



Bundeskartellamt



open markets | fair competition

# Bundeskartellamt

Annual Report 2020/21



# ORGANISATION CHART

**Responsibilities of the decision divisions:**

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

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# Message of greeting – Peter Altmaier

## Federal Minister for Economic Affairs and Energy



Like the current year, 2020 was marked by Covid-19 and the efforts to combat the pandemic.

It was also a year in which many people had to face great concerns and challenges from the economic perspective. The fight against the pandemic involved severe restrictions which resulted in a recession – and the measures taken also impacted competition policy.

First, the state aid measures we needed to take reached a level unparalleled in recent years. Not only did the subsidies pose an enormous strain on the public budget, the state also had to intervene in the economy to a far greater extent than would be feasible under normal circumstances. There are good reasons why the law on state aid and competition law set limits to such interventions. And it is absolutely clear that state participation in and state aid for businesses can only be justified in terms of competition policy for as long as they are absolutely necessary to overcome the crisis.

Second, it also became apparent in certain areas of the economy that some businesses would have to cooperate in ways that would not be acceptable in normal times; such cooperation became necessary in order, for example, to maintain supply chains which had temporarily come under pressure. The competition legislation now in force provides for flexibility when it comes to such crisis-related cooperation. I am grateful that the Bundeskartellamt clearly communicated early on that it would exercise its discretion with a sense of proportion to enable temporary cooperation between companies under the applicable legal provisions with the aim of overcoming the crisis.

I would also like to thank the Bundeskartellamt for the outstanding work it has once again accomplished in applying and enforcing competition law in spite of the difficult circumstances. The Annual Report reflects the broad scope of the authority's work. Many people in Germany and worldwide take great interest in following its highly appreciated activities. The excellent reputation of the Bundeskartellamt and its staff is well deserved.

Last year, competition policy was again marked by the overarching issues of digitalisation, global competition and sustainability. Each one of these three fields poses different challenges for the regulatory framework:

As has been examined and described in many studies, digitalisation is changing the mechanisms of competition. Through the new GWB Digitalisation Act the Federal Government has added further instruments to the Bundeskartellamt's competition law toolbox and sharpened those already available to the authority. The Competition Act also served to implement Directive (EU) 2019/1 ("ECN+"), which we agreed at the European level in 2018 in order to empower the competition authorities of the Member States to be more effective enforcers. At EU level we are now also discussing European rules for digital markets. We had worked towards this objective during the German Presidency of the Council of the European Union in the second half of 2020.

Global competition is vitally important for our economy, but it can distort competition in the domestic market when it becomes a systemic rivalry. In such a case, the key regulatory challenge is to ensure that the playing field stays level even where the competitors originate from a different economic system. Not least for this reason, the modernisation of European competition law ranks high on the European agenda. The European Commission's proposals regarding foreign subsidies play a major role in this respect.

Finally, the major overall task we will all have to fulfil over the next few years is to ensure sustainability. Competition policy does not conflict with this aim, but it will have to be proved in practice that this is not the case.

I would like to thank the Bundeskartellamt for the high level of dedication and expertise it has brought – and I am sure will continue to bring – to all these responsibilities.

A handwritten signature in blue ink, appearing to read 'Peter Altmaier', with a stylized flourish at the end.

Peter Altmaier

# Foreword – Andreas Mundt

President of the Bundeskartellamt



The past year saw fundamental changes to the economy and competition. The pandemic left a lasting mark on many economic sectors and taught us just how fragile markets can be if they cannot run smoothly. And yet the crisis has also shown us that the self-healing powers of the markets still function. Bottlenecks and closures were followed by a resumption of supply chains. Innovative solutions to the impact of the crisis were found, from the production of masks to the development of a vaccine here in Germany. Competition plays a crucial role in all of these developments because it encourages companies to develop new products or overcome shortages whilst limiting the market power of individual players and ensuring diversity on the markets.

Protecting competition is just as important in exceptional times as in normal times. Our most important priorities therefore always include cartel prosecution and preventing the abuse of market power. Equally, we take special care in merger control that acquisitions do not harm competition. It is naturally just as important to allow reasonable cooperation between companies, and competition law has proved to be extraordinarily flexible in this respect. From the automotive industry to initiatives for vaccination equipment, the Bundeskartellamt could be contacted in an unbureaucratic manner for guidance on ways of crisis-related cooperation which comply with competition law.

Some developments in the economy have been accelerated even further by the pandemic. This is especially true of the power of the large digital companies. The digital economy has long been a key area of focus for the Bundeskartellamt. We have already successfully concluded numerous landmark cases and initiated new proceedings in this sector. Since the beginning of 2021 we have come a significant step further: With the amendment to the German Competition Act the legislator has equipped us with a new tool to intervene even more effectively against anti-competitive practices of large internet platforms before the horse has bolted. The new provisions for the control of abusive practices apply above all to digital ecosystems which extend across several markets and are difficult for competitors to challenge. We are already intensively applying the new provisions, most prominently with new proceedings against Facebook, Amazon and Google. The amendment also includes a number of further important changes which enable us to be even more effective in cartel prosecution and take an even more focused approach in merger control.

We have also successfully launched the fully digital Competition Register. The Competition Register helps to prevent companies which have committed serious law violations from benefiting from public tender procedures. This is another effective deterrent against economic crime.

These competition rules serve to benefit the consumer, and without them our economy cannot function. It will still be necessary in the future for us to do everything possible to keep markets open and protect competition where it is at risk.

Our annual report provides an overall view of all the areas of our work and I hope you will enjoy reading it.

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

Andreas Mundt

# TASKS AND ORGANISATION

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

*Andreas Mundt,  
President of the Bundeskartellamt*

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

# The tasks of the Bundeskartellamt in detail:

## 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 Bundeskartellamt 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. Companies can exert relative market power even if they do not hold a dominant position. As a result they enjoy a large scope for action vis-a-vis their competitors, suppliers or 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.

With an amendment to the law in 2021, a new instrument was added to the authority's toolbox for dealing with abusive practices. The new provision set forth in Section 19a GWB is targeted in particular at large digital platforms and will enable the Bundeskartellamt to act earlier and more effectively against abusive practices.

## 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 Public Procurement Tribunals at the Bundeskartellamt are responsible for reviewing tender procedures which are carried out by the Federation or public contracting entities.

## Consumer protection

The Bundeskartellamt can conduct sector inquiries into consumer protection issues especially those raised by the digital economy 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.

## Competition Register for Public Procurement

Companies which have committed serious economic offences are to be registered in the electronic Competition Register. Under public procurement law such companies should not be able to benefit from public contracts and concessions. The Competition Register which started operating in early 2021 will enable contracting authorities in future to check in a single nationwide electronic search whether a company has committed relevant violations of law.

## Key Facts

# 2020



- President: **Andreas Mundt**
- Vice President: **Prof. Dr Konrad Ost**
- Budget 2020: **34.4 million euros**
- **400 staff**
- of which **156** are legal experts and economists
- **five** trainees
- **200** female/**200** male staff



### Ban on cartels

- Fines amounting to 349 million euros, 19 companies/associations and 24 natural persons fined



### Merger control

- Approximately 1,230 notifications
- nine second phase proceedings during which no concentration was prohibited, two notifications were withdrawn, three mergers were cleared subject to conditions and four mergers were cleared

### Control of abusive practices



- One proceeding concluded and 17 proceedings initiated

### Public Procurement Tribunals



- 124 applications for review
- 16 applications granted, 35 rejected, 49 withdrawn and 23 became moot

### Sector inquiries



- Concluded: Smart TVs in July and online user reviews in October 2020
- Initiated: Publicly accessible charging infrastructure for electric vehicles in July, and messenger and video services in November 2020
- Ongoing sector inquiries: Waste management, hospitals and online advertising



# 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.

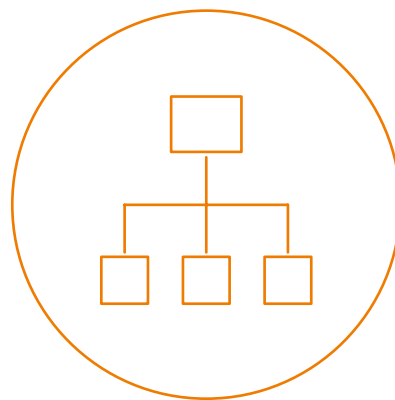
Decisions on cartels, mergers and abusive practices are taken by 13 **Decision Divisions** of the Bundeskartellamt. Nine Decision Divisions are responsible for specific economic sectors. The 10th, 11th and 12th Decision Divisions deal exclusively with the cross-sector prosecution of cartels. In the middle of 2017, a further Decision Division was established for competition protection and consumer protection. You will find an overview of the Decision Divisions, their competencies and respective chairs in the organisation chart at the end of the report.

Two **Federal Public Procurement Tribunals** are also located at the Bundeskartellamt and examine whether public procurement law was observed in the award of large public contracts falling within the Federal Government's area of responsibility.

The **Competition Register**, which started operating in early 2021, will in future list companies which have committed relevant infringements of law.

The **General Policy Division** advises the Decision Divisions in specific competition law and economic matters and represents the Bundeskartellamt in the decision-making bodies of the European Union. The Division is closely involved in competition-relevant legal reforms, both on the national level and on the European level. It coordinates the Bundeskartellamt's cooperation with

foreign competition authorities and international organisations. The Division is also in charge of press and PR work and assists the authority's president. The ongoing digital transformation and the legal and economic issues it raises are another important focus area of the General Policy Division's work.



**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.

The task of the **Central Division** is to provide cross-functional services to ensure the authority's operability and assist the various organisational units in

discharging their tasks. The cross-functional services include Budget and Procurement, Internal Services, Building Management, IT including IT Forensics and IT Security, HR and HR Development, Organisation including Risk Management and General Legal Matters.

The IT unit assists the Decision Divisions e.g. in digitalising their work processes, developing IT-based processes such as the Competition Register, and in seizing and evaluating IT data in cartel proceedings.

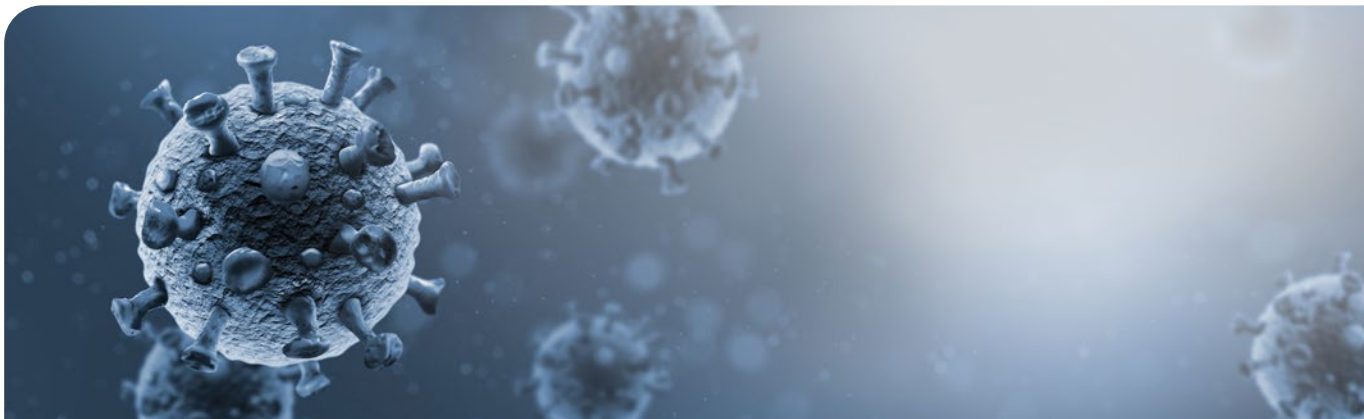
A key area of focus of the Central Division in 2020 remained the recruitment of highly qualified staff. The Bundeskartellamt is a family friendly employer faced with many diverse and challenging tasks. The Central Division plays a key role in creating appropriate working conditions for the authority's staff, especially in the light of the Covid-19 pandemic. It also places great emphasis on the further training and development of its staff both in the professional as well as personal sphere. The authority offers a large number of placements for practical training and internships for prospective lawyers and economists.

In the digitalisation of public administration even the formal procedures for signing and file management are increasingly carried out electronically. Electronic invoicing was successfully introduced in 2020 and since the end of 2020 the authority has gradually installed an electronic file management system

*“The amendment to the GWB equips the Bundeskartellamt with new tools for its proceedings in the digital economy and for its administrative fine proceedings. We have defined the competences of the Decision Divisions in such a way that our new powers in dealing with the digital gatekeepers can develop their full effectiveness/potential. In the future the Litigation and Legal Division will largely adopt the role of public prosecutor in judicial proceedings concerning administrative fines. We are preparing for this development with additional resources.”*



Prof. Dr Konrad Ost,  
Vice President of the  
Bundeskartellamt



## Protecting competition during the Covid-19 crisis

Since the beginning of 2020 the Covid-19 crisis has shaped not only the everyday lives of people but also framework conditions for industry. Many sectors are particularly affected by the crisis and the exceptional circumstances make intervention into market processes necessary. However, competition is not suspended even in times of crisis. The Bundeskartellamt is there to protect consumers and companies. At the same time the Bundeskartellamt is sufficiently flexible to facilitate useful and necessary cooperations.

### Contact partner for cooperation projects

The Bundeskartellamt has examined many cooperations as a result of the crisis, giving companies legal security and protecting them against possible punishment. There are three major areas in which the Bundeskartellamt acts as a contact partner for companies looking for support: Cooperations in the area of production in order to avoid bottlenecks, in logistics, distribution and storage and in restarting complex supply chains.

### Intensive international coordination

The Bundeskartellamt has participated in joint initiatives of European and international competition authorities to provide information and urgently needed guidance to companies.

### Prosecution of competition law violations

The authority is particularly vigilant in preventing illegal anti-competitive agreements and in preventing companies from abusing their market power to the detriment of consumers.

# The Bundeskartellamt as a family-friendly employer

Since 2015 the Bundeskartellamt has been awarded for its strategically developed family and life-phase oriented human resources policy (“audit berufundfamilie”). The authority continually develops its offers and working conditions for its staff.



## Career opportunities at the Bundeskartellamt

In our quest to protect competition we regularly recruit new staff. At the Bundeskartellamt you will play an active part in shaping the future of the German, European and international economy. We will also offer you a whole range of interesting and varied tasks with many opportunities for creative organisation. Our strength lies not only in our expertise in many different areas of specialisation but also in our highly motivated teams of experienced colleagues and new junior staff.

Further information available at

[https://www.bundeskartellamt.de/EN/AboutUs/Career/career\\_artikel.html](https://www.bundeskartellamt.de/EN/AboutUs/Career/career_artikel.html)

# Virtual group visits to the Bundeskartellamt



The Bundeskartellamt offers interested groups the possibility to visit the authority in Bonn or to learn in a virtual tour about its role, tasks and current cases. This service is open to school children, students, companies, organisations and all those interested in the Bundeskartellamt's work.

Until early 2020, the Press and Public Relations Unit still received visitor groups at the Bundeskartellamt's premises or members of the authority's staff visited schools, universities etc. Since the beginning of the pandemic interested groups have been able to book virtual information events.

## Exchange with the Monopolies Commission

In competition policy matters the Bundeskartellamt is in regular exchange with the Monopolies Commission, an independent advisory body to the Federal Government. Talks were held between the two institutions in 2020, especially in preparation of the Biennial Report in which the Monopolies Commission assesses the Bundeskartellamt's current case practice.

The Monopolies Commission prepares Biennial Reports and Sector Reports on the railway, energy, post and telecommunications sectors every two years. Four sector reports are to be completed in 2021 in which the Monopolies Commission will examine the development of competition in each sector.

