Intel and NavInfo in HERE mapping service

In early 2017 the decision division cleared the participation of Intel and the participation of a consortium consisting of the Chinese companies NavInfo and Tencent and the state-owned investment fund GIC (Singapore) in the HERE mapping service. HERE provides digital mapping databases which have up to now been used above all for classical navigation applications. In 2015 several car manufacturers (BMW, Daimler, Audi) acquired HERE from Nokia in order to jointly develop with HERE mapping databases for the future autonomous driving market.

The decision division’s examination focused on whether after the merger other car manufacturers would be foreclosed from technologies which are essential for autonomous driving. In the view of the decision division such a development is not to be expected. There is no overlap in HERE’s and NavInfo’s activities either, due to their different geographical range. The Bundeskartellamt therefore cleared both concentration projects.

Interest in autonomous means of transport
Could you imagine using one of the following means of transport if it was self-driving?



Source: Bitkom Research 2015; Basis: 1,011 persons above 14 years of age

8th Decision Division

The 8th Decision Division is mainly responsible for the areas of mineral oil, gas, electricity, district heating, water and mining. The Energy Monitoring Working Group and the Working Group for the Market Transparency Unit for Electricity/Gas are also located within the decision division. In recent months the decision division has concluded abuse of dominance proceedings on account of excessive district heating and water prices and published a report on drinking water supply in Germany. It also published the results of its sector inquiry into the submetering of heating and water costs.

Until June 2017 the 8th Decision Division was chaired by Prof Dr Carsten Becker. He was succeeded by the former Chairman of the 1st Decision Division, Christian Ewald.

Control of abusive pricing in the district heating and water sectors

Commitments in proceedings against district heating suppliers

In spring 2017 the decision division concluded its proceedings on abusive pricing against district heating suppliers. After the decision division had expressed concerns about abusively excessive price increases from 2010 to 2012 in several supply areas, the district heating suppliers offered commitments. The customers affected will benefit from reimbursements or future price reductions amounting to approx. 55 million euros in total.

In March 2013 the Bundeskartellamt had initiated proceedings against seven companies. In some supply areas the suspicion of excessive pricing could not be confirmed.

Report on drinking water supply in German cities

In summer 2016 the decision division presented a report on the framework conditions of drinking water supply and the monitoring of fees charged by water suppliers in Germany. This followed several successful proceedings against



individual water suppliers on account of abusively excessive prices (e.g. in Berlin, Mainz and Wuppertal).

In its report the decision division describes the legal framework conditions and structures of public water supply. An extensive empirical part of the report illustrates the considerable differences between the individual structural conditions of the water suppliers in comparison with their price levels. The report also deals with the consequences of the exemption since 2013 from abuse control under competition law of water *charges* (in contrast to water *prices*). This has enabled municipal water suppliers to switch to charges.

Wuppertaler Stadtwerke fulfils reimbursement obligation

In September 2015 a proceeding on abusive pricing against the Wuppertal municipal utility, which the decision division had initiated in 2012, ended with a settlement. As part of the settlement the utility undertook to refund 15 million euros to its water customers in Wuppertal. As the city of Wuppertal remunicipalised its water supply services in 2013 and has since levied water charges, the decision division's order for the utility to reduce its prices was

The Bundeskartellamt's Water Report

- The report examines the prices and structural conditions of drinking water supply in Germany's 38 largest cities.
- The prices of drinking water vary greatly from one city to another: Net revenue varied in 2013 from 1.40 to 2.60 euros/m³.
- These differences can be explained partly by the different conditions of supply (e.g. density of supply or differences in altitude).
- An efficient control of water fees by the authority prevents suppliers from abusing their monopoly position to the detriment of consumers.

rendered invalid. The decision division had then continued the proceeding with the aim of achieving a refund of the excessive water prices charged in the past.

In summer 2016 the sum of 15 million euros was finally reimbursed to water customers as a proportion of their previous water bills.

Submetering

- In 2014 the volume of turnover achieved from submetering in Germany amounted to approx. 1.47 billion euros.
- The supply side is highly concentrated. The two market leaders Techem und ista together account for more than 50 percent of the total market volume and the largest five providers together account for more than 70 percent.

