



Bundeskartellamt



Bundeskartellamt  
open markets | fair competition

# The Bundeskartellamt

Annual Report 2018



# Organisation Chart

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## Responsibilities of the decision divisions:

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

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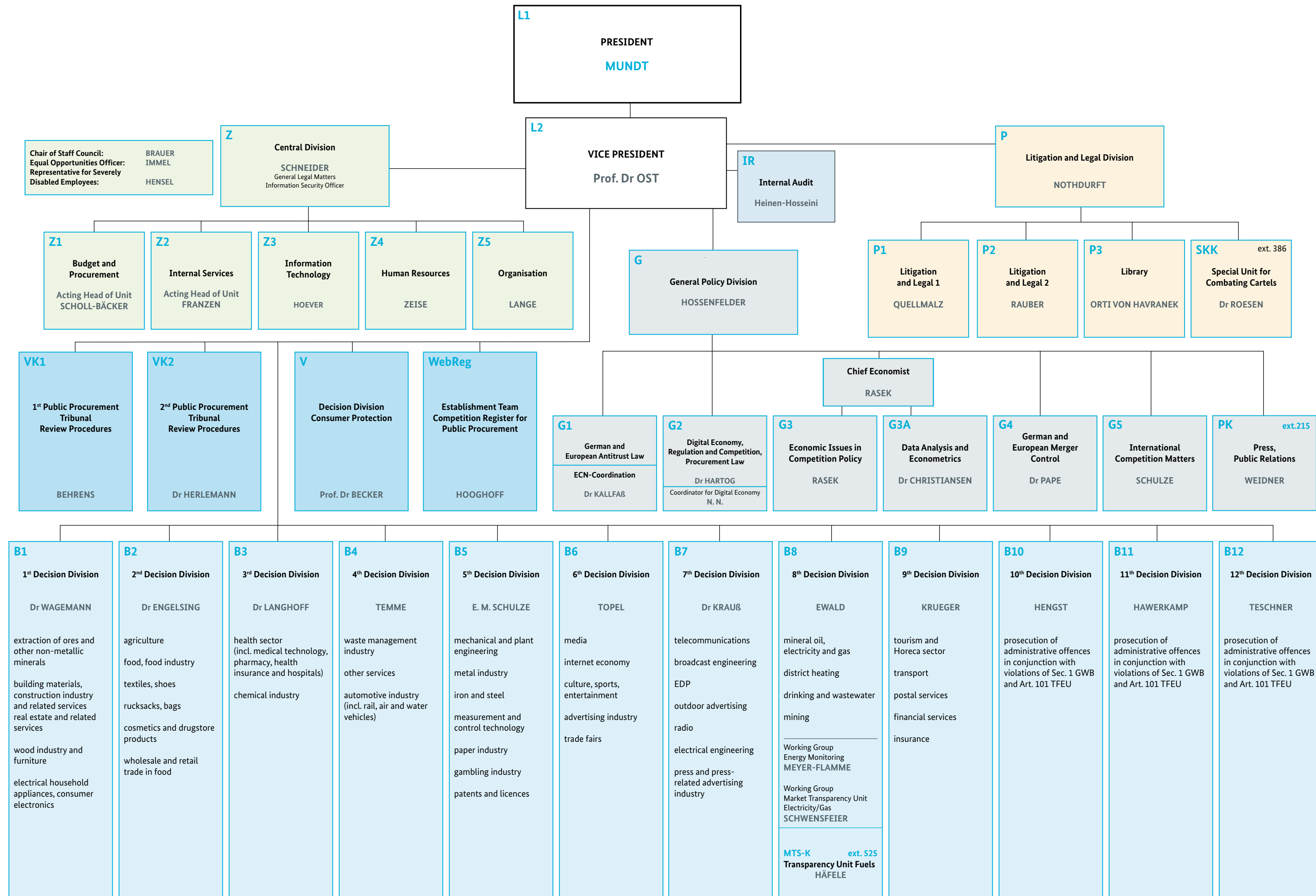
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Organisation Chart of the Bundeskartellamt

# Message of greeting Peter Altmaier

Federal Minister for Economic Affairs and Energy



In 2018 the Bundeskartellamt celebrated its 60th anniversary. Over the years of its existence the authority has experienced its fair share of demanding challenges. Against this historical backdrop I am very impressed how the Bundeskartellamt has always successfully fulfilled the tasks assigned to it in order to enforce competition and public procurement law. The authority's work rightly deserves the national and international wide recognition it enjoys.

2018 was a challenging and at the same time successful year. The Bundeskartellamt imposed fines totalling approx. 376 million euros in cartel proceedings, examined around 1,300 merger notifications, twelve of which in second phase proceedings, decided on more than 110 applications for review in public procurement cases, conducted numerous abuse of dominance proceedings and, with its new competences in consumer protection, uncovered shortcomings in the area of online comparison websites.

The authority is to be commended again for its in-depth examination of the digital economy with its data-driven and multifaceted business models. The Bundeskartellamt has convincingly demonstrated that it can stand up to the demands of complex and extensive proceedings and that even in the digital age competition law is the right tool to effectively counter the abuse of market power.

With regard to the authority's sector inquiries into consumer law issues, we should bear in mind that the infringements detected can equally be effectively ended, possibly also by widening the Bundeskartellamt's competencies. However, globalisation still poses further new challenges for politicians around the world. For Germany to remain competitive in future, we have to ask ourselves whether existing national and EU competition law still provide the appropriate tools or whether they have to be adapted to create an international level playing field.

With the 10th amendment to the German Competition Act, the Federal Government will provide the authority with further tools, especially in the area of the control of the abuse of a dominant position. The Federal Ministry for Economic Affairs and Energy will submit concrete proposals to this effect this year.

I sincerely thank the staff of the Bundeskartellamt for the excellent work and for their untiring efforts to protect competition and consumer rights and monitor compliance with the rules on award procedures. I will continue to count on your firm commitment and wish you much success for the future.



Peter Altmaier  
Federal Minister for Economic Affairs and Energy

# Foreword

## Andreas Mundt

### President of the Bundeskartellamt



Some weeks ago we celebrated 70 years of the Basic Law which is the fundament of our democratic system in Germany. The Basic Law protects the rights and freedom of our citizens and forms the basis for democracy and the constitutional state. It lays down the basic rights of occupational freedom, the right to property and general freedom of action and thus also defines that economic activity should be competition-oriented.

This constitutional framework for our economic system is mainly defined by the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB) whose 60th anniversary we celebrated in 2018. Ludwig Erhard, the GWB's "founding father" and economics minister at that time, described it as "the basic law of the social market economy".

The German Competition Act and the Bundeskartellamt, as the independent authority applying the law, are to ensure that companies compete with one another for customers, thus providing a permanent incentive for good quality, low prices and innovations. Cartel agreements, the creation of a monopoly via mergers and the abuse of market power are generally prohibited. Ultimately the German Competition Act is to serve the same purpose in the economic sector as the purpose served by our democratic order in the political arena, i.e. to ensure that not too much power lies in the hands of only a few. Franz Böhm, a mentor of the social market economy, described competition as the "most ingenious instrument of disempowerment in history".

With the introduction of the GWB and the establishment of the Bundeskartellamt in 1958 Germany assumed a pioneer role. Today Germany is one of the world's leaders in competition issues, for example in making competition policy and the application of competition law fit for purpose in the digital age.

This spring the Bundeskartellamt concluded a proceeding against Facebook. Our decision provides answers to new issues concerning the handling of personal data, free internet services and market power. The Bundeskartellamt imposed on Facebook far-reaching restrictions in the processing of user data, in particular concerning the combination of user data from different sources. As the company has appealed against our decision, the Düsseldorf Higher Regional Court will now have to decide on the case.

This case, which has received much international attention, is the culmination of many years of the Bundeskartellamt's intensive examination of issues and problems raised by the digital economy. The digital economy is certain to remain a special focus of the Bundeskartellamt's activity in the coming years. Protecting competition, especially in the web world, means more than ever safeguarding opportunities for smaller companies and newcomers and protecting consumers from large companies abusing their market power to their disadvantage.

This annual report offers an overview of our areas of activity. You will find that in the past months we have not only addressed "digital" but also many interesting issues raised by traditional economic sectors. I hope you will find our brochure useful and informative.

Yours sincerely

A handwritten signature in black ink, appearing to be 'A. Mundt', written over a horizontal line.

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 between companies are subject to merger control by the Bundeskartellamt if they fulfil certain requirements. In examining a merger project the Bundeskartell-

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

### Control of abuse of a dominant position

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

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

The provisions of public procurement law ensure that public contracts are awarded under competitive conditions and through transparent and non-discriminatory procedures. The two Federal Public Procurement Tribunals which are located at the Bundeskartellamt examine whether public procurement law was observed in the award of large public contracts falling within the Federal Government's area of responsibility.

Consumer protection

The Bundeskartellamt can conduct sector inquiries into consumer protection issues if there are any indications that consumer law provisions have been infringed. As a so-called "amicus curiae" it can also make statements in court in civil consumer protection actions.

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 new tool was introduced in 2005 the authority has concluded a whole range of sector inquiries, e.g. into the following sectors: fuels, dual systems for packaging recycling, district heating, milk as well as into buyer power in the food retail sector. In early April 2019, within its competencies in the area of consumer protection, the Bundeskartellamt concluded a sector inquiry into comparison websites.

### Bundeskartellamt: Key Facts

- President: Andreas Mundt
- Vice President: Prof. Dr Konrad Ost
- Budget 2018: 30.5 million euros
- 358 staff
- of which approx. 150 are legal experts and economists
- 5 trainees
- 183 female/175 male staff

### Ban on cartels

- In 2018 the Bundeskartellamt imposed fines amounting to around 376 million euros on 22 companies and 20 individuals in 8 cases.

### Merger control

- In 2018 the Bundeskartellamt received approx. 1,400 merger control notifications. Twelve of these were 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 2018: 6
- Number of proceedings concluded in 2018: 26

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

- In 2018 the Bundeskartellamt received 118 applications for review.
- 22 applications were granted review and 40 were rejected.

### Sector inquiries

- Since 2005 the Bundeskartellamt has concluded 13 sector inquiries.
- In February 2018 a sector inquiry was launched into online advertising. In early 2019, within its competencies in the area of consumer protection, the authority also published the final report on its sector inquiry into comparison websites. Four sector inquiries are still in progress.



## 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 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 a further Decision Division was established for consumer protection.

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. Digitalisation and e-commerce are also key areas of focus for the Division. The General Policy Division assists the Decision Divisions in developing competition law and economic policy tools for the digital economy and also represents the authority at conferences on digitalisation issues.

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

execution and evaluation of dawn raids in cartel proceedings. It is also the contact point for companies wishing to apply for leniency in cartel proceedings.

## Central Division

The task of the Central Division is to provide cross-functional services to ensure the authority's operability and to assist the various organisational units in discharging their specific tasks. The cross-functional services include budget and procurement, human resources, organisation, internal services and real estate, IT and information security as well as general legal matters.

The IT Unit assists the Decision Divisions e.g. in conducting online surveys in major proceedings and seizing and evaluating IT data in cartel proceedings.

A key area of focus of the Central Division in 2018 remained the recruitment and further training of highly qualified staff. The Bundeskartellamt is a family friendly employer faced with many diverse and challenging tasks. It places great emphasis on the further training and development of its staff both in the professional as well as personal



*“With the introduction of the ECNplus Directive the German cartel fine provisions will be further harmonised with European law. The Bundeskartellamt has encouraged this development for many years. With the expected transposition of these provisions into the 10th amendment to the GWB the Bundeskartellamt’s cartel prosecution activities will become even more effective.”*

Prof. Dr Konrad Ost,  
Vice President of the Bundeskartellamt

sphere. The authority offers a large number of placements for practical training and internships for qualified lawyers and economists.

In 2018 the Bundeskartellamt pushed further ahead with its concrete preparations to introduce an electronic file management system.

### The Bundeskartellamt as a family friendly employer



The authority was again awarded by the Federal Minister for Family Affairs, Dr Franziska Giffey, with the “work and family audit” certificate (“audit beruf- undfamilie”) for its strategically developed family and life-phase oriented human resources policy.

### Visitor groups to the Bundeskartellamt

The Bundeskartellamt offers interested groups the possibility to visit the authority to learn about its role, tasks and current cases. This service is open to school children, students, companies, organisations and all those interested in the protection of competition and the Bundeskartellamt’s work. In 2018 the Press and Public Relations Unit received over 30 visitor groups.

### 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, this 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 2018 the Bundeskartellamt ranked in the 5-star “elite” category.

### 60 Years Bundeskartellamt

In 2018 the Bundeskartellamt celebrated its 60th anniversary. On 1 January 1958 the German Act against Restraints of Competition (GWB) came into force and the Bundeskartellamt began its work in Berlin with 53 members of staff. On 22 February 2018



the authority celebrated its 60th anniversary with a festive ceremony in the former plenary hall of the German Bundestag in Bonn. Around 500 guests attended, including many representatives from politics, international competition authorities, the courts, the business sector and academia.



### Kartell Man

- The Düsseldorf University of Applied Sciences (Hochschule Düsseldorf) and the Bundeskartellamt have published a short animated film about cartel prosecution.
- Two media engineering students of the Hochschule Düsseldorf, Viviann Banh and Max Matthias Karl, produced the film as part of a bachelor thesis. The bachelor thesis was supervised by Prof. Isolde Asal (direction & editing) and Prof. Dr Sina Mostafawy (character design & animation).
- Go here to see the film: <https://www.youtube.com/watch?v=5zugIftAY9M>



### Rating of international competition authorities

**In 2018 the 5 star “elite” category was awarded to three competition authorities:**

- Autorité de la concurrence (France)
- Bundeskartellamt (Germany)
- Federal Trade Commission (USA)

Source: GCR, Rating Enforcement 2018. 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 in specific competition law and economic issues and represents the Bundeskartellamt in the decision-making bodies of the European Union. It is involved in law reforms which have a bearing on competition and coordinates cooperation between the Bundeskartellamt and foreign competition authorities as well as international organisations. It is also responsible for the authority's press and public relations work and assists the President of the authority. The Division is made up of seven units: G1 - German and European Antitrust Law, G2 - 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.

Until April 2019 the General Policy Division was chaired by Birgit Krueger.

She was succeeded by the former Chair of the 9th Decision Division, Silke Hossenfelder.