## Exchange with academic experts

The Bundeskartellamt organises an annual meeting of the Working Group on Competition Law and bi-annual meetings of the Working Group on Competition Economics. These formats offer legal and economic experts an opportunity to discuss current topics in the context of competition law and politics. For the first time both events took place in a virtual format because of the ongoing Corona pandemic.

At the 2020 annual meeting of the Working Group on Competition Law the participants discussed the topic “Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice”. The discussion also included deliberations on the extent to which competition authorities should be obliged to strike a balance between opposing competition goals and public interest objectives and to enforce such goals in the context of business cooperation; the role the legislator is supposed to play in this respect was also discussed.

The agenda of the group's first meeting in 2020 dealt with 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.

The agenda of the meeting at the end of 2020 included mergers between companies on different levels of the supply chain which can result in increased costs for competitors, the joint study of the Bundeskartellamt and the French Autorité de la concurrence on algorithms and competition and the categorisation under competition law of an overly extensive collection and use of data.



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

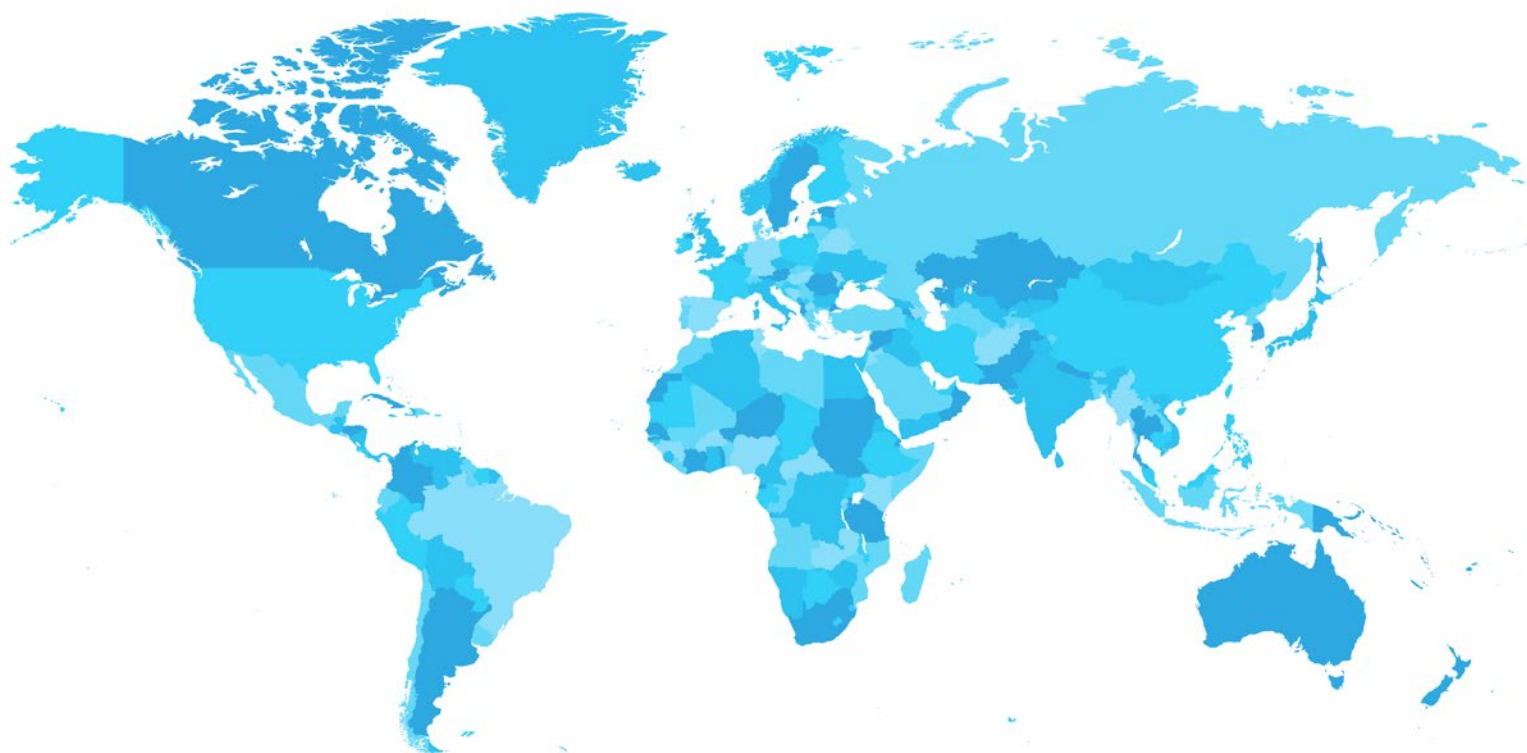
- For 40 years the Bundeskartellamt has organised every two years one of the most renowned international conferences dealing with competition issues.
- Owing to the pandemic, the 2021 International Conference on Competition (IKK) was held in a virtual and also more compact format on 4 March 2021.
- With around 1,000 participants from more than 60 countries the event once again confirmed its international appeal even in its virtual form.
- The keynote speakers were Peter Altmaier, Federal Minister for Economic Affairs and Energy, Margrethe Vestager, European Commissioner for Competition, and Christian Klein, Chief Executive Officer of SAP SE.
- The main issues discussed were the role of competition policy in dealing with Big Tech and public interest objectives as a challenge for competition law practice.

### The Bundeskartellamt in an international comparison

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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 specialist information which the journal derives from its own surveys and analyses. Again in 2019 the Bundeskartellamt ranked in the 5 star “elite” category together with the French Autorité de la concurrence and the US Federal Trade Commission.



# 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..

## ECN

The national competition authorities in the EU and the European Commission 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. In the ECN, competition authorities also exchange information on their case experience and are involved in the evaluation and review of guidelines and Block Exemption Regulations, for example on vertical and horizontal restraints of competition.

## ICN

At the international level the national competition authorities work together within the International Competition Network (ICN). With almost 140 competition authorities the ICN is the most important association of competition authorities worldwide. Since September 2013, Andreas Mundt, the President of the Bundeskartellamt, has been the Chair of the ICN's Steering Group.

In September 2020, the 19th ICN Annual Conference was hosted in a virtual format for the first time by the US Department of Justice and the US Federal Trade Commission due to the Corona pandemic. The focus of the conference lay with the digital economy from the different perspectives of the ICN working groups: Abuse cases, big data and cartelisation, competition advocacy in the digital age, merger control in the digital sector and competition agencies' strategies to address the challenges of the digital economy. At the conference the ICN announced plans for a self-evaluation of the network, the Third Decade Initiative.

Further work products dealt with cooperation in the area of leniency programmes, big data and cartels, conglomerate mergers, procedural errors in merger control and market dominance in digital markets.

In addition, the ICN Steering Group initiated a project to examine the interfaces between competition law and other areas of law such as consumer protection and data protection. The ICN already reacted to the Covid-19 pandemic in April 2020 with a declaration by the Steering Group to enforce competition law during and after the Corona crisis.

## OECD/UNCTAD

In 2020 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).

The President of the Bundeskartellamt, Andreas Mundt, is a member of the Bureau of the OECD Competition Committee. Every year the OECD hosts two conferences of the Competition Committee and a Global Forum on Competition in Paris. The conferences took place in a virtual form in 2020 due to the Covid-19 pandemic. Important topics last year included 'Start-ups, killer acquisitions and merger control', 'Consumer data rights and competition', 'Sustainability and Competition' as well as 'Abuse of Dominance in Digital Markets'.

The UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (IGE) convenes every year in Geneva. Every five years the UNCTAD hosts a Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The 8th review conference took place in a hybrid form in October 2020, at which the Guiding Policies and Procedures developed by the Discussion Group on International Cooperation were adopted.

# 10<sup>TH</sup> AMENDMENT TO GERMAN COMPETITION ACT (GWB) NOW IN FORCE

**New instrument for dealing with abusive practices: Section 19a GWB**

**New rules for platforms**

**Implementation of the ECN+ Directive and more effective cartel prosecution**

**New merger control turnover thresholds**

On 19 January 2021, the 10th amendment to the German Competition Act (GWB) entered into force as the “Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions” (“GWB-Digitalisierungsgesetz” - GWB Digitalisation Act ). A key element of the amendment is the modernisation of abuse control. The new Section 19a GWB enables the Bundeskartellamt to intervene quicker and more effectively against certain practices of large digital companies. Furthermore, the legislator supplemented traditional abuse control rules, implemented the ECN+ Directive, strengthened anti-cartel enforcement and made important changes to merger control rules.

# Extensive modernisation of competition law

The amendment to the GWB originally started with the obligation to implement the **ECN+ Directive**. The Directive is to empower the European competition authorities to be even more effective antitrust enforcers. It provides the Bundeskartellamt with **new investigative competences** and extended rights in judicial proceedings concerning administrative fines. The amendment also **enshrines into law the leniency programme**.

The **control of abusive practices** has also been modernised to enable the

Bundeskartellamt to be more effective in meeting the challenges posed by the digital economy. In particular the Act provides for **stricter rules applicable to companies of paramount significance for competition across markets**. The new provisions are set forth in **Section 19a GWB** and are intended to enable the Bundeskartellamt to impose mandatory conduct requirements on such companies. In addition, the provisions for the traditional control of abusive conduct were specified in more detail and internet-specific criteria were added.

In the area of **merger control** the legislator increased the **threshold values** for the obligation to notify mergers. This means that the number of mergers to be examined by the Bundeskartellamt will decline noticeably as a result of the amendment. At the same time a new rule has been established allowing the Bundeskartellamt to also examine mergers below the threshold values if certain preconditions are met. This will allow the Bundeskartellamt to more effectively focus its resources on problematic cases.



*“The 10<sup>th</sup> amendment to the GWB was mainly influenced by the digital transformation of the economy. It allows us to take a major step forward, in particular in the effort to take more targeted action against*

*large digital companies. In the sphere of the digital economy the Bundeskartellamt has assumed a pioneer role and can look back on important proceedings it successfully concluded in the past years. With the new powers we can intervene at an even earlier stage against anti-competitive practices - and shut the stable door before the horse bolts.”*

Andreas Mundt,  
President of the Bundeskartellamt



# More effective protection of competition in the digital economy

The GWB is keeping pace with the digital transformation. The 9<sup>th</sup> amendment to the GWB in 2017 already adapted essential elements of competition law to the specific features of the **digital economy**, for example with regard to the application of competition rules to markets providing services free of charge or by taking into account network effects and access to data as criteria defining market power. The new tools provided by the **10<sup>th</sup> amendment to the GWB** will further modernise competition law and strengthen the Bundeskartellamt's effectiveness. The new **Section 19a** probably represents the most important change.

In contrast to the traditional control of abusive practices which mainly takes effect ex post, the new section will allow the Bundeskartellamt to intervene at an early stage where competition is threatened, in particular by **large digital companies**. Where the Bundeskartellamt has issued a decision declaring that a company is of **paramount significance for competition across markets**, the authority can prohibit certain types of conduct. Such conduct includes, e.g. the self-preferencing of a company group's own services when mediating access to markets or creating or raising barriers to market entry by processing data relevant for competition. These rules can also be applied in markets where the respective company is not dominant.

With the introduction of Section 19a GWB the legislator has also **shortened the legal process**: Appeals against decisions issued by the Bundeskartellamt on the basis of Section 19a GWB will be directly brought before the **Federal Court of Justice**. By-passing the Düsseldorf Higher Regional Court, the court of first instance in all other competition law proceedings, will save a considerable amount of time in the proceedings.

## What are the Bundeskartellamt's new competences under Section 19a GWB?

The authority can intervene where companies of paramount significance for competition across markets

- engage in the self-preferencing of their own company group's services
- impede other companies in mediating access to markets
- extend their market power to non-dominated markets (envelopment strategies)
- raise barriers to market entry by processing data which are relevant for competition
- make the interoperability of products or data portability more difficult
- provide other companies with insufficient information about the service rendered
- demand unjustified benefits for handling the offers of another company

by prohibiting such conduct.

### Amendments to the traditional control of abusive practices

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In addition to the new provisions under Section 19a GWB the legislator specified in more detail the provisions for the traditional control of abusive practices and added internet-specific criteria. The new provisions clarify that access to data relevant for competition must generally be taken into account in assessing market power. Furthermore, the concept of 'power of intermediation' was included as a platform-specific factor of market power. Such a key position in the provision of intermediary services can result in dependence relevant under competition law.

Another important new feature is that in the case of powerful companies and under certain preconditions the Bundeskartellamt can order in favour of dependent companies that, where necessary, access to data must be granted in return for adequate compensation. In addition, companies with superior market power are prohibited from taking measures that could increase the likelihood of a market 'tipping', for example measures hindering competitors from independently attaining network effects.

## More effective anti-cartel enforcement/ECN+

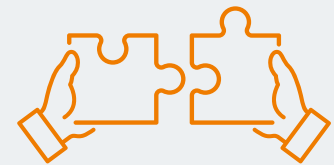
The 10<sup>th</sup> amendment to the GWB implements the **ECN+ Directive** into German law, thus strengthening the effectiveness of cartel prosecution. In line with the system in place at EU level, companies and their employees will be required in future to cooperate to a certain extent in establishing the facts of a case.

Another important step is the fact that the amendment **strengthens the**

**competition authorities' position in judicial proceedings concerning administrative fines.** Even after an objection has been filed against a finding decision, the Bundeskartellamt will remain the competent enforcement authority (not the General Prosecutor's Office as has previously been the case) and will have **the same rights** in judicial proceedings concerning administrative fines as the public prosecutor's office.

The amendment also includes several new provisions regarding administrative fines. New rules will apply to fines imposed on associations of companies. Furthermore, the amendment also **enshrines into law** the **leniency programme** which is a key factor in the detection of cartels.

## More efficient merger control



In the area of merger control the amendment will result in easing the bureaucratic burden on companies and ensure that the Bundeskartellamt will be able to focus on the examination of truly critical merger cases. This is to be achieved by **readjusting the turnover thresholds** for the obligation to notify mergers in Germany. In future mergers will be subject to merger control only if, among other conditions, one of the companies concerned achieves an annual turnover in Germany of at least 50 million euros (previously 25 million euros) and if another company participating in the merger achieves an annual turnover in Germany amounting to at least 17.5 million euros (previously five million euros). It can be assumed that the adjustment will result in a significant reduction in the number of mergers to be examined (which in previous years amounted to well over 1,000 mergers per year). The resources that will thus become available can be used by the authority to focus on critical cases.

Another important new development concerns the so-called **minor market threshold**. If turnovers on a specific market are below this threshold, the Bundeskartellamt cannot prohibit mergers on this market. The 10<sup>th</sup> amendment to the GWB raised the minor market threshold from 10 to 20 million euros and added the following clarification: The authority can prohibit a merger if the requirements for a prohibition are met on several small markets where the overall turnover exceeds the minor market threshold.

Since the 10<sup>th</sup> amendment entered into force, the Bundeskartellamt can

oblige companies to notify mergers in specific sectors of the economy even below the turnover thresholds normally applicable. However, this is subject to specific requirements regarding, e.g., turnovers and market shares, and the Bundeskartellamt must first have conducted a sector inquiry in one of the economic sectors concerned.

### Improved option to order so-called interim measures i

By ordering interim measures, i.e. by issuing a preliminary decision, the Bundeskartellamt can take faster action. This may be necessary where without an intervention competition would be harmed, for example where companies consolidate their market position by using obstructive practices, make market access more difficult for competitors or squeeze them out of the market. This instrument could so far only be used in cases where very strict requirements were met. Interventions were only possible if competition was likely to suffer imminent irreparable harm. The 10<sup>th</sup> amendment to the GWB has now lowered these requirements: The authority may impose interim measures if these are necessary in order to protect competition and if an infringement of competition rules is more likely than not to exist. In severe cases it can also intervene to protect individual companies, not only competition as a whole.