Sector Inquiry into Submetering of Heating and Water Costs

In early May the decision division presented a final report on its sector inquiry into submetering. Submetering services cover the consumption-based metering and billing of costs for heating and water within buildings as well as the provision of the necessary metering equipment. The results of the inquiry indicate that the market is dominated by a few providers. Competition is restricted in the market and it is difficult for customers to switch supplier due to the different structural features and business models of the submetering service providers. The Bundeskartellamt therefore recommends legislative measures to stimulate competition.

Guidelines on control of abuse of a dominant position in electricity generation

In summer 2016 the decision division presented draft guidelines on the control of the abuse of a dominant position in the electricity generation sector for public consultation. It prepared a questionnaire for interested companies, trade associations and public authorities. Joint guidelines are currently being planned by the Bundeskartellamt and the Bundesnetzagentur (Federal Network Agency). The guidelines will define the objective and scope of the control of abuse of a dominant position on the market for the first-time sale of electricity and the rules for its implementation.

Market Transparency Unit for Electricity and Gas Wholesale Trading

The decision division is involved in setting up a Market Transparency Unit for Electricity and Gas Wholesale Trading which is based at the Bundesnetzagentur (Federal Network Agency). The tasks assigned to this unit will be jointly carried out by the Bundesnetzagentur and the Bundeskartellamt. The task of the Market Transparency Unit is to monitor electricity and gas wholesale trading in order to detect any irregularities in price developments at the wholesale level which could be attributed to the abuse of market power.

The main focus of its work in 2016 was to develop the IT system for this purpose, in particular databank infrastructure and the necessary security measures in preparation for the inclusion of trade and fundamental data to be collected by the Agency for the Cooperation of Energy Regulators (ACER).

Competition in the energy sector Results of Energy Monitoring by the Bundesnetzagentur and the Bundeskartellamt in 2016

Electricity

- On the end customer markets consumers of electricity benefit from a large number of suppliers.
- More competition in the electric heating sector: highest number of commercial and industrial customers switching to another supplier since monitoring started in 2006.
- Wholesale markets continue to have a high level of liquidity.
- The market power of the largest electricity producers is meanwhile clearly below the 2010 level.
- Conventional electricity generation has fallen further behind electricity derived from renewable energies. The increase in conventional generation capacities is linked to the realisation of power plant projects which were decided before Germany's energy transition.

Gas

- At the reference date of 1 April 2016 gas prices for household customers and industrial customers had fallen considerably compared to the previous year (by around 6.54 ct/kWh).
- Gas prices for industrial customers in particular fell significantly due among other things to a further decline in wholesale prices and competition at the national level between the suppliers on the end customer markets.
- There was a significant increase in the volume of stock exchange gas trading.

9th Decision Division

The 9th Decision Division is responsible for the tourism, hotel, restaurant and catering sector, all the transport sectors, postal services and the automotive industry, including rail, air and water vehicles. An example of the decision division's work in 2016 was the examination as to whether Air Berlin could be allowed to lease aircraft to Lufthansa in a wet lease agreement. The decision division also enforced extensive changes to the sale of rail tickets. The 'best price' clauses of hotel booking portals remain another key issue.

The 9th Decision Division is chaired by Silke Hossenfelder.

Best price clauses of hotel booking portals

An important issue for many competition authorities in Europe are the so-called 'best price' clauses of hotel booking platforms. With these clauses the hotel booking platforms oblige hotels not to offer rooms at better rates on their own website than on the respective hotel booking portal ('narrow' best price clause). In the case of so-called 'wide' best price clauses, the hotels are obliged not to offer rooms at better rates on all other booking channels as well.

The decision division views such clauses as anti-competitive as they restrict competition between the different platforms and between the hotels themselves. After prohibiting the hotel booking platform HRS from using best prices clauses in December 2015, it also prohibited Booking.com from using such clauses. During the proceeding Booking changed its best price clauses from the wide to the narrow version but the decision division also considers this version to be an inadmissible restriction of competition.

Booking has appealed the decision to the Düsseldorf Higher Regional Court. The court's decision is still pending. Booking also appealed to the court against having to implement the demands set by the Bundeskartellamt before the court decision. However, the court rejected the appeal. A further proceeding is ongoing against the 'best price' clauses of Booking's competitor, Expedia.

Best price clauses ...