## Reform of abuse control under competition law

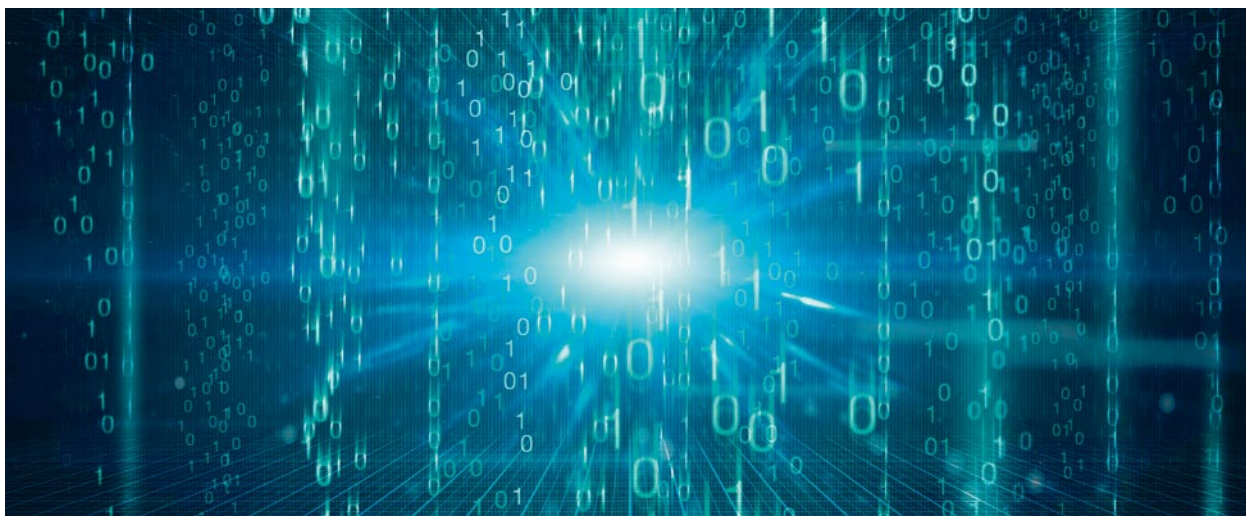
In the second half of 2018 preparatory work began on the 10th amendment to the GWB. Here the General Policy Division is closely cooperating with the competent supervisory authority, the Federal Ministry for Economic Affairs and Energy. The reason for the reform is the European Directive to empower the competition authorities of the Member States to be more effective enforcers (ECNplus), which is to be implemented into national law by 4 February 2021. With the ECNplus initiative the Commission wishes to improve the institutional framework conditions of the national authorities represented in the ECN in order for them to more effectively enforce competition law. In Germany's case this requires amendments to the GWB, in particular with a view to strengthening the Bundeskartellamt's rights in fine proceedings. Other key objectives of the amendment are a possible modernisation of the control of abusive practices by powerful companies and to find ways to speed up proceedings and make more effective use of interim measures.

The key consideration in modernising abuse control is how to deal with the market power of digital platforms. It is being discussed how the special position of such intermediaries as "gatekeepers" between the market sides can be better reflected in the law. Another aim of the modernisation measure is to give more consideration to new types of dependencies. It has become clear that large companies can also become dependent on digital platforms which is why an extension of the rules to cover relative market power should be considered. Secondly, a company can become dependent in the digital economy because it is reliant on data controlled by another company.

In view of the fast-moving developments in digital markets, possibilities for a more rapid intervention of competition authorities are also being discussed. If concentration on a particular market is foreseeable, it can be desirable for the competition authority to take measures even if the companies have not reached the threshold above which a dominant position can be assumed. For example, companies with special resources and which grow faster than their competitors could be prevented from using non-performance based anti-competitive means to further their growth.

## Consumer protection

Already in the last amendment to the GWB the Bundeskartellamt was granted initial competences in the area of consumer protection which allow it to conduct sector inquiries into consumer law issues and to make statements as *amicus curiae* in court. Since then the authority has launched two sector inquiries into the digital economy (see p. 42). The results of the sector inquiry into comparison websites were published in April 2019 and revealed several transparency deficits and possibly related violations of consumer law. However, the Bundeskartellamt does not have the necessary enforcement powers to remedy such violations. Powers of intervention in consumer law issues could



enhance well-established consumer law enforcement where there is a need for protection, private enforcement reaches its limits and the consumer protection competencies of other authorities are insufficient. This could be done without unnecessarily hindering the development of young companies, in particular, in the dynamic digital economy. An extension of the authority's competencies in this area is currently the subject of political discussion.

### Cooperatives

Building on the mandate set forth in the 2018 Coalition Agreement, the Bundeskartellamt, in cooperation with the Federal Ministry for Economic Affairs and Energy, is preparing draft guidelines on the conformity of cooperatives with competition law. The aim of these guidelines is to remedy the legal uncertainty perceived by cooperatives regarding their scope of action for cooperation between each other under competition law.

### Data and algorithms

The increasing collection, evaluation and commercial use of data has triggered a broad debate about the role which data plays in business strategies and the application of competition law to such strategies. Data-based business models have significant economic potential. However, the collection and analysis of data can also raise competition concerns. Data can be seen as a factor contributing to market power. At the same time data can increase market transparency between suppliers and make agreements easier. Data can ultimately cause anti-competitive behaviour. Algorithms are also gaining importance in the way collected data is used. The use of algorithms by companies has triggered a broad discussion about their effects on competition and the consequences for society in general. Against this background the Bundeskartellamt and the

French competition authority, Autorité de la concurrence, launched a joint project in June 2018. The main purpose of the project is to analyse the challenges posed by the use of algorithms and to identify possible approaches to dealing with them.

Competition in the internet also played a key role in further international cooperation. In February 2018 the Bundeskartellamt organised a workshop under the auspices of the ECN working group on digital markets which was set up in 2017. The topics of the workshop focused on market definition in multi-sided markets and online advertising.

### Economics and data analysis in the application of competition law

Methods and concepts used in competition economics are an integral element in the application of competition law by the Bundeskartellamt. This is reflected inter alia in strongly economics-based theories of harm. The Bundeskartellamt has also conducted data-based analyses in an increasing number of cases. The two economic units of the General Policy Division assist the Decision Divisions in this area in all major administrative proceedings and sector inquiries. They also maintain an intensive exchange with academic experts and other competition authorities.

A focus has been on quantitative methods which can be applied relatively easily and quickly in a large number of proceedings. These methods include the analysis of tenders, overlaps, supply streams, transaction data and random sampling as a basis for market investigations. For instance, extensive price data was evaluated for the annual report of the Market Transparency Unit for Fuels. The Bundeskartellamt was also able to gain valuable experience with consumer surveys which it commissioned during the Booking.com appeal proceedings.



### Working Group on Competition Economics

The Working Group on Competition Economics which was set up in October 2017 has proved successful. The format of the working group and the intensive exchange between experts at former conferences met with keen interest from the participating academics and were also regarded by participants from the authority as very constructive. The agenda of the group's third meeting in February 2019 included the impact of the Market Transparency Unit for Fuels, the application of competition law to minority shareholdings and modernising abuse control as a possible response to the growing market power of large digital platforms.

### Guidance on new transaction threshold

Together with the Austrian competition authority the Bundeskartellamt published a joint "Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification". It is intended to provide assistance on how to interpret the new legal provisions on the transaction value thresholds which had been incorporated into German law in Section 35 (1a) GWB and in a similar provision in Austrian competition law. It is the first guidance which the Bundeskartellamt has drawn up jointly with a foreign competition authority.

### 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.

#### 19<sup>th</sup> International Conference on Competition (IKK)

- From 13 to 15 March 2019 the Bundeskartellamt hosted its 19th International Conference on Competition in Berlin.
- With around 400 participants from more than 50 countries the event once again confirmed its international appeal.
- The keynote speakers were Peter Altmaier, Federal Minister for Economic Affairs and Energy, Margrethe Vestager, European Commissioner for Competition, and Daniel Ek, Chief Executive Officer and founder of Spotify.
- In addition to how to deal with the challenges posed by the global rise in market power and digitalisation as well as the importance of data as a competition parameter, the interaction between leniency programmes and anti-trust damages actions was another key area of focus of the conference.

## ICN

At international level the national competition authorities work together within the International Competition Network (ICN). With over 130 competition authorities from approx. 120 jurisdictions the ICN 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 2018 the ICN published various work products, including guiding principles on procedural fairness and a new annotated guidance document on investigative process, updated and expanded recommended practices on cooperation in merger control and an interim report on key elements for efficient and effective leniency programmes. Further work products deal with vertical mergers, sector inquiries and strategies for the development of an effective competition culture. The above work products were approved at the 17th ICN Annual Conference on 23 March 2018 in New Delhi.

The 18th ICN Annual Conference took place from 15 to 17 May 2019 in Cartagena, Columbia. The ICN Framework on Competition Agency Procedures (CAP) was launched at the conference with the Bundeskartellamt as a founding member.

## OECD/UNCTAD

In 2018 the Bundeskartellamt again cooperated in the competition-related activities of the Organisation for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). Andreas Mundt is a member of the Bureau of the OECD's Competition Committee.

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.

## Franco-German Competition Day

The Franco-German Competition Day is a biennial bilateral conference which has been hosted in turn since 2004 by the French competition authority, Autorité de la Concurrence, and the Bundeskartellamt.

Key themes of discussion at the 8th Franco-German Competition Day held on 3 July 2018 in Bonn included developments in abuse control in platform markets in the digital economy as well as challenges for merger control in digital markets.

## ECN

The national competition authorities in the EU work very closely together. Areas of cooperation include cartel prosecution, the control of abusive practices and merger control. In order to combat cross-border restrictions of competition the national competition authorities 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.

### European cooperation in 2018:

- Whenever mergers are examined in parallel by several national competition authorities, the respective authorities inform one another about the date of the notification of the merger and the contact details of the case handlers. In 2018 the Bundeskartellamt was involved in around 100 of these information processes.
- In European Commission proceedings, in which, as in the Bayer/Monsanto merger, the Commission conducts a second phase examination, "Advisory Committees" are set up in which the national authorities can give their opinion on the Commission's draft decision. The Bundeskartellamt has participated in all Advisory Committees.
- At the request of the participating companies or competition authorities a merger can under certain circumstances be referred to another authority whereby competence for examining the respective merger can switch between the European Commission and the national authorities. As a consequence the Bundeskartellamt has now examined the Remondis/DSD merger whereas the Commission examined a merger between shipyards which was originally notified to the Bundeskartellamt and the French competition authority.



# 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 administrative and 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.



## Conclusion of the legal action concerning the prohibition of the EDEKA/Tengelmann merger (file BGH, KVR 65/17)

The Federal Court of Justice rejected the parties' appeal against the denial of leave to appeal against the Düsseldorf Higher Regional Court's confirmation of the prohibition of the EDEKA/Tengelmann merger. In 2015 the Bundeskartellamt had prohibited the acquisition of Tengelmänn's food retail business by the market leader EDEKA. This was the first case in which the Bundeskartellamt had based its prohibition decision on the criterion of a significant impediment to effective competition which was introduced into the German competition law in 2013. In the subsequent appeal proceedings, which had meanwhile become moot after the issue of the ministerial authorisation, the Düsseldorf Higher Regional Court had applied the classical market dominance test as the criterion for prohibition. On this basis it held that the Bundeskartellamt's decision was justified alone in view of the fact that the merger would have created a dominant position in the Berlin districts of Friedrichshain-Kreuzberg. The Federal Court of Justice saw no reason to grant the parties leave to appeal against this decision on points of law.

## Confirmation by the Federal Court of Justice of abuse of buyer power (file KVR 3/17)

After oral proceedings at the end of 2017, the Federal Court of Justice confirmed the Bundeskartellamt's decision in which the authority found that following its acquisition of the "Plus" discount chain in 2009, EDEKA had abused its buyer power vis-a-vis its suppliers. In its decision the authority had identified a number of demands which EDEKA had made of its suppliers. In the case of three of six demands the Bundeskartellamt had challenged a decision of the Düsseldorf Higher Regional Court, which the Federal Court of Justice had reversed. The Federal Court of Justice agreed with the Bundeskartellamt's view of the demands.

### 2018 statistics

- Two new cartel fine proceedings
- Three new cartel administrative cases
- 433 new private antitrust cases
- 8 *amicus curiae* briefs

*“The number of antitrust damages actions continue to rise. Practically every cartel proceeding is followed up with a large number of damages actions.”*

### **Partial confirmation of decisions of Düsseldorf Higher Regional Court on liquefied gas cartel (KRB 51/16 inter alia.)**

In a series of decisions the Federal Court of Justice confirmed the allegations that several liquefied gas suppliers had concluded cartel agreements. In what were to some extent exceptionally extensive proceedings the Düsseldorf Higher Regional Court had imposed fines totalling 272 million euros on the suppliers. However the Federal Court of Justice criticised the calculation methods used by the Higher Regional Court and referred the proceedings back to the latter with the request that the fines be recalculated. In one case the proceeding must be reopened to re-examine the allegation due to a procedural error made by the Higher Regional Court.

### **Düsseldorf Higher Regional Court confirms action taken by the Bundeskartellamt against the CTS group (VI Kart 3/18 [V], VI Kart 2/18 [V])**

The court confirmed the authority’s prohibition of the planned acquisition by CTS EVENTIM of the Four Artists group. The CTS group is active in many areas of the organisation and marketing of concerts and other events. It is

known particularly for its online ticket shop eventim.de. The company also provides ticketing services for promoters and advance booking offices, operates event venues and organises events itself, especially rock/pop tours and festivals. The Higher Regional Court shared the Bundeskartellamt’s view that the merger would strengthen CTS’s dominant position on the German market for ticketing system services. The court based its decision inter alia on a new provision in the German Competition Act on the measurement of the market power of online platforms.

The Düsseldorf Higher Regional Court also confirmed a further decision in which the Bundeskartellamt prohibited the CTS group from concluding a number of exclusivity agreements in its contracts with promoters and advance booking offices. Upholding the Bundeskartellamt’s decision, the court held that the agreements constituted an abuse of a dominant position as well as a violation of the ban on cartels. It confirmed that exclusivity agreements, especially when they are concluded by powerful companies, raise serious concerns under competition law.

CTS has appealed both cases on points of law to the Federal Court of Justice.

### **Decisions of Düsseldorf Higher Regional Court in cartel fine proceedings**

After a contentious hearing the Düsseldorf Higher Regional Court imposed a fine on a company and an individual involved in the sausage cartel (V-6 Kart 6/17 [OWi]). It also imposed a fine of 30 million euros on the company Rossmann for vertical price fixing in the sale of roasted coffee (V-4 Kart 3717 [OWi]). However, a proceeding against the company Carlsberg and one individual for their involvement in a horizontal beer cartel was closed because it was statute-barred (V-4 Kart 2/16 [OWi]). All cases were appealed to the Federal Court of Justice on points of law.