# CARTEL PROSECUTION



Steel forging companies | Aluminium forging | Road drainage products  
Wholesale of plant protection products | Private damages actions

In 2020 the Bundeskartellamt imposed fines of around 349 million euros on a total of 19 companies or trade associations and 24 natural persons. The sectors concerned were steel and aluminium forging, the manufacture of road drainage products, and the wholesale of plant protection products.

Due to the effects of the Covid-19 pandemic, it was temporarily not possible to carry out dawn raids in 2020. After putting in place a comprehensive safety concept, dawn raids were carried out again – at least in reduced numbers.



## Fines against steel forging companies

In February 2021 the Bundeskartellamt imposed fines totalling approx. 35 million euros on three steel forging companies and two senior staff members for their regular involvement in an anti-competitive exchange of information between October 2002 and December 2016.

At meetings of a working group of the European forging industry association Euroforge which took place up to three times a year, senior staff of leading German forging companies exchanged competition-sensitive information with other forging companies from other European countries. This in-

cluded information in particular about the respective cost situation of the companies, their pricing strategies and concrete negotiations with suppliers and customers. The aim of the participating companies was to pass on cost increases to the fullest extent possible to their customers without having to fear being undercut by their competitors. Among the principal customers of the steel forging companies are large car manufacturers and the automotive supply industry.

The investigations were triggered by a leniency application filed by another forging company on which no adminis-

trative fine was imposed in accordance with the Bundeskartellamt's leniency programme. All the companies cooperated fully with the Bundeskartellamt during the entire proceedings. Furthermore, settlement agreements were reached with the companies. Both these factors helped to reduce the level of their fines.

### Settlement



- Administrative fine proceedings 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 resource-intensive antitrust proceedings.
- The formal requirement for settlement is a confession and a settlement declaration in which the company or individual involved acknowledges the facts of the infringement with which it/the individual is charged and accepts the fine up to the amount announced.
- In the case of cartel agreements a settlement declaration can lead to a maximum of 10% reduction in fines.
- A waiver of the right to appeal is not part of a settlement declaration.



## Anti-competitive agreements among aluminium forging companies

In December 2020, the Bundeskartellamt imposed fines totalling approximately 175 million euros on five aluminium forging companies and ten senior employees for engaging in illegal anti-competitive agreements.

For many years the companies had worked towards the mutual aim of passing on rising costs to their customers in an effort to avoid disadvantages caused by increased costs. Between April 2006 and April 2018, senior executives of the companies attended a total of 23 meetings of what they referred to as the “Aluminium Forging Group”. At these meetings they exchanged information on individual costs incurred in their procurement processes and on increased costs for aluminium, energy and the processing of aluminium into an input material suitable for forging. The companies’ representatives also discussed how these costs could be passed on to customers. Automotive suppliers and manufacturers are among the key customers of the forging companies.

The Bundeskartellamt's investigations were triggered by a leniency application. In accordance with the authority's leniency programme no fine was imposed on the company filing for leniency. In setting the fine against two other companies the Bundeskartellamt took into account that with their leniency applications these companies had substantially helped to prove the alleged offence and had cooperated with the authority in uncovering the infringements. These two companies and another company acknowledged the alleged offence and agreed to a settlement. However, two companies appealed against their fines to the Düsseldorf Higher Regional Court, which is still to decide on the matter.

### The Leniency Programme in brief

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- 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. Members of a cartel who have coerced others to participate in the cartel are excluded from immunity.
- All other and later leniency applicants can have their fines reduced by a maximum of 50%, provided they cooperate with the Bundeskartellamt and produce decisive evidence to prove the offence.
- The requirement for immunity from and a reduction in the level of fine is the continuous and unlimited cooperation of the leniency applicant with the Bundeskartellamt throughout the entire proceedings.

# Price-fixing agreements between manufacturers of road drainage products

In January 2021, the Bundeskartellamt imposed fines of around six million euros on two manufacturers of road drainage products and their representatives for concluding agreements on prices and rebates and an agreement to carve up two major contracts between themselves. Road drainage products include manhole covers and gully tops made of cast iron or concrete.

The two leading German manufacturers of manhole covers and other road drainage products engaged in illegal price-fixing agreements to the detriment of their customers. On several occasions in 2018 senior staff members of the two companies agreed to raise prices and reduce rebates for certain product groups. In August 2018, they also agreed to split two major orders from building material merchants between them. According to the Bundeskartellamt's investigations, an agreement between the two companies had existed from 16 May 2018 until the dawn raid on 14 November 2018, by which the special rebate for specific standard products and the net prices for specific concrete/iron manhole covers were to be agreed between the two companies. Based on this

agreement conditions were readjusted several times during the period mentioned.

The infringements were uncovered with the help of the Bundeskartellamt's anonymous whistle-blowing system.



## Selected maximum fines\*

| Year | Cartel proceeding         | Total fines imposed in euros | Highest single fine against a company |
|------|---------------------------|------------------------------|---------------------------------------|
| 2020 | Aluminium forging         | 174,841,500                  | 145,000,000                           |
| 2020 | Plant protection products | 157,817,170                  | 68,600,000                            |
| 2019 | Quarto plates             | 646,405,000                  | 370,000,000                           |
| 2018 | Special steel             | 304,050,050                  | 118,000,000                           |
| 2014 | Beer                      | 338,000,000                  | 160,000,000                           |
| 2014 | Sausage                   | 338,500,000                  | 128,050,000                           |
| 2014 | Sugar                     | 281,700,000                  | 195,500,000                           |
| 2009 | Coffee                    | 159,000,000                  | 83,000,000                            |
| 2008 | Clay roof tiles           | 188,081,000                  | 66,280,000                            |
| 2007 | Liquefied gas             | 249,000,000                  | 67,200,000                            |
| 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.

# Proceeding against wholesalers of plant protection products

In early 2020, the Bundeskartellamt imposed fines totalling 157.8 million euros on eight wholesalers of plant protection products and their representatives for agreeing on price lists, discounts and several individual sales prices for retailers and end customers in Germany.

The companies agreed on price lists for plant protection products in the spring and autumn of each year between 1998 and the dawn raid in March 2015. Their agreements were based on a joint calculation on the part of the wholesalers that led to largely uniform price lists for retailers and end customers. Especially during the first few years, some companies simply used the agreed price list to set their own prices and basically just added their company logo to the final list.

All the wholesalers concerned cooperated with the Bundeskartellamt during the proceeding and helped to clarify the matter by applying for leniency. All eight companies and individual employees concerned which were fined acknowledged the facts as established by the Bundeskartellamt and agreed to a settlement. The orders imposing the fines are final.

After the final conclusion of the proceeding and payment of the fines one company claimed damages in the

amount of the fines and defence costs due to an alleged breach of official duty in the preliminary investigations. On 2 December 2020, the action was dismissed by the Regional Court in Bonn, against which the company appealed.

## Calculation of fines

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- Fines are calculated according to the seriousness and duration of the infringement. Under the German Competition Act, GWB, the maximum fine is limited to 10% of a company's total annual turnover.
- Another significant aspect in the Bundeskartellamt's calculation of fines is the cartel-related turnover, i.e. the turnover achieved with the products that were the subject of the cartel agreement.

*“We invest many resources in cartel prosecution. It remains a key focus of the Bundeskartellamt's work. Cartels harm the economy and consumers due to artificially increased prices, inferior quality and restrained innovation.”*

*Andreas Mundt,  
President of the Bundeskartellamt*

## Positive effects of cartel prosecution

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



## Private damage actions as the second pillar of cartel prosecution

Companies which violate the prohibition of cartels not only have to reckon with fines from the competition authorities but also claims for damages from customers or suppliers harmed by the cartel. Last year again witnessed a large number of damages actions following cartel proceedings by the Bundeskartellamt or the European Commission (“follow-on claims”). In recent years these actions related to a variety of product areas such as sugar, trucks, rails, bathroom fittings, electronic cash, chipboard panels, detergents, television tubes, packaging, cement, steel abrasives, wallpapers, gas-insulated switchgears, drugstore products, flour (mills cartel), confectionery, sausage, beer or spark plugs.

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 460 actions were filed in connection with the case.

The actions for damages vary greatly in terms of the amount of damages and the value in dispute. The claimants are mainly active in the construction, transport, carrier and logistic services sectors but also in other sectors, such as the food industry. They included many small companies. Last year more than 40% of all actions were brought by the public sector (cities and municipalities, municipal undertakings, federal states, etc.).

The majority of pending claims are bundled claims or are based on other assignment models. Various district courts already ruled in the first instance that this kind of bundling of claims is inadmissible, but the legal situation has not yet been clarified by the Federal Court of Justice. For this reason it remains to be seen whether the bundling model will prevail for such claims in future.

In view of the economic significance of assignment models, further professionalisation in the bundling and assertion of damages claims can in fact be observed.

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

Conditions for damages actions were further improved in the 9<sup>th</sup> and 10<sup>th</sup> amendments to the GWB. Furthermore, the Federal Court of Justice has meanwhile defined the requirements for determining damages in several landmark decisions in the rail and truck cartels, creating a greater amount of legal certainty for the claimants. In this respect it is likely that damages actions will continue to play a significant role in antitrust law in future.





# AVOID CONCENTRATIONS – PRESERVE DIVERSITY OF COMPETITION

**"VCI Emergency Platform for Vaccination Equipment" | Renesas/Dialog  
GlobalWafers/Siltronic | "Online Copyright Clearance System"  
Deutsche Post AG | RWZ/RaiWa | ControlExpert/Allianz | hospital mergers  
Deutsche Kreditwirtschaft | Condor/Lufthansa | Carglass/ATU  
Telefónica (O2)/Deutsche Telekom/Vodafone | Berliner Morgenpost/Der Tagesspiegel  
Süddeutsche Zeitung/Frankfurter Allgemeine Zeitung | Heinrich Bauer Verlag/MDZ  
Ruhr Nachrichten/Verlag J. Bauer KG | CinemaxX/Cinestar | CRRC/Vossloh Locomotives**

Mergers between companies are subject to merger control by the Bundeskartellamt if they fulfil certain requirements. They may be implemented only after clearance by the Bundeskartellamt. The Bundeskartellamt examines and assesses the effects a merger will have on competition. If the negative effects on competition outweigh the positive effects, a merger project can be prohibited or cleared only subject to certain conditions.

Cooperation between companies can also restrict competition. However, meaningful and necessary cooperations are explicitly allowed, provided that the boundaries of competition law are observed. The Bundeskartellamt also often makes antitrust assessments of cooperations between companies, which provide companies with guidance on how to specifically structure their project.

# Green light for “Emergency Platform for Vaccination Equipment”



In March 2021 the Bundeskartellamt gave the green light for the participation of pharmaceutical wholesalers in the “**VCI Emergency Platform for Vaccination Equipment**”. The platform was launched with the Bundeskartellamt’s approval in February 2021 to better coordinate the supply of vaccination equipment such as syringes, cannulas, and NaCl solution in the Covid-19 crisis. The platform does not provide any details on prices and quantities and its duration is to be limited to the current emergency situation in the Covid-19 pandemic.

Via the B2B platform the federal Länder and vaccination equipment manufacturers provide information on their current supply situation and their capability to deliver. The pharmaceutical wholesale industry along with the pharmacies is responsible for supplying the Covid-19 vaccine to general practitioners. This also involves the provision of complete sets of vaccine and the necessary vaccination equipment.

## Cooperations in the Covid-19 crisis

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During the Covid-19 crisis companies in many sectors had to cooperate with one another to react to bottlenecks in the production, storage, and logistics of goods caused by the pandemic

A coordinated approach to overcoming such problems can be justified. Competition law is sufficiently flexible to facilitate useful and necessary cooperations. However, such measures must comply with competition law requirements and be explicitly limited to a certain period of time.

In 2020/2021 the authority guided many such cooperation projects and advised the companies accordingly. In the summer of 2020, for instance, it assisted the German Association of the Automotive Industry (VDA) in developing measures to cushion the economic effects caused by the Covid-19 pandemic in the automotive industry. The measures presented by the VDA contained framework conditions for restarting automotive production and a model for restructuring suppliers serving the automotive industry.

## Concentration in the semiconductor industry

In April 2020 the Bundeskartellamt cleared plans by the Japanese **Renesas Electronics Corporation** to acquire the British company **Dialog Semiconductor PLC**. In addition to numerous other semiconductor products, the proposed merger concerned in particular so-called microcontrollers for the automotive industry, which are used to operate ABS, airbags, window regulators or instrument clusters.

Renesas is one of the leading manufacturers in this sector. The focus of Dialog's sales are semiconductors for consumer and communication applications. Before the merger Dialog was active only to a limited extent in the automotive industry.

A survey of a large number of automobile manufacturers and their suppliers had confirmed Renesas' strong position as a microcontroller manufacturer.

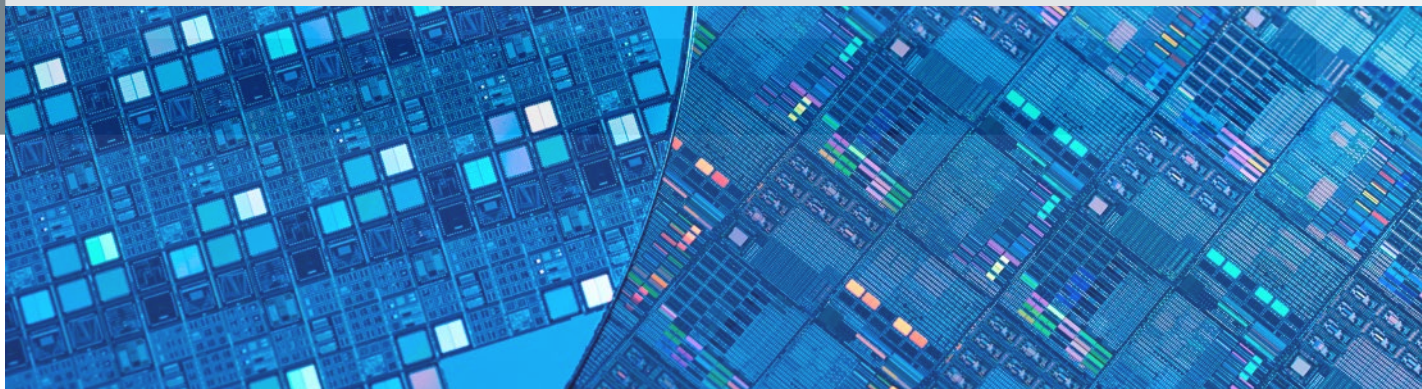
Some of Dialog's products are also purchased by the automotive industry. However, there are only overlaps with Renesas' product range in some specific areas. The merger could be cleared because in addition to the parties there are a number of alternative suppliers of the relevant products and new technological developments are expected on the market.

In February 2021 the Bundeskartellamt also cleared plans by the company **GlobalWafers Co. Ltd.** to acquire the majority of shares in and control of **Siltronic AG**. The proposed acquisition concerned the manufacture and distribution of silicon wafers, an essential input product in the semiconductor industry.

In the past years, the Taiwanese company GlobalWafers has constantly expanded its position on the

international market with additional acquisitions. However, international investigations at numerous semiconductor manufacturers showed that the acquisition raises no competition concerns.

A large number of alternative suppliers will be available to the producers on the international market even after the merger. The market is characterised by a comparatively high degree of dynamism. Buyers of silicon wafers are usually financially strong companies which regularly negotiate new prices. The investigations showed that large quantities are procured from constantly changing suppliers.