- oblige hotels to grant their contract partner the best conditions available;
- risk hindering competition between different platforms;
- can make the market entry of other booking platforms more difficult;
- prevent the hotels from offering more favourable conditions

Share of sales channels used for hotel bookings (in percent)

year	offline	online-booking portals	hotel website
2013	54	33	13
2014	50	36	13
2015	47	40	14
2016	45	41	14

Source: European Commission: Report on the Monitoring Exercise carried out in the Online Hotel Booking Sector by EU Competition Authorities in 2016

Best prices clauses were also recently a topic of intense discussion at European level. A working group within the network of European competition authorities, ECN, compiled a report on the topic, in which the Bundeskartellamt was actively involved. The report confirms that the specifics of the different national hotel portal markets must be taken into consideration in the design of measures to strengthen competition in the sector.

Lufthansa may lease aircraft from Air Berlin

In early 2017 the decision division cleared a wet lease agreement on 38 passenger aircraft between Lufthansa and Air Berlin. With the wet lease agreement Air Berlin will lease 38 aircraft including cockpit and cabin crews to Lufthansa and its subsidiaries. The aircraft are stationed at German and Austrian airports. The agreement is for a term of six years. The responsibility for flight operation, crew planning and maintenance remains with Air Berlin.

From a competition perspective, the lease of aircraft from a competitor had to be assessed differently than the takeover of the competitor itself. The agreement between Lufthansa and Air Berlin does not relate to the routes served by the two air carriers. Furthermore, Lufthansa will only lease aircraft and not take over the Air Berlin slots. Nor will the lease of the aircraft affect the re-allocation of slots that have so far been used by Air Berlin. Even though Lufthansa will be able to expand its business with the new aircraft, this did not suffice to prohibit the merger project.



Deutsche Bahn: Far-reaching changes to the sale of passenger tickets

Following investigations by the Bundeskartellamt, Deutsche Bahn AG is making far-reaching changes to the sale of passenger tickets. The measures will improve the ticket sales options of its competitors. In early 2014 the Bundeskartellamt had initiated a proceeding against Deutsche Bahn AG on the suspicion that it had abused its dominant position in the sale of rail passenger tickets. The proceeding was terminated on account of the commitments undertaken by the company.

Competitors of Deutsche Bahn AG in local passenger rail services may in future also sell long distance rail tickets of Deutsche Bahn AG at their ticket machines. They will also have easier access to ticket sale options in railway station shops. Up to now rental contracts for railway station shops have contained clauses which made this virtually impossible. Commission charges which are paid by Deutsche Bahn and its competitors for the reciprocal sale of passenger tickets will also be standardized and reduced to a large extent.

Competition in the rail transport market in 2015*

- Long distance passenger rail services:
37 billion passenger kilometres, of which:
99 percent Deutsche Bahn AG
< one percent Competitors
- Local passenger rail services:
55 billion passenger kilometres, of which:
78 percent Deutsche Bahn AG
22 percent Competitors

* Share of transport service
Source: Federal Network Agency (Bundesnetzagentur), Rail Market Study 2016

Consolidation in long-distance bus sector

There has been a rapid increase in the supply of long-distance bus services since the market was opened to competition in 2013. This has been accompanied by a remarkable level of consolidation in the market. The company FlixBus GmbH ("FlixBus") has acquired several competitors and established itself as the only major operator of regular long-distance bus services in Germany. The acquisitions were not subject to merger control because the turnover of the respective long-distance bus service operators were below the statutory merger control thresholds. Should there be indications that the company is abusing its powerful market position to the detriment of consumers or other companies, the decision division could initiate a proceeding.

Cartel prosecution

The 10th, 11th and 12th Decision Divisions are responsible for the cross-sector prosecution and punishment 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 2016 the Bundeskartellamt imposed fines amounting to around 124.6 million euros on 24 companies and five private individuals in seven cases. These included major proceedings on vertical price fixing in the food retail sector, the supply of rails and railway sleepers and fines against TV studio operators.

Since the beginning of March 2017 the 10th Decision Division has been chaired by Daniela Hengst.

Previous to this Michael Teschner was the interim chair of the decision division.

The 11th Decision Division is chaired by Ulrich Hawerkamp.

The 12th Decision Division is chaired by Michael Teschner.



Final fines in vertical price fixing proceeding in the food retail sector

Last year the Bundeskartellamt concluded its proceeding on vertical price fixing in the food retail sector. The final investigations focussed on agreements between the brewery Anheuser Busch InBev Germany Holding GmbH and several retailers on shop prices for beer from 2006 to 2009. In this series of proceedings fines amounting to around 112 million euros (90 million of which were imposed in 2016) were imposed on 11 companies.