# 1<sup>st</sup> Decision Division

The 1st Decision Division is competent for the following areas: extraction of ores and other non-metallic minerals, building materials, construction industry and related services, real estate and related services, wood industry and furniture, electrical household appliances and consumer electronics. Last year the Decision Division was intensively occupied with the furniture sector and examined several merger projects in this sector. It also concluded a cartel proceeding against asphalt producers and an examination of two bidding syndicates as part of a public-private partnership project.

The 1st Decision Division is chaired by Dr Markus Wagemann.

## Furniture sector

The Decision Division took a closer look at the consolidation process in the furniture sector and examined several mergers.

The merger projects were cleared because they did not raise any serious competition concerns on the relevant sales and procurement markets.

Demands by furniture retailer for retroactive adjustment of purchase conditions

After acquiring Möbel Buhl, XXXLutz requested Möbel Buhl's suppliers at the end of 2017 to retroactively adjust their purchase conditions from 1 January 2017 and to issue a credit for all differences in price and conditions as of that date (so-called "wedding rebate").

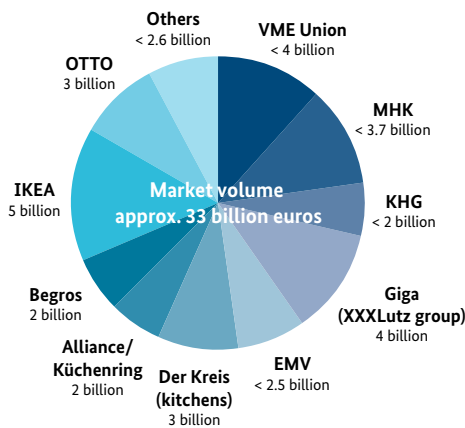
After the Bundeskartellamt's intervention the furniture chain XXXLutz waived its demand for a retroactive adjustment of purchase conditions.



Supply structures in the furniture sector

In October 2018 the Decision Division initiated an administrative proceeding against Germany's largest purchasing cooperation VME Union (and MHK). In view of the increasing concentration in the furniture sector and the announcement of the Krieger group of its plan to join the VME Union cooperation, the Division is currently examining whether this cooperation is expected to raise competition concerns in its present or an extended form. Such cooperations are not generally prohibited under competition law. Smaller furniture retailers, in particular, can potentially benefit from improved purchasing conditions and thus compete with chains and the "big players" in the market. However, one needs to make sure that their buying power does not raise concerns with regard to the manufacturing landscape as a whole, which is mostly characterised by small and medium-sized manufacturers. When examining cooperations, a large number of factors are considered, e.g. the actual purchasing procedure and the degree of freedom retailers which joined the cooperation actually have when effecting procurements. Furthermore, such cooperations can restrict competition in sales to end customers. Another factor to consider in this instance are the cooperations' activities in selling to end customers under a private label. European competition law regulations generally consider purchasing cooperations unproblematic, provided that they do not exceed a certain size, with a market share of 15 percent being used as a reference value on both the purchasing and sales side.

Share of turnover of leading furniture retailers in Germany in 2018\*



\* according to official figures; partly estimated



## Fines against asphalt producers and review of association guidelines for supplier consortia

In 2018 the Decision Division imposed a fine amounting to 1.4 million euros on Gaul GmbH, a manufacturer of asphalt mixes, and subsidiary of STRABAG for participating in cartel agreements. Another company involved in the cartel agreements was Südhessische Asphalt-Mischwerke GmbH & Co. KG, which disclosed the agreement in a leniency application and as a result was not punished. The investigations against Mitteldeutsche Hartstein-Industrie AG and its former subsidiary Mitteldeutsche Hartstein-Industrie GmbH were terminated for legal reasons.

The companies concluded agreements on prices, sales areas, customers and quotas for the supply of construction companies in the western Rhine-Main area between at least 2005 and 2013. The agreements took the form of supplier consortia.

Following the proceeding the German asphalt association (Deutscher Asphaltverband e.V.) published guidelines for checking whether supplier consortia are admissible under competition law. The Decision Division assisted the association in drafting the guidelines. Other associations in the construction material sector are planning similar guidelines.

## PPP projects in motorway construction

The increasing significance of public-private partnership projects in motorway extension and the concentration

of bidders for tenders in bidding syndicates which can be observed gives general cause for examination under competition law.

Last year the Decision Division closely examined two bidding syndicates which had submitted bids in the competitive tender process for the extension of the A3 motorway (junction Biebelried – junction Fürth/Erlangen).

What is decisive for the assessment of such cases under competition law is whether the participating undertakings would not have been able to submit an independent bid or not been able to realize the project on their own and could only have made an offer in cooperation with one another.

In the two cases concerning work for the extension of the A3 motorway the Division had to consider that, compared to other projects, the project in question required particularly large capacities and bore significant construction risks because it involved extending a more than 70 km stretch of motorway in topographically difficult terrain within a five-and-a-half year construction period. In exercising its discretionary powers the Bundeskartellamt thus decided not to prohibit the bidding syndicates.

### PPP projects

Public-private partnerships are forms of cooperation between administrative authorities, bodies or undertakings in the public sector and the private economy.



# 2<sup>nd</sup> Decision Division

The 2nd Decision Division is competent for agriculture, textiles, bags, shoes, drugstore products, food manufacture, wholesale and retail trade in food, and e-commerce. The focus of the Division's work last year included an abuse proceeding against Amazon, a proceeding against the German Olympic Sports Confederation (DOSB) and the International Olympic Committee (IOC), the assessment of sustainability initiatives and the examination of the Kaufhof/Karstadt merger as well as mergers in the perfumery sector and between potato crisp manufacturers.

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

## Proceeding against Amazon

In November 2018, following a large number of complaints from small and medium-sized retailers, the Decision Division initiated an abuse proceeding against Amazon to examine its terms of business and practices towards sellers on its German marketplace amazon.de.

Amazon is the largest online retailer and operates by far the largest online marketplace in Germany. Many retailers and manufacturers depend on the reach of Amazon's marketplace for their online sales. Its double role as the largest retailer and largest marketplace has the potential to hinder other sellers on its platform.

The Decision Division is now examining whether Amazon is abusing its market position to the disadvantage of sellers. The practices which might be considered abusive are liability provisions (court of jurisdiction and choice of law clauses), rules on product reviews, the non-transparent termination and blocking of sellers' accounts or withholding or delaying payment.

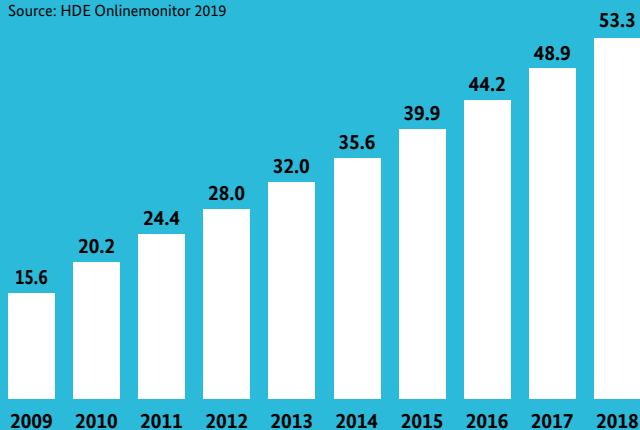
## Further advertising opportunities for athletes during the Olympic Games

German athletes and their sponsors will have considerably enhanced advertising opportunities during the Olympic Games in future.

In 2017 the Decision Division initiated an administrative proceeding against the German Olympic Sports Confederation (DOSB) and the International Olympic Committee (IOC) on the suspicion that they had abused their dominant position. The proceeding was concluded at the beginning of 2019 after the DOSB and IOC had committed to the Bundeskartellamt to ease the previous advertising restrictions pursuant to rule 40, bye-law 3 of the Olympic Charter. The DOSB and IOC have a dominant position on the market for organising and marketing the Olympic Games. The Decision Division examined whether the two organisations had previously imposed excessive advertising restrictions on athletes. Pursuant to the case law of the European Court of Justice the rules of a sports association are also subject to competition law insofar as they refer to economic activities.

### Development of (net) online turnover in Germany (in billion euros) from 2009 to 2018

Source: HDE Onlinemonitor 2019

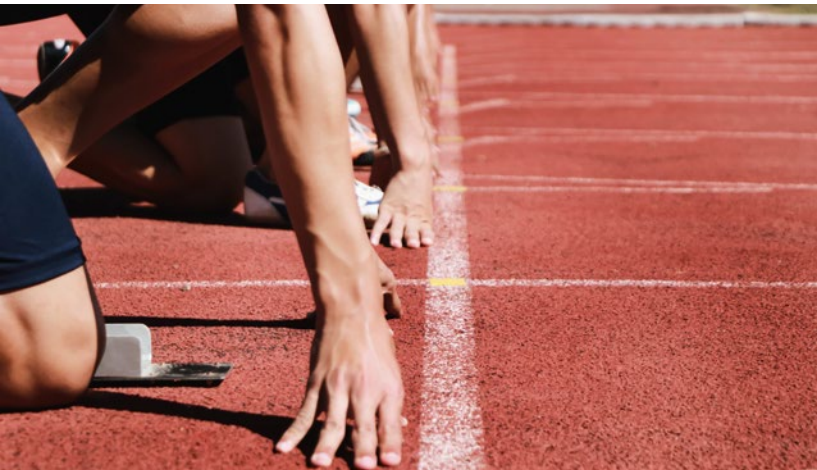


### Online share of retail 2018

Source: HDE Onlinemonitor 2019







Athletes cannot benefit directly from the IOC's high advertising revenue generated with official Olympic sponsors. However, as the games mark the height of their careers, self-marketing during the games plays a very important role. The extended leeway now granted to them includes the use of certain "Olympic" terms, social media activities or the use of their pictures taken at sport events.

### Sustainability initiatives

The Decision Division has monitored the introduction of various "sustainability initiatives", focusing in particular on the Fairtrade system and the "Tierwohl" animal welfare initiative. The aims of such initiatives are often meant to be achieved through agreements between as many companies as possible, which requires that they comply with competition law criteria.

### Merger between Karstadt and Kaufhof

In November 2018 the Decision Division cleared the merger between Karstadt Warenhaus and Galeria Kaufhof. The companies are the only department store operators which are active throughout Germany. However, there is no department store market as such which could be assessed from a competition point of view. The Decision Division therefore had to examine the specific market conditions for around 20 different product categories from "underwear" and "bags" through to "office products and stationery" at the department store locations of the respective companies.

It was found that even in an isolated analysis of purely brick-and-mortar retailing, Kaufhof and Karstadt only achieve market shares of more than 25 per cent in individual product categories and regions. In most product categories online retailers are also an important shopping alternative for a fast-growing number of consumers.

### Acquisition of Parfümerie Akzente by Douglas

In the summer of 2018 the Decision Division cleared the merger between Douglas and Parfümerie Akzente. Although Douglas is the leading perfumery company in Germany, Akzente has a prominent market position in particular in online sales with its online shop parfum-dreams.

The results of the merger examination showed that Douglas's share of the online sales market would increase significantly after its acquisition of Parfümerie Akzente. However, the scope of action of the merged company will still be sufficiently controlled by its strong competitors. Competitors in online sales include in particular Amazon, Flaconi and Notino as well as a number of third-party sellers on Amazon Marketplace.

### Merger between crisp manufacturers

The Decision Division cleared the acquisition of the Tyrrells Group by the Intersnack Group. Both companies produce savoury snacks such as potato crisps or popcorn. The Division's investigations showed that the German market for the manufacture and sale of potato crisps and sticks is very concentrated. With its brand names such as "Chio" or "funny-frisch", the Intersnack Group is by far the largest supplier, followed by Lorenz Bahlsen.

However, the merger was cleared because Tyrrells only has a weak market position in Deutschland, the prices for potato crisps have fallen since 2015 due, among other factors, to the listing of Intersnack's brands with the discounter Aldi, and the market entry in 2015 of the crisp manufacturer PepsiCo with its worldwide leading crisps brand "Lay's" which has since established itself as a new competitor.



# 3<sup>rd</sup> Decision Division

The activities of the 3rd Decision Division cover the health sector, including health insurance, hospitals, pharmacy and medical technology as well as the chemical industry. In 2018, the Decision Division examined around 180 mergers. An area of particular focus in its merger control proceedings is consolidation in the hospital sector. Against this background it expressed its concern about competition in two merger cases. Since 2016 it has also carried out a sector inquiry into the hospital service. A further area of focus last year was the Division's examination of two proposed mergers between mail order pharmacies.

The 3rd Decision Division is chaired by Dr Ralph Langhoff.



## 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 sector. It is therefore important first of all to maintain competition in the quality of healthcare for patients. It is crucial to ensure that patients have sufficient local options to choose from.

When examining a proposed merger the Decision Division first of all assesses whether the services provided by the hospitals are comparable from the patients' point of view. There are, for example, separate market definitions for the market for acute hospitals and the market for rehabilitation centres or retirement and nursing homes.

As for the geographic market definition, only those hospitals will be examined which patients actually choose as an alternative.

In merger projects between public service enterprises, in particular, the Decision Division also often conducts an

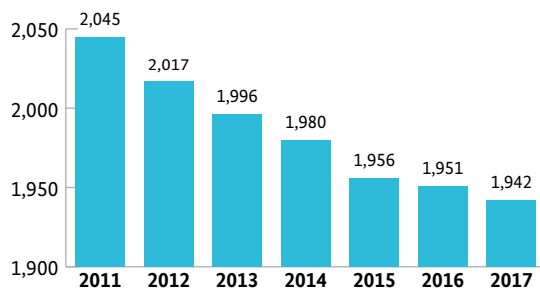
informal preliminary examination of the plans. In this way any possible competition concerns about the merger can be considered at an early stage of the political decision-making processes of the individual local authority bodies and, if necessary, alternative solutions be sought.

## Withdrawal of two merger notifications in hospital sector

In two separate merger control proceedings in the hospital sector the undertakings concerned withdrew their notifications in second phase proceedings after the Decision Division had expressed its competition concerns. One case concerned the acquisition by Ameos Psychiatrie Holding GmbH (Ameos) of the majority of shares in Sana Kliniken Ostholstein GmbH, and in the other case the hospital operator Stiftung der Cellitinnen zur heiligen Maria (Cellitinnen Nord) in Cologne had planned to merge with the hospital operator Stiftung der Cellitinnen gemeinnütziger eingetragener Verein (Cellitinnen Süd), which affected several hospitals in Cologne.