*“Effective merger control is the most powerful instrument we have to prevent too much market power from falling into the hands of only a few companies.”*

Andreas Mundt,  
President of the Bundeskartellamt

## No objections to launch of “Online Copyright Clearance System”

In March 2021 the Bundeskartellamt stated that it had no objections to the launch of the “**Online Copyright Clearance System**”. The clearance system is an initiative launched by the sector to act against systematic infringements of copyrights and ancillary intellectual property rights. The aim is to use so-called DNS blockings to make access to websites more difficult which by their nature infringe copyrights.

Participants in the initiative are on the one hand holders of copyrights and ancillary intellectual property rights or their associations from the music, film, gaming and scientific publications sectors and on the other all the large internet access providers in Germany.

Initiatives which place the enforcement of statutory rules in private hands can be problematic under competition law. It must be ensured that legitimate offers are not endangered by a possible boycott. However, the proposed clearance system has provided for a range of security mechanisms to prevent any excessive restrictions and these measures have additionally been reinforced at the Bundeskartellamt’s suggestion. It is also intended to engage the Bundesnetzagentur before blocking recommendations are implemented.



## Fair competition in the dispatch of newspapers and magazines

In early 2021 **Deutsche Post AG** amended its system of conditions for the dispatch of newspapers and magazines in reaction to the Bundeskartellamt’s competition concerns. The customers of such mailing services include not only publishing houses but also associations or health insurance funds which send out membership magazines.

The original contracts between Deutsche Post and the senders partly contained clauses which made the allowance of discounts dependent on the entire circulation being dispatched via Deutsche Post. When imposed by a dominant company these kinds of exclusive purchasing obligations are definitely anti-competitive because they make it impossible for other companies to enter the market.

After an amendment of the contracts failed to dispel the authority’s concerns, Deutsche Post finally abandoned its previous discount system.

In future set unit prices will be agreed with the senders for the dispatch of newspapers and magazines and different conditions will not be granted without justification. Overall these measures are intended to improve the situation of alternative mailing service providers.

Deutsche Post denies holding a dominant position in the dispatch of newspapers and magazines but has agreed with the Bundeskartellamt on a commitment to uphold the measures outlined above.

## Acquisition in the agricultural sector

In April 2021 the Bundeskartellamt cleared the acquisition of 19 locations of the agricultural cooperative **Raiffeisen Waren-Zentrale Rhein-Main eG (RWZ)** by **Raiffeisen Waren GmbH (RaiWa)** in second phase proceedings.

The launch of a joint venture, Raiffeisen AgriTrading Rhein-Main GmbH & Co. KG, to market agricultural products (grain and oil seeds) at wholesale level, was also cleared.

RaiWa supplies agricultural products and services and operates 62 locations, mainly in Hesse, Thuringia and Saxony. RWZ operates approx. 150 locations in large parts of North Rhine-Westphalia, Hesse, Thuringia, Saxony, Rhineland-Palatinate and Saarland. The main customers of both companies are farmers.

The companies had originally planned to operate several joint ventures in order to cooperate more closely with one another in future. However, the Bundeskartellamt's inves-

tigations among competitors and farmers had shown that this project would have significantly impeded competition in the agricultural markets, above all in Hesse. In reaction the companies amended their original plans and the project could be cleared.



## Automated settlement of motor vehicle claims: Allianz cleared to acquire ControlExpert

In October 2020 the Bundeskartellamt cleared plans by **Allianz Strategic Investments. S.à.r.l., Luxembourg**, to acquire **ControlExpert Holding B.V. Amsterdam**.

Allianz is one of the top vehicle insurance providers in Germany. ControlExpert provides vehicle insurers, leasing companies and fleet operators with automated IT-based services to settle motor vehicle claims. It is by far the

industry's leading provider of claims settlement services.

In view of ControlExpert's strong market position, the authority had to carefully examine whether its range of services would become indispensable for other vehicle insurance providers as a result of Allianz's joining the company and whether ControlExpert's competitors would have to expect a significant loss of customers.

Its investigations showed that there are still a number of innovative competitors which are able to provide comparable services. Other companies are also increasingly using artificial intelligence to automate the process of settling vehicle insurance claims.



# Competition between hospitals for the benefit of the patient

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 of key importance in merger control 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 Bundeskartellamt first of all assesses whether the services provided by the hospitals are comparable from the patients' point of view. The market for acute hospitals, for instance, is defined as a separate market from the market for rehabilitation centres or senior citizens homes 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 operators, in particular, the Bundeskartellamt 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 can be sought.

In 2020 and up to April 2021 the authority received 24 merger notifications from the hospital sector, all of which were cleared.

## Merger control in the hospital sector



In recent years the number of notified merger control projects has increased.

- From 2003 to December 2020 the Bundeskartellamt examined a total of 335 notified hospital mergers.
- 284 mergers were cleared, 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 yet been concluded or the plans were abandoned by the parties.

In many cases the Bundeskartellamt carried out an informal pre-assessment before the mergers were formally notified. Since 2011 there have been eight cases in which the intended merger was not notified after the authority had expressed its preliminary competition concerns.



## Deutsche Kreditwirtschaft's joint payment system

The Bundeskartellamt has no objections to the first stage of implementation of the German Banking Industry Committee **Deutsche Kreditwirtschaft's "Xpay" or "#DK" project** to set up a uniform payment system for all payment channels. In a first step the current e-commerce payment methods paydirekt and giro pay as well as the customer to customer payment system Kwitt are to be merged into a joint payment brand.

Deutsche Kreditwirtschaft plans to offer consumers a product to cover all payment methods, irrespective of the bank with which the account is held. It is absolutely necessary for the authority to provide guidance on competition law as the project involves a cooperation between the large majority of banks and savings banks in Germany.

The project is to be implemented in partial stages. Deutsche Kreditwirtschaft will inform the Bundeskartellamt about further steps.



## Condor's complaint against Lufthansa



Since early 2021 the Bundeskartellamt has closely examined a complaint by the air carrier **Condor** against its competitor **Lufthansa**.

In November 2020 Lufthansa had terminated its Special Prorate Agree-

ment (SPA) with Condor with effect from June 2021. Under this agreement Lufthansa provides feeder flights for Condor's long-haul flights.

Condor complained to the Bundeskartellamt about the termination of the agreement because in its opinion Lufthansa was abusing its leading market position in the provision of feeder flights in order to unfairly impede Condor on the markets for long-haul flights.

In January 2021 the Bundeskartellamt initiated summary proceedings and a main proceeding in the matter. Finally, in mid-May 2021, after the Bundeskartellamt had expressed its competi-

tion concerns about the termination in the summary proceedings, Condor and Lufthansa agreed in close cooperation with the Bundeskartellamt to suspend the termination of the SPA until mid-May 2022. They also agreed on arrangements to ensure Condor's actual possibilities to book feeder flights in the remaining contractual period.

As the agreement initially allows Condor to continue to fly long-haul tourist flights for tour operators and individual travellers as a competitor to Lufthansa, there were no more grounds for the summary proceedings. The Bundeskartellamt subsequently suspended the summary proceedings temporarily and is now continuing to examine the matter in the main proceeding.

## Carglass can acquire parts of ATU's vehicle glass business



In late 2020, following an in-depth examination, the Bundeskartellamt cleared the acquisition of ATU's vehicle glass business by the Belron group, the parent company of Carglass GmbH.

Carglass operates around 350 service centres in Germany. The Junited Autoglas network, which includes around 300 partner companies, also belongs to Carglass. ATU's network of service centres for vehicle parts and tyre sales and its auto-repair chain include around 500 branches.

As the merger concerned the sale of the glass business of the largest German auto-repair chain to the largest vehicle glass specialist, the authority conducted extensive investigations. It was ultimately possible to rule out that the acquisition would significantly impede competition in the market even if Carglass would be able to expand its leading market position as a glass specialist. Firstly, customers have alternative glass specialists and independent auto-repair centres to choose from. Secondly, they also largely use the auto-repair shops of their vehicle model manufacturer.

## Safeguarding competition in mobile communication cooperations

In January 2021 the Bundeskartellamt examined plans by Telefónica (o2), Deutsche Telekom and Vodafone to enter into mutual cooperations to close gaps in their mobile communication networks, so-called grey spots.

As in 2020 only Deutsche Telekom and Vodafone – without the involvement of Telefónica – had already agreed on such a cooperation, the Bundeskartellamt had assessed the project as problematic from a competition perspective and had insisted on an extension of the cooperation.

The aim of the agreements between the companies is to grant mutual access to their 4G networks in areas with low mobile phone traffic and in this way to close smaller gaps (dead spots) in areas otherwise supplied by the respective operators. It is often unprofitable for the companies to expand their own network in these areas. The cooperations affect several thousand base station sites in Germany.





## Cooperation between publishing houses possible

In early 2020 **Berliner Morgenpost GmbH** and the publishing house **Der Tagesspiegel GmbH** asked the Bundeskartellamt to assess their planned cooperation agreement under competition law. The planned cooperation will include the joint marketing of advertising space, joint newspaper distribution, a joint call centre, joint promotional activities and possibly cooperation in procurement. The cooperation agreement will not affect the editorial offices of Berliner Morgenpost and Der Tagesspiegel. The Bundeskartellamt has no objections to the cooperation.

In October 2020 the authority cleared a cooperation between **Süddeutsche Zeitung** and **Frankfurter Allgemeine Zeitung** for the purpose of jointly marketing supra-regional advertising space. The publishing houses wanted to set up a joint venture to this effect.

The formation of joint ventures always has to be examined under two different aspects of competition law. In late July 2020 the Bundeskartellamt had already cleared the formation of the joint venture under merger control provisions. The cooperation was then reviewed under the prohibition of anti-competitive agreements. Due to the statutory exemption for the press sector introduced in 2017, the German prohibition of anti-competitive agreements did not apply to the agreement.

However, owing to the economic importance of the project, European competition law also had to be applied. The relevant sales generated by the parties with customers in other EU countries were the main reason for this legal assessment.

Although the assessment showed that the cooperation would restrict competition on the market for advertising space in news print media, the requirements for exempting this agreement were met. The survey of numerous agencies and advertising customers clearly signalled that the costs associated with booking advertising campaigns would be reduced to the customers' advantage.

In February 2020 the authority also cleared plans by the publishing house **Heinrich Bauer Verlag** to acquire all the shares in the media group **Mitteldeutsche Zeitung GmbH & Co. KG**, **Mitteldeutsches Druck- und Verlagshaus Geschäftsführungsgesellschaft mbH** and **MZ Drucker-eigesellschaft mbH** (together "MDZ"). The newspapers published by Bauer include "Volksstimme" and several advertising newspapers in the north of Saxony-Anhalt. MDZ publishes the daily "Mitteldeutsche Zeitung" and two advertising newspapers in its distribution area.

The Bundeskartellamt considered the planned merger to be unproblematic because the circulation areas of "Volksstimme" and "Mitteldeutsche Zeitung" do not overlap. Their circulation areas only adjoin one another in the Harz, Salzlandkreis and Anhalt-Bitterfeld districts. As a result the two newspapers practically do not compete for the same readers. No restriction of competition is expected on the advertising and radio broadcasting markets either because there are no geographical overlaps.

In September 2020 the Bundeskartellamt also cleared plans by **Ruhr Nachrichten Verlag & Co. KG** (Lensing Media) to acquire all the shares in **Verlag J. Bauer KG**. Bauer publishes the newspaper Recklinghäuser Zeitung, which has six local editions. The newspapers published by Lensing Media include Ruhr Nachrichten, Münsterland Zeitung, Dorstener Zeitung and Halternener Zeitung. The publishing houses also publish advertising newspapers in their respective circulation areas and operate local radio stations.

The merger project could be cleared because although the newspapers are published in neighbouring areas, they do not compete for the same readers. The circulation areas of the advertising newspapers and the broadcasting areas of the local radio stations operated by the two publishing houses do not overlap either.

### GWB: Exemption regulation for the press sector

i

- 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 and editorial cooperation are not exempted from the prohibition of anti-competitive agreements.
- This exemption is only applicable under German competition law. If the cooperation also appreciably affects trade between the Member States of the EU, Article 101 TFEU applies.

## Local competition: Merger of two cinema chains not implemented

In March 2020 the Bundeskartellamt cleared the merger between the two cinema chains **CinemaxX** and **Cinestar** subject to the merger parties selling six of their cinemas to other operators first. Ultimately, the parties did not implement the merger.

A merger between CinemaxX and Cinestar would have created the leading cinema operator in Germany in terms of turnover and number of cinema screens. The acquisition would have led to such high joint market shares in the six

regions of Augsburg, Bielefeld/Gütersloh, Bremen, Magdeburg, Wuppertal/Reimscheid and the western part of the Ruhr region that it would have been likely to significantly impede local competition between the cinemas there. The cinema operators undertook to sell one cinema each to a competitor in these regions to avoid disadvantages for consumers in the affected regions, e.g. in the form of higher ticket prices.

## Extensive examination of acquisition by Chinese state-owned company

The Bundeskartellamt examined in great detail the acquisition of **Vossloh Locomotives** by the **CRRC group** (People's Republic of China) in second phase proceedings. Vossloh's strong market position on the one hand and CRRC's still very weak position on the European market on the other hand made it difficult to assess the participation of Chinese state-owned companies in the context of merger control. The project could be cleared in April 2020 after an in-depth examination.

The CRRC group is the world's largest manufacturer of rolling stock. Its activities have mainly focused on China so far. The company has more than 150,000 employees and operates a large number of factories in China and other countries. Its success in Europe has been limited so far.

Vossloh is the market leader for the manufacture of diesel-powered shunters in the European Economic Area and in Switzerland. China's state aid for CRRC played an important role in the assessment of the case under competition law: In its assessment the Bundeskartellamt's considerations included possible state subsidies, the risk of low-price and

dumping strategies, strategic advantages obtained through other participations and cost advantages due to state funding for CRRC activities in many other markets.

Based on the Bundeskartellamt's investigations it was possible to ultimately rule out that the acquisition would considerably impair competition on the European shunter market. Even though in future CRRC will be able to benefit in complex approval processes for shunters from the expertise it obtains from Vossloh as an established manufacturer, the company has only played a minor role on the European market so far. Vossloh's competitiveness has consid-

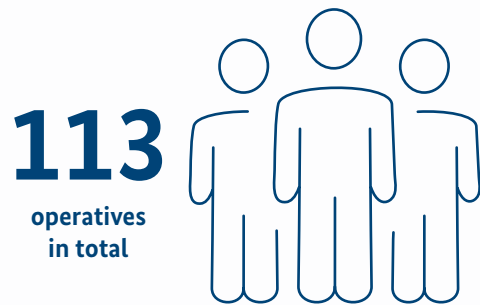
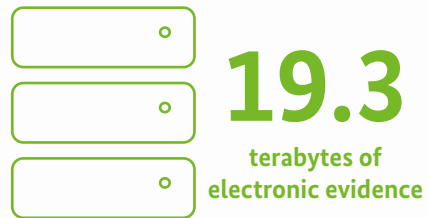
erably decreased over the last few years and several strong competitors are now active on the market. What is more, new competitors providing innovative drive technologies have entered the market since.

This case has shown that although Chinese state-owned companies enter markets with strong economic power, they cannot be assessed as a general threat to competition.



# FACTS AND FIGURES

## Prohibition of anti-competitive agreements 2020

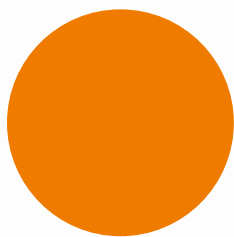


## Fines imposed in 2020

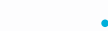
In total approx.