The proceedings on vertical price fixing were some of the most extensive in the Bundeskartellamt's case practice. In a vast number of fine proceedings food manufacturers and retailers were investigated for vertical price fixing. On principle, retailers and manufacturers must not conclude agreements on shop prices to the detriment of end consumers. For example, manufacturers must not pressurize retailers or give them monetary incentives to maintain certain retail prices.

The nationwide dawn raids carried out in January 2010 only focussed on the product categories confectionery,

coffee and pet food. The area of investigation was extended to beer, body care products, baby food and baby cosmetics after information provided by companies willing to cooperate with the authority and chance finds had yielded additional evidence. All in all, 38 individual fines were imposed on 27 companies. The fines amounted in total to 260.5 million euros.

Rail case concluded

In early 2016 the Bundeskartellamt concluded the so-called rail case. Already in 2012 and 2013 the Bundeskartellamt had punished agreements between rail manufacturers in the submission of bids for calls for tender by Deutsche Bahn with a total fine of around 135 million euros. It also punished agreements concluded to the detriment of local public transport companies, private, regional and industrial railway companies as well as construction companies with fines amounting to nearly 100 million euros. In the latter case a settlement was reached with eight companies. In March 2016 the Bundeskartellamt imposed a fine of almost 3.5 million euros on Vossloh Laeis as a settlement could not be reached with the company. Vossloh Laeis appealed against the decision.





The authority also concluded its investigation proceedings against manufacturers of concrete and wooden railway sleepers. The investigations showed that several manufacturers of concrete sleepers had agreed on prices among one another to the detriment of Deutsche Bahn. The following companies were involved in the cartel: Durtrack GmbH, Möllenhagen, voestalpine BWG GmbH, Butzbach, and Rail.One GmbH, Neumarkt. The Bundeskartellamt imposed a fine of 1.5 million euros on Durtrack GmbH. The fines imposed on voestalpine BWG

GmbH and Rail.One GmbH were waived because by cooperating with the authority these companies helped to uncover and provide evidence of the cartel. The proceeding against the manufacturers of wooden sleepers was discontinued because the suspicion that they had concluded anti-competitive agreements among one another to Deutsche Bahn's detriment was not confirmed.

Proceeding against TV studio operators

The Bundeskartellamt has imposed fines amounting to a total of approx. 3.1 million euros on Studio Berlin Adlershof (SBA) GmbH, its affiliate Studio Berlin Broadcast GmbH and Bavaria Studios & Production Services GmbH on account of their participation in an anti-competitive information exchange. The investigations were triggered by a leniency application filed by MMC Studios Köln GmbH which was also involved in the exchange of information. In accordance with the leniency programme no fine was imposed on this company.

From September 2011 to December 2014 regular meetings and other personal contacts took place between the representatives of the companies involved. On these occasions information was exchanged on prices, details of offers, their supply behaviour and other competitively sensitive information. Such an extensive flow of information between competitors can restrict competition in the same way as price agreements.

The Leniency Programme in brief:

- Whoever as the first participant in a cartel agreement uncovers a cartel of which the Bundeskartellamt has no previous knowledge, receives immunity from a fine ("first come, first served" principle). Immunity from fines can also be granted at a later date if the Bundeskartellamt is provided with decisive evidence without which the existence of a cartel could not have been proved. The sole ringleader and those members of a cartel who have coerced others to participate in the cartel are excluded from immunity.
- All other applicants can have their fines reduced by a maximum of 50 percent, provided they cooperate with the Bundeskartellamt and produce decisive evidence to prove the offence.
- The requirement for immunity from and reduction of fines is the continuous and unlimited cooperation of the leniency applicant with the Bundeskartellamt throughout the proceedings.

Measures to increase the effectiveness of cartel prosecution

2000

The Bundeskartellamt launches its Leniency Programme.

2001

2002

The Special Unit for Combating Cartels is established.

2003

2004

Launch of a first division for hardcore cartels. Fines are increased following the 7th Amendment to the German Competition Act.

2005

2006

The Leniency Programme is revised. The Bundeskartellamt issues its Guidelines for the Setting of Fines.

2007

2008

Launch of a second division for hardcore cartels.