In the first case it was established that the Carlyle Group, a private equity company based in Washington, D.C. (USA),

Development of number of hospitals in Germany



Source: destatis

already controlled the acquiring company Ameos and the largest competitor of the Sana clinics, namely Schön Klinik SE, Prien, via various investment funds. The Sana clinics would have been added as a result of the merger. With a market share in the Ostholstein district of over 50 of the cases in the acute inpatient sector and a very large lead over other hospitals outside the market area, Ameos, Schön Klinik Neustadt and Sana Kliniken would have gained a dominant position. The parties to the merger withdrew their notification in March 2019.

In the second merger case both hospital operators in Cologne already withdrew their notification in December 2018. The merger would have created by far the largest hospital group in the City of Cologne. Intensive investigations had also shown that the Cellitinnen Nord hospitals already had a dominant position in the “Cologne north left Rhine bank” market area even before the planned merger. This position would have been strengthened as a result of the transaction.

Due to the withdrawal of the notifications, the merger proceedings were concluded without a final decision by the Bundeskartellamt. Both mergers cannot therefore be implemented.

### Interim results - Sector inquiry into the hospital sector

In May 2016 the Bundeskartellamt launched a sector inquiry to obtain information about the current market situation and intensity of competition in acute inpatient hospital treatment and to further develop examination criteria for the authority’s 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 also looks into the role of various stakeholders such as medical staff, remuneration structures and the financial situation of the hospitals.

In a first step 500 hospitals were requested to provide information. In a second step the group of stakeholders questioned was extended to doctors accredited with the statutory health system who prescribe necessary hospital treatment and offer their patients advice on appropriate hospitals. The extensive replies are currently being assessed.

### Consolidation process in the hospital sector

- In recent years the financial situation of the hospitals has stabilised and the number of notified merger projects has increased.
- From 2003 to 2018 the Bundeskartellamt examined a total of more than 295 hospital mergers. In many cases the Bundeskartellamt carried out an informal pre-assessment before the mergers were formally notified. 251 mergers were cleared and seven prohibited. In two cases the notifications were withdrawn in second phase proceedings after the authority had expressed its concerns.
- In the other cases the mergers were either not subject to merger control, the proceedings have not been concluded or the parties had abandoned their plans before notification.

### Merger between mail-order pharmacies

In the summer of 2018 the Decision Division cleared the acquisition of the mail-order pharmacy apo-rot by DocMorris Holding GmbH. Both companies sell prescription and non-prescription drugs via the internet.

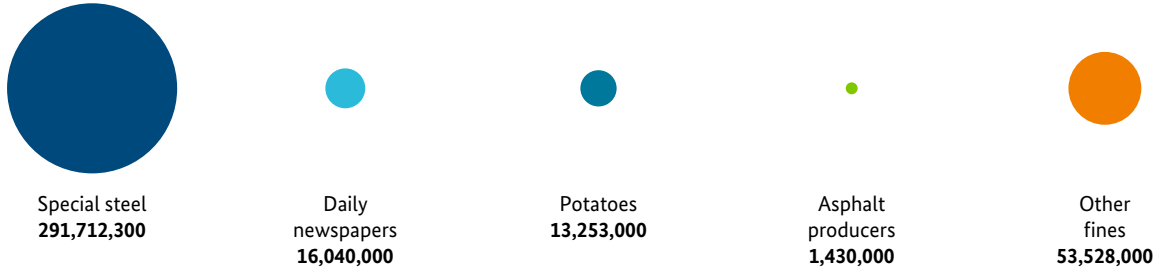
While DocMorris is Germany’s largest mail-order pharmacy, the nationwide market shares of both companies after the acquisition of its competitor apo-rot are less than 1 % of the turnover achieved with prescription drugs and under 5 % of that achieved with non-prescription drugs. The regional effects of the merger also proved unproblematic. As the market position of the merger company was unproblematic from a competition perspective, the merger was cleared.



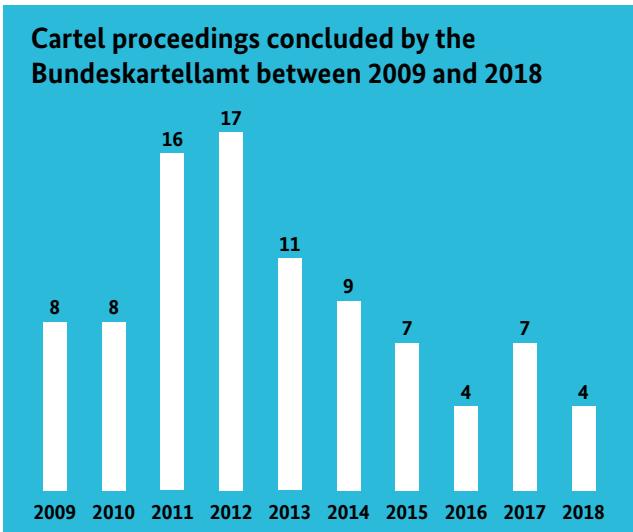


# Facts and Figures

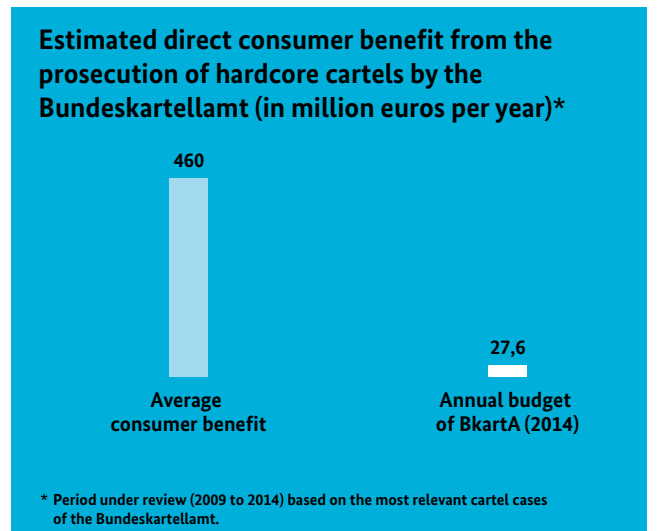
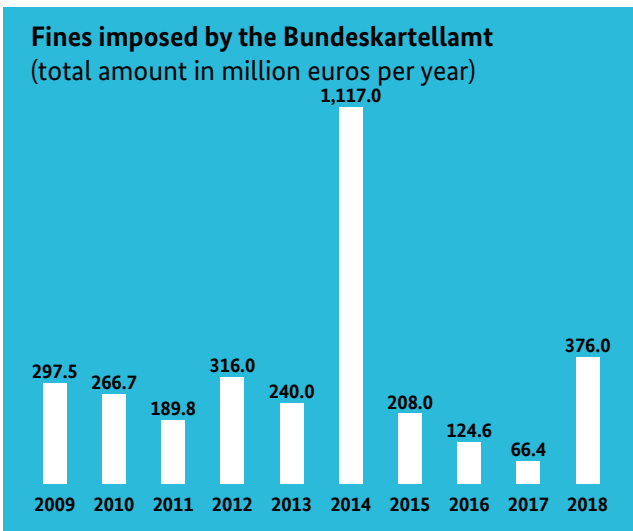
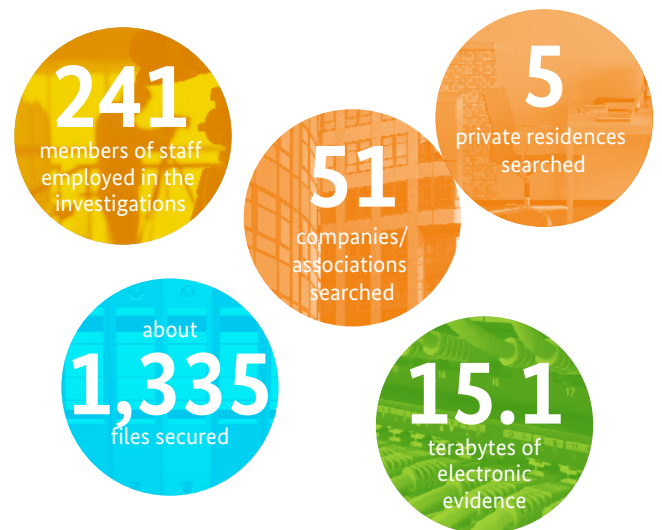
## Fines imposed in 2018 in euros Total of approx. 376,000,000.00\*



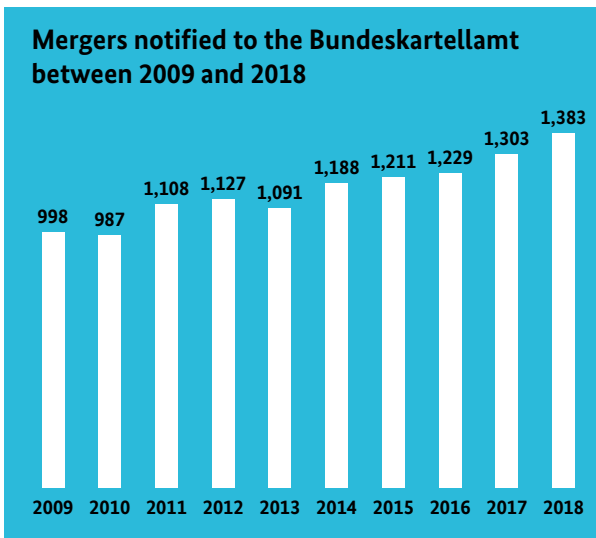
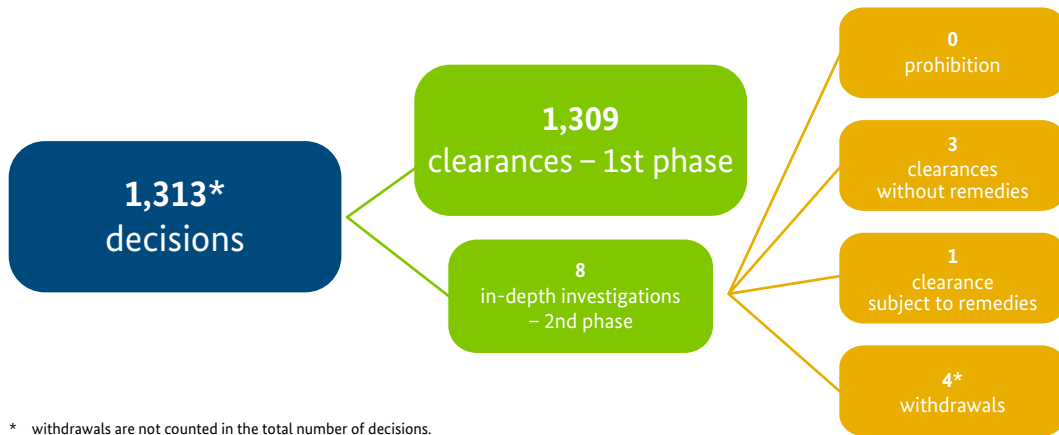
\* The figures are rounded values.



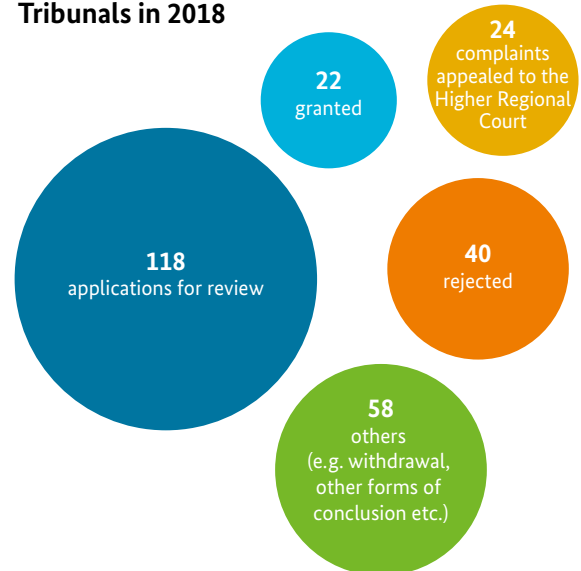
## Dawn raids and evidence seized in 2018



### Merger control: Bundeskartellamt decisions in 2018



### Practice of the Federal Public Procurement Tribunals in 2018



### Abuse of dominance proceedings in figures for 2018



# 4<sup>th</sup> Decision Division

The activities of the 4th Decision Division cover the waste management industry, financial services and other services. The focus of the Division’s work in the area of financial services lay with several mergers in the market for payment services and the adjustment of the special conditions for online banking. The Decision Division’s sector inquiry into the waste management sector is still ongoing. There were also a large number of merger projects in this sector.

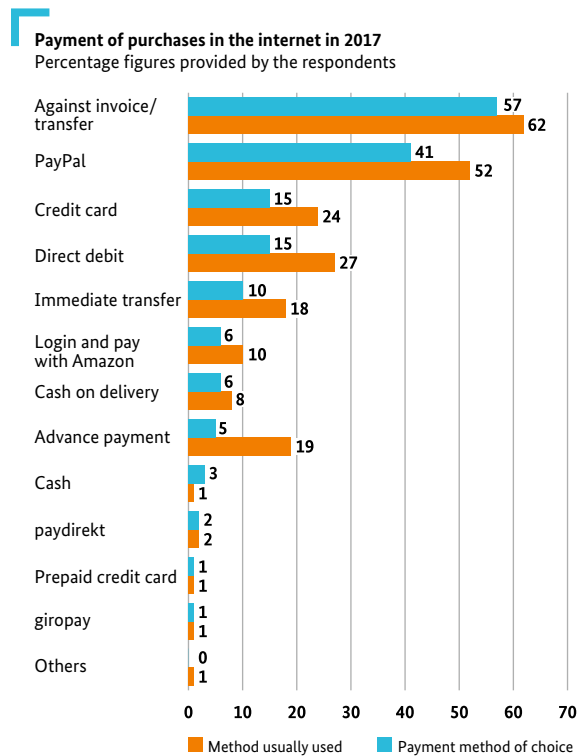
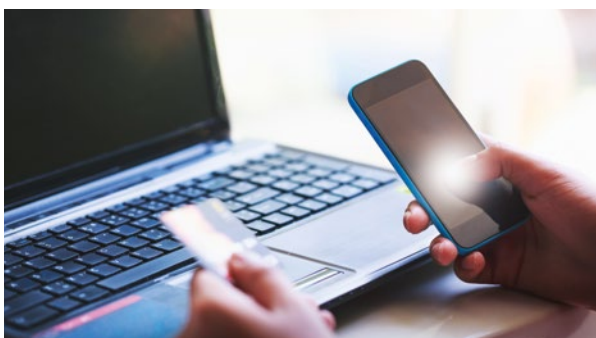
The 4th Decision Division is chaired by Eberhard Temme.