**349,000,000 euros\***

\* The figures are rounded values.



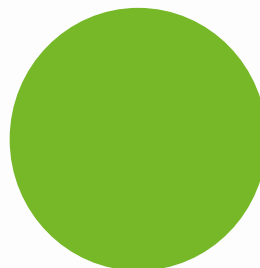
Plant protection  
products  
**157,817,170**



Vehicle  
registration plates  
**172,300**



Musical  
instruments  
**10,684,350**

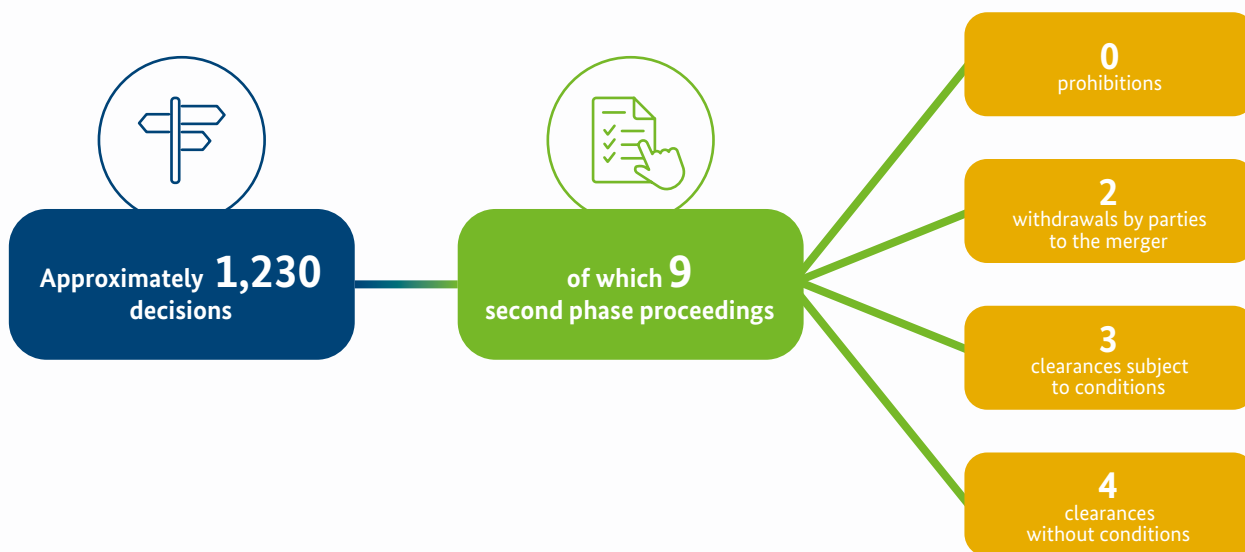


Aluminium forging  
companies  
**174,841,500**

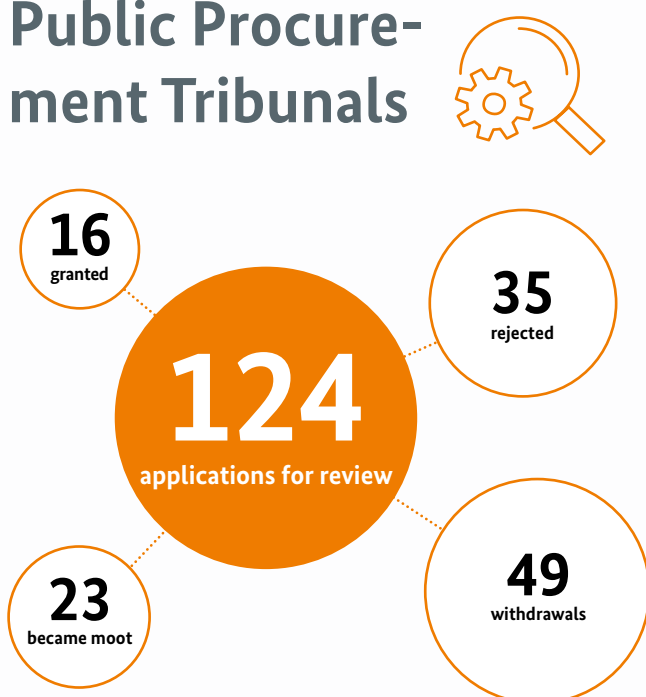


Manhole  
covers  
**5,885,000**

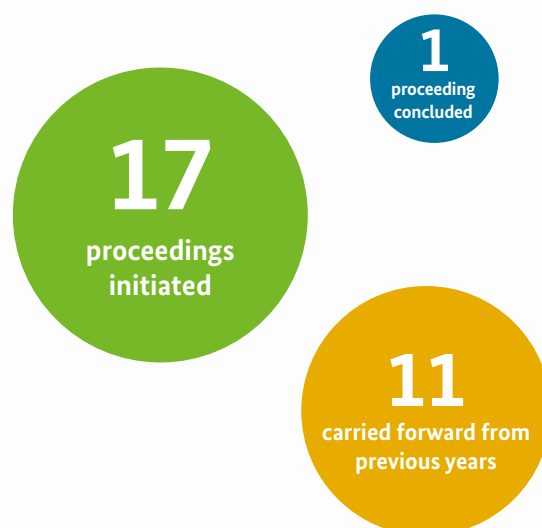
## Merger control: Bundeskartellamt decisions in 2020



## Data of the Federal Public Procurement Tribunals



## Abuse control figures



# DIGITAL ECONOMY



**New tools with GWB amendment | Facebook | Amazon  
Google | Sector Inquiry into Online Advertising | Policy work for the digital economy**

The digital economy remains a key focus of the Bundeskartellamt's work. The authority initiated new proceedings against Facebook, Amazon and Google and continued its sector inquiry into "Online Advertising". With the 10<sup>th</sup> amendment to the German Competition Act (GWB) in early 2021 the Bundeskartellamt gained new competences to intervene when competition is threatened by certain large digital companies. The amendment also modernised the traditional control of abusive practices. The Bundeskartellamt can now better address the conduct of large internet companies and the role played by digital business models.

# New provisions for the control of abusive practices in the digital economy

For many years now the digital economy has been a key focus of the Bundeskartellamt's work. Digital transformation has fundamentally changed many economic sectors and made completely new business models possible. The Covid-19 crisis has further accelerated this development - online sales have experienced strong growth whilst brick-and-mortar retail has suffered closures in many areas.

The Bundeskartellamt has already successfully conducted numerous proceedings in the digital economy, e.g. against **Facebook**, **Amazon** and **Booking.com**. However, the highly dynamic digital economy and the rapid growth of the large digital platforms have made it necessary to be able to take even **faster and more effective** action.

Against this background the legislator has introduced new tools with the **10<sup>th</sup> amendment** to the GWB which are especially applicable to large digital companies. With these tools the Bundeskartellamt is even better equipped for the new competitive challenges posed by digitalisation. The new **Section 19a GWB** will allow the authority to prohibit certain practices by companies of **paramount significance for competition across markets**, even in markets where they do not have a dominant position. Such conduct includes, e.g., the self-preferencing of a group's own services or creating or raising barriers to market entry by processing data relevant for competition.

The Bundeskartellamt already started to apply the new provisions shortly after they came into force. Since the beginning of 2021 it has also examined whether Facebook has a position of paramount significance for competition across markets. An ecosystem which extends across various markets may be an indication that a company holds such a position. It is often very difficult for other companies to challenge a position of significant power. If it is found that a company is of paramount significance for competition across markets, the new provisions allow the authority to intervene at an earlier stage than previously to terminate any anti-competitive practices. The 10<sup>th</sup> amendment to the GWB also **modernised the traditional control of abusive practices** by making it even more applicable to digital business models.

## Data, platforms and network effects – Reforms introduced by the amendment to the GWB

- ▶ The consideration of access to data relevant for competition as a factor of market power, also for cases outside the platform economy
- ▶ The consideration of so-called intermediation power, i.e. the significance of platforms in mediating access to markets
- ▶ Dominant or powerful companies can be obliged to allow access to data in return for adequate compensation if other companies are dependent on these data
- ▶ Companies with superior market power are prohibited from taking measures that could increase the likelihood of a market 'tipping', e.g. measures hindering competitors from attaining independent network effects
- ▶ The Bundeskartellamt can formally determine that a company is of paramount significance for competition across markets and can prohibit it from engaging in certain abusive practices such as:
  - ▶ self-preferencing its group's own services when mediating access to markets
  - ▶ creating or raising barriers to market entry by processing data relevant for competition
  - ▶ **making the interoperability of services or data portability more difficult**

# New proceedings against digital companies

The digital economy remains a top priority of the Bundeskartellamt which has already conducted a large number of proceedings in this area. Key cases were its newly initiated proceedings against **Facebook**, **Amazon** and **Google** as well as **the sector inquiry into online advertising**.

In late 2020, following its decision of principle in 2019 regarding Facebook's practice of combining data from different sources, the Bundeskartellamt initiated a new proceeding against Facebook. In this proceeding the authority is examining the linkage between **virtual reality** products of the Facebook group under the brand name **Oculus** and its social network. In the new proceeding against Amazon, the Bundeskartellamt is examining whether Amazon is possibly intervening in its **sellers' freedom to set prices**. In another proceeding it is examining whether Amazon is disadvantaging sellers on its marketplace by **cooperating with brand manufacturers**. Already in 2019 the Bundeskartellamt had obtained far-reaching improvements in the terms of business for sellers, which are now applicable worldwide.

Directly after the 10<sup>th</sup> amendment to the GWB came into force, the Bundeskartellamt began to apply the new **legal provisions applicable to large digital companies** (Section 19a GWB). Proceedings were initiated against **Facebook**, **Amazon** and **Google**.

In a first step the authority examines whether a company is of **paramount significance for competition across markets**. Should this be the case, the Bundeskartellamt can prohibit any possible anti-competitive practices by the company at an earlier stage than previously. In Facebook's case, the examination is part of the Oculus proceeding. Here the Bundeskartellamt will examine whether the linkage between Oculus and the Facebook network is to be assessed based on the new provisions. In the Google case it will examine not only the company's position of economic power but also whether consumers wishing to use Google's services have **sufficient choice as to how** Google will **use their data**.

In the area of merger control in the digital economy the Bundeskartellamt dealt with online classifieds platforms, online dating platforms, online payment services, digital health platforms and services for automated IT services to settle motor vehicle claims, in which, among other factors, access to data relevant for competition plays a role.

Within the scope of its competencies in the area of consumer protection the Bundeskartellamt also concluded sector inquiries into online user reviews and smart TVs. In November 2020, the authority launched a new inquiry into messenger and video services.

## Court proceeding against Facebook

In 2019, the Bundeskartellamt had prohibited **Facebook** from extensively collecting and using user data without the express and voluntary consent of the users. In order to remedy this Facebook must first submit proposals the suitability of which will be examined by the Bundeskartellamt. In the Bundeskartellamt's view, Facebook has a dominant market position and must make the use of its social network possible without such extensive consent to data processing.

Facebook had appealed the Bundeskartellamt's decision to the Düsseldorf

Higher Regional Court (OLG). Facebook was initially successful with its emergency appeal to the OLG, the court of first instance, before a court decision on the merits of the case could be reached. The court had expressed serious doubts as to the legality of the decision and ordered its temporary suspension. The Bundeskartellamt subsequently lodged an appeal on points of law with the Federal Court of Justice (BGH).

The latter annulled the OLG's decision in summary proceedings. The BGH has no serious doubts either about Facebook's

dominant position on the German market for social networks nor that it abuses this dominant position. The oral hearing in the main proceeding took place before the OLG on 24 March 2021. Here the OLG decided to refer certain issues relating to the application of the General Data Protection Regulation to the European Court of Justice (ECJ). In the OLG's view a decision on the merits of the case can only be made after these issues have been clarified. The Bundeskartellamt's decision is still enforceable, however.

## Sector Inquiry into Online Advertising

The Bundeskartellamt is currently conducting a sector inquiry into the online advertising sector. Following several extensive written surveys involving different groups of market players (around 600 companies, including advertisers, media agencies and digital agencies, publishers and providers of technical services), the results

of the sector inquiry will be presented shortly in the form of a consultation report.

The economic significance of online advertising has increased immensely in recent years. In the sector inquiry the Bundeskartellamt is therefore focusing on the technical effects and foreseeable

developments of online advertising on the market structure and the market opportunities of the various players. The authority will also examine whether, as some market players claim, closed systems of a few large providers actually exist (gatekeeper positions or so-called walled gardens) and if they exist, what significance these systems have.

### Booking.com: Decision of principle on “narrow price parity clauses”



In May 2021, in reaction to a proceeding initiated by the Bundeskartellamt, the Federal Court of Justice decided that so-called “narrow price parity clauses” of online hotel platforms are also anti-competitive. Such clauses prevent hotels from offering rooms at lower prices on their own websites than on a hotel platform like e.g. Booking.com. In particular, they can lead to higher prices for consumers booking directly with the hotel. They also impede competition between the hotel platforms because there is no incentive for them to differentiate

on prices if the hotels cannot also offer the low prices on their own websites.

Already some years ago the Bundeskartellamt had prohibited so-called “wide price parity clauses” in a proceeding against HRS (non-appealable since 2015). Under these clauses hotels originally could not offer rooms at lower prices elsewhere than on the respective hotel platform, i.e. also not on competing hotel platforms or offline (reception, telephone, email).

## Policy work for the digital economy



The digital transformation of the economy poses new challenges for competition and the work of the Bundeskartellamt, which are reflected in the authority’s policy work. The Bundeskartellamt launched an “Internet Think Tank” as early as 2015. Since 2016 we have maintained an interdisciplinary team for digital topics within the General Policy Division, which in August 2019, when the division was restructured, was merged into the new Digital Economy Unit. The unit works on conceptual projects and in particular supports the work of the Decision Divisions in the area of the digital economy (e.g. multi-sided markets or platforms, data-driven

business models, algorithms and issues relating to the access to data relevant for competition).

Last year, as part of its policy work, the Bundeskartellamt published several articles in its series of papers on “Competition and Consumer Protection in the Digital Economy”. The paper on “Algorithms and Competition” is a follow-up to the joint study on the same theme conducted in 2019 by the Bundeskartellamt and the French competition authority, *Autorité de la concurrence*. One paper deals with insights into the effects of narrow price parity clauses on online sales gained from the authority’s Booking proceeding. Three

other papers describe the need for action in the area of consumer rights, specifically in the context of comparison websites, online user reviews or smart TVs.

The Bundeskartellamt also offers its expertise in national and international discussions of urgent competition policy issues raised by the digital economy. The authority provided guidance with the 10th amendment to the GWB and commented in detail during the legislative process. The Bundeskartellamt is currently playing a constructive role in discussions, in particular about the European legislative proposal for the Digital Markets Act.



# ENERGY SECTOR



Since the liberalisation of energy supply in the late 1990s, there has been a continuous surge of competitive activity in the electricity and gas markets. Consumers can choose from a variety of offers provided by various energy suppliers. The Bundeskartellamt protects competition on markets that are upstream and downstream of the energy networks. These markets cover in particular the generation, trading and supply of energy to end customers.

# Market power report on the conditions of competition in the generation of electricity

The further development of the market power situation in electricity generation was analysed in a second separate market power report presented by the authority in December 2020. In the report the Bundeskartellamt analysed whether and to what extent the capacities of a producer are indispensable for meeting the demand for electricity.

The market power analysis, which was further refined to assess the increasing importance of net electricity imports and the potential of foreign competition, confirms that RWE is currently still not dominant. The analysis shows that RWE is indispensable for meeting the demand for electricity in a significant number of hours which, however, are not sufficient to assume a domi-

nant position. However, the company could cross the threshold for market dominance in future due to the further shortage of supply as a consequence of the imminent phase-out of nuclear and coal power.