2009

Launch of the IT Forensics Unit

2010

2011

Launch of a third division for hardcore cartels.

2012

Introduction of an anonymous whistle-blowing system. Launch of Network on Bid-Rigging Agreements.

2013

The Guidelines for the Setting of Fines are updated.

Illegal agreements between sausage manufacturers - liability loophole in the German Competition Act

In October 2016 the Bundeskartellamt terminated its fine proceedings against two companies of the “Zur Mühlen” group. The fines totalling 128 million euros which were imposed on Böklunder Plumrose GmbH & Co. KG and Könecke Fleischwarenfabrik GmbH & Co. KG had become invalid due to internal restructuring measures taken by the companies. The “Zur Mühlen” group is a holding company of Clemens Tönnies senior.

The restructuring measures taken within the “Zur Mühlen” group meant that the authority could no longer enforce its claim to payment of the fines. The loophole in the law (so-called “sausage gap”) which existed at the time had made this possible.

With the 9th Amendment to the German Competition Act in 2017 the law was harmonised with the rules on corporate fines which already exist in European law. According to these rules a company’s responsibility for competition law violations also extends to the legal and economic successors of the company which was originally responsible and to the controlling parent company.

The issue of legal succession

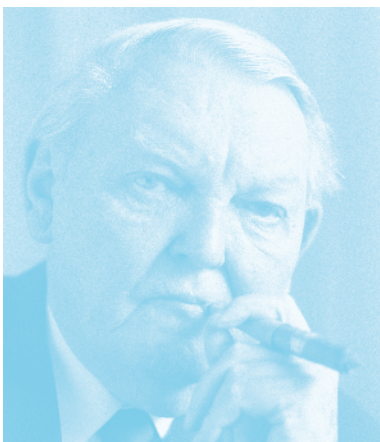
- **2011** Heavy fines imposed by the Bundeskartellamt cannot be collected after restructuring measures taken by the companies concerned. In proceedings against industrial insurers and in the ready-mix concrete sector, the Federal Court of Justice confirms that after corporate restructuring measures the legal successor of a company is only liable for fines imposed against that company if the successor’s assets are “essentially identical” to the assets of its predecessor.
- In both cases legal succession makes it impossible to impose fines on the companies concerned. In the Federal Court of Justice’s view, this loophole can only be closed by the legislator.
- **2013** The 8th Amendment to the German Competition Act closes loopholes regarding the liability of legal successors. Practical experience shows, however, that in particular large companies facing high fines continue to have the incentive and possibility to avoid a fine by taking restructuring measures.
- **2016** The orders imposing fines on two companies of the “Zur Mühlen” group in the sausage cartel are rendered invalid on account of restructuring measures taken within the company group. Fines to the amount of 128 million euros cannot be collected. There is a serious risk that fines will not be enforceable in other cases as well.
- **2017** With the 9th Amendment to the German Competition Act the legislator closes the remaining loopholes in the antitrust fines regime.

Selected maximum fines*

Year	Cartel proceeding	Total fines imposed in euros	Highest single fine against a company
2015	Automotive part manufacturers	89,700,000	29,500,000
2014	Beer	338,000,000	160,000,000
2014	Sausage	338,500,000	128,050,000
2014	Sugar	281,700,000	195,500,000
2013	Rails - DB Schienen	134,500,000	103,000,000
2010	Ophthalmic lenses	115,000,000	28,760,000
2009	Coffee	159,000,000	83,000,000
2008	Decorative paper	61,000,000	25,000,000
2008	Clay roof tiles	188,081,000	66,280,000
2007	Liquefied gas	249,000,000	67,200,000
2005	Industrial insurance	151,400,000	33,850,000
2003	Cement	396,000,000**	175,900,000

* Figures are rounded. Some cases are still pending and so not all the orders imposing the fines are final.

** Based on a judgment issued by the Federal Court of Justice in 2013 now final.



© Bundesregierung; Foto: Engelbert Reineke

“There have never been as many unemployed in German economic history as in the period when cartels flourished most strongly. Cartels always have to be paid for by a lower standard of living.”

Ludwig Erhard: Wohlstand für alle (Prosperity for all), Düsseldorf/Vienna, 8th edition 1964, p. 185 f.