## Payment transactions

As a result of the introduction of new technologies and changes in the payment behaviour of customers, the payment services market is currently undergoing a transition which has sparked a wave of consolidation throughout Europe. New and innovative players are entering the market. At the same time German banks and savings banks are withdrawing from the payment services market or are looking for (international) partners. This gave rise to several mergers (including Ingenico/BS Payone), which the Bundeskartellamt cleared. Although the mergers resulted in high market shares in individual cases the investigations showed that the remaining competitors will still exert sufficient competitive pressure on the merged companies.

## Online payment services in e-commerce

In June 2016 the Bundeskartellamt concluded an administrative proceeding against the German Banking Industry Committee (Deutsche Kreditwirtschaft, DK) and some of its leading banking associations and declared some of the associations’ jointly agreed rules on online banking as illegal. In its decision the authority found that the clauses objected to in the online banking conditions violated German and European competition law. 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.



Source: German Central Bank, Fourth study on the use of cash and non-cash means of payment, 2018

In January 2019 the Düsseldorf Higher Regional Court rejected the appeals of the parties concerned against the Bundeskartellamt’s decision. In its ruling the court held that the contested clauses in the online banking conditions were a restraint of competition by object. It also held that the contested rules in the online banking conditions were not indispensable to ensure security in online banking. The parties were not granted leave to appeal on points of law against the ruling. The parties then appealed to the Federal Court of Justice against the refusal of leave to appeal against the higher court’s decision and on points of law. The Federal Court of Justice has still to decide on the matter.

In January 2018, following the implementation of new statutory regulations, the associations involved deleted the contested clauses in their online banking conditions or replaced them with clauses which complied with competition law.



## Competition in the waste management sector

### Sector inquiry into household waste collection

In 2018 the Decision Division continued work on its sector inquiry into the household waste collection sector. The sector inquiry focuses on the competition conditions in the regional markets for the collection and transport of household waste. In a first step data were collected on the conditions in the market for the collection of waste packaging by the contractors of the dual systems for packaging recycling. After consulting leading local authority associations, the association of local utilities (Verband Kommunaler Unternehmen, VKU) and different market participants until the summer of 2018, data of public waste management authorities was collected in a further round of investigations. This included data on tenders for contracts for the collection of waste from private households, collection systems as well as the details of the contracts, cooperations and subcontracting. The responses to the sector inquiry are currently being processed and evaluated.

### Proposed merger between REMONDIS and Duales System Deutschland viewed critically

The trend towards concentration in the waste management sector continued in 2018 resulting in a large number of mergers for the Decision Division to examine. The Decision Division examined particularly closely three mergers involving Germany's largest waste management company REMONDIS and the Rethmann group it belongs to.

In one of these proposed mergers REMONDIS planned to acquire the company "Duales System Deutschland – der Grüne Punkt". In April 2019 the Decision Division informed the two companies that it planned to prohibit the proposed merger. According to the Decision Division REMONDIS' acquisition of DSD would significantly impede competition between the dual systems for packaging recycling in Germany. The companies were given the opportunity to comment on the decision.

Almost 20 years ago the Bundeskartellamt had broken up the previous monopoly of Duales System Deutschland. As a result various competitors entered the market causing massive reductions in waste management costs to the advantage of consumers and improvements in quality.

### REMONDIS acquires waste management company Helene Müntefering-Gockeln

The Decision Division very closely examined plans by REMONDIS to acquire the waste management company Helene Müntefering-Gockeln GmbH & Co. KG, a large container service in the Ruhr area which also operates a commercial waste sorting facility and a large plant for recycling waste wood.

It also examined in-depth the market conditions for the collection and sorting of mixed commercial waste. In spite of REMONDIS' very powerful market position in the densely populated Ruhr area, the acquisition could be cleared because there was still sufficient competition from smaller container services and a large number of very small container services. It also became clear from the Decision Division's investigations that REMONDIS has great advantages over its competitors, especially in respect of waste incineration plants. The Decision Division will therefore take a very close look at any further possible acquisitions.

### Acquisition of glass recycling company by Rethmann group

The Decision Division also cleared the acquisition of two waste management companies of the Belgian family Vanswatenbrouck by the Rethmann group (REMONDIS/ GRI). The acquired companies are active in Germany in the recycling of waste glass. The Rhenus group, which belongs to the Rethmann group, already owns the most glass recycling facilities and has the largest recycling capacities in Germany. Although the companies together achieve very high market shares, the Decision Division had to clear the merger because its investigations showed that the market was a so-called minor market.

### Minor markets

- Minor markets are markets which have existed for at least five years and which had a sales volume in Germany of less than 15 million euros in the last calendar year (Section 36(1) sentence 2 no. 2 German Competition Act, GWB).
- In these markets the prohibition of a merger by the Bundeskartellamt is expressly excluded by law.

# 5<sup>th</sup> Decision Division

The 5th Decision Division is responsible for the armaments industry, mechanical and plant engineering, the metal, iron and steel industry, measurement and control technology, the paper industry, the sanitary, heating and air conditioning sector, watches, jewellery and toys and the gambling industry. The Decision Division also has an interdivisional competence for patents and licences. In 2018 the Decision Division took a close look at the steel industry, examining several merger projects in this sector. It cleared a merger between two ship suppliers and prohibited the creation of a joint venture in the plain bearing production sector and the acquisition of the MBO group by Heidelberger Druckmaschinen AG.

The 5th Decision Division is chaired by Eva-Maria Schulze.

## Association work in the steel industry must be compatible with competition law

Last year the Decision Division held several discussions with associations in the steel industry. The aim of the discussions was to inform the association members of the limits of the admissible activity of a trade association, remove uncertainty in this area and explain the value of association work for the industry.

## Merger between Aurubis and Deutsche Gießdraht

Before the merger Deutsche Gießdraht was a joint venture of Aurubis and Codelco Kupferhandel GmbH and produced continuous cast copper rod exclusively for the two parent companies. Aurubis and Codelco sold the continuous cast copper rod in competition to one another. Deutsche Gießdraht is one of the leading producers of continuous copper rod in Europe.

With the acquisition Codelco as a close competitor of Aurubis would disappear from the market. However, the investigations showed that post merger customers would still have several alternative suppliers in Germany and Europe which supply continuous cast copper rod of a similar quality. Buyers would also be able to switch to another producer in future without any substantial effort.

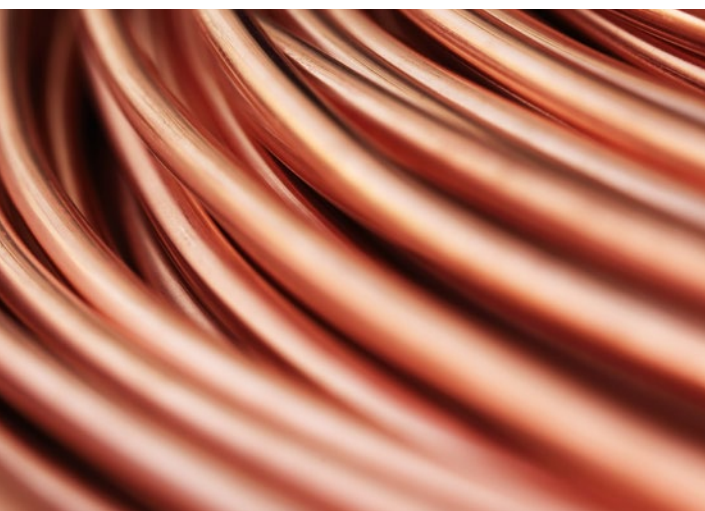


In July 2018 the Decision Division therefore cleared plans by Aurubis AG to acquire a further 40 per cent of the shares in Deutsche Gießdraht GmbH.

## Merger between two ship suppliers

After an in-depth examination the Decision Division cleared the acquisition of the marine cargo handling business of TTS Group ASA by Cargotec Oyj without conditions. The activities of the two companies overlap in the sale, repair and maintenance of ship cranes, hatch covers, winches and technical equipment for cruise liners and roll-on/roll-off ships.

Both parties are also active on the international after sales service market for ship cranes. The merger had to be cleared in spite of the parties' strong market positions. Demand for ship supplies on the relevant markets in Germany was so weak in the recent past that the markets were assessed as so-called "minor markets" (see info box on p. 25). It was therefore not possible to prohibit the merger.







### Prohibition of a joint venture in plain bearing manufacture

In January 2019 the Decision Division prohibited the launch of a joint venture between Miba AG and Zollern GmbH & Co. KG. The companies had planned to pool their hydrodynamic plain bearing production activities in a joint venture.

The investigations showed that the two companies are the major competitors in a market which is already highly concentrated. They have outstanding development expertise and supply a prominent range of plain bearings primarily affected by the merger. It is already complex and costly for customers to switch to one of the few alternative suppliers. The merger would exacerbate the situation because Miba and Zollern, two very close competitors from the customers' perspective, would join forces.

After the merger was prohibited the parties applied to the Federal Ministry for Economic Affairs and Energy for a ministerial authorisation. In a special opinion commissioned by the Ministry for Economic Affairs and Energy the Monopolies Commission recommended against issuing a ministerial authorisation. The ministry's decision is still pending.

### Prohibition of acquisition of MBO group by Heidelberg Druckmaschinen AG

The Decision Division prohibited plans by Heidelberg Druckmaschinen AG to acquire all the shares in an asset management company which is a shareholder of the folding machine manufacturer Oppenweiler Binder GmbH (MBO group). The merger mainly affects the market for

special machines for the manufacture of sheet folding machines for industrial printing processes. On the basis of its extensive market investigations the Bundeskartellamt established that industrial sheet folding machines form a separate product market. Heidelberg Druckmaschinen AG is already the market leader on the European market for sheet folding machines. With the merger the parties would have achieved joint market shares far exceeding 50 per cent. There are already only four companies active on the relevant market throughout the whole of Europe. The merger would have created a dominant position for Heidelberg Druckmaschinen and have significantly impeded competition in the market to the detriment of customers.

The investigations also showed that market entry seems difficult due to the high costs and time involved, the high level of customer loyalty and the customers' requirements for prompt service and spare parts supply. In fact no market entries were witnessed in the last 20 years.

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

- The Federal Minister for Economic Affairs and Energy can, upon application, authorise a merger which has been prohibited by the Bundeskartellamt if ...
  - ... in a specific case the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration or
  - ... the concentration is justified by an overriding public interest..
- Since the introduction of merger control there have been nine successful applications for ministerial authorisation.

# 6<sup>th</sup> Decision Division

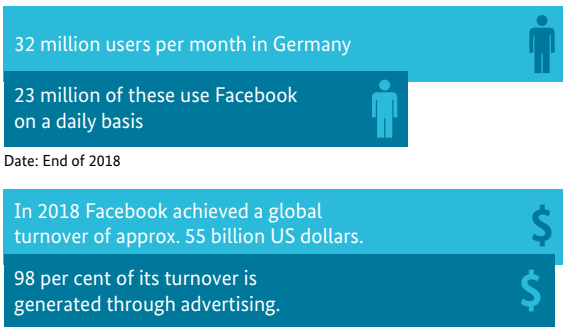
The 6th Decision Division is responsible for the media sector, internet economy, culture, sports and entertainment, advertising industry and trade fairs. A key area of the Division’s activities in 2018 was an abuse of dominance proceeding against Facebook. It is also conducting a sector inquiry into online advertising. The Division also closely examined two mergers in the area of video platforms and dictionaries/printed language training products.

The 6th Decision Division is chaired by Julia Topel.

## Online platforms

The internet economy raises many new antitrust and competition economics issues. Currently there is an intensive debate about the competitive conduct and strategies of large internet companies and their alleged powerful market positions. At the same time many digital markets are very dynamic and innovative. The 6th Decision Division has closely observed these developments in recent years and has already concluded a large number of cases.

### Facebook is the largest social network



### Decision in Facebook proceeding

In February 2019 the Decision Division imposed on Facebook far-reaching restrictions in the collection and processing of user data.

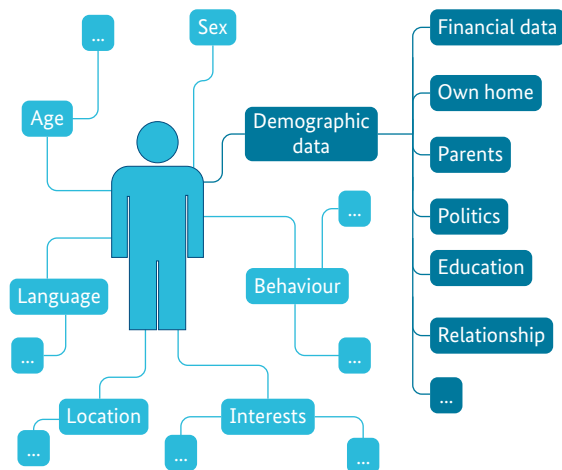
Data about Facebook users are collected from different sources and combined with the user’s Facebook account. The company collects not only information about the users which is available in Facebook’s network itself but also information from Facebook-owned services such as WhatsApp and Instagram, as well as data generated from the surfing behaviour of users on countless third-party websites. This type of extensive collection and use of data will not be possible in future without the explicit and voluntary consent of Facebook users. It will otherwise not be admissible for Facebook to collect data on third-party websites and the data would have to be kept separately according to their origin. In view of the network’s market

power, voluntary consent means that the use of Facebook’s services must not be subject to the users’ consent to their data being collected and combined in this way. The use of the social network must also be possible without such consent.

The Decision Division evaluates Facebook’s conduct as a so-called exploitative abuse. Dominant companies may not exploit consumers. This applies above all if the exploitative practice also impedes competitors that are not able to amass such a treasure trove of data.

The decision is not yet final because Facebook has filed an appeal at the Düsseldorf Higher Regional Court.

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



### Sector inquiry into online advertising

In February 2018 the Bundeskartellamt launched a sector inquiry into online advertising. The reasons for examining this sector are the great economic importance of online advertising for advertisers and content providers active on the internet as well as discussions about the difficult competitive environment in this market on which companies like Google or Facebook play a key role.

Online advertising has experienced an extraordinarily high rate of growth in the last 20 years. The market volume in Germany is estimated at five to nine billion euros.