## Sector Inquiry into charging stations for electric vehicles

The Bundeskartellamt initiated a sector inquiry into the provision and marketing of publicly accessible charging infrastructure for electric vehicles.

This was triggered firstly by a large number of complaints received by the authority about conditions of access, prices and conditions at the charging stations. Secondly, according to the plans of the German federal government, a nationwide and publicly accessible charging infrastructure is to be established in Germany by 2030. However, the process of setting up and operating charging stations is not subject to

the comprehensive regulation of electricity networks. The sector inquiry is intended to detect at an early stage any possible competition problems in this area which could be addressed by competition law.


To ensure effective competition, non-discriminatory access to potential locations for charging stations as well as the specific terms and conditions applying at the charging stations are of ultimate importance. The sector inquiry will also examine the form of and procedure for the award of locations for charging stations.

## 2020 Monitoring Report

In January 2021, the Bundesnetzagentur and the Bundeskartellamt published their joint 2020 Monitoring Report on developments in the electricity and gas markets. The key findings from the report are:

- The proportion of renewable electricity generation in the 2019 reporting year rose to 42% of gross electricity consumption. There was a steep decline in conventional power generation from coal-fired power stations.
- As at 1 April 2020, average electricity prices for household customers rose slightly but there was hardly any change in average gas prices in comparison to the previous year.
- On average household customers can choose between 130 electricity and around 110 gas suppliers. Switching provider can still save money despite increasing prices.
- However, the number of customers who switched electricity and gas supplier is currently stagnating, especially in the household customer segment, and is even declining in some cases. There is hence still scope for a further boost to competition.
- Despite a slight decrease, the share of household customers supplied under the relatively more expensive default supply conditions remains relatively high. Changing tariff with the same supplier can already achieve potential savings.

# MARKET TRANSPARENCY UNIT FOR FUELS

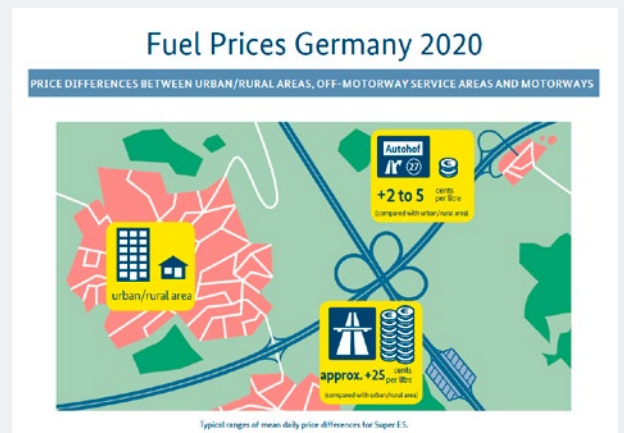
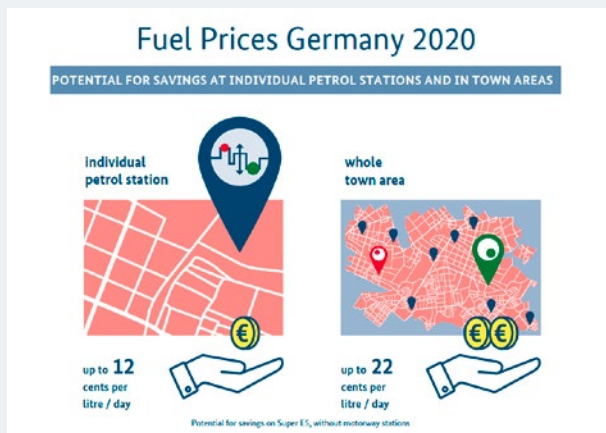


The Market Transparency Unit for Fuels (MTU Fuels) monitors the trade in fuels. It enables consumers to obtain immediate information about current fuel prices via different channels and a number of information services. The Bundeskartellamt also publishes annual reports on the work of the MTU Fuels. These reports can provide consumers with comprehensive information on pricing at the petrol stations which can help them in their choice of where to refuel. By using this information consumers can benefit from lower petrol prices and create competitive impulses with their decision on where to buy petrol.

# 2020 Annual Report

In April 2021, the Bundeskartellamt published its current annual report. Its key findings include:

- At one and the same petrol station, average price differences of approx. 12 cents/litre can be observed every day. A comparison of all petrol stations in any one town shows that there are even average price differences of up to 22 cents/litre every day.
- The average price differences between towns and rural areas are relatively insignificant. Off-motorway service areas often charge somewhat higher prices (+2-5 cents/litre). Motorists refuelling at a motorway station must expect considerably higher prices (approx. +25 cents/litre).



- Fuel prices are in most cases highest in the mornings and lowest in the evenings. In between these periods, prices on average vary significantly. Since the end of March 2021 there have been periodically six instead of previously five peaks in the prices of several large petrol brands. The prices are normally highest between 5 and 8 am and lowest between around 6 and 10 pm. However, even during the evenings when prices are normally at their lowest, consumers should check whether prices have increased in the meantime. Towards the night time prices are significantly raised again and remain that high during the night.
- Fuel prices were subject to strong fluctuations last year. Whereas in the spring of 2020 fuel prices had also reached a low point with a very low crude oil price due among other factors to the pandemic, at the end of February 2021 they were back to a similarly high level as in early 2020. Apart from the rise in the crude oil price and other factors, the reincrease in VAT and introduction of CO<sub>2</sub> pricing on 1 January 2021 also played a role in this development.



# TRADE



Food trade | Real stores | Sustainability initiatives

Thalia/Lehmanns | Thalia/Osiander | Flaschenpost/Radeberger | Liebherr | Intersport

Signa (including Karstadt and Kaufhof)/SportScheck | XXXLutz/Roller

Boundaries of competition law for demands for special rebates

From food to furniture and DIY to books – trade covers a diverse range of goods and is always subject to competition control. In addition to brick-and-mortar retailers and wholesalers, the large internet platforms have long become active players. Last year the Bundeskartellamt had to deal with numerous cases in this multi-faceted sector. The competitive pressure exerted by online sales has posed a special challenge. In its case practice the Bundeskartellamt endeavours to ensure that consumers still have an adequate number of local shopping alternatives to choose from. It also closely examines the procurement side, i.e. demand on the retail side vis-a-vis the manufacturers and suppliers. Its aim is to ensure effective and fair competition both online and offline, which ultimately benefits consumers.

## Food trade



The German food retail market is highly concentrated. The four big retailers EDEKA, REWE, Aldi and the Schwarz Group (Lidl, Kaufland) account for more than 85% of food sales to consumers (excluding drug-stores, specialist retailers and online sales).



## Sale of Real stores

Last year the Bundeskartellamt examined the sale of **Real stores** in several extensive proceedings. The Metro Group had sold the more than 270 Real stores to the **real estate investor SCP**, which then took up negotiations with food retailers and involved the Bundeskartellamt at an early stage. Following the notification of specific merger projects by **EDEKA, Kaufland, Globus** and **V-Markt (Georg Jos. Kaes)** regarding the acquisition of Real stores, the Bundeskartellamt intensively investigated the sales and procurement side. The investigations included surveys of all competitors and of more than 350 producers, the analysis of pay-back data for defining the geographic markets and a consumer survey.

- As a result, Kaufland can acquire up to 92 Real stores. The acquisition of nine stores is not allowed due to competition concerns.
- EDEKA, Germany's leading food retailer, can acquire only 45 of the up to 72 stores originally notified without conditions. The Bundeskartellamt had competition concerns about 21 stores and prohibited the acquisition. In the case of six other stores EDEKA has to carve out retail space for other food retailers or already intends to close the stores.
- Globus can acquire 24 and Georg Jos. Kaes two additional stores without conditions.

By imposing conditions on EDEKA and Kaufland the Bundeskartellamt ensures that competition between different local food retailers is maintained.

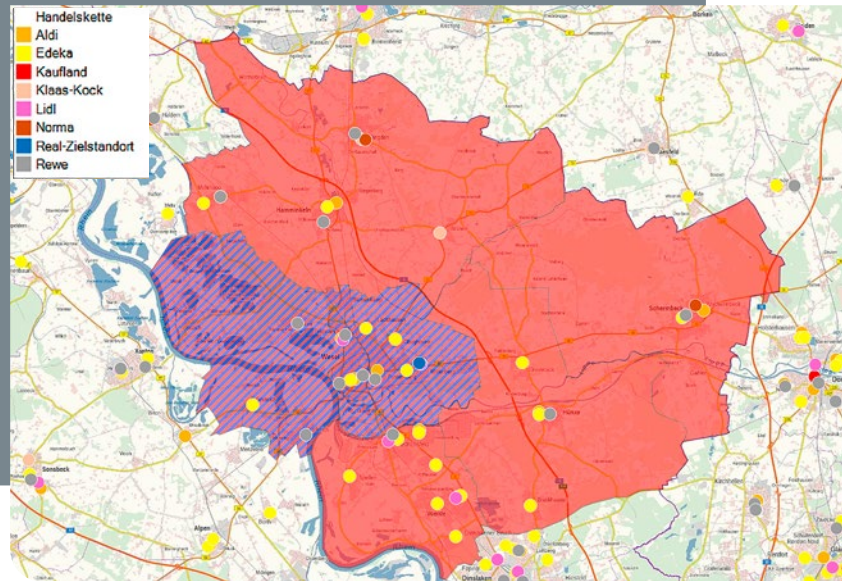
The Bundeskartellamt also keeps a close eye on the procurement side, i.e. the relationship between food retailers and their suppliers. The authority must ensure that retailers do not become too powerful in relation to their suppliers and that sufficient sales alternatives exist for those suppliers. In the Real acquisition proceedings relating to EDEKA and Kaufland, the Bundeskartellamt therefore imposed certain conditions for the procurement side: SCP, which is selling the stores, has to sell Real stores with a total food purchase volume of at least 200 million euros to medium-sized food retailers.

## Shopping locally – Markets and investigations in the food retail sector

Selling food is all about regional markets because customers shop locally. When examining the sale of the Real stores, the Bundeskartellamt used payback data to first determine where the customers that generate 90% of a target store's turnover reside. This catchment area constituted the relevant geographic market of the Real store concerned. Where the market shares in a regional sales market amounted to 25% or more, the vicinity of the Real store (also referred to as the core area) was carefully analysed in more detail since this is the area where customers generating two thirds of a store's turnover reside.

By way of example, this map shows the Wesel market area including the target Real store in Rudolf-Diesel-Straße (blue dot). The area highlighted in red is the catchment area generating 90% of the turnover, the hashed area is the core area (vicinity).

In the EDEKA proceeding the Bundeskartellamt decided to prohibit the acquisition of this store since EDEKA's acquisition of this store would have caused significant competition problems.



## Sustainability – a genuine competitive factor

Sustainable production is becoming increasingly important for consumers, companies and politicians alike. The chief aim of sustainable production is to maintain social and ecological standards in the supply chain (from the purchase of raw materials through to the manufacture and distribution of the product). Sustainability is a genuine competitive factor for companies because they can distinguish themselves from their competitors with sustainable products. However, new sustainability initiatives can be expensive and risky for companies. The aims of such initiatives are often meant to be achieved through agreements between as many companies as possible.

Against this background the Bundeskartellamt frequently receives requests from companies regarding the competition law criteria that have to be observed when cooperating with others. Examples of such sustainability initiatives which the authority has had to examine in the recent past include the animal welfare initiative “Tierwohl” and the “Fairtrade” initiative. Others are the Partnership for Sustainable Textiles (“Green Button”) and the strategy to reduce fat, sugar and salt contained in drinks and convenience products.

### Sustainability initiatives:



In examining sustainability initiatives, the Bundeskartellamt focuses on the following aspects:

- How great are the restrictions of competition caused, e.g., by aligning cost components?
- How does this affect the sales prices?
- Is access to the cooperation non-discriminatory?
- Were the sustainability criteria developed in an open process?
- Is there sufficient transparency for consumers (“labelling”)?

## Mergers in the book and specialist literature sector

In April 2021, the Bundeskartellamt cleared the acquisition of the **specialist literature provider Lehmanns** by the **book retailer Thalia**.

With over 380 bookshops, Thalia is by far the largest bookstore chain in Germany. Lehmanns is mainly active as a provider of specialist literature for professional clients (universities, libraries, companies) and also operates 15 specialist bookstores in university towns.

The acquisition particularly affects the provision of specialist literature for professional clients in the areas of science/technology/medicine and law/business/taxation, book retailing and

the procurement of books. The merger is not expected to significantly impede effective competition on any of the markets affected.

The provision of specialist literature is facing enormous challenges caused, for example, by the growing importance of direct sales by large publishers or the shift to open access publications. During the merger proceeding several market participants emphasised that specialist literature providers have to be of a certain size to be able to survive in and stabilise the market.

In November 2020, the Bundeskartellamt also cleared the merger of the book retailers **Thalia** and **Osiander**. At that

time, Osiander operated 72 bookshops mainly located in southern Germany. Both companies also sell books online.

The merger with Osiander allows Thalia to expand its strong position in the German book retail market. However, the merger will not significantly impede competition with respect to consumers, publishers or book wholesalers. Due to online selling and numerous smaller and medium-sized book retailers in particular there are still good shopping and distribution alternatives available. When assessing the merger, the particular role of the German Book Resale Price Maintenance Act was also taken into account.

## Acquisition of beverage delivery services

In December 2020, the Bundeskartellamt cleared the takeover of the online beverage delivery service **Flaschenpost SE** by **Radeberger Gruppe** which is part of the Dr. Oetker Group.

The Dr. Oetker Group, which achieves a worldwide turnover of 7.4 billion euros, includes a large German brewery group (Radeberger Gruppe) and a major producer of sparkling wine (Henkell/Freixenet). The group also runs more than 500 beverage shops (in particular Getränke Hoffmann and the Lippert group) as well as its own online beverage delivery service, [durstexpress.de](http://durstexpress.de).

Founded in Münster in 2012, Flaschenpost SE supplies beverages to its customers exclusively online via its website and app. The company expanded its business from Münster to many other cities.

The merger was cleared since, at the time of the merger, the economic activities of the two companies only overlapped in a few cities. In these urban areas, the numerous compa-

nies in the food and beverage retail sector exert sufficient competitive pressure so that customers of online beverage delivery services will in the future still have sufficient options to switch supplier.





# Equal opportunities for online sales ensured

Based on its proceeding following complaints from market participants, the Bundeskartellamt instructed **Liebherr-Hausgeräte Vertriebs- und Service GmbH** not to use certain clauses in its sales conditions. In the authority's view, these clauses would have disadvantaged online sales.

In Germany Liebherr sells its household appliances through Liebherr-Hausgeräte Vertriebs- und Service GmbH. The company has a particularly important market position in the sector of freezers and refrigerated wine cabinets.

Most products are sold through authorised retailers in a so-called selective distribution system. Brand manufacturers such as Liebherr can define quality requirements to be met by retailers selling their products. However, Liebherr set considerably stricter requirements for online sales than for offline sales, which retailers had to meet to qualify for rebates.

Retailers who use both distribution channels and do not meet the strict online requirements risked losing the

rebate for brick-and-mortar sales as well. For instance, online shops had to ensure that staff could be contacted between 9am and 8pm on Sundays and holidays or offer certain modes of payment. Such clauses can substantially impair the attractiveness of online sales and even cause some retailers to cease their online activities altogether.

Liebherr undertook towards the Bundeskartellamt to adjust the criteria in question to those applicable to brick-and-mortar sales outlets and to make them more flexible.

This dispelled the authority's competition concerns.