New proceedings initiated

Again in 2016 the Bundeskartellamt followed up many suspicions of violations of competition law and initiated new cartel proceedings. With the assistance of the criminal investigation departments and public prosecutors, the authority carried out 17 dawn raids at a total of 91 companies and five private homes.

Cartel prosecution is an investigative challenge. It is very difficult to uncover and prove illegal agreements between companies. In order to initiate a cartel proceeding and search companies the Bundeskartellamt requires sufficient grounds for initial suspicion. Over half of all cartel proceedings are triggered by information provided by key witnesses. In 2016, 59 companies informed the authority about infringements in their sector via the leniency programme (key witness programme).

The Bundeskartellamt also receives valuable information on infringements from other sources, e.g. via the anonymous whistle-blowing system launched on its website in 2012. Between June 2012 and December 2016, and with 55,582 clicks on the whistle-blowing system's website, a total of 1,420 tip-offs were posted, some of which have led to the initiation of (fines) proceedings.

In many cases, indications of illegal agreements in a specific market can be found in ongoing proceedings which concern a neighbouring market or in merger control proceedings or abuse control proceedings.

Cartel prosecution in 2016 in figures

- Fines imposed: approx. 124.6 million euros
- Leniency applications: 59 in 36 proceedings
 - filed by companies: 55
 - filed by individuals involved: 4
- Dawn raids: 17
- Sites searched:
 - 91 companies/associations
 - 5 private residences
- Total number of operational staff: 523
 - Number of Bundeskartellamt staff: 322
 - Police officers: 197
 - of which IT personnel: 104
 - Public prosecutors: 4
- Items of evidence seized:
 - approx. 1,300 files
 - more than 20 terabytes of electronic evidence

Market Transparency Unit for Fuels

The Market Transparency Unit for Fuels (MTU Fuels) enables consumers to obtain direct information about current fuel prices via different channels and a number of information services. The Bundeskartellamt also publishes annual reports on the work of MTU Fuels. These reports can provide consumers with comprehensive information on pricing at the petrol stations which can help them in their choice of petrol station. MTU Fuels began operating in 2013.

The operators of public petrol stations or companies which have the power to set prices at them (e.g. oil companies) are required to report every change in price for the fuel categories Super E5, Super E10 and diesel “in real time” to MTU Fuels. The unit then passes these price data on to

consumer information services, which in turn inform the consumers. Via the internet, a smartphone or navigation system, motorists are thus able to gain information on current fuel prices and find the cheapest petrol station in their vicinity or along a specific route.



“There are still significant price changes in the course of a day. So it is worth using the data collected by the Market Transparency Unit. Choosing a cheap petrol station saves money and raises the competitive pressure on the oil companies.”

Third Annual Report

In February 2017 the Bundeskartellamt published its third annual report on the work of the Market Transparency Unit for Fuels.

The key findings are:

- There are still significant price changes in the course of a day:
 - There can be differences of up to 30 cents/litre between the average highest and lowest fuel price within one town.
 - Even leaving out the most expensive 5 percent of petrol station prices (mostly prices charged during the night), the difference can still amount to 20 cents/litre.
 - Differences of around 10 cents/litre can be seen between the average highest and lowest fuel price at one petrol station.
- On average the cheapest time to refuel is still between 6pm and 8pm.

- During the night prices at the petrol stations open are usually at a comparatively high level until the first price reduction in the morning.
- At many petrol stations prices do not fall gradually over the course of the day. Instead, they initially drop in the morning and often rise by a few cents around noon. Afterwards prices drop again until the evening.
- “Cheap” petrol stations often remained cheap during the observation period. “Expensive” petrol stations often stayed expensive.
- In the observation period the development of fuel prices essentially followed that of the crude oil price.
- Finally fuel prices again did not increase significantly in 2016 around Easter and Whitsuntide.

Consumer information services

- A list of authorised and active consumer information services is available at: www.bundeskartellamt.de
> Markttransparenzstelle für Kraftstoffe > Verbraucher

Annual reports

- The Bundeskartellamt’s annual reports on the work of the Market Transparency Unit for Fuels are available (in German) at: www.bundeskartellamt.de
> Markttransparenzstelle für Kraftstoffe

Organisation Chart

Competences of the Decision Divisions:

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

Postal address

Kaiser-Friedrich-Straße 16
53113 Bonn

Federal Public Procurement Tribunals

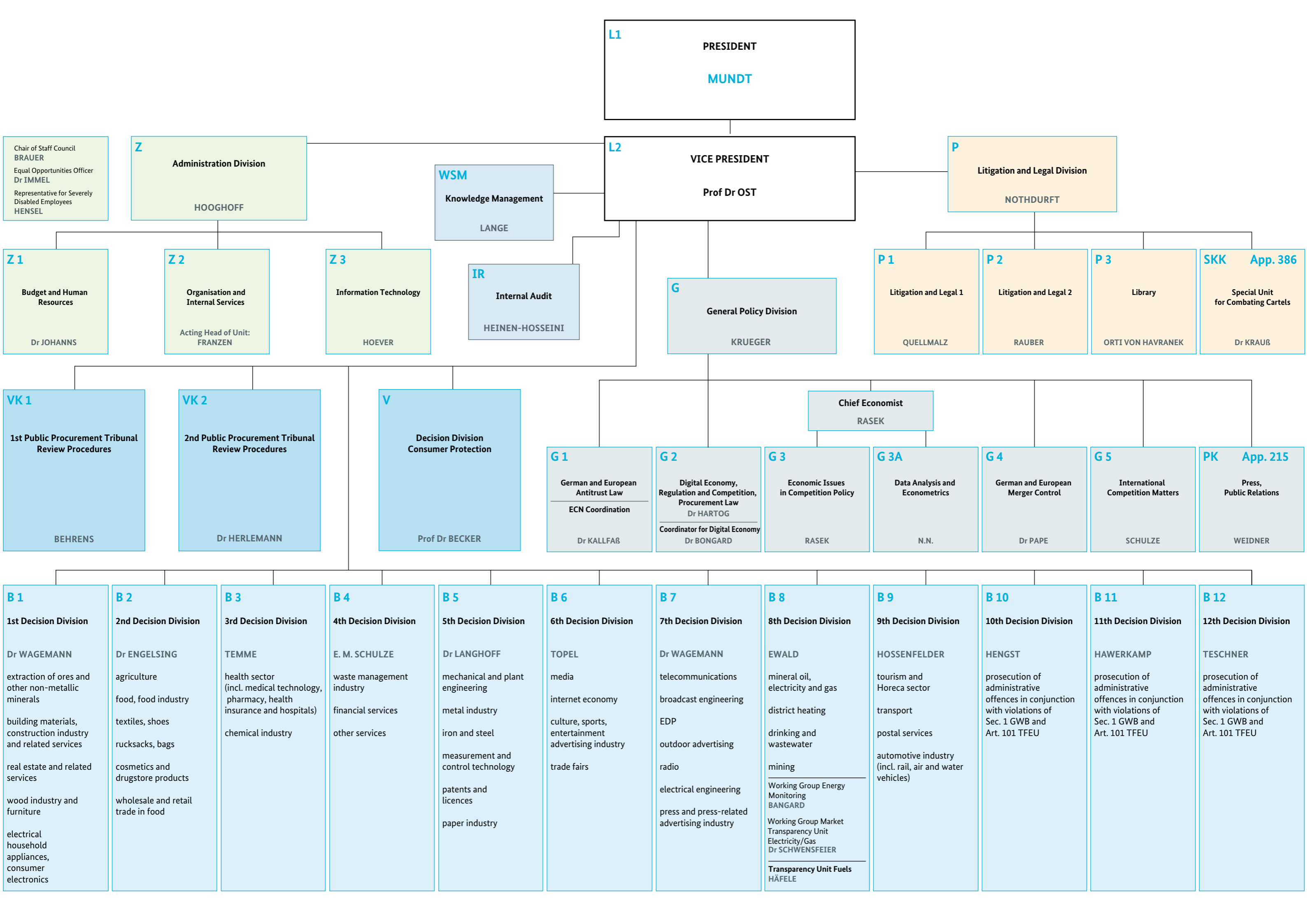
Villemombler Straße 76
53123 Bonn

Phone: +49 (0) 228 – 9499 – 0
Fax: +49 (0) 228 – 9499 – 400
IVBB: +49 30 18 7111 – 0

E-Mail: poststelle@bundeskartellamt.bund.de
(Only informal contacts are possible via e-mail)

Please read the information provided under “legal notice” on our
website www.bundeskartellamt.de

June 2017



Bundeskartellamt

Kaiser-Friedrich-Straße 16
53113 Bonn

www.bundeskartellamt.de