In a first step the Decision Division held exploratory talks with numerous companies along the value-added online advertising chain to more precisely define the focus of the sector inquiry. Based on the information gained from the discussions the Decision Division is conducting written investigations in a second step.

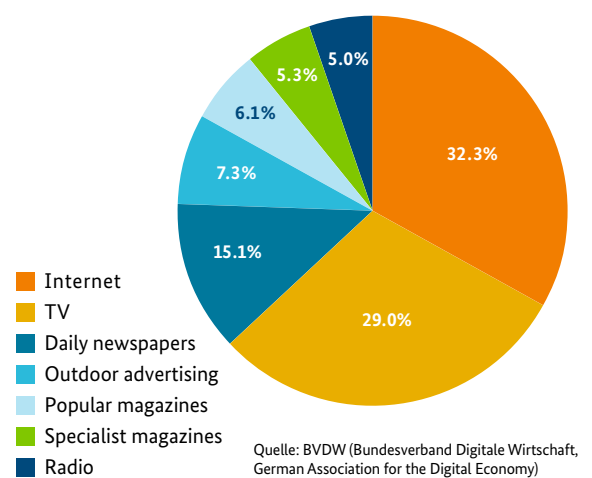
Addition of Maxdome and Eurosport to 7TV video platform

In June 2018 the Decision Division cleared plans by ProSiebenSat.1 Media SE and Discovery Communications to add their video streaming offers “Maxdome” and “Eurosport-Player” to their joint video platform 7TV.

Up to that point 7TV had offered videos on demand and also live streaming of TV programmes of the parent companies which were both funded by advertising. The Decision Division was able to clear the extension of the cooperation because the market for paid video on demand is still expanding rapidly and has powerful competitors like Amazon, Netflix, iTunes, Sky as well as public service providers.



**Expenditure on advertising in 2017**  
broken down into the following media as a percentage share



## Merger between PONS and Langenscheidt

The Decision Division cleared the acquisition of all business divisions of Langenscheidt GmbH & Co. KG and Langenscheidt Digital GmbH & Co. KG, by PONS GmbH, part of the Klett group.

As a result of the merger the companies will together have high market shares both in the markets for printed dictionaries as well as printed language training products. Nevertheless the Decision Division had to clear the merger because the critical markets are so-called minor markets with low turnover which cannot be prohibited by law. Furthermore, it found that digital products/services exert strong competitive pressure. Many consumers are now predominantly using the internet to look up words or learn languages.



# 7<sup>th</sup> 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 7th Decision Division examined among other mergers the notification by Gruner + Jahr of its plans to purchase the “National Geographic” licence, conducted a fine proceeding against the DuMont media group and the Bonner GeneralAnzeiger group due to territorial agreements and another fine proceeding against eight magazine lending service providers on account of customer allocation agreements. In the area of mobile communications the 7th Decision Division monitored the Bundesnetzagentur (Federal Network Agency) in its award of mobile frequencies.

The 7th Decision Division is chaired by Dr Katharina Krauß.

## Gruner + Jahr withdraws notification of purchase of “National Geographic” licence

The 7th Decision Division closely examined plans by the publishing house Gruner + Jahr to acquire the licence for publishing the German-language edition of “National Geographic”. The company withdrew its notification at the end of January 2019 after the Decision Division had expressed its competition concerns. Gruner + Jahr has already held the licence for the German-language edition of the “National Geographic” since 1999. The agreed license period ends in the near future.

Gruner + Jahr is by far the largest publisher of popular science magazines in Germany and publishes the “GEO” magazine, which is the largest science magazine on the German market. According to the Division’s preliminary assessment, Gruner + Jahr’s renewed purchase of the licence would have significantly impeded competition between the science magazines because, among other things, National Geographic and GEO are the leading magazines and closest competitors in this market in Germany. In addition, Gruner + Jahr’s dominant position in print publications is not sufficiently controlled by competition from alternative internet or TV offers.

## DuMont media group fined for concluding territorial agreements with the Bonner General-Anzeiger media group

In the autumn of 2018 the Decision Division imposed fines amounting to a total of 16 million euros on DuMont Mediengruppe GmbH & Co. KG, an individual responsible and a lawyer. The company is accused of concluding an illegal territorial agreement with the Bonner General-Anzeiger media group.

The DuMont group and Bonner General-Anzeiger group had already agreed in December 2000 that either one of the two newspaper publishers largely withdraws its distribution from each of the areas agreed in the Bonn region. This was done among other things by noticeably thinning-out local reporting. In 2005 the companies further safeguarded the territorial agreements which were to run up to 2016 via mutual participations and by awarding the DuMont group a pre-emption right to the Bonner General-Anzeiger group. The pre-emption right was deliberately not disclosed to the Bundeskartellamt although it was of key relevance for its examination of the mutual participations under merger control.



### GWB: Exemption regulation for the press sector

- In order to ensure press diversity, Section 30(2b) sentence 1 of the German Competition Act (GWB) allows cooperations between publishers to strengthen their economic basis for intermedia competition.
- However, even under this provision which was introduced in summer 2017, price-fixing, territorial and customer agreements are not exempted from the prohibition of cartels.

Following a leniency application by the Bonner General-Anzeiger group, the proceeding was initiated in December 2017 with a dawn raid of DuMont's head offices and the law firm in which the lawyer is active. In accordance with the leniency programme no fines were imposed on the Bonner General-Anzeiger group. The DuMont group and the individuals responsible admitted to the accusations against them and agreed to a settlement.

#### **Eight magazine lending service providers fined on account of customer allocation agreements**

In early 2019 the Decision Division imposed fines amounting to approx. three million euros on eight magazine lending service providers. The companies are accused of having concluded illegal customer allocation agreements.

The companies concerned are Daheim Liefer-Service GmbH, the advertising agency Lesezirkel Brabandt LZ plus Media GmbH, Lesezirkel Dörsch GmbH & Co. KG, Lesezirkel Detlef Krumbek GmbH, Lesezirkel Die Medien-Palette GmbH & Co. KG, Lesezirkel Media-Collection GmbH, Lesezirkel "Die Hanse" GmbH, and Hettling's LeseZirkel.

Magazine lending services purchase different magazines from publishers in order to create magazine packs which they usually rent out to their customers for a period of one week. Their customers include private individuals and in particular doctors' practices, hairdressers or restaurants.

The agreements were concluded between the magazine lending services providers to prevent them from poaching business customers from one another. The customer allocation practice prevented price competition between the services. All the companies concerned agreed to have the proceedings terminated by settlement.



#### **Award of mobile frequencies**

In 2018 the Decision Division closely monitored the Bundesnetzagentur's proceeding for the auction of mobile frequencies in the 2 GHz and 3.4 GHz to 3.7 GHz bands and in August 2018 gave its opinion on the award conditions in a Bundesnetzagentur hearing. The Decision Division expressed the view that competition in LTE (long term evolution) services in Germany could be dampened compared to competition abroad. The market therefore had to be kept open to competition in the long term to provide the appropriate competitive conditions for investment and innovation. The interests of potential newcomers i.e. new network operators, service providers and virtual network operators had to be taken into consideration in the frequency conditions.

The Bundesnetzagentur has introduced a negotiation requirement which stipulates that whenever an incumbent network operator acquires new frequencies in future it will have to negotiate in a fair and non-discriminatory manner on network access with service providers and new network operators.

# 8<sup>th</sup> Decision Division

The 8th Decision Division is 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 the last few months the Decision Division closely examined RWE's acquisition of a shareholding in E.ON. Following the Division's critical assessment, two proposed mergers in the petrol station and bunkering services sectors were withdrawn. The Decision Division also published guidelines on the control of the abuse of a dominant position in electricity generation.

The 8th Decision Division is chaired by Christian Ewald.



## Acquisition by RWE of a shareholding in E.ON

In February 2019 the Decision Division cleared plans by RWE AG to acquire a 16.67 per cent minority holding in E.ON SE. The acquisition is part of an extensive exchange of business activities between the two companies. As a result RWE will primarily be active on the upstream markets for electricity generation and wholesale, whereas E.ON will concentrate on electricity and gas retail and the operation of distribution networks. The Division's decision was taken at the same time as the EU Commission's clearance of RWE's acquisition of E.ON's capacities for the generation of wind and nuclear power. The EU Commission's examination of E.ON's acquisition of a majority holding in RWE's subsidiary innogy SE is still ongoing (editorial deadline: mid May 2019).

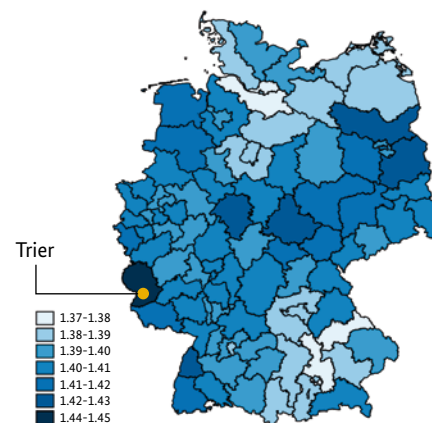
The part of the planned acquisition examined by the Decision Division mainly concerned the market for the generation and first-time sale of electricity but not the distribution of electricity to the final consumer. According to an extensive data analysis, RWE is by far the leading power supplier and periodically indispensable for meeting the demand for electricity. However, this is not sufficient to assume its market dominance. RWE's market position will only change minimally with the acquisition of the minority holding in E.ON SE and, in the Division's view, will not pose a competition problem. The results of the data analysis indicate that due to general capacity shortages after the nuclear phase-out which is due by the end of 2022, RWE could be dominant on the market. However, with the phase-out the nuclear power plants currently still operated by E.ON would be shut down.

## Total withdraws from proposed acquisition of petrol stations in Trier region

Total Deutschland GmbH withdrew the notification of its acquisition of eleven petrol stations owned by Autohof Görgen GmbH & Co. KG after the Decision Division had written to the company expressing its competition concerns about the merger project. According to the authority's preliminary assessment the proposed acquisition would have significantly impeded competition in the Trier market area.

Fuel prices in Trier are already among the highest fuel prices in Germany. According to the Division's preliminary assessment, the complete integration of all of Görgen's petrol stations into Total's distribution network would have worsened the competitive conditions in the Trier market too much to the detriment of motorists. The oligopoly of the leading fuel suppliers in Germany would have expanded its market share in Trier to over 80 per cent. This would have had negative consequences in particular for those motorists who cannot benefit from the much lower petrol price level in neighbouring Luxembourg.

## Regional average prices for E5 petrol



Observation period: January to June 2018

Source: Market Transparency Unit for Fuels (MTU Fuels), Annual Report 2018.

## Refuelling of shipping vessels: Withdrawal of notification

The companies Reinplus VanWoerden Bunker GmbH and Nord- und Westdeutsche Bunker GmbH also withdrew their merger notification after the Decision Division had written to them expressing its competition concerns.

Reinplus and NWB provide so-called bunkering services. The term “bunkering services” is used in the shipping industry to describe the refuelling (or bunkering) of shipping vessels with fuel for their own propulsion. The proposed merger concerned in particular the supply of inland waterway vessels with diesel fuel. Due to the location of the bunker stations or bunker boats of the two companies, there were overlaps in supply, especially on the German part of the Rhine.

Bunkering services in this part of the Rhine are already only provided by three companies. The merger would have further reduced the number of competitors from three to two and Reinplus would have further expanded its already leading position in the market by acquiring a price active competitor in Cologne.



## Consultation on the control of the abuse of a dominant position in electricity generation

The Decision Division and the Federal Network Agency drafted joint guidelines for the control of abusive practices in the electricity generation and wholesale trade sector under antitrust and energy wholesale law. The guidelines were published for consultation in early 2019.

The guidelines set out the main intention, rules of application and scope of the control of abusive practices in electricity generation. The aim of the guidelines is to provide the necessary legal certainty for investments needed in power plants. The subject of market power in electricity generation will gain in importance again as a consequence of the imminent shutdown of the last nuclear power stations and the intended phase-out of coal. Following the consultation the guidelines will be finalised and published.

### Competition in the energy sector

In November 2018 the Federal Network Agency and the Bundeskartellamt published their joint annual Monitoring Report on developments in the German electricity and gas markets.

#### Results of Energy Monitoring in 2018:

##### Electricity

- The degree of market concentration in conventional electricity generation and electricity sales decreased further in 2017; there was no single dominant supplier on either of the two largest electricity retail markets.
- The percentage of household customers on default contracts was for the first time lower than those served by a supplier other than their regional default supplier.
- The average electricity price for household customers at 1 April 2018 was 29.88 ct/kWh which was broadly unchanged from the previous year (2017: 29.86 ct/kWh).
- In 2017 more generating capacity was available for the first time from renewables than from conventional energy sources.
- In 2017 renewable electricity generation accounted for 36 per cent of electricity consumption.

##### Gas

- The volume of sales of the largest companies active in gas retail still remains well below the threshold above which market dominance is presumed.
- As of 1 April 2018 gas prices for household and commercial customers had fallen again compared with the previous year.
- However, gas prices for industrial customers rose slightly.

##### Distribution via comparison websites

- Comparison websites are now a very important distribution channel in the energy sector.
- Nearly every fourth supply contract with a household customer is now concluded via a comparison website.



# 9<sup>th</sup> Decision Division

The focal areas of activity of the 9th Decision Division are the tourism, hotel, restaurant and catering sector, transport, postal services and the automotive industry including rail, air and water vehicles. Examples of the Decision Division's work in 2018 were mergers between producers of towbars for cars, companies leasing rail freight cars and shipyards specialised in building cruise liners. The Decision Division also conducted a fine proceeding against harbour towage service providers.

The 9th Decision Division was chaired by Silke Hossenfelder until April 2019.

She was succeeded by the former head of the General Policy Division, Birgit Krueger.

## Horizon/Westfalia and Brink withdraw merger notification after Bundeskartellamt expresses concerns about competition

In 2018 the 9th Decision Division closely examined a merger project between companies active in the production and sale of towbars for cars and light commercial vehicles. In early 2018 Horizon Global Corporation, USA, notified the Decision Division of its intended acquisition of Brink International B.V., the Netherlands. In Europe Horizon is mainly active via its subsidiary Westfalia-Automotive GmbH.

In its proceedings the Decision Division carried out extensive market enquiries among customers and competitors. The results showed that after its merger with Brink, Horizon/Westfalia would have gained a scope of action which would no longer have been sufficiently controlled. Indicators for this included market shares exceeding 50 per cent on the markets affected, few alternative suppliers and a significant technological lead in particular over its smaller competitors. In addition, the merger would have eliminated Brink as a close competitor of Horizon/Westfalia. For these reasons the Decision Division issued a statement of objections to the proposed merger in May 2018. In June 2018 the parties withdrew their merger notification because they did not wish to pursue further with the project.