## Competition strengthened in sports retailing

The Bundeskartellamt examined the sales model of **Intersport's online platform** and had no objections under competition law.

Intersport is the world's largest association of medium-sized companies in the sports retail sector. More than 900 members run approximately 1,500 sports retail outlets in Germany. Within the Intersport organisation, Intersport Digital GmbH (IDG) operates an online sales platform for associated retailers in Germany.

This platform switched to a drop shipping model in January 2019, meaning that the IDG platform determines the prices and sells the products to end customers. The Intersport retailers can, however, determine a price for which they are prepared to sell a particular product to IDG.

IDG then forwards the orders to one or more retailers. After a customer places an order via the online shop, a purchase contract is concluded between IDG and the retailer.

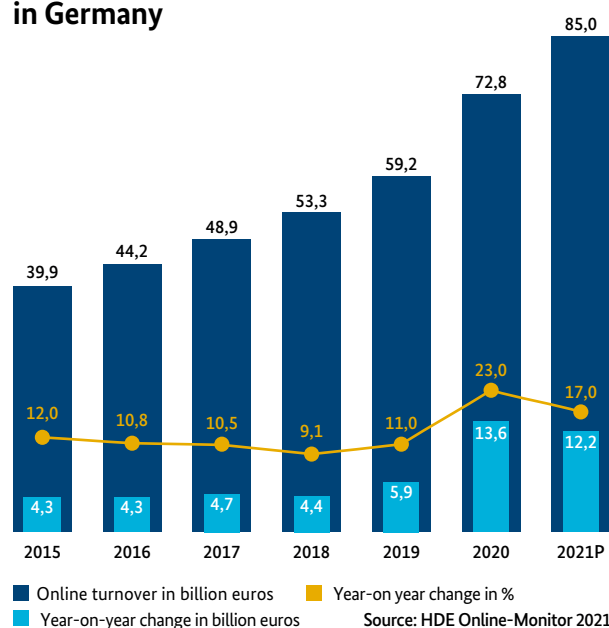
# Signa (incl. Karstadt and Kaufhof) can acquire SportScheck

In February 2020, the Bundeskartellamt cleared the acquisition of **SportScheck GmbH** by **Signa Retail GmbH**. With Karstadt Sports, the Galeria Karstadt/Kaufhof department stores and several specialist retailers like the Tennis-Point Group and the Outfitter Group, Signa Retail is active in the sports and outdoor retail sector. SportScheck previously belonged to the Otto Group. With its 19 stores and an online shop, the company is a significant retailer in this sector. The authority's investigations showed that a large number of competitors, including specialists and the direct retailing operations of the sports goods manufacturers, offer local shopping alternatives for consumers. Online sales provide some of the closest competition for most brick-and-mortar outlets. Ultimately the merger project did not give rise to any competition law concerns.



In the Bundeskartellamt's view, the Intersport platform strengthens competition in sports retailing since it is very difficult for a large number of Intersport retailers, especially for smaller retailers, to operate their own sustainable online shop. It is difficult especially for smaller retailers to compete alone against major online retailers like Amazon and the manufacturers' online shops. Using the platform is an opportunity for them to run an online business.

## Development of sales in online trading (net) in Germany



## XXXLutz acquires Roller

Plans by **XXXLutz** to acquire 50% of the shares in and joint control of **Roller GmbH & Co. KG** and other companies of the Tessner Group were examined in detail in November 2020 and cleared only subject to conditions.

As an exception, this merger project was not examined by one single competition authority, but by the Bundeskartellamt in Germany (for its effects on the sales side) and the Eu-

ropean Commission as the European competition authority (for its effects on the procurement markets). As the planned concentration mainly has effects in Germany, the parties to the merger filed an application with the European Commission to have the case examined by the Bundeskartellamt (request for referral). However, since the procurement markets can be expected to cover an area reaching beyond Germany's borders, as e.g. furniture can

also be purchased by the parties outside Germany, the European Commission's referral of the merger control case to the Bundeskartellamt in late January 2020 only concerned the sales markets affected (relationship between furniture retailers and end customers). The European proceeding was cleared without conditions.

### Who is competent?



#### Merger control:

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

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

Cases in which European law is (also) applicable are notified within the European Competition Network (ECN) and 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.

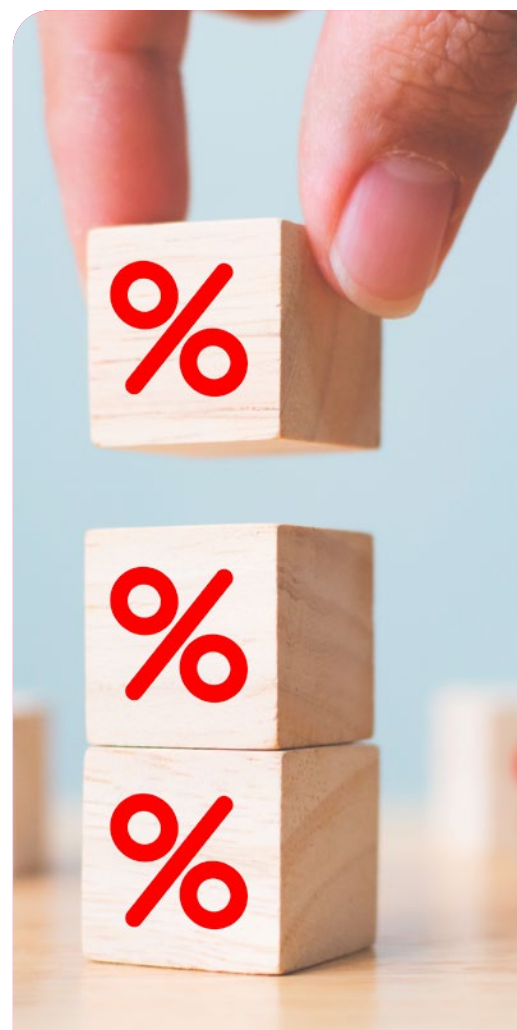
The Bundeskartellamt had competition concerns regarding the acquisition of 25 of the altogether 155 Tessner stores. In the relevant 25 market areas (some of which overlap) the merger would have significantly impeded effective competition. In the discount furniture sector in particular, customers would no longer have been able to choose from a sufficient number of different retailers. For this reason, the companies first had to sell 23 outlets to one or several independent third parties before they were allowed to implement the merger.



# Boundaries of competition law for demands for special rebates

Demanding special rebates (“wedding rebates”, “integration bonuses”, “concentration bonuses”, etc.) from suppliers is becoming a frequent phenomenon following the acquisition of smaller competitors or mergers between trade associations in the trading sector. These demands can raise competition concerns if the new company or the new association has a powerful or even dominant market position and “no objectively viable service” is offered in return, e.g. additional exhibition space or guaranteed listing. In many cases such demands are even made during a business year within the framework of ongoing supply contracts, which means manufacturers have to worry about their products being de-listed in the following year if they do not agree to grant a special rebate.

In early 2020, following the Bundeskartellamt’s concerns, the furniture retailer XXXLutz KG abandoned its sweeping demands for a 7.5% “anniversary rebate” from its suppliers. In celebration of its 75th anniversary in 2020, XXXLutz had demanded a 7.5% rebate from its suppliers over two three-month periods. Following the Bundeskartellamt’s intervention, the company abandoned this demand and instead individually negotiated the rebate with each supplier and agreed on services in return for the rebate. In view of this the Bundeskartellamt decided not to further examine the facts of the case.



## Federal Court of Justice’s decision of principle on “wedding rebates”

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- After its takeover of the “Plus” stores in 2008, EDEKA imposed one-sided demands on its suppliers.
- These included demands with retroactive effect, the “cherry picking” of individual preferential conditions and the general and unjustified demand for substantial special payments.
- The Bundeskartellamt had selected the demands on sparkling wine manufacturers as an example and prohibited them in its 2014 decision of principle because they violated the so-called “Anzapfverbot” which prohibits retailers from demanding unjustified benefits from their suppliers.
- In 2018, the Federal Court of Justice confirmed the Bundeskartellamt’s decision in key points, which sent out an important signal to the entire industry.

# PROFESSIONAL SPORT

DOSB/IOC | DFL media rights  
Sky/DAZN | DFL 50+1 Rule

Professional sport in general and football, in particular, are of great economic value. The organisation of various types of sport by associations and other organisations is therefore also always relevant under competition law. Markets closely related to professional sport, e.g. advertising and the media sector, also raise competition issues.

# Advertising opportunities for athletes competing in the Olympic Games

The Bundeskartellamt recently obtained further advertising opportunities for German athletes during the Olympic Games from the **German Olympic Sports Confederation (Deutscher Olympischer Sportbund, DOSB)** and the **International Olympic Committee (IOC)**.

Due to the authority's competition concerns, DOSB and IOC undertook appropriate commitments to considerably relax the very extensive restrictions on advertising which had previously existed under Rule 40 bye-law 3 of the Olympic Charter.

Until the beginning of 2019, no athlete participating in the Olympic Games was allowed under rule 40 bye-law 3 to use his or her person, name, picture or sports performances for advertising purposes during and several days before and after the Olympic Games. As the games mark the height of their careers, self-marketing during the games plays a very important role for athletes. As the possibilities of exemption from the rule were very restricted, it was barely impossible for athletes to organise advertising activities with their individual sponsors.

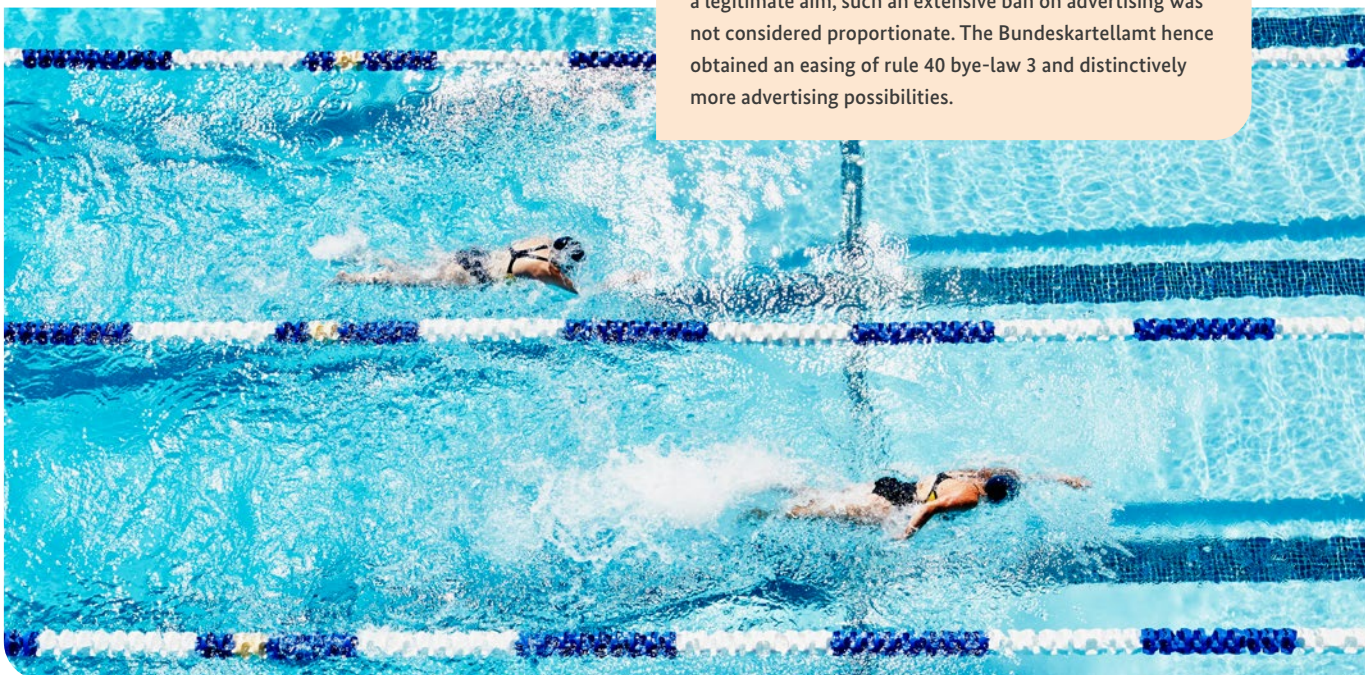
In the meantime the DOSB has approached the Bundeskartellamt to agree on modifications to its guidelines on Rule 40 in line with the monitoring scheme agreed in the commitment decision. These modifications are necessary due to the postponement of the Olympic Games in Tokyo by a year as a consequence of the pandemic and due to the amended Rule 40 resulting from the Bundeskartellamt's proceeding. The IOC is also involved in the current monitoring scheme.

## What is the Bundeskartellamt's role in this?

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Rules of any sport association such as those imposed on athletes by the DOSB or IOC are also generally subject to national and international competition law insofar as they refer to economic activities. However, this does not apply if they serve legitimate objectives and are thus proportionate to the legitimate objectives pursued.

All athletes wishing to participate in the Olympic Games have to comply with the Olympic Charter in order to be admitted to the games. Even if the prevention of legally inadmissible forms of advertising to ensure that the games can take place on a regular basis could be deemed a legitimate aim, such an extensive ban on advertising was not considered proportionate. The Bundeskartellamt hence obtained an easing of rule 40 bye-law 3 and distinctively more advertising possibilities.





# Award of media rights to football matches complies with competition law.

In March 2020 the **German Football League (Deutsche Fußball Liga, DFL)** undertook towards the Bundeskartellamt to observe comprehensive criteria when awarding media rights for the matches of the Bundesliga and Bundesliga 2 from the 2021/2022 season onwards. DFL had offered various self-commitments, in particular a so-called 'no single buyer' rule, to dispel the authority's competition law concerns.

In this way the Bundeskartellamt has ensured that no single bidder can exclusively acquire all live rights and act as a monopolist in providing coverage for viewers. In principle, DFL's joint sell-

ing of the media rights relating to the individual football matches represents an anti-competitive agreement. However, under German and European competition law such an agreement can be exempted from the prohibition of anti-competitive agreements if it results in specific advantages for which such a restraint of competition is indispensable.

As in the previous award of media rights, the Bundeskartellamt has called for rules which ensure that no single supplier can exclusively acquire the rights to all matches and thus enable competition between different TV and streaming providers. The award of rights should result in more than one supplier broadcasting football matches. However, the specific form which this requirement should take, especially the question whether viewers will require more than one subscription to be able to view all the matches, will have to be decided by DFL and the interested companies. The Bundeskartellamt's competences do not extend to specifying the exact details of the award procedure.

DFL finally implemented this requirement by awarding broadcasting rights for live matches for the seasons 2021/2022 to 2024/2025 in an auction for live games in four packages. Every package covered all transmission channels (satellite, cable, internet). According to the commitments undertaken by DFL it was not possible for a single bidder to acquire all of the four packages exclusively (no single buyer rule).

DFL could grant individual packages of rights to different acquirers if they had submitted bids to this effect. Should one acquirer nevertheless have won the award for all four packages of rights and for all transmission channels, DFL would have granted two of the four packages on a co-exclusive basis to a second acquirer for OTT coverage. In the final outcome the live rights were acquired by Sky and DAZN, whereby DAZN will in future broadcast more than double the number of games it has done so far.



# Broadcasting rights for Champions League matches - Proceeding against Sky and DAZN discontinued

In April 2020 the Bundeskartellamt discontinued its proceeding against **Sky** and **DAZN** for discretionary reasons; the proceeding had been conducted due to suspected anti-competitive agreements in connection with the award of UEFA Champions League broadcasting rights.