Throughout the proceeding the Decision Division maintained a close exchange with the British Competition and Markets Authority (CMA), which also expressed considerable competition concerns about the merger project.

## Rail freight car leasing companies may merge subject to condition precedent

In March 2018 the Decision Division cleared the acquisition of CIT Rail Holdings including its subsidiary Nacco by VTG Rail Assets GmbH subject to a condition precedent. VTG is a rail logistic services provider and the largest rail wagon leasing company in Europe. Nacco is also active in the lease of rail wagons.

Nacco's acquisition by VTG would have significantly impeded competition between rail wagon leasing companies; moreover, VTG would have gained a dominant position as a result of the merger. The condition for the clearance of the acquisition was therefore that a certain number of wagons and the entire business of Nacco's German and Luxembourg subsidiaries be hived off and a significant part of Nacco's west European business be sold to an independent third party. These commitments have since been implemented with the acquisition of the divestment business by the Swiss wagon leasing company Wascosa AG.

## Agreements between harbour towage companies

In early 2018 the Decision Division concluded a proceeding against harbour towage companies, imposing fines totalling approx. 17.5 million euros on four companies and their representatives. No fine was imposed on another company involved and its subsidiary because the company had reported the cartel to the Bundeskartellamt. For discretionary reasons no fine was imposed on another company which has meanwhile exited the market.

At least between 2002 and 2013 the harbour towage companies had divided orders and turnover earned from several German harbours among themselves.

The companies set quotas based on turnover which they used to allocate orders between them.

The quotas were set in 2000/2001 after Dutch harbour towage companies had started operating on the Elbe and Weser rivers. All the major towage companies in the respective harbours had participated in the quota allocation. As Dutch companies were also involved in the cartel, the Decision Division cooperated closely with the Netherlands competition authority in this case.

### Mergers in the ship building sector

In the period covered by the report the Decision Division examined the merger between the Italian state shipyard Fincantieri and the French state-owned shipyard Chantiers de l'Antique. The first stage of the overall project was the sole acquisition of all the shares in the shipyard by the French agency for managing the French state's holdings in companies (APE). This part of the merger was cleared.

However, in the second stage of the project, the launch of a joint venture between APE and the Italian shipyard Fincantieri, the situation was different. As Fincantieri like Chantiers de l'Antique is active in the construction of cruise liners, the joint venture meant that one of only

#### Who is competent?

##### Merger control:

The European Commission examines cases with a Community dimension (rule of thumb: if the combined turnover of all the companies involved is higher than 5 billion euros). Cases can be referred between Brussels and the Bundeskartellamt in Bonn on application.

##### Cartel prosecution and control of abusive practices:

Cases in which European law is (also) applicable are notified within the European Competition Network (ECN) and are dealt with by the best placed authority. As a rule the European Commission is to be considered the best placed authority if an infringement affects competition in more than three Member States.

three suppliers of large cruise liners in the world would disappear from the market. Apart from the parties to the merger only the Meyer shipyard in Papenburg and in Turku in Finland is active in this line of business. The merger project was subject to notification in Germany and France. In November 2018 both countries applied for the case to be referred to the European Commission, which the Commission granted in January 2019. The Commission's examination proceeding is still ongoing.



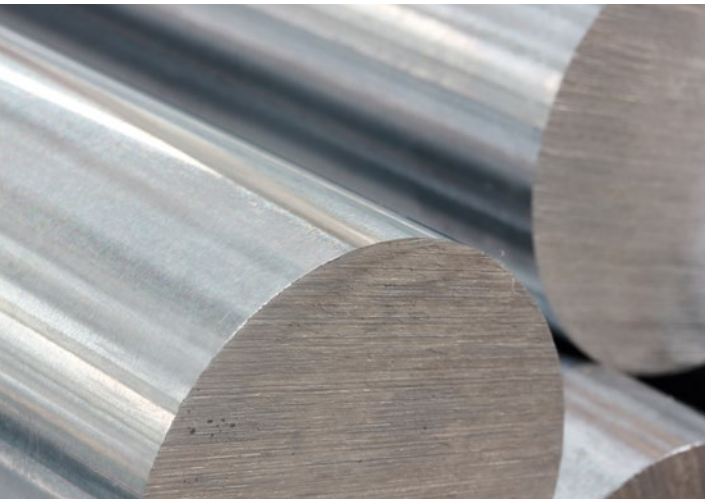
# Cartel prosecution

The 10th, 11th and 12th Decision Divisions are responsible for the cross-sector prosecution of illegal cartels. They are assisted in the planning, execution and evaluation of investigative measures such as e.g. dawn raids by the Special Unit for Combating Cartels (SKK). In 2018 the Bundeskartellamt imposed fines amounting to around 376 million euros on 22 companies and 20 individuals in eight cases. The cases included proceedings against special steel manufacturers, a bicycle wholesaler and potato packaging companies.

The 10th Decision Division is chaired by Daniela Hengst.

The 11th Decision Division is chaired by Ulrich Hawerkamp.

The 12th Decision Division is chaired by Michael Teschner.



The companies are producers or processors and traders of special steel products. Among the products covered by the agreements were long steel products belonging to the categories of engineering steel, tool steel and high-speed steel as well as rust, acid and heat-resistant steel.

These special steel products were usually sold based on a price model which essentially consists of the so-called basic price and surcharges for scrap and alloys. These surcharges accounted for a substantial part of the end price, e.g. approx. a third of the engineering steel price, around half of the tool and high-speed steel price and around two-thirds of the price for rust, acid and heat-resistant steel, on account of the comparatively higher proportion of alloying elements.

## Fines imposed on special steel manufacturers

The Bundeskartellamt imposed fines totalling around 291.7 million euros on seven special steel manufacturers, two trade associations and 14 individuals responsible for concluding price-fixing agreements and exchanging competitively sensitive information. Investigations into three other companies are still ongoing.

The proceeding was initiated in November 2015 with a sector-wide dawn raid following a leniency application.

The investigations showed that for years the companies had agreed on important price components in the sale of special steel. The agreed and sector-wide calculation and implementation of standard scrap and alloy surcharges and extensive exchange of competitively sensitive information significantly restricted price competition between the companies. The trade associations, in particular Edelstahl-Vereinigung e. V., played a decisive role in the agreements. They helped to organise the companies' anti-competitive conduct.

## 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.
- Later leniency applications can only lead to a maximum reduction of 50 per cent of the fine, provided that the applicants cooperate with the Bundeskartellamt and produce decisive evidence to prove the offence.
- The requirement for immunity from and a reduction of a fine is the continuous and unlimited cooperation of the leniency applicant with the Bundeskartellamt throughout the proceedings.





At least from 2004 until at latest the dawn raid in November 2015 the steel producers had jointly agreed on and implemented the standardised method of calculation of the scrap and alloy surcharges for special steel products across the sector. There was also a basic agreement between the companies that the surcharges be passed on to the customers in full. The fines imposed are final.

### Vertical price-fixing by bicycle wholesaler ZEG

The Bundeskartellamt imposed fines totalling around 13.4 million euros on the bicycle wholesaler ZEG Zweirad-Einkaufs-Genossenschaft eG (ZEG), Cologne, and its representatives for fixing retail prices with 47 bicycle retailers. The proceeding was triggered by a tip-off from the trade.

ZEG agreed with its member companies on retail prices for certain bicycle models. The independent retailers were asked not to undercut the minimum sales prices set by ZEG for different bicycle models. This greatly restricted price competition between the members of the purchasing cooperation to the detriment of the consumer.

Although short-term resale price maintenance is allowed under German and European law for associations such as purchasing cooperations, e.g. for joint special offer campaigns, the measures taken in this particular case far exceeded what is permissible and created a situation similar to a sales cartel among the participating retailers.

ZEG is a purchasing cooperative consisting of approx. 960 independent bicycle retailers in Europe, around 670 of which are in Germany alone. It has a strong market position in Germany both on the purchase and sales sides. ZEG sells to its retailers bicycles of its own brands, e.g. Pegasus, Bulls and ZEMO, as well as certain models of other manufacturers which are sold exclusively by ZEG.

The subject of the proceeding were agreements between

ZEG representatives and 47 bicycle retailers. The agreements, some of which dated back to February 2007, ended with a dawn raid on ZEG's premises in February 2015.

For discretionary reasons no proceedings were initiated against the retailers due to their low level of involvement in the offences in comparison to ZEG. They were therefore not accused of having committed a cartel offence.

In setting the fine the Bundeskartellamt took into account that the ZEG had cooperated with the authority in uncovering the agreements and that a settlement could be reached. The fining decisions are final.

### Fines against potato and onion packaging companies

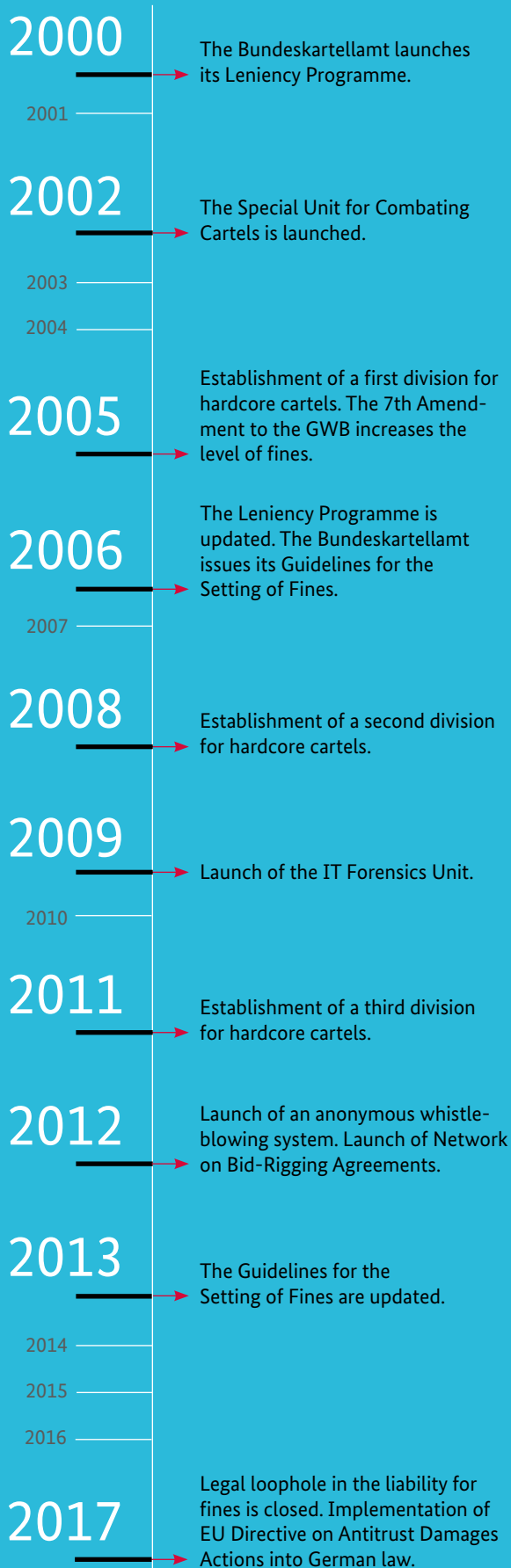
In the spring of 2018 the Bundeskartellamt imposed fines totalling 13.2 million euros on two potato and onion packaging companies for fixing prices in their supplies

#### Settlement

- An antitrust proceeding can be concluded in the form of a negotiated agreement (settlement) between the Bundeskartellamt and the parties concerned to terminate the proceedings.
- A settlement generally expedites and shortens complex and resource-intensive antitrust proceedings.
- The formal requirement for settlement is a confession and a so-called settlement declaration in which the company or individual responsible involved acknowledges the facts of the infringement of which it/he is charged and accepts the fine up to the amount announced.
- A settlement declaration can lead to a reduction of the fine by a maximum of 10 per cent.
- A waiver of the right to appeal is not part of a settlement declaration.



## Measures to increase the effectiveness of cartel prosecution



to the Metro group. The companies concerned are Hans-Willi Böhmer Verpackung und Vertrieb GmbH & Co. KG and Kartoffel-Kuhn GmbH. The proceeding was initiated in May 2013 with a sector-wide dawn raid following a leniency application.

Since early 2005 and until the proceedings were initiated in May 2013, the persons responsible at the companies above had been in regular telephone contact with one another, especially in the run-up to the weekly offer for packed potatoes and onions to the Metro group. In their telephone calls the company representatives informed one another of their purchase prices for potatoes and onions (so-called “raw product prices”) and agreed to use the same raw product price both for potatoes and onions as the basis for their internal calculations of offer prices to the Metro group. In addition they agreed to apply the same or approximately the same amounts for other cost items in their internal offer price calculations. Unlike the raw product prices, the other costs generally remained constant. By aligning their purchase prices used in the calculation, the two major suppliers of the Metro group virtually eliminated any price competition between them.

The proceedings against other potato and onion packaging companies suspected of price-fixing in their supply to other food retailers were terminated for discretionary reasons. Since the dawn raid carried out by the Bundeskartellamt the companies have ended all these practices.

In calculating the fine the Bundeskartellamt took account of the fact that the company Kuhn had cooperated extensively with the authority in uncovering the agreements. The fining decisions are not yet final. Böhmer and Kuhn and their staff responsible appealed the fines to the Düsseldorf Higher Regional Court. The court’s decision is still pending.

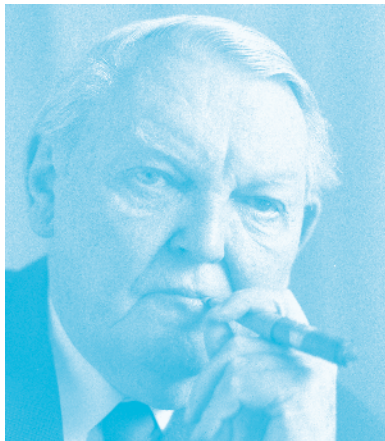
### Increase in number of private damages actions

Companies which violate the prohibition of cartels not only have to expect fines from the competition authorities but also claims for damages from customers or suppliers harmed by the cartel. The number of damages actions following cartel proceedings by the Bundeskartellamt or the European Commission (“follow-on claims”) increased significantly in recent years. The actions applied to a variety of product areas such as sugar, freight vehicles, rails, bathroom fittings, electronic cash, chipboard panels, detergents, television tubes, packaging, flour (mills cartel) or confectionery.