Sky and DAZN had been suspected of agreeing prior to the award procedure to split the broadcasting rights for Germany for the seasons 2018/2019 to 2020/2021 between them. At that time Sky was the only company to acquire the broadcasting rights for all matches and then sublicense some of the rights to DAZN.

One of the consequences of the award procedure was that Champions League matches were no longer broadcast live on free TV. Although Sky and DAZN's conduct at first seemed problematic under competition law, the Bundeskartellamt decided to discontinue the proceeding. New players entering the market are increasing its dynamism, which was again demonstrated by the award procedure in early 2020 for Champions League broadcasting rights for matches from the 2021/2022 season.

What is more, the effects of the Corona crisis on the current football season

in national and international football made near-term market developments hardly predictable. For this reason it would have been particularly difficult to assess the effects of an intervention under competition law.

Unlike collusion prior to the award procedure, subsequent cooperations between broadcasters after the bidding and award processes are permissible under certain circumstances under competition law. In case of doubt these cooperations have to be assessed beforehand by the competent competition authorities.

## DFL's 50+1 rule

The Bundeskartellamt is also currently examining whether the so-called **50+1 ownership rule** in the statutes of **Deutsche Fußball Liga (DFL)** complies with European and German competition law. The appraisal of the 50+1 rule goes back to an initiative of DFL. At the end of May 2021 the Bundeskartellamt informed DFL and other parties to the proceeding of its preliminary assessment. In the Bundeskartellamt's preliminary assessment, the basic rule is potentially unproblematic under competition law because of the sport policy objectives it pursues. However, the Bundeskartellamt considers it problematic that the rule's uniform application and enforcement is currently not ensured.

The 50+1 rule was introduced in 1999 on the one hand to provide the clubs of the Bundesliga and Bundesliga 2 with new funding possibilities and on the other to limit the influence of investors and retain the club character of the sport. The rule laid down in the statutes of the DFL stipulates that if the professional soccer division is outsourced into a capital company, a not-for-profit parent club has to retain the majority of the voting rights in that company (basic rule). However, the executive committee of the DFL can grant an exemption to this basic rule if an investor has substantially supported the parent club's football activities for a continuous period of more than 20 years (benefactor exemption).

Professional sport is also subject to competition rules. The economic activities of associations and clubs are subject to German and European competition law. Restricting participation in league matches to entities controlled by not-for-profit membership clubs undoubtedly constitutes a restriction to competition. However, restrictions of competition can in certain cases escape the prohibition of anti-competitive agreements. With the 50+1 rule DFL intends to maintain the club character of the sport and ensure a certain even balance in sports competition. These sport policy objectives can also be recognised under competition law. In its basic form the 50+1 rule seems appropriate and proportionate for achieving such goals. On the other hand there are doubts about its combination with the current benefactor exemption. Exemptions to the rule are generally possible. Such exemptions must be clearly defined and not directly counteract the sport policy objectives which DFL itself pursues with the 50+1 - rule. The current form of the so-called benefactor exemption does not appear to ensure this.

In a next step the authority will await the comments of DFL and the clubs and investors admitted to the proceeding on its preliminary assessment.



# CONSUMER PROTECTION



With the 9<sup>th</sup> amendment to the German Competition Act (GWB), which came into force in early June 2017, the Bundeskartellamt was for the first time granted competences in the area of economic consumer protection, which includes rules on unfair competition and the provisions governing general terms and conditions of business. Public consumer protection is to be intensified in order to address possible shortcomings in the enforcement of consumer rights, especially in the digital economy. The Bundeskartellamt can now conduct sector inquiries into consumer law issues and also act as an *amicus curiae* (“friend of the court”) in civil consumer protection actions. However, the authority has not yet been granted powers to intervene in such civil consumer protection issues, e.g. the power to order the termination of the infringement.

## Smart TVs

In July 2020 the Bundeskartellamt published its final report on its sector inquiry into smart 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.

Among other findings the sector inquiry has shown that smart TVs can collect personal user data in many forms. Almost all the smart TV manufacturers use

privacy policies that have serious shortcomings in terms of transparency and thus violate the General Data Protection Regulation.

In its final report the Bundeskartellamt demands that the manufacturers provide consumer information that is easily understandable and recommends legal regulations especially for updates and liability issues.

## Online user reviews

In October 2020 the Bundeskartellamt published the results of its sector inquiry into online user reviews. As well as prices, online user reviews are often a key criterion influencing online purchases.

It is therefore very important for manufacturers and retailers to receive positive reviews on their products. The Bundeskartellamt's sector inquiry shows that there is more than meets the eye in user reviews. Many of the reviews are not authentic but fake or manipulated. Some of them are professionally created or appropriate software is used to do this. In some cases users are promised free products for giving a very good review.

It is very difficult for consumers to spot fake reviews.

The following tips can help:

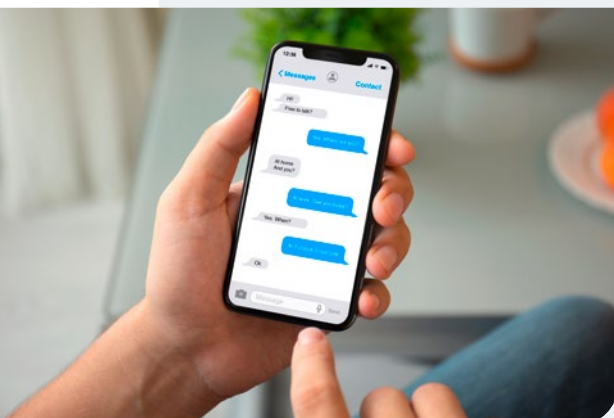
- Be sceptical. Not all reviews are genuine.
- Watch out for distinctive signs such as overblown language, recurring patterns or only best ratings.
- Read as many different reviews as possible.
- Take a good look at the information provided by the platforms about how the reviews are created.

### Video with tips (in German):



The Bundeskartellamt demands that sales, booking and review platforms as well as search engines assume greater responsibility in this area in future.


There are technical means such as filters or analytical tools to detect or at least block fake reviews. However, existing possibilities have not yet been sufficiently used.



## Messenger and video services

In November 2020 the Bundeskartellamt launched a sector inquiry into messenger and video services. The inquiry is to provide clarification on issues relevant to data protection and data security, e.g. whether users are obliged to upload their contact lists when registering or whether a promised end-to-end encryption really deserves this name. Furthermore, the inquiry is to provide an opportunity to shed some light on the interoperability of messenger services, which is often called for in political circles, and its possible effects on the use of more privacy-friendly services.

# FEDERAL PUBLIC PROCUREMENT TRIBUNALS

A modern conference room with a long table, chairs, and water bottles, overlooking a city and mountains at sunset.

The Federal Public Procurement Tribunals are responsible for reviewing tender procedures which are carried out by the Federation or its 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 a tender procedure has found indications of a violation of public procurement law and applies to the public procurement tribunals for a review of the award procedure.

One of the main subjects of the review proceedings concerned procurements in the areas of security and defence, construction (including hydraulic engineering projects) and security and cleaning services.

## Award procures in the Covid-19 pandemic

In 2020 the Covid-19 pandemic also affected several procurement projects of public contracting authorities.

For instance, in the procurement of medical protective equipment, especially masks, special rules were applied which can deviate from the usual procurement procedures to enable particularly urgent procurements. The relevant public contracting authority had directly commissioned a company with the processing of the purchase contracts, organisation of the storage and distribution of protective masks. In this case an open, competitive pro-

cedure would normally have had to be carried out in order to offer all interested companies the possibility to participate in the award procedure. However, in view of the shortage of masks at the beginning of the pandemic, the public procurement tribunal confirmed the awarding authority's opinion that the award was justified on grounds of extreme urgency.

Due to the consequences of the pandemic, the cancellation of an award procedure to carry out certain training courses for trainees in the hotel and catering industry was also justified. Ulti-

mately the company which had hoped to receive the award was unsuccessful in its objection to the cancellation of the procedure. The public procurement tribunal acknowledged that firstly the need to carry out certain courses to prepare trainees, particularly in the hotel and catering industry, for professional experience no longer existed due to the restructure of the employment market as a consequence of the pandemic. Secondly, the courses could no longer be carried out due to social distancing rules and the compulsory closure of hotels and restaurants.

### The Federal Public Procurement Tribunals in figures



- In 2020, 124 applications were filed for the initiation of review proceedings.
- Around 61% of the cases concerned the award of contracts for public supplies and services, and for defence and security services which accounted for 20% of the cases. These were followed by the award of works contracts and sectoral contract services.
- 51 decisions were taken, 35 of which in favour of the public contracting authorities and 16 in the applicants' favour. In all other cases the review proceedings were terminated without a decision on the merits either because applications were withdrawn (49) or cases were concluded by other means (23).
- In 19 cases the decisions of the public procurement tribunals were immediately appealed to the Düsseldorf Higher Regional Court.

## Can a public contracting authority negotiate with bidders solely on price?

This question was answered with an explicit "yes" by the respective public procurement tribunal. The decision, which has since also been confirmed by the Düsseldorf Higher Regional Court, was taken in the case of a repair measure in the area of security and defence. The awarding authority had chosen the negotiated procedure which rightfully allows it to negotiate with the selected companies on the content of the contract and on prices. In this case the awarding authority decided not to negotiate on the subject matter of the contract itself but only on the bidders' offer prices. The public procurement

tribunal had no objections to this as long as the fundamental principles of public procurement law, i.e. competition, transparency and equal treatment, were observed in the price negotiations. In observing these principles the awarding authority as the custodian of public funds can pursue the aim to ensure the most cost-effective use of these funds and therefore also strive for lower prices.

### Public procurement law



Public procurement law defines the rules which have to be observed by public contracting authorities in procurement procedures and the possibilities which suppliers have to defend themselves against any violations of public procurement law.

The aim of public procurement law is to ensure the efficient use of budgetary resources whilst at the same time protecting fair competition between the companies and guaranteeing free market access to the European Single Market.

# COMPETITION REGISTER FOR PUBLIC PROCUREMENT

The national Competition Register for Public Procurement provides public contracting authorities, sector contracting entities and concession grantors with information allowing them to assess whether a company must or can be excluded from a public procurement procedure for having committed economic offences. Contracting entities, which to date usually have to rely on the information provided by the companies themselves, will in the future be able to consult the Competition Register to objectively assess whether grounds for exclusion exist.

In spring 2021, the Bundeskartellamt commenced operating the Competition Register starting with the registration of the contracting entities authorised to consult the register and the authorities obliged to communicate data.

# Obligations to communicate data and consult the register associated with the Competition Register

The statutory obligations to communicate data and to consult the register will only come into effect once all requirements for electronic data transmission have been put in place. The Federal Ministry for Economic Affairs and Energy will publish an announcement to this effect in the Federal Gazette.

One month after this announcement, the public prosecuting authorities and the authorities imposing administrative fines will be obliged to communicate decisions that have to be entered

in the Competition Register to the Bundeskartellamt (registry authority). From this moment, the registry authority will be able to offer contracting entities the possibility to consult the Competition Register. After another six months, public contracting authorities will be obliged to consult the Competition Register prior to awarding a contract in a public procurement procedure involving an estimated order value, excluding value-added tax, of 30,000 euros or more on whether there are any entries in the Competition Register relating to the company

which after the assessment of the bids received in the procurement procedure is to be awarded the contract. If the value of the contract is less than this amount, contracting entities may consult the Competition Register on a voluntary basis.

The decision on whether to exclude a company listed in the Competition Register from the procurement procedure still remains with the contracting entity. An entry in the Competition Register does not automatically bar a company from receiving a contract.

## Strengthening 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. In Sections 123 and 124 of the German Competition Act (GWB) public procurement law therefore sets out that companies must or can be excluded from the procurement procedure if their senior staff have committed certain crimes or administrative offences.

The data stored in the Competition Register are intended to quickly provide public 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.

The Competition Register can only be consulted by public contracting authorities in the context of procurement procedures. The register is not accessible to the general public. Entries 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"). In order to have their entry deleted prematurely, companies must demonstrate that they have provided compensation for any damage caused by their misconduct, actively cooperated with the investigating authorities and adopted preventive measures for the future.

### Competition Register – Key facts



- In the future public contracting authorities will be obliged to electronically consult the Competition Register before awarding a contract with a minimum value of 30,000 euros, excluding value-added tax.
- They will also 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.

*“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.”*

# PUBLICATION DETAILS

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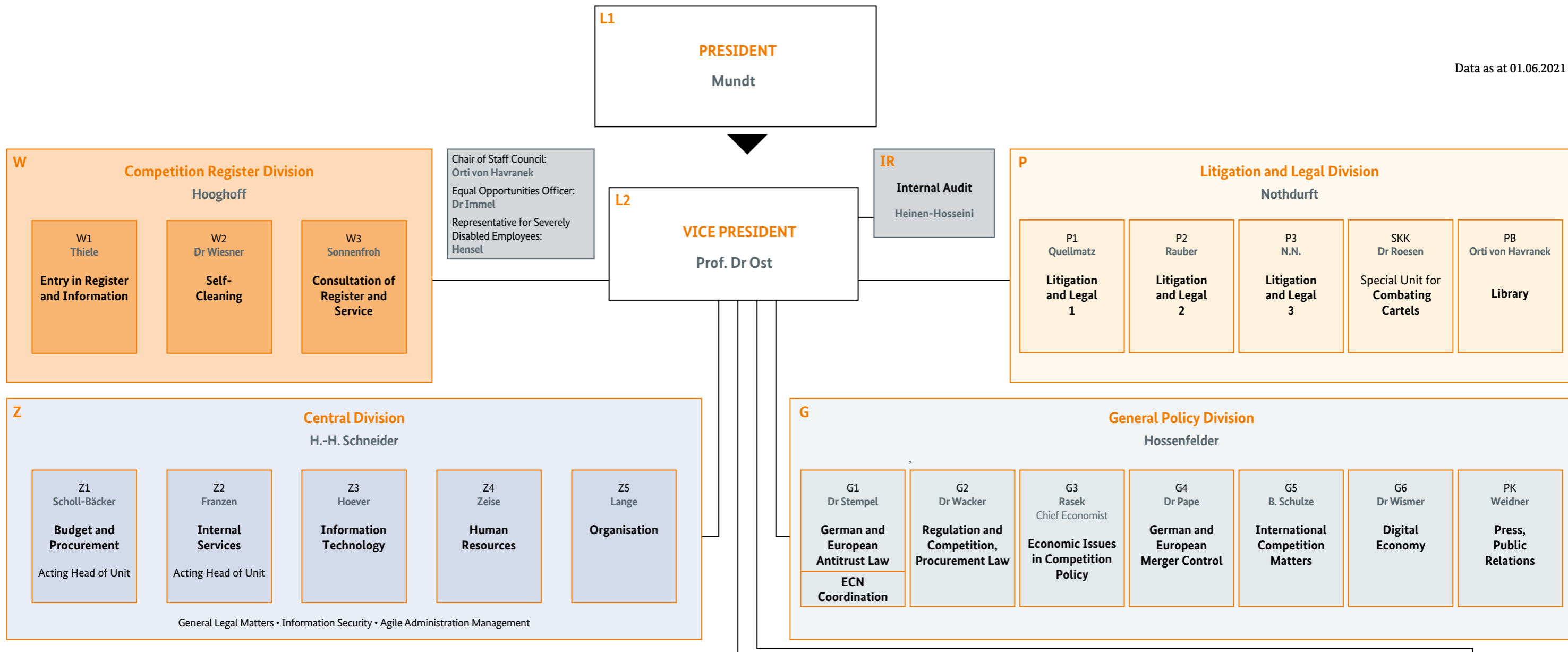
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All decisions in administrative and administrative fine cases;  
Participation in proceedings of the supreme Land authorities

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



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