The truck cartel is a good example of the significance of follow-on actions. In 2016/2017 the EU Commission had imposed fines on several truck manufacturers for agreeing on their sales prices for freight vehicles over a number of years. In Germany alone over 300 actions were filed in connection with the case. The actions vary greatly in terms of the amount of claim for damages and the value in dispute. The claimants are mainly from the construction, transport, freight forwarding and logistics sectors but also from other sectors such as the food retail trade. Many actions were brought by small companies, e.g. craftsman's businesses or fashion boutiques.

The Bundeskartellamt estimates that in private damages proceedings the large part of all compensation payments is usually enforced in out-of-court negotiations (also partly by offsetting claims in future deliveries.) It is therefore generally not possible to exactly calculate the amount of compensation actually paid in such damage actions.

Further professionalisation in the grouping and assertion of damages actions can be observed which is being spurred on by the market entry of lawyer firms specialising in damages actions and litigation funders. The number of enforced damages actions is expected to rise even further after conditions for bringing damages actions were



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

Ludwig Erhard: Prosperity for all.

improved with the implementation of the EU Directive governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union 2014/104/EU into the 9th Amendment to the GWB in the summer of 2017.

#### Selected maximum fines\*

Year	Antitrust proceeding	Total fines imposed in euros	Highest single fine against a company
2018	Special steel	291,700,000	118,000,000
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	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. Since litigation is still pending in individual cases, not all the fines are final.

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

#### Cartel prosecution in 2018 in figures

- Fines imposed: approx. 376 million euros
- Leniency applications: 25 in 20 proceedings
  - filed by companies: 25
  - filed by individuals involved: 1
- Dawn raids: 7
- Sites searched:
  - 51 companies/associations
  - 5 private residences
- Total number of operational staff: 241
  - Bundeskartellamt staff: 152
  - police officers: 88
  - of which IT personnel: 48
  - public prosecutors: 1
- Items of evidence seized:
  - approx. 1,335 files
  - approx. 15.1 terabytes of electronic evidence

# 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 main areas of focus in 2018 lay once again with applications for the review of procurements by the statutory health insurance funds. The reviews concerned rebate contracts for pharmaceuticals and to an increasing extent the procurement of medical aids. Further areas of focus were public contracts in the areas of security and defence as well as construction services.

The 1st Public Procurement Tribunal is chaired by HansWerner Behrens.

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

## Open house authorisation procedures in the health sector

The statutory health insurance funds have made increasing use of so-called “open house” models as an alternative procedure to issuing invitations to tender for their procurement requirements. According to a decision of principle of the European Court of Justice, these procedures are to be considered as authorisation procedures which are not subject to procurement law and are non-selective (i.e. any provider can submit an offer), and which therefore cannot be considered as public contracts that must be put out to tender.

In several review proceedings in 2018 the Public Procurement Tribunals examined whether the model chosen by the individual health insurance fund really was a non-selective authorisation system or whether an invitation to tender had to be issued. The Public Procurement Tribunals considered those cases to be disadvantageous for bidders in which the health insurance fund had initially concluded selective framework contracts and only allowed other suppliers to join these contracts at a later date.

In 2018 further applications for review following the invitation of tenders by statutory health insurance funds primarily concerned tenders for medical aids. In the applications for review the “social welfare appropriateness” of the tender was challenged and the fact that a tender procedure had been carried out. The Public Procurement Tribunals did not share the applicants’ view. They held that “appropriateness” was not a criterion for the obligation to

tender in European public procurement law and that this limitation to the obligation to tender was not compatible with the procurement provisions.

The Düsseldorf Higher Regional Court has since changed its underlying case practice on the matter to the effect that it is not possible to file an application for review claiming that public procurement law should not apply. It held that an application for review in this matter was not only unfounded but also inadmissible. According to the Court, the preliminary question as to whether a procurement can be publicly tendered is for the social courts to decide.

In other review proceedings concerning the procurement of medical aids, the applicants criticized what they considered to be the inadequate consideration of qualitative aspects in the evaluation decision. These applications for review were not granted for the most part because the contracting entity had already set detailed specifications to ensure a high quality.

In comparison to evaluation criteria, a requirement in the description of the service to be rendered is a compulsory specification, the non-fulfilment of which leads to the exclusion of the bid. Unlike in the application of evaluation criteria, lower quality cannot be compensated for by a lower price. The requirement in a description of the service to be rendered is therefore considered an additional requirement in comparison to an evaluation criterion, which is more suitable to ensure a high (minimum) quality level.



### Electronic procurement

Increasing electronic communication in award procedures posed additional challenges for contracting entities and bidders which were the subject of several review proceedings in the reporting period. Sources of error for contracting entities were violations of the obligation to keep all award documents accessible under one electronic address. It is not sufficient to make other relevant award documents accessible only after further research on other websites. It must also be ensured that a national contract notice is not published before a European-wide notice because this could discriminate against bidders from outside Germany.

### Review of tender evaluation based on functional specifications

The object of a further review proceeding in 2018 were requirements for functional specifications. These specifications are only made concerning the required functions, the product itself is not specified. In specifying the award criteria the contracting entity has the possibility to carry out a quality competition for the (realisation) concepts of the bidders. According to the recent case law of the Federal Court of Justice, the contracting entity can evaluate such bids based on a relatively open evaluation system on a scale comparable to a school grading system if it can at least be ensured that, from the perspective of skilled providers, the qualitative service requirements to be evaluated are sufficiently identifiable from all the award documents, in particular from the functional specifications. If the functional specifications are not immediately identifiable,

as in the case to be decided by the Public Procurement Tribunals, the contracting entity has no basis to find the most economic offer with the best price-performance ratio. This is also in the direct interest of the public contracting entity because only a functional specification which is sufficiently identifiable can ensure that the expected functions can form an integral part of the contract.

#### The Federal Public Procurement Tribunals in figures

- In **2018, 118** applications were filed for the initiation of review proceedings.
- Around three quarters of the cases concerned the award of contracts for public supplies and services, followed by construction contracts. These were followed by the award of contracts for defence and security services and by sectoral contracting entities (such as Deutsche Bahn AG).
- **62** decisions were taken, **40** of which in favour of the public contracting entities and **22** (at least in part) in the applicants' favour. In all other cases the review proceedings were terminated without a decision on the merits either because applications were withdrawn or cases were concluded by other means.
- In **24** cases the decisions of the Public Procurement Tribunals were immediately appealed to the Düsseldorf Higher Regional Court.

# Decision Division for Consumer Protection

In June 2017 the Decision Division for Consumer Protection was established to exercise the Bundeskartellamt's new competences in the area of consumer protection. The authority can now conduct sector inquiries if there are any indications that consumer law provisions have been infringed and need to be pursued in the public's interest. It can also act as an amicus curiae in civil consumer law actions. However, the authority has as yet not been granted powers to intervene in such matters e.g. order the termination of the infringement.

The Decision Division for Consumer Protection is chaired by Prof. Dr Carsten Becker.

## Sector inquiries

### Comparison websites

In April 2019 the Decision Division published the results of its sector inquiry into online comparison websites.

During the sector inquiry a large number of comparison website operators from different sectors were asked about market coverage, ranking, factors influencing the ranking, user reviews and cooperations. A public consultation was also launched. The results of the inquiry differed greatly according to sector and website. In some cases consumers are misled, transparency obligations are violated or advertisements are not indicated as such.

On concluding its sector inquiry the Bundeskartellamt published a video which provides consumers with helpful hints for dealing with comparison websites.

#### When using online comparison websites consumers should pay attention to the following:

- Some key providers are not included in the comparison.
- Providers can influence positions in the ranking list by payment.
- Some websites leave out certain offers in their initial rankings.
- Some websites display selected offers above the actual ranking ("position 0") and receive payment for this from the providers.
- Sometimes the websites indicate shortages, benefits or exclusive offers in a misleading manner that may put consumers under pressure.
- Services can often only be rated by users who were able to procure them via the website.
- Comparison websites in all sectors cooperate with one another with the result that different websites show identical search results, which could simply have been copied.



### Smart TVs

The main purpose of the Sector Inquiry into Smart TVs launched in December 2017 is to examine how the TV manufacturers process user data. In contrast to conventional TVs, smart TVs are connected to the internet which not only means that viewers receive data and TV programmes but also that their user data is transmitted.

The aim of the sector inquiry is to find out whether and to what extent personal data is collected, passed on and commercially used by the TV manufacturers or third parties and whether the users are informed about this.

Following preliminary talks with TV manufacturers, a data protection authority and a consumer protection authority, and a first inquiry in which around 30 suppliers were questioned, the Decision Division is now examining more closely the conduct of the major 20 smart TV manufacturers in a second stage of the inquiry which began in November 2018.

The results of this sector inquiry will also be published in due course.



# Competition Register for Public Procurement at the Bundeskartellamt

The Competition Register is intended to quickly and electronically provide contracting authorities, sector contracting entities and concession grantors with information on the relevant law violations committed by senior staff of companies for their procurement procedures. The Register is to be made available to contracting entities and concession grantors during the course of 2020.

The Establishment Team for the Competition Register is headed by Kai Hooghoff.

The reporting and inquiry obligations of the Competition Register will ensure that public contracts and concessions are only awarded to those companies which have not committed any serious offences and have acted fairly in competition. Reporting and inquiry obligations will come into effect only once the ordinance comes into force.

Contracting authorities will then be obliged to consult the register on whether an entry exists before awarding contracts with a minimum estimated value of 30,000 euros net. However, the decision on whether to exclude a company which has an entry in the Register from the procurement procedure will remain with the contracting entity.

## Strengthen the preventive effect of the law

A company whose senior staff have committed serious economic offences should not be able to benefit from public contracts and concessions. Under the public procurement law provisions under Sections 123 and 124 GWB companies are thus to be excluded from participating in procurement procedures on compulsory or facultative grounds if their senior staff have committed certain crimes or administrative offences.

The data stored in the Competition Register is intended to quickly provide contracting authorities, sector contracting entities and concession grantors with the necessary information to reliably examine the grounds for exclusion. The purpose of the Competition Register is therefore to help fight economic crime. This transparency for contracting authorities will increase the preventive effect of criminal and administrative offence law, including competition law.

Search enquiries in the Competition Register can only be made by contracting authorities in procurement procedures. The register is not accessible to the general public. Entries of companies in the Register will be deleted after the expiry of certain periods (three or five years). Companies listed in the Register will also have the opportunity to apply for premature deletion from the register once they have implemented suitable remedies (“self-cleaning”).



*“The Competition Register is to help fight economic crime and antitrust violations. This new transparency will strengthen the preventive effect of criminal and competition law.”*

### Award of contracts by state agencies

- The State is an important contractor for many companies.
- In the future contracting authorities will be obliged to electronically consult the Competition Register before they award any contract with a minimum value of 30,000 euros net.
- They will have the possibility to consult the register if the value of the contract is less than this amount.
- If the company concerned is listed in the register, it is for the contracting authority to decide whether the company should be excluded from the procurement procedure.

# 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. By using this information, consumers can benefit from lower petrol prices and create competitive impulses with their decision on where to buy petrol.

The Market Transparency Unit for Fuels is chaired by Steffen Häfele.

## Annual Report 2018

In March 2018 the Bundeskartellamt published its current annual report on the activities of MTU Fuels. Key findings include:

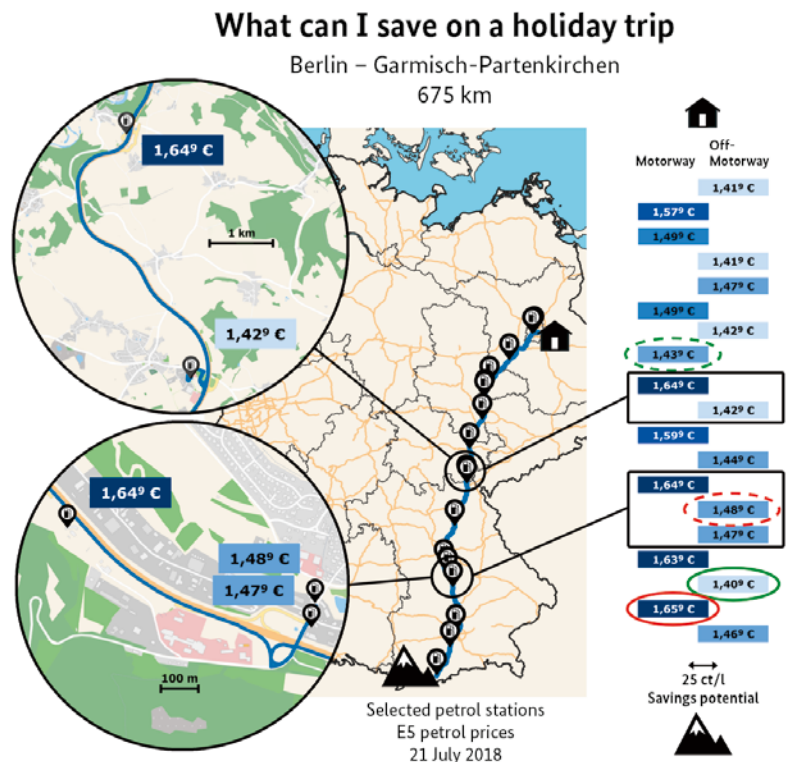
- There are still significant price differences in the course of a day: In the course of a day, there can be differences of up to 20 cents/litre between the average highest and lowest fuel prices within one town. In specific cases these differences can be even higher.
- Prices still tended to be highest in the morning and lowest in the evening. The annual report shows the price patterns that could be observed in 2018 and directly after a change in late March/early April 2019.
- The relative price position of the different petrol stations compared to each other is quite stable. “Cheap” petrol stations mostly remained relatively cheap. “Expensive” petrol stations mostly stayed relatively expensive.

## Evaluation report by the Ministry for Economic Affairs and Energy

In 2018 the Ministry for Economic Affairs and Energy (BMWi) assessed the activities of MTU Fuels and presented the report to the German Parliament and the Bundesrat. Its overall assessment is positive. According to the report, MTU Fuels has increased fuel price transparency for consumers. There are indications that MTU Fuels promotes competition. The Ministry for Economic Affairs and Energy thus recommends to continue the work of MTU Fuels to better analyse its effects on competition. The report is available (in German) at [www.bmw.de](http://www.bmw.de).

### Saving money on petrol with MTU Fuels

- 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.
- For a list of authorised consumer information services and MTU Fuels’ annual reports (in German), please refer to [www.bundeskartellamt.de](http://www.bundeskartellamt.de) → Market Transparency Unit for Fuels



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